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# Military Law Review

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# *Military Law Review*

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**MILITARY LAW REVIEW**

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# "NO SUBSTITUTE FOR VICTORY"[1]: AN EVALUATION OF NATO STATE PRACTICE IN KOSOVO AND LIBYA AND THE IMPORTANCE OF SUCCESS ON THE LAW OF HUMANITARIAN INTERVENTION

LIEUTENANT COLONEL GEORGE C. KRAEHE[*]

## I. Introduction

Since 2011, hundreds of thousands of civilians have been killed in Syria's non-international armed conflict.[2] In Aleppo, women and children have been killed and maimed on a daily basis without regard for

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[1] Gen. of the Army Douglas MacArthur, Farewell Address to Congress (April 19, 1951) (82d Cong., 97 Cong. Rec. 4125 (1951)).

[2] *See* Max Fisher, *Straightforward Answers to Basic Questions About Syria's War*, N.Y. TIMES, Sept. 19, 2016.

humanitarian norms of conduct.[3] Elsewhere in Syria, countless innocents have been slaughtered by the so-called Islamic State, an organization that has redefined the scope and breadth of human depravity: prisoners are burned alive, children crucified and beheaded, children as young as eight years old recruited as soldiers and suicide bombers, homosexuals cast from towers to their deaths, women and young girls sold into sexual slavery, ethnic and religious minorities virtually exterminated, and irreplaceable cultural heritage defaced and destroyed on an unprecedented scale.[4]

The conflict in Syria also has had collateral effects that impact peace and security regionally and internationally. Chief among these is the migration of approximately five million people from Syria, with approximately three million fleeing to Turkey and at least another million fleeing to other European countries.[5] Millions more have been displaced internally within Syria.[6] The rapid influx of migrants has imposed often onerous financial costs on host states, burdened border infrastructure, and contributed to social, political, and cultural tensions impacting the viability of governments and the solidarity of the European Community.[7] The Syrian internal conflict also has facilitated the rise of the Islamic State and other terrorist groups who have increased their activity in the Middle East, in Europe, and throughout the world.[8]

For five years, the world has watched this debacle in horror, seemingly powerless to check it. The United Nations, whose primary purpose is to "[t]o maintain international peace and security,"[9] has failed to shepherd a solution, largely sidelined as an effective force for want of Security Council unanimity. International actors, enfeebled by international and domestic political considerations, likewise have failed to intervene either collectively or unilaterally on behalf of the suffering.[10] Instead, the international response to Syria has been characterized by insufficient humanitarian aid, a series of failed diplomatic missions, military

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[3] *Id.*

[4] AMNESTY INTERNATIONAL, ESCAPE FROM HELL (2014), http://www.amnestyusa.org/sites/default/files/escape_from_hell__torture_and_sexual_slavery_in_islamic_state_captivity_in_iraq_mde_140212014_.pdf (retrieved Mar. 3, 2017).

[5] *See* S.C. Res. 1244, U.N. Doc. S/RES/2332 (Dec. 21, 2016).

[6] *Id.*

[7] *Id.*

[8] *Id.*; *see also* Fisher, *supra* note 2.

[9] U.N. Charter. art. 1, ¶ 1 [hereinafter U.N. Charter].

[10] *See* Simon Adams, *Failure to Protect: Syria and the UN Security Council*, GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT OCCASIONAL PAPER SERIES NO. 5 (2015) at 4-6.

interventions limited primarily to serve narrow Big Power interests, and an increasingly xenophobic inclination in European and American public opinion.[11]

The Syrian internal conflict also has represented a disaster for the world order itself. First, the conflict has provided yet another instance to showcase the inability of the United Nations to reliably respond to even the most extreme of humanitarian disasters.[12] In addition, the failure of the North Atlantic Treaty Organization (NATO) to assert leadership in formulating a collective response to the raging war on its very doorstep has weakened the alliance as a premier guarantor of international security.[13] Finally, the Syrian internal conflict has undermined the viability of humanitarian intervention as a legal doctrine, which already was highly contested, as well as "Responsibility to Protect" (R2P), which in past years seemed to be taking root as a basis for preserving and restoring peace and justice.[14] In short, the failure to act in Syria has undermined confidence in international institutions, world security, and the rule of law.

How did we get here? Is the failure to respond adequately to the Syrian humanitarian crisis a special case or does it reflect a diminishment of confidence in humanitarian intervention as a practicable response to humanitarian disasters and as a principle of law? This dissertation seeks to address these questions by comparing humanitarian interventions by the NATO in Kosovo and Libya, the effects of state practice on customary international law in each case, and what this recent history tells us about the status of the law of humanitarian intervention today.

Ultimately, this article argues that the success of a humanitarian intervention is not only important, but essential—not only for those who are victimized by human rights violations—but for the formation of state practice and customary international law. This is shown by first suggesting measures, including those suggested by R2P, by which the success of a humanitarian intervention can be assessed. In this regard, this

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[11] *Id.*

[12] See *Failing Syria: Assessing the impact of UN Security Council resolutions in protecting and assisting civilians in Syria*, Syrian American Medical Association (2015).

[13] *See The War of Western Failures: Hopes for Syria Fall with Aleppo*, DER SPIEGEL ONLINE (Feb. 17, 2016), http://www.spiegel.de/international/world/the-siege-of-aleppo-is-an-emblem-of-western-failure-in-syria-a-1077140.html.

[14] *See* Muditha Halliyade, *Syria - Another Drawback for R2P?: An Analysis of R2P's Failure to Change International Law on Humanitarian Intervention*, 4 IND. J. L. & SOC. EQUALITY 215 (2016).

article defines humanitarian intervention and reviews the process by which state practice and *opinion juris* impacts the development of customary international law, as well as the spectrum of legal theories that consider humanitarian intervention as a descriptive and normative concept. Then, within this framework, this article compares the Kosovo and Libya interventions as functions of NATO state practice, assesses their success or failure, and discusses what impact this had on customary international law and humanitarian intervention. Finally, this article concludes with the observation that the evolution of humanitarian intervention, both descriptively and normatively, is impacted not only by the legal bases on which humanitarian interventions, as state action, are based, and by the moral convictions and political motivations underlying such actions, but, more importantly, by their practical real-world outcomes.

## II. Assessing the Success of a Humanitarian Intervention

What makes a humanitarian intervention a success or a failure? This chapter examines the descriptive and normative components of humanitarian intervention, first by offering a definition of humanitarian intervention in its descriptive or generic sense and then by discussing the concept of state practice and its interaction with customary international law. Finally, with a view of the descriptive and normative, we propose measures, including those suggested by R2P doctrine, by which we later evaluate the success of the Kosovo and Libya interventions.

### A. Defining Humanitarian Intervention

In its generic or descriptive sense, humanitarian intervention is state practice involving a forcible intervention for purposes of humanitarian protection irrespective of authorization from the UN Security Council.[15] In a normative sense, on the other hand, humanitarian intervention denotes the "right" under customary international law to intervene for

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[15] *See* Dino Kritsiotis, *Humanitarian Intervention*, *in* ENCYCLOPEDIA OF GLOBALIZATION (Roland Robertson & Jan Aart Scholte eds, Routledge 2007) vol. 2, at 583-587 (discussing humanitarian intervention descriptively and normatively); *see also* George Wright, *A Contemporary Theory of Humanitarian Intervention*, 4 FLA. INT'L L. J. 435 (1989) (discussing range of intervention from "verbal remarks" to "dictatorial interference . . . in the internal affairs of another state"); Thomas Franck & Nigel Rodley, *After Bangladesh: the Law of Humanitarian Intervention by Military Force*, 67 AMERICAN J. OF INT'L LAW 275 (1973) (discussing humanitarian intervention in normative sense).

humanitarian purposes. This paper compares a humanitarian intervention invoked under a "right" of humanitarian intervention that lacked UN Security Council authorization—the Kosovo intervention—with one that rested on UN Security council authorization within a broader framework of R2P doctrine—the Libya intervention. This paper therefore offers a generic definition of humanitarian intervention that encompasses both kinds of humanitarian intervention and as having the following elements:

(1) the breach or threatened breach of a state's sovereignty by another state, collective of states, non-state actors, or a combination thereof;

(2) for purposes of preventing continued human rights violations and or providing relief to persons within that state who have suffered, are suffering, or are expected to suffer human rights abuses or deprivations of their rights under international humanitarian law; and

(3) regardless of the legal authority, or lack of legal authority, on which the breach of sovereignty rests.[16]

## B. State Practice and the Normative Dynamic of Humanitarian Intervention

Each humanitarian intervention, as defined above, has a normative component, and its outcome affects the use of humanitarian intervention both as a tool of state practice and as a normative concept generally. As Franck and Rodely pointed out, customary international law is "both more and less than the total of *successful* initiatives by states."[17] Before going on to address how outcomes impact humanitarian intervention, we

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[16] *See* DAVID ROBERTSON, A DICTIONARY OF HUMAN RIGHTS 119 (2nd ed. 2004) (defining "humanitarian intervention" as "A doctrine under which one or more states may take military action inside the territory of another state in order to protect those who are experiencing serious human rights persecution, up to and including attempts at genocide."); SEAN MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 12 (1996), defining "humanitarian intervention" as:

> coercive action by states involving the use of armed force in another state without the consent of its government, with or without authorisation from the United Nations Security Council, for the purpose of preventing or putting to a halt gross and massive violations of human rights or international humanitarian law.

*Id.*

[17] Franck & Rodley, *supra* note 15, at 303 (emphasis added).

summarize the relationship between state practice and customary international law and different views on humanitarian intervention as a normative concept.

"International law is not static."[18] Rather, customary international law is in continual development on the basis of *opinio juris* and state practice.[19] In evaluating state practice and its impact on customary international law, "[t]he international lawyer must impose on events his historical sense of their meaning and relationship to other events; he must also bring to bear a sense of policy perceived from the perspective of mankind."[20] By comparing a successful humanitarian intervention with a failed one, this paper hopes to demonstrate how the law of humanitarian intervention is in flux and shaped by events and perceptions of those events even as they unfold.

Successful or not, state practice interacts with *opinio juris* in the ongoing development of customary international law. The seminal *Nicaragua Case* addressed this dynamic.[21] In that case, Nicaragua sued the United States in the International Court of Justice, complaining that certain actions by the United States military constituted a breach of Nicaragua's sovereignty in violation of international law.[22] The Court agreed with Nicaragua, affirming the principle of non-intervention in customary international law.[23] In so ruling, however, it stated the rule that "[r]eliance by a state on a novel right or an unprecedented exception to the principle might, if shared in principle by other states, tend toward a modification of customary international law."[24] As Professor Dino Kritsiotis has pointed out, "[t]he Court's verdict in the *Nicaragua Case* made clear that the principle of non-intervention could admit to new exceptions in customary international law where states, through their legal

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[18] *Id.*

[19] *Opinio juris* is the body of law established by courts and tribunals, while state practice is comprised of the actions taken by states and the reasons they assert to justify such actions. *See* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 5 (2004).

[20] Frank & Rodley, *supra* note 15, at 303.

[21] Military and Paramilitary Activities in and Against Nicaragua (Merits), 1986 I.C.J. 14, ¶ 264 (June 27) [hereinafter Nicaragua Case] (Judgment) (principle of non-intervention is "the fundamental principle of state sovereignty on which the whole international law rests").

[22] *Id.*

[23] *Id.*; *see also* Corfu Channel Case (Merits), 1949: I.C. J. 4 at 35 (April 9) [hereinafter Corfu Channel Case] (Judgment) ("Between independent states, respect for territorial sovereignty is an essential foundation of international relations.").

[24] Nicaragua Case, *supra* note 21, at 109.

actions, deem this appropriate."[25] Humanitarian intervention as state practice, "accompanied by requisite legal statements or stated convictions," can "edge[] us towards new normative frontiers."[26]

When it comes to humanitarian intervention, where the normative frontiers lie is highly contested.[27] Some posit that humanitarian intervention is confined by the text of the UN Charter and UN procedures for obtaining authority to use force. [28] Others argue that a contextual reading of the UN Charter and international law recognizes either a right of humanitarian intervention or, short of that, legitimizes humanitarian intervention on moral or political grounds.[29]

A textual approach to the law of humanitarian intervention relies on the UN Charter and *opinio juris*, as well as on policy grounds, to argue that there is no right of humanitarian intervention under international law. First and foremost, this approach relies on the UN Charter's express prohibition against the threat or use of force by one state against the other,[30] except in cases of individual or collective self-defense or when use of force is authorized by the UN Security Council.[31] This approach recognizes the primacy of state sovereignty as a foundational principle of customary international law.[32] It also argues that exceptions to the UN Charter's general prohibition on the use of force should be given a narrow construction to exclude an exception that permits the use of force on purely

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[25] Dino Kritsiotis, *Reappraising Policy Objections to Humanitarian Intervention*, 19 MICH. J. INT'L L. 1005, 1013 (1998) [hereinafter Kritsiotis].
[26] *Id.* at 1014.
[27] *See, e.g.*, Eliav Lieblich, *Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflict as International Agreements*, 344 29 B.U. INT'L L.J. 337, 344-46 (2014); Lori Fisler Damrosch, *Introduction*, *in* ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 1, 3 (1993); FERNANDO TESON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (2nd ed. 1997) at 133 (discussing different legal theories advanced to justify humanitarian intervention).
[28] *Compare* Christopher Greenwood, *New World Order or Old*, 55 MOD. L. R. 153, 177 (1992) [hereinafter Greenwood] ("intervention in northern Iraq and the international acceptance of it, is likely to be invoked as evidence that there is a right of humanitarian intervention in international law"); Michael Reisman, *Humanitarian Intervention and Fledgling Democracies*, 18 FORDHAM INT'L L. J. 794, 802-804 (1995)(discussing illegality of intervention).
[29] *See* John Moore, *The Control of Foreign Intervention in Internal Conflict*, 9 VA. J. INT'L L. 205, 201-11 (1969); Quincy Wright, *The Legality of Intervention Under the United Nations Charter*, 51 AM. SOC'Y INT. L. PROCEEDINGS 79, 85 (1957).
[30] U.N. Charter, *supra* note 9, art. 2,¶ 4.
[31] *Id.*, art 51.
[32] *See* Nicaragua Case, *supra* note 21, § 264; Corfu Channel Case, *supra* note 22, at 35.

humanitarian grounds.[33] Some even argue that the prohibition on the use of force is a rule of *jus cogens* that cannot be superseded by custom, proscribing any intervention without "legal justification in a positivist sense[.]"[34] Finally, some oppose humanitarian intervention on policy grounds. Franck and Rodley, for example, observed that interventions historically have been motivated not by humanitarian concerns, but by "self-interest" and "power-seeking."[35] Daniel Joyner argued against a right of humanitarian intervention because it "carries with it profound disadvantages in clarity and susceptibility to abuse," further arguing that it "could lead to the entire overthrow of the United Nations system . . . and the thrusting of the international community into a new epoch of unrestrained state use of force, nominally justified on humanitarian or other grounds."[36] Christian Henderson went a step further, opposing humanitarian intervention even when authorized by the UN because open-ended authorizations, such as in Libya and Cote d'Ivoire, can result in "mission creep" beyond appropriate humanitarian aims.[37] Similarly, Fokure Ipinyomi objected to a UN-authorized humanitarian intervention in Cote d'Ivoire on grounds that it concealed a hidden agenda—regime change and the imposition of a "democracy" that was engineered "to satisfy the international community," not Ivoirians, and thus had the effect of denying Ivoirians "the freedom of choice."[38]

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[33] *See* Dapo Akande, *The Legality of Military Action in Syria: Humanitarian Intervention and the Responsibility to Protect*, EJIL TALK! (Aug. 28, 2013), https://www.ejiltalk.org/humanitarian-intervention-responsibility-to-protect-and-the-legality-of-military-action-in-syria/ [hereinafter Akande].

[34] Richard Lappin, *Is There a Legal Basis for Military Intervention to Protect Civilians in Syria?*, 8.4 CEJISS 46, 47 (2014) [hereinafter Lappin]; *see also* Akande, *supra* note 33, and Kenneth Anderson, *Legality of Intervention in Syria in Response to Chemical Weapon Attacks*, 17 AMERICAN SOCIETY OF INT'L LAW INSIGHTS 21 (2013) [hereinafter Anderson].

[35] Lappin, *supra* note 34, at 47.

[36] Daniel Joyner, *The Kosovo Intervention: Analysis and a More Persuasive Paradigm*, (2002) 113 EUR. J. INT'L L. 597-619 (2002) [hereafter Joyner]; *see also* Bartram Brown, *Humanitarian Intervention at a Crossroads*, 41 WM. &MARY L.R. 1683, 1691 (2000); Kritsiotis, *supra* note 25, at 1020 *et seq.* (summarizing policy objections to humanitarian intervention).

[37] Christian Henderson, *International Measures for the Protection of Civilians in Libya and Cote d'Ivoire*, 60 INT'L & COMP. L.Q. 767-78, 769, 776 (2011).

[38] Fokure Ipinyomi, *Is Cote d'Ivoire a Test Case for R2P? Democratization as Fulfilment of the International Community's Responsibility to Prevent*, 56(2) J. AFR. LAW 151-74, 160-63, 173-74 (2012); *see also* David Reiff, *The Road to Hell: Have Liberal Intellectuals Learned Nothing from Iraq*, THE NEW REPUBLIC (Mar. 23, 2011)(voicing skepticism that NATO's intervention in Libya was intended to protect civilians more than

On the other side of the spectrum is an approach to humanitarian intervention that advances a contextual reading of the UN Charter and *opinio juris* to permit the inference that humanitarian intervention is legal under international law. While acknowledging that international law is based on the law of state sovereignty, not on individual human rights, some argue that the UN Charter and international law should be read together with human rights law to warrant action necessary to protect human rights violations, or at least grave ones. A contextual reading of international law thus infers "the legal authority to enforce" human rights, "including by the use of force."[39] A narrow reading of UN authority, on the other hand, "has the potential to detract from the universalist aspirations of the global system by posing different and indeed lower standards of protection while providing convenient justifications for human rights violations."[40] Some have argued, for example, that the exercise of a veto by a permanent member of the UN Security Council thwarting intervention to prevent genocide "would constitute a violation of the vetoing States' obligation under the Genocide Convention."[41] A contextual reading of international law also has been advanced as a basis for R2P, specifically, that international actors have not only a right, but an "obligation . . . to intervene in the internal affairs of a state in order to protect civilian populations against mass atrocities."[42]

### C. Assessing a Humanitarian Intervention's Success

We have defined humanitarian intervention in its descriptive sense, have described the relationship between state practice and the development of customary international law, and have summarized various views on its normative content. With these fundamentals in mind, we now formulate a possible rubric for assessing the success of a humanitarian intervention as state action before applying these to the

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effect regime change), https://newrepublic.com/article/85621/libya-iraq-muammar-qaddafi.

[39] Anderson, *supra* note 34, at 2.

[40] Lappin, *supra* note 34, (citation and quotation marks omitted).

[41] Luke Glanville, *The Responsibility to Protect Beyond Borders*, 12 HUM. RTS. L. REV. 1, 23 (2012), *quoting* Louise Arbour, *The Responsibility to Protect as a Duty of Care in International Law and Practice*, 34 REV. OF INT'L STUDIES 445, 454 (2008); *see also* Akande, *supra* note 33 (discussing with disapproval argument that violation of human rights implicates the right to pre-emptive self-defense, for example, to counter supposed proliferation of weapons of mass destruction implicated by the use of chemical weapons in Syria).

[42] Anderson, *supra* note 34, at 2-3.

interventions in Kosovo and Libya. We also show how R2P reflects a similar vision of what makes a humanitarian intervention a success.

In offering a rubric for success, we start with the assumption that any given humanitarian intervention arises from state practice situated at the confluence of unique real-world moral, political, and legal circumstances. These circumstances necessarily overlap in an inter-relational dynamic. In using the term "moral," we refer to a given community's general repugnance of and natural impulse to alleviate human suffering, sometimes by political and legal means.[43] By "political," we mean the power landscape, relationships, and processes that must be navigated or surmounted to give action to a moral impulse or legal right or duty. Finally, by "legal" we mean what is authorized by positive law, as distinguished from what is considered, more broadly, legitimate, i.e., what is viewed as moral, arguably legal or just, logical, or reasonable. So informed, the following specific measures by which to assess a humanitarian intervention's success are offered:

(1) the extent to which it was moral, e.g., mitigated or increased human rights violations and human suffering;

(2) the extent to which it positively or negatively impacted state sovereignty and the state's internal political, economic, social, legal, and cultural institutions;

(3) whether it advanced or undermined regional and international peace and security, e.g., by promoting international security institutions or, alternatively, by exacerbating regional or international rivalries;

(4) whether it was legal or, if not so, legitimate, e.g., whether it was authorized by law or, short of that, exhausted procedures for obtaining authorization based on colorable legal arguments;

(5) in what ways it further established or eroded an already established legal doctrine, confirmed or disconfirmed a new principle of law, or promoted or undermined a legal theory premised on legal, policy, or moral grounds; and

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[43] My definition of "moral" is based on Karl Popper's definition of "negative utilitarianism." *See* KARL POPPER, THE OPEN SOCIETY AND ITS ENEMIES vol. I, ch.5, note 6 (1952).

(6) whether it strengthened or weakened the rule of law and the institutions emplaced to safeguard and advance the rule of law.

As noted, R2P also suggests similar measures for assessing a humanitarian intervention. In its original formulation of R2P, the report of the International Commission on Intervention and State Sovereignty (ICISS), describes R2P as a moral program for action motivated by an impulse to remedy the most serious human rights violations.[44] As a practical guide, the ICISS Report offers a number of principles by which to determine when a humanitarian intervention should be initiated.[45] These principles contemplate a just cause threshold before an intervention may be initiated, satisfaction of certain precautionary principles, e.g., "right intention" and "last resort," invocation of the "right authority," and observation of certain "operational principles" in its implementation.[46] The ICISS Report also recognizes that intervention "can only be justified if it stands a reasonable chance of success, that is, halting or averting the atrocities or suffering that triggered the intervention in the first place," or "if the consequences of embarking upon the intervention are likely to be worse than if there is no action at all."[47] R2P thus invokes cost-benefit balancing as a measure of success, much as the rubric proposed above does, and offers practical, success-oriented measures for guiding state practice. As detailed further below, these measures reflect the same balance of interests—moral, political, and legal—on which the above formulation is based.

First, R2P is centered on the moral, as we have defined it—on protection of the values encompassed by international human rights. Some have asked, what exactly is R2P? Is it a legal regime, a political doctrine, or something else?[48] First and foremost, R2P proposes a response to human suffering and the protection of human rights consistent with principles of state sovereignty and the UN Security Council's

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[44] INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY (ICISS), THE RESPONSIBILITY TO PROTECT: REPORT ON THE COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY ¶ 4.11 *et seq*., p. 31 (2001) (hereinafter ICISS Report).

[45] *Id.* at XII.

[46] *Id.*

[47] *Id.* ¶ 4.41, p. 36.

[48] THOMAS WEISS, LIBYA, R2P, AND THE UNITED NATIONS IN POLITICAL RATIONALE AND CONSEQUENCES OF THE WAR IN LIBYA 235 (Dag Henriksen & Ann Karin Larssen eds., 2016); B.C. Nirmal, *Responsibility to Protect: A Political Doctrine or An Emerging Norm (With Special Reference to the Libyan and Syrian Crises)*, 57:3 JILI 333-375 (2001).

responsibility to maintain peace and security.[49] R2P has thus been aptly described as "a multifaceted political concept based on existing principles of international law . . . . [that] does not alter the basic contours of the legal framework governing the use of force" under the UN Charter and customary international law.[50]

R2P also acknowledges the political. For instance, it provides guidance, consistent with the UN Charter, as to who should take the lead in mounting a humanitarian intervention, recommending that "collective intervention be pursued by a regional or sub-regional organization acting within its defining boundaries."[51] As a political tool, it is different from "humanitarian intervention [which] automatically focuses upon the use of military force . . . [and] overlooks the broad range of preventive, negotiated and other non-coercive measures that are central to R2P."[52]

Finally, R2P offers a program for negotiating the legal aspects of humanitarian intervention. In keeping with its pragmatic program, R2P acknowledges the legal and political realities of the UN Security Council that preclude military intervention "in every case where there is justification for doing so," but nonetheless recommends that military intervention should be considered when there is reason to do so.[53] The ICISS Report thus suggests that a humanitarian intervention may be successful even if, strictly speaking, it is illegal. At the same time, it recognizes the paramountcy of the UN system for authorization of use of force.[54] It also does not seek to displace a "right" of humanitarian intervention, to the extent such a right exists, but rather to re-tool it in a broader context.[55] In this sense, the ICISS Report does not advocate so much for a change in thinking about international law than in a change in

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[49] ICISS Report, *supra* note 44, at VII, XII, XII, 1.

[50] Andrew Garwood-Gowers, *The Responsibility to Protect and the Arab Spring: Libya as the Exception, Syria as the Norm?*, 36(2) UNSW L.J. 36(2), 594-618, 600 (2013) [hereinafter Garwood-Gowers]; *see also* Jennifer Welsh, *Statement by Special Advisor on RtoP Jennifer Welsh at the Thematic Discussion in the UN General Assembly on Ten Years of the Responsibility to Protect: From Commitment to Implementation* (Feb. 26, 2016) (taking similar position).

[51] ICISS Report, *supra* note 44, ¶¶ 6.31, 6.32, 53-54.

[52] Simon Adams, *Libya and the Responsibility to Protect*, GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT OCCASIONAL PAPER SERIES NO. 3, 11 (2012) [hereinafter Adams].

[53] ICISS Report, *supra* note 44, ¶ 4.42, 36.

[54] *Id.*

[55] *Id.*; *see also* Adams, *supra* note 52.

how states should behave in a very real world in which international law is but one fact of many.[56]

As indicated by the measures discussed above as reflected in R2P, state practice interposes humanitarian intervention at the intersection of inter-dependent moral, political, and legal interests. And the crux of this intersection is whether the humanitarian intervention succeeds or fails. As we hope to demonstrate below, a humanitarian intervention will be considered successful if it minimally satisfies and balances these interests. A humanitarian intervention will be considered a failure, on the other hand, if it fails to achieve this balance of interests.

## III. The Humanitarian Intervention in Kosovo

Was the humanitarian intervention in Kosovo successful according to the measures discussed above? If it was successful, what made it so? If viewed as successful, what impact did this have on state practice and on the humanitarian intervention's status in customary international law?

### A. Background

The Balkans is a region that has experienced ethnic tensions dating back hundreds of years.[57] Chief among the ethnic rivalries is that between the Serbians and Kosovo-Albanians. After a series of military defeats at the hands of the Ottoman Turks in the 15th and 16th centuries, ethnic Albanians came to supplant ethnic Serbians in Kosovo.[58] By the 20th Century, Albanians formed the overwhelming majority in Kosovo, while the minority Serbs still considered Kosovo their historical homeland.[59] This dynamic occasionally led to outright violence, for example, during the First Balkan War (1912-13) and World War I (1914-18).[60] Following the disintegration of the Ottoman and Austro-Hungarian empires after World War I, Kosovo became part of a predominantly Serbian Yugoslav state, and the ethnic Albanians suffered ethnic and political repression.[61]

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[56] *Id.* ¶ 2.28, 16.

[57] László Gulyás, *A Brief History of the Kosovo Conflict with Special Emphasis on the Period 1988-2008*, 27 HISTORIA ACTUAL ONLINE 141, 141-142 (Jan. 2012), https://dialnet.unirioja.es/servlet/articulo?codigo=3861597.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.* at 142.

Violence between Serbs and Albanians erupted again during World War II.[62] After World War II, the non-aligned Socialist movement of Josip Tito attempted to replace Serbian and Albanian nationalism with an over-arching pan-Slavic nationalism.[63] For over forty years, Tito's Yugoslavia prevented violence through a policy that exercised strict political and administrative control while granting Kosovar Albanians rights in the areas of language, culture, and education.[64]

Tito's structure came crashing down with the dissolution of the Soviet Union. Yugoslavia itself broke up largely along ethnic lines into Slovenia, Croatia, Bosnia and Herzegovina, Macedonia, and a Federal Republic of Yugoslavia (FRY) composed of Montenegro and Serbia, of which Kosovo was a part.[65] Fearful of Serbian repression, Kosovo formed the Republic of Kosova in 1990 as part of a looser Yugoslav confederation and declared its independence in 1992.[66] The Kosovo Liberation Army (KLA) was formed at about the same time and, in a series of armed attacks and sabotage operations, challenged Serbian control of Kosovo.[67] In 1998, Serbian-led FRY forces responded with a violent crackdown that gave rise to ethnic cleansing and other atrocities.[68]

The Serbian crackdown in Kosovo resulted in immediate attention from international institutions. On March 31, 1998, the UN Security Council issued UNSCR 1160 which called for a political solution that contemplated an autonomous Kosovo within the FRY; established an arms blockade on the FRY, including Kosovo; and directed investigation of Serbian actors for possible prosecution by the International Criminal Tribunal for the former Yugoslavia (ICTY), established in 1993.[69]

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[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *See* Albrecht Schnabel & Ramesh Thakur, Kosovo, *The Changing Contours of World Politics, and the Challenge of World Order* and Marie-Janine Calic, *Kosovo in the Twentieth Century: A Historical Account*, in *Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action, and International Citizenship* (Albrecht Schnabel & Ramesh Thakur eds. 2000).
[66] SNEZANA TRIFUNOVSKA, YUGOSLAVIA THROUGH DOCUMENTS: FROM ITS CREATION TO ITS DISSOLUTION 237 (1994); NOEL MALCOLM, KOSOVO: A SHORT HISTORY 356-7 (1998); Aydin Babuna, *Albanian national identity and Islam in the post-Communist era*, 8(3) PERCEPTIONS 43–69 (Sept.-Nov. 2003).
[67] ARMEND BEKAJ, THE KLA AND THE KOSOVO WAR; FROM INTRA-STATE CONFLICT TO INDEPENDENT COUNTRY, BERGHOF CONFLICT RESEARCH 17-20 (2010).
[68] *Id.* at 21-23; *see also* Adam Roberts, *NATO's 'Humanitarian War' over Kosovo*, 41(3) SURVIVAL 102, 112 (1999) [hereinafter Roberts].
[69] S.C. Res 1160, U.N. Doc. S/RES/1160 (Mar. 31, 1998).

Subsequently, a Serbian offensive in the summer of 1998 killed an estimated 1,500 Kosovar Albanians and displaced approximately 300,000 who fled their homes to escape Serbian violence.[70] In September 1998, the UN Security Council issued UNSCR 1199, which called for a cessation of hostilities, action to "avert the impending humanitarian catastrophe," and renewed political talks.[71] The UN Security Council did not authorize use of force or a humanitarian intervention in either UNSCR 1160 or UNSCR 1199.[72]

B. NATO State Practice in Kosovo

NATO began to take notice of Kosovo as early as 1992, well before the atrocities of 1998 and 1999. Deploring the Serbian's "systematic gross violations of human rights and international humanitarian law, including the barbarous practice of 'ethnic cleansing'" in Bosnia-Herzegovina, NATO also expressed "deep[] concern about possible spillover of the conflict, and about the situation in Kosovo."[73] NATO viewed the possible "explosion of violence in Kosovo" as a "serious threat to international peace and stability and security" that "would require an appropriate response by the international community."[74] NATO called for "restoration of autonomy to Kosovo within Serbia" as well as "a UN preventive presence in Kosovo"[75] as part of a "negotiated and just settlement."[76]

Under the threat of NATO airstrikes, the Serbians agreed in October 1998 to partial withdrawal of Serbian security forces from Kosovo; deployment of 2,000 unarmed monitors under the aegis of the Organization for Security and Cooperation in Europe (OSCE); and aerial verification by NATO.[77] The UN Security Council endorsed this agreement in UNSCR 1203, but did not authorize force to enforce it.[78]

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[70] Roberts, *supra* note 68, at 112.
[71] S.C. Res. 1199, U.N. Doc. S/RES/1199 (Sept. 23, 1998).
[72] *Id.*
[73] North Atlantic Cooperation Council, *Statement on Former Yugoslavia*, (NATO Archives) (Dec. 17, 1992).
[74] *Id.*
[75] *Id.*
[76] NATO Archives, North Atlantic Cooperation Council, Press Release M-NACC(92) 109, Dec. 18, 1992).
[77] NATO Archives, Meeting of the North Atlantic Council in Foreign Ministers Session, Press Release M-NAC-2(98) 143 (Dec. 8, 1998); *see also* Roberts, *supra* note 68, at 11; NATO Archives, Final Communiqué of the Meeting of the North Atlantic Council in Foreign Ministers Session, Press Release M-NAC-D-2(98) 152 (Dec. 17, 1998).
[78] S.C. Res. 1203, U.N. Doc. S/RES/1203 (Oct. 24, 1998).

Notwithstanding this apparent breakthrough, Serbian atrocities continued, including the killing of at least forty-five ethnic Albanians in the village of Recak.[79] The FRY's good faith in complying with OSCE monitoring and NATO verification was questioned when ICTY investigators were denied access to Recak.[80] Condemning the massacre, NATO Secretary General Javier Solana announced his decision to dispatch to Belgrade the Chairman of the North Atlantic Council's Military Committee and the Supreme Allied Commander Europe "to impress upon the Yugoslav Authorities the gravity of the situation and their obligation to respect all their commitments to NATO."[81] On January 30, 1999, the North Atlantic Council issued an ultimatum, demanding the FRY's full compliance with UNSCRs 1160, 1199, and 1203, as well as full cooperation by FRY authorities with ICTY investigations of the Recak massacre.[82] Citing the Recak massacre, the need to avert a "humanitarian catastrophe" in general, and the Kosovo situation's "threat to peace and security in the region," NATO warned that, in the event of non-compliance, "NATO is ready to take whatever measures are necessary . . . by compelling compliance with the demands of the international community and the achievement of a political settlement."[83]

NATO's unilateral military intervention in the Kosovo war commenced on March 24, 1999, with a bombing campaign directed at Yugoslav targets in Belgrade and elsewhere.[84] The so-called Operation Allied Force was the first NATO military operation initiated without UN Security Council authorization. As such, the military campaign violated NATO's own charter, the North Atlantic Treaty, which at Article 1 enjoins its member states to "refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations."[85] The North Atlantic Treaty makes it clear in Article 7 that the

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[79] YUGOSLAV GOVERNMENT WAR CRIMES IN RACAK, HUMAN RIGHTS WATCH (1999); *see also* MILOSEVIC ET AL. "KOSOVO" - SECOND AMENDED INDICTMENT; *see also* Roberts, *supra* note 68, at 113.

[80] International Criminal Tribunal Yugoslavia, Press Statement from the Prosecutor regarding Kosovo Investigation, (Jan. 20, 1999).

[81] NATO Archives, Statement by the Secretary General of NATO, Press Release (1999) 003 (Jan. 17, 1999).

[82] NATO Archives, Statement by the North Atlantic Council on Kosovo, Press Release (1999) 012 (Jan. 30, 1999).

[83] *Id.*

[84] INDEP. INT'L COMM'N ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, AND LESSONS LEARNED 193 (2000) [hereinafter Kosovo Report].

[85] The North Atlantic Treaty, art. 1, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 [hereinafter The North Atlantic Treaty].

UN Security Council, not NATO, has "the primary responsibility . . . for the maintenance of international peace and security."[86]

Operation Allied Force also was inconsistent with NATO's Strategic Concept. At the beginning of the bombing campaign, NATO's Strategic Concept that had been issued on November 7, 1991, applied, while a new Strategic Concept came into effect as of April 24, 1999.[87] The 1991 Strategic Concept provided that NATO's "essential purpose, set out in the Washington Treaty and reiterated in the London Declaration, is to safeguard the freedom and security of all its members by political and military means in accordance with the principles of the United Nations Charter."[88] Similarly, the 1999 Strategic Concept emphasized its commitment "to the Washington Treaty and the United Nations Charter."[89] Moreover, nothing in either version of NATO's Strategic Concept specifically made humanitarian intervention a task, let alone a priority, within NATO's ambit. Indeed, human rights or humanitarian emergencies were referenced only in passing, and humanitarian intervention was not mentioned at all in either version.[90] Rather, NATO's strategy broadly prioritized "a stable security environment in Europe, based on the growth of democratic institutions and commitment to the peaceful resolution of disputes, in which no country would be able to intimidate or coerce any European nation or to impose hegemony through the threat or use of force"; "[t]o deter and defend against any threat of aggression against the territory of any NATO member state"; and "[t]o preserve the strategic balance within Europe."[91] Saving Albanians from Serbians did not seem to clearly fall within NATO's remit except to the extent that doing so might advance the security interests of NATO members.[92] Nonetheless, NATO, contravening both the UN Charter and the North Atlantic Charter, justified its unilateral military action not only

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[86] *Id.* art. 7.

[87] NATO Archives, The Alliance's Strategic Concept, agreed by the Heads of State and Government participating in the meeting of the North Atlantic Council in London (Nov. 7, 1991) [hereinafter 1991 Strategic Concept].

[88] *Id.* ¶ 15.

[89] NATO Archives, The Alliance's Strategic Concept, approved by the Heads of State and Government participating in the meeting of the North Atlantic Council in Washington D.C., Press Release NAC-S(99) 65, ¶ 10 (Apr. 24, 1999) [hereinafter 1999 Strategic Concept].

[90] *Id.* ¶ ¶ 19, 20, 49, 50.

[91] 1991 Strategic Concept, *supra* note 87, ¶ 20. The 1999 Strategic Concept similarly lists "Security," "Consultation," and "Deterrence and Defence" as its fundamental tasks. 1999 Strategic Concept, *supra* note 89, ¶ 10.

[92] 1991 Strategic Concept, *supra* note 87, ¶ 20.

on security grounds but on its conviction that it needed to avert a "humanitarian catastrophe."[93]

NATO's Kosovo air campaign was concluded on June 11, 1999, by which time FRY authorities had substantively acceded to all the key demands made by NATO at the outset of the campaign and as set forth in UNSCRs 1160, 1199, and 1203.[94] The day before, the UN Security Council issued UNSCR 1244, authorizing a peacekeeping force to guarantee NATO's political and humanitarian objectives.[95] A NATO-sponsored peacekeeping force was permitted access to Kosovo, where it remains to the present day.[96] NATO's commitment to the management of ethnic tensions in the region was open-ended.[97] While there was loss of civilian life during and after the campaign, atrocities on the scale that occurred before the campaign were averted.[98] Displaced persons were able to return to their homes, and the ICTY was able to prosecute violations of human rights and humanitarian rights that occurred in Kosovo.[99] Not only were the immediate objectives of the campaign accomplished, but human rights also were protected both in the short term and in the long term.

### C. The Kosovo Intervention's Impact on Customary International Law

With reference to the rubric for success articulated in Chapter I above, NATO's intervention in Kosovo can be regarded, on the whole, as a success because it balanced moral, political, and legal interests in a manner that mitigated human rights violations, advanced regional peace and security, utilized international security institutions and processes, including the UN, NATO, and the ICTY, and enhanced the legitimacy of a "right" of humanitarian intervention. It also played a role in motivating formulation of R2P as a broader framework for addressing human rights violations, even serving to some extent as a model for R2P. While the intervention negatively impacted FRY sovereignty, failed to fully resolve

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[93] NATO Archives, Statement by the North Atlantic Council on Kosovo, Press Release (1999) 012 (Jan. 30, 1999).
[94] Roberts, *supra* note 68.
[95] S.C. Res. 1244, U.N. Doc S/RES/1244 (June 10, 1999).
[96] *Id.*
[97] *See, e.g.*, NATO Archives, The Warsaw declaration on Transatlantic Security, issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Warsaw (July 8-9, 2016) at ¶ 9.
[98] *Kosovo Report*, *supra* note 84, at 107.
[99] *Id.*

regional ethnic tensions, and was initiated without UN Security Council authorization, on balance it was successful and largely was regarded as such.

The NATO intervention in Kosovo was not without its critics, particularly early on when its successes were still tentative.[100] Opinions also differed on how to assess the impact of the Kosovo intervention on international law.[101] Bruno Simma, for example, argued that NATO's intervention eroded NATO's legal core of "subordination to the principles of the UN Charter," and he cautioned against using Kosovo as a basis for turning NATO's exceptional "resort to illegality" "into a general policy."[102] For many others, however, the Kosovo intervention demonstrated an alternative to the UN Security Council's often unworkable monopoly on the use of force. The Independent International Commission on Kosovo, chaired by Nelson Mandela, identified as one of the intervention's key lessons the acknowledgment that the "[UN] Charter as originally written is not satisfactory for a world order that is increasingly called upon to respond to humanitarian challenges."[103] Rooting its assessment of the intervention in an expansive reading of legal sources, the Kosovo Commission further found that, while the "'right' of humanitarian intervention is not consistent with the UN Charter if conceived as a legal text, . . . it may, depending on context, nevertheless, reflect the spirit of the Charter as it relates to the overall protection of people against gross abuse."[104] The Kosovo intervention's perceived legitimacy encouraged many to take up with renewed energy "the presentation of a principled framework . . . to guide future responses in the face of imminent or unfolding humanitarian catastrophe."[105] In making recommendations for such "a principled framework," the Kosovo Commission built on what was viewed as the NATO intervention's success, to bridge "the gap between legality and legitimacy."[106] The positive outcome of the Kosovo intervention had the effect of legitimizing

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[100] *See, e.g.*, Kofi Annan, *Two concepts of sovereignty*, THE ECONOMIST, Sept. 16, 1999 [hereinafter Annan, *Two concepts of sovereignty*].

[101] *See, e.g.*, Javier Solana, *NATO's Success in Kosovo*, FOREIGN AFFAIRS, Nov./Dec. 1999; Wesley Clark, *Waging Modern War: Bosnia, Kosovo and the Future of Combat*, Public Affairs 417–19 (2001); Wallace Thies, *Compellence Failure or Coercive Success: The Case of NATO and Yugoslavia*, 22 COMPARATIVE STRATEGY 243, 244 (2003).

[102] Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EJIL 1, 22 (1999).

[103] *Kosovo Report*, *supra* note 84, at 185.

[104] *Id.* at 186.

[105] *Id.* at 190.

[106] *Id.* at 194, 291.

what was an illegal use of force under positive international law and also stirred enthusiasm for what would become R2P.

This was particularly important because the acceptance of the legitimacy, let alone the legality, of humanitarian intervention had been in flux over the preceding twenty years. After the soul-searching that followed the brutal Rwandan genocide in 1994, many important international figures and institutions coalesced around the view that humanitarian intervention, subject to a regime of restrictions and contingencies, was a necessary exception to the general proscription against the use of force in the internal affairs of a sovereign state absent authorization by the UN Security Council or circumstances warranting self-defense.[107] This consensus relied not only on the still-fresh horrors of Rwanda, but also on the success of the humanitarian intervention in Kosovo. As Kofi Annan argued, "in cases where forceful intervention does become necessary, the Security Council . . . must be able to rise to the challenge."[108] However, when it could not do so, "[t]he choice must not be between council unity and inaction in the face of genocide—as in the case of Rwanda—and council division, but regional action, as in the case of Kosovo."[109] Importantly, Annan also emphasized long-term commitment as essential to success: "when fighting stops, the international commitment to peace must be just as strong as was the commitment to war. In this situation, too, consistency is essential."[110]

Both Rwanda and Kosovo foreshadowed and justified Annan's call in 2000 for a fundamental rethinking of the role of humanitarian intervention in advancing global peace and justice.[111] When ICISS answered Annan's invitation by issuing its report on R2P, it showcased both the cautionary tale of Rwanda and the success of Kosovo in formulating new approaches to humanitarian intervention.[112] In many respects, ICISS presented NATO's experience in Kosovo as an example of how humanitarian

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[107] *See, e.g.*, Kofi Annan's *Reflections on Intervention*, Thirty-Fifth Annual Ditchley Foundation Lecture (June 26, 1998); Roberts, *supra* note 68, at 105.
[108] Annan, *Two Concepts of Sovereignty*, *supra* note 100.
[109] *Id.*
[110] *Id.*
[111] Kofi Annan, *We The Peoples: The Role of the United Nations in the 21st Century*, United Nations, Department of Public Information (New York, 2000) at 47-48 (". . . if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?). *Id.*
[112] ICISS Report, *supra* note 44 at I, VII, ¶¶ 1.2, 1.4, 1.6, 1.22, 2.2, 5.26, 5.30, 6.34, 6.36, 7.11.

intervention could be executed to positive effect.[113] Indeed, NATO's intervention in Kosovo in 1999 in large measure followed the prescription for humanitarian intervention ICISS later laid out in its report.[114] Notably, the Kosovo intervention met what ICISS described as a humanitarian intervention's basic objective—"always to achieve quick success."[115] The failure in Rwanda had made R2P a moral imperative, while NATO's success in Kosovo had shown that humanitarian intervention was practically feasible.

Ultimately, Kosovo was seen by many as building on past successful humanitarian interventions, e.g., in Liberia in 1990 and northern and southern Iraq in 1991-1992, to advance humanitarian intervention as a sometimes necessary alternative to UN Security Council inaction.[116] It also served as a basis for advancing R2P as a new doctrine for the protection of human rights.[117] Why was this? In Kosovo, actions spoke louder than words. Nothing in NATO policy spoke to intervention to avert gross violations of human rights and humanitarian law, yet NATO action resoundingly affirmed its conviction that it should do so. Pragmatic problem solving spoke louder than policy. NATO patiently sought to avoid military action and maximized use of UN processes before acting meaningfully to protect human rights. Finally, NATO was committed to preserving its success by establishing a long-term security structure. The results tell the rest of the story—Kosovo and the Balkans have been at peace for nearly a generation. Until the intervention in Libya, these results were crucial in helping to endorse humanitarian intervention as a tool of state practice while also bridging the gap between the legitimacy and legality of humanitarian intervention under customary international law.

## IV. The Humanitarian Intervention in Libya

While success in Kosovo enhanced the standing of humanitarian intervention generically and with respect to customary international law, failure in Libya eroded it.

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[113] *Id.* at 16, 44, 45, 54, 59, 66.
[114] *Id.* at 57-67.
[115] *Id.* at XII, 37, 57.
[116] *Compare* Michael Reisman, *Kosovo's Antinomies*, 93 AJIL 860, 861-862 (1999) *with* Joyner, *supra* note 36; *see also* Greenwood, *supra* note 28 (discussing Iraq intervention).
[117] ICISS Report, *supra* note 44, at 16, 44, 45, 54, 57-67.

A. Background

On December 17, 2010, an impoverished Tunisian fruit seller by the name of Mohamed Bouazizi doused himself with gasoline and set himself on fire after local officials confiscated his wheelbarrow of fruit for refusing to pay a bribe.[118] Bouazizi died eighteen days later.[119] Bouazizi's act of self-immolation touched off a popular revolt that toppled the 23-year regime of Tunisian President Zine El Abidine Ben Ali within a matter of days.[120] The revolution in Tunisia galvanized opponents of long-standing authoritarian regimes in neighboring countries, including Egypt, Syria, and Libya, regionalizing popular uprisings that came to be known as the Arab Spring.[121] The suddenness and scale of the Arab Spring came as a surprise to states and international institutions.[122] Within weeks of Bouazizi's death, regimes that had stood for decades and seemed all but impregnable were swept away not only in Tunisia, but also in Egypt and Libya, while coming under assault in Syria and elsewhere.[123]

Events moved with particular rapidity in Libya. There, localized protests over government corruption in mid-January 2011[124] quickly developed into a more generalized revolt by February.[125] A National Conference for the Libyan Opposition staged a "Day of Rage," which resulted in the torching of police stations and government controlled media in Libya's biggest cities.[126] The regime of Libyan dictator Muamar Qaddafi responded to the revolt with increasing brutality, resorting to torture, rape, and the killing of civilians.[127] The opposition formed a National Transitional Council, which began calling itself "the Libyan Republic," and internal armed conflict ensued with government and rebel

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[118] Peter Beaumont, *Mohammed Bouazizi: the dutiful son whose death changed Tunisia's fate*, THE GUARDIAN (Jan. 20, 2011), https://www.theguardian.com/world/2011/jan/20/tunisian-fruit-seller-mohammed-bouazizi.
[119] *Id.*
[120] *Ben Ali gets refuge in Saudi Arabia*, AL JAZEERA ENGLISH (Jan. 16, 2011), http://www.aljazeera.com/news/middleeast/2011/01/201111652129710582.html.
[121] ROGER OWEN, THE RISE AND FALL OF ARAB PRESIDENTS FOR LIFE 172-83 (2012).
[122] *Id.* at 172-73.
[123] *Id.* at 172-77.
[124] *Libyans Protest over Delayed Subsidized Housing Units*, ALMASRY ALYOUM (Jan. 16, 2011), https://web.archive.org/web/20110322055904/.
[125] *Libyan Police Stations Torched*, AL JAZEERA (Feb. 16, 2011), http://www.aljazeera.com/news/africa/2011/02/20112167051422444.html.
[126] *Popular Protest in North Africa and the Middle East (V): Making Sense of Libya*, International Crisis Group, Middle East/North Africa Report No. 107, (June 6, 2011) at 3.
[127] *Id.* at 4-5.

bases of operation centered in the western and eastern parts of the country, respectively.[128]

International actors quickly called on the Qaddafi regime to desist from human rights violations. On February 25, 2011, action was taken to suspend Libya from the United Nations Human Rights Council, which invoked R2P by calling on the Libyan regime "to meet its responsibility to protect its population."[129] Referencing the reported use of tanks, helicopters and military aircraft and the killing of thousands of civilians, the UN High Commissioner for Human Rights condemned the government's "reported mass killings, arbitrary arrests, detention and torture of protestors" and warned that such "attacks against the civilian population may amount to crimes against humanity."[130] Independent observers, including Amnesty International, also confirmed the Qaddafi regime's systematic violations of human rights and called for action.[131] On February 26, 2011, the UN Security Council, also invoking the "Libyan authorities' responsibility to protect its population," adopted UNSCR 1970, which referred reported human rights violations by the Libyan regime to the International Criminal Court, ordered an arms embargo, and froze the Libyan regime's financial assets abroad.[132] Barely three weeks later, the UN Security Council adopted UNSCR 1973. "Reiterating the responsibility of the Libyan authorities to protect the Libyan population," the UN Security Council, among other things, "[a]uthorize[d] Member States . . . acting nationally or through regional organizations or arrangements . . . to take all necessary measures. . . to protect civilians and civilian populated areas under threat of attack in [Libya] while excluding a foreign occupation force of any form on any part of Libyan territory[.]"[133] UN Secretary-General Ban Ki-moon declared that UNSCR 1973 "affirms, clearly and unequivocally, the international community's determination to fulfil its responsibility to

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[128] *Id.* at 3, 23 *et seq.;* Statement of the National Transitional Council (Mar. 5, 2011), https://web.archive.org/web/20110314133238/http://ntclibya.org/english/.

[129] *UN rights council recommends suspending Libya, orders inquiry into abuses*, UN News Centre (Feb. 25, 2011), http://www.un.org/apps/news/story.asp?NewsID=37626#.WDIbxxCQwc8.

[130] *Id.*

[131] *See The battle for Libya: Killings, disappearances, and torture*, AMNESTY INTERNATIONAL (Sept. 13, 2011), https://www.amnesty.org/en/documents/MDE19/025/2011/en/; *Arab States Seek Libya No-Fly Zone*, AL JAZEERA (Mar. 12, 2011), http://www.aljazeera.com/news/africa/2011/03/201131218852687848.html.

[132] S.C. Res. 1970, U.N. Doc S/RES/1970 (Feb. 26, 2011).

[133] S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011) [hereinafter S.C. Res. 1973].

protect civilians from violence perpetrated upon them by their own government."[134]

B. NATO State Practice in Libya

The French initiated military action against Libya on March 19, 2011, with NATO taking over operational control of the action on March 25, 2011.[135] Again, under the leadership of NATO, air power was deployed to stop human rights abuses on the ground. This time, the use of force was authorized by the UN Security Council.[136] NATO's intervention came in the form of an air campaign—the so-called operation "Unified Protector"—which targeted Libyan air defense capabilities, government facilities, military facilities, and military troop formations on the ground without contemplating a follow-on ground campaign.[137]

Unlike the NATO intervention in Kosovo, the Libya air campaign did not on its face violate NATO's charter, at least to the extent that the intervention was consistent with the UN Security Council's authorization.[138] The Libya intervention was also in line with NATO's new Strategic Concept, adopted in November 2010 at the NATO Summit in Lisbon, which committed NATO "to the principles of individual liberty, democracy, human rights and the rule of law[,]" as well as to the "purposes and principles of the Charter of the United Nations and to the Washington Treaty, which affirms the primary responsibility of the Security Council for the maintenance of international peace and security."[139] While neither the 1999 Strategic Concept in force during the Kosovo campaign nor the 2010 Strategic Concept in force during the Libya campaign expressly made humanitarian intervention or R2P a core NATO task, it is difficult to read the 2010 Strategic Concept without finding in it the imprint of R2P doctrine as the guiding basis for the Libya intervention. Addressing its

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[134] Ban Ki-moon, STATEMENT BY THE SECRETARY-GENERAL ON LIBYA (Mar. 17, 2011), http://www.un.org/sg/statements/?nid=5145 (retrieved Nov. 27, 2016).

[135] PRECISION AND PURPOSE: AIRPOWER IN THE LIBYAN CIVIL WAR 108 (Karl Mueller ed., 2015) [hereinafter Mueller].

[136] S.C. Res. 1973, *supra* note 133, ¶ 8 (authorizing member states to "take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack").

[137] Mueller, *supra* note 135, at 43 *et seq*.

[138] The North Atlantic Treaty, *supra* note 85, art. 1 (prohibiting use of force by NATO in "manner inconsistent with the purposes of the United Nations.").

[139] NATO Archives, Active Engagement, Modern Defense: Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organization, adopted by Heads of State and Government at the NATO Summit in Lisbon (Nov. 19-20, 2010).

role in "crisis management," the 2010 Strategic Concept invoked "lessons learned from NATO operations, in particular in Afghanistan and the Western Balkans, [that] make it clear that a comprehensive political, civilian and military approach is necessary for effective crisis management."[140] More telling, perhaps, the 2010 Strategic Concept describes NATO's role in terms of prevention, "manage[ment] of ongoing hostilities," e.g., through its "unparalleled capability to deploy and sustain robust military forces in the field," and, "when conflict comes to an end," contributions "to stabilisation and reconstruction"—[141] language that clearly echoes R2P doctrine's three pillars of "prevent, react, and rebuild."[142]

All this is not surprising. By 2011, R2P had been endorsed by the United Nations at its 2005 World Summit.[143] It also was incorporated as a policy, if not also legal, basis for humanitarian intervention in the official policy statements of most NATO partners, including the United States and France.[144] In his December 2009 speech accepting the Nobel Peace Prize, President Obama stated: "I believe that force can be justified on humanitarian grounds, as it was in the Balkans, or in other places that have been scarred by war."[145] The Obama Administration later expressly endorsed R2P as part of its National Security Strategy.[146] Similarly, humanitarian intervention as an instrument of R2P appears to have been adopted by NATO state practice, at least in the public expression of its stated convictions and legal commitments. On paper, the Libya intervention appeared to adhere to R2P principle: there was support by

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[140] *Id.* at 19, ¶ 21.
[141] *Id.* at 19-20, ¶¶ 22-24.
[142] *See* ICISS Report, *supra* note 44, at V (Contents).
[143] United Nations General Assembly, *Resolution adopted by the General Assembly, 2005 World Summit Outcome*, ¶¶ 138-140. UN Doc A/RES/60/1 (Oct. 24, 2005).
[144] *See, e.g.*, Ambassador Susan Rice, Remarks Before the U.N. Security Council (29 January 2009) (declaring that "[t]he United States takes . . . seriously" its responsibility to protect populations subject to human rights abuses) (transcript available at http://www.state.gov/p/io/rmi/2009/l15579.htm) (retrieved Nov. 11, 2016); Simon Chesterman, *"Leading from Behind": The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention After Libya*, (New York University Public Law and Legal Theory Working Papers) Paper 282 (2011); Stewart Patrick, *Libya and the Future of Humanitarian Intervention*, Foreign Affairs (Aug. 26, 2011); Malissa Tucker, *Lines in the Sand: Drawing Meaningful Contours for the Responsibility to Protect Doctrine (In a World at War)*, 2 NATIONAL SECURITY LAW BRIEF 5 (2015) at 27-28.
[145] *Remarks on Accepting the Nobel Prize in Oslo*, 2 PUB. PAPERS 1799, 1801 (Dec. 10, 2009) (quoted in Harold Koh, *The War Powers and Humanitarian Intervention*, 53:4 HOUSTON L. R. 971 (2016) at 980).
[146] THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 48 (2010).

regional institutions; referral to the ICC; a multilateral plan for intervention; and even a clear and undisputedly legal authorization for the use of force. Early in its campaign, NATO identified its three objectives as cessation of "[a]ll attacks and threats of attack against civilians and civilian-populated areas have ended;" withdrawal of the Qaddafi regime's military forces from populated areas; and the granting of "immediate, full, safe and unhindered humanitarian access to all the people in Libya in need of assistance."[147] The UN authorization, NATO's 2010 Strategic Concept, and statements made by NATO at the time of the intervention left little doubt that the Libya campaign was intended as an R2P intervention.

In its actions, however, NATO state practice fell short of the standard for humanitarian intervention formulated by R2P. While in Kosovo NATO's military intervention was just part of a comprehensive political solution that contemplated a long-term political and security commitment to the troubled region, NATO's intervention in Libya came to an end, for all intents and purposes, when the military action came to an end. There was little on either side of NATO's military reaction—neither much prevention nor post-intervention reconstruction. On the front-end of the intervention, the precipitous pace of events in January and February 2011 in Libya may have severely limited successful preventive measures. On the back-end of the intervention, NATO's option to establish a stabilizing military presence in the region was precluded by the narrow UN authorization under which its intervention proceeded.

In the end, NATO's involvement in Libya was limited to military action, and even this departed from R2P principles. While the campaign appeared at the start to have proper humanitarian objectives, as it progressed it came to look more and more like an operation to effect regime change, an outcome that aroused considerable cynicism in the region and international community at large, further problematizing an already difficult situation.[148] This objective appeared to be confirmed when on October 21, 2016, the day after Qaddafi was killed, the NATO Secretary General, Anders Fogh Rasmussen, announced the termination

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[147] NATO Archives, Statement on Libya following the working lunch of NATO Ministers of Foreign Affairs with non-NATO contributors to Operation Unified Protector, Press Release (2011) 045 (Apr. 14, 2011); *see also* NATO Archives, Statement on Libya Following the Working lunch of NATO Ministers of Defence with non-NATO Contributors to Operation Unified Protector, Press Release (2011) 071 (June 8, 2011).

[148] As many have commented, this was because UNSCR 1973 was vague and open to varying interpretations. *See, e.g.*, Pierre Thielbörger, *The Status and Future of International Law after the Libya Intervention*, 4 GÖTTINGEN J. INT'L L. 11, 20-24 (2012) [hereinafter Thielbörger].

of Operation Unified Protector.[149] Rasmussen further announced that NATO would have no continuing role in Libya: "We have no intention to keep armed forces . . . . in the neighbourhood of Libya. It's our intention to close the operation. It will be a clear-cut termination of our operation."[150] He also made clear that the Libyan people were now on their own: "now is the time for the Libyan people to take their destiny fully into their own hands."[151] NATO's intervention in Libya was quick in, quick out with no one left behind but the Libyan people.

### C. The Libya Intervention's Impact on Customary International Law

Professor Thomas Weiss understood what was at stake for R2P in Libya: "If the Libyan intervention goes well, it will put teeth in the fledgling RtoP doctrine. Yet, if it goes badly, critics will redouble their opposition, and future decisions will be made more difficult."[152] Early on, Weiss and many others hailed the Libya intervention and its application of R2P, primarily because it had secured UN approval in advance, enjoyed the support of regional institutions, and involved no boots on the ground.[153] The intervention in Libya was at first viewed as a success for humanitarian intervention within the framework of R2P—the debate was no longer "whether such an abstract responsibility exists," but rather about "how R2P should be practically implemented in specific cases and crises."[154] But even those who early saw success hedged their assessments, allowing that "a final judgment to this effect cannot of course be made until the country's governance is inclusive, the protection of citizens' human rights is substantially secure and economic recovery is on a sound footing."[155]

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[149] Press conference by NATO Secretary General on the latest developments in Libya and Operation Unified Protector (Oct. 21, 2011), http://www.nato.int/cps/en/natohq/opinions_79807.htm (retrieved 21 November 2016.

[150] *Id.*

[151] *Id.*; *see also* NATO Archives, Final Statement Meeting of the North Atlantic Council at the level of Foreign Ministers held at NATO Headquarters, Brussels, Press Release (2011) 145 (Dec. 7, 2011).

[152] Thomas Weiss, *RtoP Alive and Well after Libya*, 25 ETHICS & INT'L AFFAIRS 287 (2011).

[153] Thielbörger, *supra* note 148, at 32.

[154] Adams, *supra* note 52, at 17.

[155] Spencer Zifcak, *The Responsibility to Protect After Libya and Syria*, 13 MELBOURNE J. OF INT'L LAW 1 (2012).

In retrospect, claims of success proved premature. On the ground, things went badly. Even though Operation Unified Protector was largely a technical military success, the effect of such success did not appear to achieve UNSCR 1973's underlying aims—a decrease in human suffering and a cessation of human rights abuses. According to the National Transition Council, at least 30,000 died between March and September 2011.[156] While estimates of the exact number were disputed, there was little dispute that both government and anti-Qaddafi forces were responsible for gross violations of human rights. The UN Human Rights Council's International Commission of Inquiry later concluded that anti-Qaddafi forces, "committed serious violations, including war crimes and breaches of international human rights law . . . unlawful killing, arbitrary arrest, torture, enforced disappearance, indiscriminate attacks and pillage."[157] Even NATO "admitted to a small number of civilian casualties caused by technical malfunctions or targeting errors," and a "later investigation by the UN Human Rights Council's International Commission of Inquiry found that sixty civilians were accidentally killed in at least five NATO strikes that went wrong."[158] Qaddafi's extra-judicial killing was itself considered by many to be a war crime.[159]

Since the fall of the Qaddafi regime, Libya has descended into an ongoing internal armed conflict among dueling rebel factions, including adherents of the Islamic State, leading some responsible commentators to characterize Libya as a failed state.[160] Notwithstanding the success of its military operations, NATO, too, commented on "the ongoing violence and the deteriorating security situation in Libya, which threaten to undermine the goals for which the Libyan people have suffered so much and which pose a threat to the wider region."[161] By 2016, with no end to the Libyan internal armed conflict in sight, NATO lamented "[t]he continuing crises and instability across the Middle East and North Africa region, in

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[156] Karin Laub, *Libyan estimate: At least 30,000 died in the war*, THE GUARDIAN (Sept. 8, 2011), http://www.cnsnews.com/news/article/libyan-estimate-least-30000-died-war.

[157] United Nations Human Rights Council, A/HRC/19/68, (Mar. 2, 2012) at 2, 15-16, 44, 87, 128-136, 141, 148-149, 156.

[158] *Id.*; *see also* Adams, *supra* note 52, at 10.

[159] *ICC says Muammar Gaddafi killing may be war crime*, BBC NEWS (Dec. 16, 2011), http://www.bbc.com/news/world-africa-16212133.

[160] *See, e.g.*, Alan Kuperman, *Obama's Libya Debacle: How a Well-Meaning Intervention Ended in Failure*, FOREIGN AFFAIRS (March/April 2015).

[161] NATO Archives, Wales Summit Declaration Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Wales, Press Release (2014) 120 (Sept. 5, 2014) [hereinafter Wales Summit Declaration].

particular in Syria, Iraq and Libya, as well as the threat of terrorism and violent extremism across the region and beyond."[162]

While NATO's use of force was couched in terms of R2P, its strategy for protection of Libyan civilians was essentially limited to an air campaign—later morphing into mere "regime change"—and lacked the long-term military, civil, and political commitment NATO employed in Kosovo.[163] Although Operation Unified Protector succeeded in dislodging Qaddafi from power and perhaps in providing Libyan civilians temporary relief from the regime's human rights abuses, the NATO air campaign created circumstances that resulted in long-term and endemic human rights abuses in Libya by government and non-government actors, including the Islamic State and al-Qaeda.[164] NATO's campaign in Libya has widely been viewed as a failure, not only in military and strategic terms, but also as a humanitarian intervention under the rubric of R2P.

In the final analysis, the Libya intervention failed to achieve the balance of moral, political, and legal interests necessary to assure a humanitarian intervention's success. Instead of mitigating human rights violations, it created conditions that increased suffering while also upending Libya's internal political, economic, social, and legal institutions. It also undermined regional peace and security and exacerbated ethnic rivalries. Although the intervention enjoyed UN Security Council authorization as well as the approval of R2P advocates, this authorization papered-over NATO's failure to exhaust other legal remedies before resorting to force. Moreover, the operation's failure damaged the UN's role in guaranteeing international security and subverted the rule of law by calling into question the effectiveness of UN authority.

The failure of the intervention in Libya also undermined acceptance of humanitarian intervention generically, and it did not advance the notion of a "right" of humanitarian intervention under customary international law. This was illustrated, in part, by the general backlash against R2P, as a mode of humanitarian intervention, following the troubling course of

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[162] NATO Archives, Warsaw Summit Communiqué Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Warsaw 8-9 July 2016, Press Release (2016) 100 (Jul. 9, 2016).

[163] NATO Archives, Statement on Libya following the working lunch of NATO ministers of foreign affairs with non-NATO contributors to Operation Unified Protector, Press Release (2011) 45 (Apr. 14, 2011).

[164] Jeffrey Goldberg, *The Obama Doctrine*, THE ATLANTIC, April 2016.

events in Libya.[165] R2P's own godfather, Kofi Annan, stated that "the way the 'responsibility to protect' was used in Libya caused a problem for the concept."[166] India's ambassador to the UN stated that "Libya has given R2P a bad name."[167] President Obama himself acknowledged that failing to follow up in Libya was the "worst mistake" of his presidency.[168] Overall, "[t]he perception that R2P was used as a smokescreen for regime change has undoubtedly undermined the concept's credibility."[169]

Harking back to Annan's "Two Concepts of Sovereignty," it must be remembered that humanitarian intervention as a function of R2P was proposed as a possible alternative to UN Security Council use of force procedures. Ironically, notwithstanding the UN's authorization of force in Libya, NATO's failure in Libya discredited not only the UN and R2P, but also humanitarian intervention generically and with it the "right" of humanitarian intervention in customary international law. Humanitarian intervention, having gained wider acceptance after the success of Kosovo, was relegated after Libya to a position of decided ambiguity. This article suggests that the failed humanitarian intervention in Libya made humanitarian intervention in Syria less palatable, whether under UN Security Council auspices or as a "right" under customary international law.

### D. Conclusion

On September 5, 2014, three years after the close of the Libya intervention, the heads of state and government participating in the North Atlantic Council summit in Wales issued a declaration expressing their deep concern for "the ongoing violence and the deteriorating security situation in Libya."[170] NATO urged little more than a call on "all parties to cease all violence and engage without delay in constructive efforts

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[165] Adams, *supra* note 52, at 15-17.

[166] Natalie Nougayrède, *Kofi Annan: "Sur la Syrie, à L'évidence, Nous N'avons Pas Réussi"*, [Interview with Kofi Annan*: 'On Syria, It's Obvious, We Haven't Succeeded'*], LE MONDE (July 7, 2012), www.lemonde.fr/proche-orient/article/2012/07/07/kofi-annan-sur-la-syrie-a-l-evidence-nous-n-avonspas-reussi_1730658_3218.html.

[167] Phillipe Bolopion, *After Libya, the Question: To Protect or Depose?*, LOS ANGELES TIMES (Aug. 25, 2011), http://articles.latimes.com/2011/aug/25/opinion/la-oe-bolopion-libya-responsibility-t20110825.

[168] *President Obama: Libya aftermath "worst mistake" of presidency*, BBC News (Apr. 11, 2016), *www.bbc.com/news/world-us-canada-36013703*.

[169] Garwood-Gowers, *supra* note 50, at 609.

[170] Wales Summit Declaration, *supra* note 161.

aimed at fostering an inclusive political dialogue[.]"[171] Recalling its efforts in Operation Unified Protector "to protect the Libyan people," NATO stood ready to "support Libya with advice on defence and security institution building"—and nothing more.[172] It is hard to read this as anything more than an admission of failure. After a six month bombing campaign, NATO cut and run, leaving Libyans "to their destiny." Three years later NATO could offer little more than "advice" in recompense.

At the very same meeting, with no trace of irony, NATO "commended the Kosovo Force (KFOR) for the successful conduct of its mission over the past 15 years."[173] NATO promised that "KFOR will continue to contribute to a safe and secure environment and freedom of movement in Kosovo [and] . . . will also continue to support the development of a peaceful, stable and multi-ethnic Kosovo [and] . . . to maintain KFOR's robust and credible capability to carry out its mission . . . [with] any reduction of our troop presence . . . measured against clear benchmarks and indicators, . . . conditions-based and not calendar-driven."[174] In Kosovo, NATO committed itself to success, and the results were clear for all to see, even if the lessons learned were not applied in Libya.

A comparison of NATO's involvement in Kosovo and in Libya yields three important observations. First, as the ICISS report warned, humanitarian intervention should be undertaken only if it has reasonable chances of success.[175] According to ICISS's formula for humanitarian intervention, based in large measure on the success of Kosovo, success requires both an exhaustion of alternative remedies pre-intervention, a legal interest, as well as a long-term commitment post-intervention, a political interest.[176] Libya utterly failed to satisfy these requirements on both sides of the equation—it was hurry in and hurry out. Together with the human suffering caused by Libya's subsequent civil unrest, the predictable result was a failure to balance the intervention's moral, political, and legal interests.

Second, a comparison of the Kosovo and Libya interventions shows that success or failure of a humanitarian intervention matters not only for

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[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] ICISS Report, *supra* note 44, at XII, 37, 57 *et seq.*
[176] *Id.*

the humanitarian intervention itself—as an operation to prevent continued human rights violations—but for the acceptance of humanitarian intervention generically and as a principle under customary international law. No state practice speaks louder than the results of the action itself. Although NATO's Strategic Concept at the time of the Kosovo air campaign made no pronouncements regarding a right of humanitarian intervention,[177] its success in the Kosovo intervention significantly boosted the prospects of humanitarian intervention by providing a positive, successful example, both as a tool within the rubric of R2P and as a right under customary international law. NATO's failed Libya intervention, on the other hand, was explicitly pursued as an exercise of NATO and United States policy endorsing humanitarian intervention and R2P and resulted in the significant undermining of R2P and humanitarian intervention as tools of state practice and consequently of humanitarian intervention as a legal principle.

Finally, the legal theory or authority under which a humanitarian intervention is initiated is only one factor—and not a determinative one—in assessing its outcome as well as its impact on humanitarian intervention both generically and normatively. Granted, the further a humanitarian intervention strays from UN Security Council authorization, the more it must rely on moral and political grounds for legitimacy and, ultimately, success. On the other hand, even a humanitarian intervention authorized through UN Security Council procedures can lose its legitimacy if it fails to sustain a balance of moral, political, and legal interests. A humanitarian intervention that fails morally and politically can de-legitimize an otherwise legal humanitarian intervention, while also undermining humanitarian intervention generically and as a legal principle in customary international law. Equally so, a morally and politically successful humanitarian intervention can legitimize a technically illegal humanitarian intervention, while also fortifying humanitarian intervention generically and as a principle of customary international law. Recognizing this dynamic, the Kosovo and Libya interventions show there is a narrower gap to bridge between a legal and illegal humanitarian intervention than meets the eye. In the end, it is the success or failure of a humanitarian intervention as a whole that is crucial.

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[177] The 1999 Strategic Concept, *supra* note 89.

# COMMAND RESPONSIBILITY: HOW THE INTERNATIONAL CRIMINAL COURT'S JEAN-PIERRE BEMBA GOMBO CONVICTION EXPOSES THE UNIFORM CODE OF MILITARY JUSTICE

MAJOR TRENTON W. POWELL*

*When things go wrong in your command, start searching for the reason in increasingly larger concentric circles around your own desk.*[1]

## I. Introduction

Military commanders[2] exercise great power over their subordinates and have ultimate authority over their units to ensure readiness and develop disciplined and cohesive units.[3] However, with great authority

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[1] William Safire & Leonard Safire, Good Advice, More Than 2,000 Apt Quotations to Help You Live Your Life 14 (1982) (quoting General (Retired) Bruce D. Clark).

[2] The term "military commander" has a specific meaning across the service components in the U.S. military. *See, e.g.*, U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 1-5a (6 Nov. 2016) [hereinafter AR 600-20]; U.S. DEP'T OF AIR FORCE, INSTR. 51-604, APPOINTMENT TO AND ASSUMPTION OF COMMAND para. 3.2 (4 Apr. 2006); U.S. DEP'T OF NAVY, U.S. NAVY REGULATIONS, 1990, art. 802 (14 Sept. 1990). But, generally, the term military commander as used in this article refers to a military leader that has command authority or direct authority over military subordinates.

[3] AR 600-20, *supra* note 2, para. 1-5c.

comes great responsibility.[4] The U.S. Army's Command Policy Regulation, Army Regulation 600-20, paragraph 2-1b, states, "Commanders are responsible for everything their command does or fails to do."[5] In other words, commanders are accountable not only for their personal actions, but also bear responsibility for the acts and omissions of their subordinates.[6] In U.S. Army doctrine, commanders may delegate authority to subordinate leaders and Soldiers to accomplish their assigned duties, and where necessary, may hold these subordinates accountable for their failures.[7] However, the commander retains overall responsibility for the actions within his or her command, including the actions of individuals in the command.[8] This principle underlies the legal doctrine of command responsibility, where, as a general rule, commanders may be held criminally responsible for the war crimes of their subordinates even though they did not participate in the commission of the actual offense.[9]

The U.S. military has long recognized this principle as applicable to U.S. commanders and still considers it a core tenet to the functioning of well-trained, disciplined units.[10] But, while the U.S. military may hold fast to the principle of command responsibility, questions remain as to whether the current punitive system provides an adequate standard to adjudicate

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[4] *Id*. para. 1-5b. Army Regulation 600-20 breaks the key elements of command into two subcomponents: authority and responsibility.
[5] *Id*. para. 2-1b.
[6] Gary D. Solis, The Law Of Armed Conflict 381 (2010).
[7] *See* AR 600-20, *supra* note 2, para. 1-5c.
[8] *Id*.
[9] *See* SOLIS, *supra* note 6, at 381. Command responsibility is also referred to as "superior responsibility." *Id*.
[10] *Id*. *See also* U.S. Dep' Of Army, Field Manual 27-10, The Law Of Land Warfare para. 501 (18 July 1956) [hereinafter FM 27-10]; U.S. Dep't of Def., DoD Law of War Manual para. 18.23.3 (Dec. 2016) [hereinafter Law of War Manual].

U.S. command failures that lead, or contribute, to war crimes[11] by subordinates.[12]

## A. Command Responsibility Vignette

One way to evaluate the feasibility of the U.S. domestic system to prosecute crimes under a theory of command responsibility is to consider a hypothetical scenario involving U.S. forces. The following scenario attempts to provide context to the analysis contained in this article and to

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[11] There is no universally accepted or definitive definition of what constitutes a "war crime." SOLIS, *supra* note 6, at 302 (citing John B. Bellinger III & William J. Haynes II, *A U.S. Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 866 INT'L REV. OF THE RED CROSS 443, 467 (2007)). However, The War Crimes Act of 1996, 18 U.S.C. § 2441(c) (1996) defines the term "war crime" as any conduct:

> (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
>
> (2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;
>
> (3) which constitutes a grave breach of common Article 3 (as defined in subsection (d)) when committed in the context of and in association with an armed conflict not of an international character; or
>
> (4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

*Id*.

[12] See, e.g., Colonel William G. Eckhardt, *Command Criminal Responsibility: A Plea for a Workable Standard*, 97 MIL. L. REV. 1, 1-2 (1982) [hereinafter Eckhardt]; Michael L. Smidt, Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations, 164 MIL. L. REV. 155, 156 (2000) [hereinafter Smidt]; Victor Hansen, What's Good for the Goose is Good for the Gander, Lessons from Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility Towards its Own, 42 GONZ. L. REV. 335, 338 (2007) [hereinafter Hansen].

illustrate the facts of recent, and potentially future, command responsibility cases.[13]

A high-level U.S. commander[14] receives a mission to aid a coalition partner to repel rebel forces threatening the security and stability of the coalition government.[15] Within the context of this scenario, the commander holds broad formal powers for discipline and training over his subordinate forces, including the authority to develop training guidance, initiate investigations and establish courts-martial. Upon receiving the mission, the commander, along with the military staff, develops an operational plan that calls for the deployment of three subordinate battalions totaling approximately 1,500 Soldiers to aid the coalition partner. The three battalions move to the relevant area of operations where intelligence posits there are many known or suspected rebels and rebel sympathizers hiding among the civilian population. The commander does not move with the subordinate forces, but maintains constant direct lines of communication with subordinate leaders in the field. Furthermore, over the course of the operations, the commander receives periodic intelligence and situational reports.

The mission is difficult and exacts a toll on the Soldiers. The rebel forces engage in hit-and-run tactics, inflicting gruesome injuries on U.S. and coalition forces using a variety of homemade explosives and complex ambush techniques. The civilians are openly hostile to the United States presence in the area with many helping the rebels by providing information and caching weapons and supplies. U.S. forces begin clearing operations and move to different villages, searching homes for rebels and attempting to disrupt rebel activities.

After a few weeks, a small number of Soldiers in the battalions begin to steal items of value from the local populace, including money, food, electronics and vehicles. Later, the misconduct becomes widespread with a greater number of Soldiers stealing and engaging in behavior that is more egregious. Discipline continues to erode and Soldiers begin to engage in sexual assaults and rapes upon random civilians in the area of operations.

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[13] What follows is a situation based loosely on the International Criminal Court's (ICC) conviction of Jean-Pierre Bemba Gombo. Discussion and analysis of this case occur *infra* Section III.

[14] In this situation, consider a high-level U.S. commander a general officer.

[15] For the purposes of this illustration, assume there are no *jus ad bellum* considerations as to the lawful deployment of the forces. The purpose of this scenario is to highlight the actions of both the subordinate military members and the commander.

Over the course of the operation, which lasts five months, the Soldiers victimize and rape at least twenty-eight persons, mostly young women and girls. In some cases, Soldiers hold victims at gunpoint during the rapes with members of victims' family present. Often, multiple Soldiers also assault the victims being held at gunpoint. Approximately four months into the operation, U.S. forces murder three civilians resisting the pillaging of their belongings.

Throughout the entirety of the operation, the U.S. commander continues to receive various reports. In fact, the commander receives specific reports of the criminal allegations committed by U.S. forces. Additionally, local and international media begin reporting the atrocities. The U.S. commander travels to the area of operations and meets with a number of local leaders and international aid organizations. The U.S. commander admonishes the Soldiers for their behavior and issues stern public warnings to his troops for any further acts of unlawful violence. He orders additional training for all Soldiers on the proper treatment of noncombatants and the rules of engagement. Furthermore, the commander commissions two investigations to determine the facts and circumstances surrounding the allegations, and convenes seven courts-martial to try Soldiers for pillaging. After approximately five months, the commander orders the redeployment of the unit from the area.

B. What to do with the U.S. Commander?

This fictional scenario raises a number of questions concerning the culpability of the high-level U.S. commander. Considering the commander had actual knowledge that the U.S. forces were committing the crimes based on the periodic operational reports and media accounts, did he take reasonable measures to prevent the atrocities? Were the investigations into the allegations fair and impartial? Did the courts-martial serve to punish the perpetrators and deter others from committing other criminal acts? Did the U.S. commander take sufficient action to remedy the clear deficiencies in training prior to the deployment, or when he first became aware of the allegations? Was the commission of the offenses a result of the commander's failure to control the forces under his command? Assuming the commander is culpable, in what forum should he be tried and for what offenses? These questions raise some relevant and remarkable issues underscoring the current U.S. system to deter and punish commanders for behavior akin to the foregoing. Moreover, in light of the recent conviction of Jean-Pierre Bemba Gombo in the International

Criminal Court (ICC), these questions highlight fundamental flaws in the U.S. application of command responsibility to its own forces.

## C. The Bemba Decision Highlights the Flaws in the U.S. System

On 21 March 2016, Trial Chamber III (TC III) of the ICC[16] delivered a historical judgment in the case of The Prosecutor v. Jean-Pierre Bemba

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[16] Adopted on 17 July 1998 at conference in Rome, Italy, 120 States established the first treaty-based permanent international criminal tribunal—the Rome Statute of the International Criminal Court (ICC). *See* INT'L CRIM. CT., UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT, https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf (last visited Jan. 18, 2017) [hereinafter INT'L CRIM. CT.]. Located in The Hague in the Netherlands, the ICC is an international tribunal charged with investigating, and where warranted, the prosecution of perpetrators of the most serious crimes committed after July 1, 2002, in the territories or by the nationals of the parties to the Rome Statute. *Id*. Since 2002, four additional States have become parties to the Rome Statute, bringing the total number to 124. *The States Parties to the Rome Statute*, INT'L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Nov. 6, 2016) [hereinafter *The States Parties to the Rome Statute*]. The Rome Statute grants the ICC jurisdiction over four main crimes: genocide, crimes against humanity, war crimes, and the crime of aggression. *How the Court Works*, INT'L CRIM. CT., https://www.icc-cpi.int/about/how-the-court-works (last visited Nov. 6, 2016). The statute defines the crime of genocide as,

> the specific intent to destroy in whole or in part a national, ethnic, racial or religious group by killing its members or by other means: causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; or forcibly transferring children of the group to another group.

*Id*. The Rome Statute lists fifteen forms of crimes against humanity that are serious violations as part of a large-scale attack against a civilian population, including murder, rape, imprisonment, sexual slavery, torture, and apartheid. Rome Statute of the International Criminal Court art. 7, July 17, 1998, U.N. Doc. A/CONF.183/9 (amended Jan 16, 2002) [hereinafter Rome Statute]. Article 8 of the Rome Statute provides jurisdiction to prosecute war crimes defined as grave breaches of the Geneva Conventions, including, for example, willful killing or torture of civilians and intentionally directing attacks against hospitals, monuments, or buildings dedicated to religion, education, or sciences purposes. *Id*. Lastly, the crime of aggression is defined as the use armed force by a State against the sovereignty, integrity or independence of another State. *How the Court Works*, INT'L CRIM. CT., https://www.icc-cpi.int/about/how-the-court-works (last visited Nov. 6, 2016). This definition was adopted through the amendment mechanism at the First Review Conference of the Statute on Kampala, Uganda in 2010. *Id*. However, it will not enter into force until ratified by at least thirty

Gombo.[17] The ICC found Bemba guilty of two counts of crimes against humanity (murder and rape) and three counts of war crimes (murder, rape, and pillaging).[18] Three months later, on June 21, 2016, the ICC sentenced Bemba to 18 years imprisonment.[19]

This conviction and sentence represents a landmark decision for the ICC.[20] In significant part, because it represents a first move by the ICC toward imputing liability to individuals at the highest levels of military command for the criminal acts of their subordinates using a theory of command responsibility.[21] In finding Bemba guilty, the ICC signaled its willingness to advance from its previous judgments and find high-level leaders criminally responsible for the derelict discharge of their command functions.[22] Furthermore, while Bemba's conviction is groundbreaking in and of itself, it also exposes substantive flaws in the current U.S. system

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State parties and voted on by the State parties in 2017. *Id.* In addition to creating ICC jurisdiction and codify the punitive articles, the Rome Statute establishes the rules of procedure and the mechanisms for States to cooperate with the ICC. Rome Statute, *supra*.

[17] The Prosecutor v. Jean–Pierre Bemba Gombo, ICC-01/05-01/08-3343, Judgment pursuant to Art. 74 of the Statute (Mar. 21, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_02238.pdf [hereinafter Final Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo]. Decisions and documents of the Court cited herein are available online at its website, INT'L CRIM. CT., http://www.icc-cpi.int (last visited Nov. 6, 2016).

[18] Final Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo, *supra* note 17, ¶ 742.

[19] The Prosecutor v. Jean–Pierre Bemba Gombo, ICC-01/05-01/08-3399, Decision on sentence pursuant to Art. 76 of the Statute (June 21, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_04476.pdf [hereinafter Sentence Decision, The Prosecutor v. Jean–Pierre Bemba Gombo].

[20] In addition to being noteworthy for a conviction based on a theory of command responsibility, this conviction represents the ICC's first ever conviction for crimes of sexual violence. Niamh Yvonne McDermott, *International Decision: Prosecutor v. Bemba*, 110 AM J. INT'L L. 526, 532 (July 2016); Niamh Hayes, *The Bemba Trial Judgement—A Memorable Day for the Prosecution of Sexual Violence by the ICC*, PHD STUDIES IN HUMAN RIGHTS (Mar. 21, 2016, 6:32 PM), http://humanrightsdoctorate.blogspot.com/2016/03/hayes-bemba-trial-judgement-memorable.html. Additionally, the eighteen-year sentence is the longest ever handed down by the ICC. Wairagala Wakabi, *Bemba Given 18-Year Jail Sentence at ICC*, INT'L JUST. MONITOR (June 21, 2016), https://www.ijmonitor.org/2016/06/bemba-given-18-year-jail-sentence-at-icc.

[21] Final Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo, *supra* note 17, ¶ 741.

[22] Alexandre Skander Galand, First Ruling on Command Responsibility before ICC: The ICC Enters its First Conviction on Command Responsibility in the Bemba Case, CASE MATRIX NETWORK (Mar. 29, 2016), http://blog.casematrixnetwork.org/toolkits/eventsnews/news/first-ruling-on-command-responsibility-before-the-icc/?doing_wp_cron=1474978207.9296619892120361328125.

and represents a bold and aggressive move in the application of the doctrine of command responsibility. In light of the ICC's first-ever conviction for a commander under a theory of command responsibility, it is time for the United States to reexamine the doctrine of command responsibility under the Uniform Code of Military Justice (UCMJ)[23] and adopt a punitive command responsibility article.

This article will provide a brief background on the modern development of command responsibility and its application in a number of historical tribunals. Thereafter, a more in-depth analysis of the Bemba case will provide insight into the ICC's historic conviction. The next section will use the foregoing vignette to illustrate the shortcomings of the U.S. system while contrasting the Bemba case as it relates to convictions under a theory of command responsibility. The final section will examine two scholarly proposals and call for the United States to make appropriate changes to the UCMJ to account for its limitations.

## II. Background and Modern Legal Development of Theory Command Responsibility

The concept of command responsibility dates back to at least as early as the 15th century when Charles VII of Orleans issued an ordinance stating:

> [T]he King orders that each captain or lieutenant be held responsible for the abuses, ills and offenses committed by members of his company . . . . If, because of his negligence or otherwise the offender escapes and thus evades punishment, the captain shall be deemed responsible for the offense as if he had committed it himself . . . .[24]

Following the 15th century, the doctrine saw use in at least two United States conflicts including the American Revolution and the Civil War.[25]

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[23] 10 U.S.C. §§ 801-946 (2012) (codifying the Uniform Code of Military Justice [hereinafter UCMJ]).

[24] SOLIS, *supra* note 6, at 382 (quoting LESLIE C. GREEN, ESSAYS ON THE MODERN LAW OF WAR 283 (2d ed. 1999) (internal quotations omitted).

[25] *Id.* (citing George L. Coil, *War Crimes in the American Revolution*, 82 MIL. L. REV. 171, 197 (1978)) (citing COLONEL WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 297 n.2 (2d ed. 1920)). British Lieutenant Governor of Quebec Henry Hamilton was tried for the pillaging committed by American Indians allied with the British even though

However, it was not until the conclusion of World War II that the doctrine of command responsibility fully developed into its current form.[26]

A. General Yamashita to Captain Medina

The case of Japanese General Tomoyuki Yamashita saw the doctrine applied to the highest levels of military command.[27] His conviction stemmed from the October 1944 American invasion of Manila where in the midst of their retreat, Japanese defenders murdered approximately 8,000 civilians and raped almost 5,000.[28] While Yamashita argued that he neither ordered nor had knowledge of the crimes, the military commission found Yamashita guilty and ordered him to hang because "[t]he crimes were so extensive and widespread, both as to time and area, that they must either have been willfully permitted by [Yamashita], or secretly ordered by [Yamashita]."[29] In a *habeas corpus* petition to the U.S. Supreme Court, the Court affirmed his conviction, holding:

> [T]he law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of acts which are violations of the law of war . . . . and he may be charged with personal responsibility for his failure to take such measures when violations result.[30]

This decision was groundbreaking. Failing to supervise and control subordinates during the commission of war crimes constituted a punishable and executable offense for a military commander where there was evidence that he "knew or should have known" about the offenses.[31] The *Yamashita* case greatly expanded the scope of command actions and omissions deemed potentially criminal, and along with a few other post-

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he took no part in the offenses. *Id*. After the Civil War, Major Henry Wirz was hanged for thirteen counts of murder and conspiracy to maltreat prisoners. *Id*.

[26] Timothy Wu & Yong-Sung Kang, Criminal Liability for the Actions of Subordinates—The Doctrine of Command Responsibility and Its Analogues in United States Law, 38 HARV. INT'L L. J. 272, 274 (1997).

[27] SOLIS, *supra* note 6, at 383.

[28] *Id*.

[29] United States of America vs. Tomoyuki Yamashita, Military Commission Appointed by Paragraph 24, Special Orders 110, Headquarters United States Army Forces, Western Pacific, dated 1 Oct. 1945, Tr. 4059-4063.

[30] *In re* Yamashita, 327 U.S. 1, 14 (1946) [hereinafter Yamashita Case].

[31] Smidt, *supra* note 12, at 177.

World War II cases, laid the groundwork for the modern development of the doctrine over the course of the next sixty years.[32]

The *Yamashita* concept of command responsibility and the "knew or should have known" standard seemed reaffirmed and incorporated into U.S. military policy with the issuance of the 1956 edition of the Army's Field Manual 27-10, Law of Land Warfare (FM 27-10).[33] Issued approximately ten years after General Yamashita's conviction, the manual contains paragraph 501, entitled "Responsibility for Acts of Subordinates."[34] This section states:

> In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. Thus, for instance, when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. *The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.*[35]

Despite FM 27-10 making a clear statement of accountability for command failures, these "violations" are not actionable under this manual because it provides no independent basis for criminal liability.[36] Instead,

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[32] Jeremy Dunnaback, Command Responsibility: A Small-Unit Leader's Perspective, 108 NW. L. REV. 1385, 1393 (2014).
[33] FM 27-10, *supra* note 10, para. 501.
[34] *Id*.
[35] *Id*. (emphasis added).
[36] FM 27-10, para. 1.

The purpose of this Manual is to provide authoritative guidance to military personnel on the customary and treaty law applicable to the conduct of warfare . . . This Manual is an official publication of the United States Army. However, those provisions of the Manual which are neither statutes nor the text of treaties to which the United States is a party

the manual appears to educate military members as to the current status of the law of war with the end goal to prevent and deter potential violations.[37] Furthermore, the U.S. military's primary system for disciplining its forces, the UCMJ, contains no punitive article on command responsibility, and thus, no ready-made charge to prosecute commanders for actions envisioned under paragraph 501.[38] Thus, while the U.S. military showed a willingness to prosecute enemy leaders for command failures, and even purported to apply such a standard to its own forces through FM 27-10, the UCMJ fails to contain a punitive article necessary to dispose of serious command transgressions.

### B. The Lessons of My Lai and Captain Medina

The My Lai massacre and the subsequent court-martial of Captain Ernesto Medina is probably the most noteworthy U.S. case concerning the doctrine of command responsibility.[39] Extensive scholarship exists on the *Medina* case, but a brief recounting of the facts leading up to the prosecution will provide context and serve to highlight some of the shortcomings present in the UCMJ at the time of the court-martial.

Captain Medina was the company commander of Charlie Company, Task Force Barker of the 11th Brigade of the Americal Division.[40] On the morning of 16 March 1968, his unit assaulted an area known as Pinkville in the Quang Nai province in the Republic of South Vietnam.[41] Believing the unit was to face resistance from a large Viet Cong force in the area, the company prepared for a fight.[42] However, upon arriving to the Pinkville objective, the three platoons of Charlie Company met no resistance and

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should not be considered binding upon courts and tribunals applying the law of war. However, such provisions are of evidentiary value insofar as they bear upon questions of custom and practice.

*Id*.; *see also* Smidt, *supra* note 12, at 186.

[37] *Id*.

[38] UCMJ (1956). The UCMJ was first enacted in 1950 and has underwent major revisions in 1968 and 1983. *Index and Legislative History of the UCMJ (1950)*, LIBR. OF CONGRESS, https://www.loc.gov/rr/frd/Military_Law/index_legHistory.html (last visited Nov, 18, 2016).

[39] Eckhardt, *supra* note 12, at 12. Colonel William Eckhardt was the Chief Prosecutor in the Medina case. *Id.* at 12 n.21.

[40] *Id*.

[41] *Id*.

[42] *Id*.

began to clear the various villages.[43] The evidence shows that members of Charlie Company, in particular the members of the platoon led by Lieutenant William Calley, engaged in the systematic killing of noncombatants, including old men, women, and children.[44] Additionally, the U.S. forces burned a village and committed multiple acts of rape and sexual assault.[45] While the exact number of noncombatants killed is unknown, some estimates range as high as five hundred.[46]

No evidence placed Captain Medina at the scenes of the crimes throughout the entirety of the commission of the offenses.[47] Additionally, the prosecution had no credible evidence that Captain Medina either ordered his men to commit these atrocities or took part in them himself.[48] Thus, the case was an ordinary case of command responsibility, in particular, a case of inaction or command omission.[49]

The "knew or should have known" standard articulated in the *Yamashita* case, and later adopted in the 1956 version of FM 27-10, section 501, would seem to apply to the Medina prosecution. However, that was not to be the case. By policy, FM 27-10, section 507 provided that service members who commit war crimes are normally tried for violations of the UCMJ, rather than violations of the laws of war.[50] Therefore, the military judge instructed the panel members to consider Captain Medina's culpability under an instruction on Article 77, Principals, UCMJ.[51] In other words, the panel members were to determine whether Captain Medina acted as a principal for aiding and abetting the atrocities committed by members of Charlie Company.

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[43] *Id*.
[44] *Id*.
[45] *Id*.
[46] *Id*.
[47] *Id*. at 13.
[48] *Id*.
[49] *Id*.
[50] FM 27-10, *supra* note 10, para. 507b.

> The United States normally punishes war crimes as such only if they are committed by enemy nationals or by persons serving the interests of the enemy state. Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice, and, if so, will be prosecuted within the United States that code.

*Id*.
[51] Smidt, *supra* note 12, at 194.

While critics argue the military judge erred in providing the instructions to the panel,[52] this case remains important because it provides guidance when scrutinizing the correct legal standard to apply to domestic prosecutions under a theory of command responsibility.[53] Although, had the UCMJ at the time of the Medina court-martial contained a specific punitive article for command responsibility allegations that tracked the post-*Yamashita* FM 27-10, practitioners and scholars need not engage in such analysis. And, perhaps the outcome of *Medina* would have been different.[54]

C. Command Responsibility under International Law

The *Yamashita* legal standard for command responsibility became the cornerstone of the doctrine in the international community and over time developed into customary international law (CIL).[55] Furthermore, considering the U.S. Army adopted the doctrine in the 1956 version of FM 27-10, it is indisputable that the United States acknowledged it as controlling CIL as well.[56] However, despite the United States and the international community agreeing that the *Yamashita* standard reflected CIL, U.S. domestic law saw no change in command responsibility even after the *Medina* case. However, the international community did take measures to codify the CIL doctrine of command responsibility in 1977

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[52] See generally Roger S. Clark, Medina: An Essay on the Principles of Criminal Liability for Homicide, 5 RUT-CAM. L.J. 59 (1973).

[53] Smidt, *supra* note 12, at 198-99.

[54] On 22 September 1971, the court acquitted Captain Medina of the charged offenses stemming from the allegations during the My Lai massacre on 16 March 1968. Eckhardt, *supra* note 12, at 11 n.19.

[55] Smidt, *supra* note 12, at 200. Customary international law is unwritten law that results from a general and consistent practice of states followed by them from a sense of legal obligation. *See* I RESTATMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2), at 24 (AM. LAW. INST. 1987).

[56] Smidt, *supra* note 12, at 201 (citing FM 27-10, *supra* note 10, para. 501; The Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, 1060 (1945)). As this article will further illustrate, the United States still considers the *Yamashita* standard for command responsibility and its later adoption into the FM 27-10 as reflective of customary international law with the recent publication of the Department of Defense (DoD) Law of War Manual. *See* LAW OF WAR MANUAL, *supra* note 10, para. 18.23.3. *See infra* Section II.E. for a more thorough exploration on the background of this manual.

with the adoption of Additional Protocol I (AP I) to the 1949 Geneva Conventions.[57] In pertinent part, AP I, article 86, paragraph 2 states:

> The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.[58]

Even though the United States is not a party to AP I,[59] the codification of the foregoing article nearly forty years ago, coupled with its similarities to the standard announced in *Yamashita*, certainly make it binding CIL.[60] Consequently, between the prosecution of General Yamashita in 1946, and the 1977 codification of command responsibility into a treaty, it would seem a reasonable United States position that domestic law fell short in handling the litany of command responsibility cases arising from an increasingly complex operating environment.[61] Nevertheless, despite

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[57] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 43, Jun. 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

[58] *Id*. art. 86(2).

[59] *Treaties, State Parties and Commentaries to AP I*, INT'L COMM. OF THE RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470 (last visited Nov. 22, 2016).

[60] *See generally* Martin Dupuis et al., *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419 (1987). At a conference in 1986, Mr. Michael Matheson, former U.S. Department of State Deputy Legal Advisor, expanded on the provisions of Additional Protocol I to the Geneva Conventions the United States considers customary international law. *See generally id*. Mr. Matheson's comments reflect the position that, at the time, the United States viewed Articles 85-89 as customary international law. *Id*. at 428.

[61] The type of cases that may arise from a complex operating environment include two noteworthy U.S. cases. The first case concerned the 2003 abuses of detainees at the Abu Gharib detention facility. *Iraq Prison Abuse Scandal Fast Facts*, CNN LIBR. (Mar. 12, 2016, 4:05 PM), http://www.cnn.com/2013/10/30/world/meast/iraq-prison-abuse-scandal-fast-facts. After extensive investigations and reports, only lower-ranking Soldiers were prosecuted and no officers were found criminally liable for the actual mistreatment of detainees. *Id*. The second case stemmed from the killings of at least twenty-four civilians in the town of Haditha, Iraq by members of Kilo Co., 3d Battalion,

calls to the contrary,[62] the United States took no action to amend the UCMJ to account for likely prosecutions under a theory of command responsibility.

D. Rome Statute and ICC

The next consequential development in the command responsibility doctrine occurred with the creation of the ICC and the 1998 ratification of the Rome Statute. In establishing the jurisdiction of the ICC and codifying punishable offenses, the parties to the Rome Statute also adopted a specific article concerning superior responsibility.[63] Interestingly, the Rome Statute provided a command responsibility theory applicable to both military and civilian leaders.

The provision for holding both military commanders and superiors liable for the acts of their subordinates appears in Article 28. It states:

> In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

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5th Marines. *Haditha Killings Fast Facts*, CNN LIBR. (Apr. 1, 2016, 11:13 AM), http://www.cnn.com/2013/10/30/world/meast/haditha-killings-fast-facts. In that case, the military judge dismissed all charges against the unit's battalion commander, including charges of dereliction of duty, before trial. *Id*.

[62] Colonel William G. Eckhardt was one of those persons who saw the drafting of the Additional Protocols to the Geneva Convention, approximately ten years removed from My Lai, as an opportunity to address the shortcomings reflected in domestic law. *See generally* Eckhardt, *supra* note 12. As it related to command responsibility, he called for substantive changes not only to the UCMJ, but also to the Manual for Courts-Martial and saw a need for the promulgation of new executive orders, directives, and regulations. *Id*. at 27. Specifically, when considering the deficiencies in the UCMJ, Colonel Eckhardt stated:

> [T]he civilian-oriented Uniform Code of Military Justice does little to assist in legally categorizing possible breaches of command responsibility. No article of the Code concerns the battlefield responsibility of a commander. The Manual for Courts-Martial is equally and painfully silent. One must make the legislatively-expressed, ancient common law work, although it teaches little regarding the terrors and the pressures of the battlefield.

*Id*. at 21. Interestingly, he also called for a tri-service manual on the law of war. *Id*. at 27. His desire was realized, albeit, thirty-three years later, with the 2015 release of the DoD Law of War Manual. *See generally* LAW OF WAR MANUAL, *supra* note 10.

[63] Rome Statute, *supra* note 16, art. 28.

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That the military command or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for the investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or

> repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[64]

As evidenced by the foregoing statutory language, the drafters of Article 28 clearly adopted the *Yamashita* legal standard of "knew or should have known." However, Article 28 contains two unique features not seen in previous international *ad hoc* tribunals,[65] in the 1956 version of FM 27-10, nor in AP I.[66] First, for both military and civilian superiors, Article 28 contains a causation element. Both subparts provide for a superior's culpability where the crimes were committed "*as a result of his or her failure to exercise control properly over such forces* (or subordinates)."[67] The second interesting feature of Article 28 is that it contains two separate negligence standards for military and civilian leaders. The *Yamashita* standard, and the one contained in Article 28(a) for military commanders—"knew or should have known"— becomes "*knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes*."[68] Alternatively, the standard for civilian superiors becomes "*knew or consciously disregarded information which clearly indicated*" that subordinates were committing or about to commit crimes.[69]

During the drafting of Article 28 at the Rome Conference in 1998, the U.S. objected to extending a "knew or should have known" standard to non-military leaders or civilian superiors.[70] In doing so, the United States argued that this negligence standard was one not normally applied to civilians in criminal prosecutions.[71] And, civilians would likely exercise less authority and control over their subordinates than would military

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[64] *Id*. Notably, Article 28 draws a distinction between military and civilian leaders. *Id*. Article 28(a) concerns military commanders, whereas part (b) concerns civilian leaders. *Id*.

[65] These ad hoc tribunals include, for example, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

[66] Adria De Landri, *Command Responsibility in the International Tribunals: Is There a Hierarchy?* 49 NO. 1 CRIM. LAW BULLETIN ART. 1, 8 (2013) [hereinafter Landri]; *see also* Smidt, *supra* note 12, at 211.

[67] Rome Statute, *supra* note 16, art. 28 (emphasis added).

[68] *Id*. (emphasis added).

[69] *Id*. (emphasis added).

[70] Landri, *supra* note 66, at 8 (citing United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court art. 28, A/CONF.183/13 (Vol. I) (June 15-July 17, 1998) http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v1_e.pdf.

[71] *Id*.

commanders, making it unfair to extend this standard to civilians.[72] Nevertheless, apart from these objections, Article 28's standard for holding military leaders responsible reflected, for the most part, the longstanding U.S. view of command responsibility.

E. Current Status of U.S. Command Responsibility Doctrine

Between the Rome Conference in 1998 and the release of the overhauled U.S. Department of Defense (DoD) Law of War Manual in 2015,[73] the world bore witness to a number of conflicts that helped continue shaping the law governing and regulating the use of force.[74] The release of the DoD Law of War Manual, more than 25 years in the making and the first comprehensive manual on the law of war since 1956, provided an opportunity for the United States to address a number of legal developments.[75] This institutional publication reflects decades of work by civilian and military lawyers from all U.S. service components and is intended to serve as a resource for DoD personnel.[76]

Section 18.23.3 of the DoD Law of War Manual addresses command responsibility, reaffirming the doctrine first recognized in *Yamashita* and later incorporated into FM 27-10.[77] Additionally, the manual cites to a number of cases and statutes arising out of various international criminal tribunals,[78] as well as references Article 28 of the ICC's Rome Statute.[79]

The DoD Law of War Manual reaffirmed the longstanding principle of command responsibility and the resulting liability commanders may face should they fail to ensure their troops do not commit war crimes. Under the DoD Law of War Manual, "commanders may be punished

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[72] Per Saland, *International Criminal Law Principles*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 189, 203 (Roy S. Lee ed., 1999).
[73] LAW OF WAR MANUAL, *supra* note 10.
[74] These conflicts include, for instance, the conflict in Kosovo, the war in Iraq, the war in Afghanistan, and the Russian incursion into Crimea.
[75] Marty Lederman, *A Reader's Guide to Our Mini-Forum on DoD's New Law of War Manual*, JUST SECURITY (Aug. 12, 2015, 2:07 PM), https://www.justsecurity.org/25371/readers-guide-mini-forum-dods-law-war-manual/.
[76] LAW OF WAR MANUAL, *supra* note 10, at ii-iii.
[77] *Id*. para. 18.23.3.
[78] *Id*. para. 18.23.3.2 (discussing the statutes of international tribunals incorporation of command responsibility as a mode of liability).
[79] *Id*.

directly for their failure to take necessary and reasonable measures to ensure that their subordinates do not commit violations of the law of war."[80] This language mirrors FM 27-10, requiring "necessary and reasonable measures" to ensure subordinate compliance with the law of war.[81] It also tracks closely with article 86 of AP I which requires military leaders to take "all feasible measures within their power" to ensure subordinate compliance with the law of war.[82] Similar to FM 27-10, the DoD Law of War Manual does not create an individual basis for liability.[83] Rather, the "purpose of the manual is to provide information on the law of war to DoD personnel responsible for implementing the law of war and executing military operations."[84] Yet, the manual goes into extensive detail outlining the various legal theories under which a commander may be liable for the war crimes of his or her subordinates.[85] For example, a commander may face liability under the theory of conspiracy if he or she agreed to commit a law of war violation.[86] Or, a commander may face an offense triable under a theory of aiding and abetting if the commander had some knowledge of the war crime and provided some type of assistance.[87] The closest and most similar charge for a command responsibility violation as a distinct offense is under UCMJ Article 92, dereliction of duty.[88] Using this charge as a basis for liability is certainly reasonable for most conduct that falls within the purview of command responsibility under international law. However, given the maximum confinement under the UCMJ for article 92 violations range from three months to two years,[89]

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[80] *Id*. para. 18.23.3.
[81] FM 27-10, *supra* note 10, para. 501.
[82] AP I, *supra* note 57, art. 86(2).
[83] LAW OF WAR MANUAL, *supra* note 10, at 1.

> [T]his manual is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law of in equity against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

*Id*.
[84] *Id*.
[85] *Id*. para. 18.23.3.
[86] *Id*. para. 18.23.5.
[87] *Id*. para. 18.23.4.
[88] UCMJ art. 92(3) (2012).
[89] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 16e(3)(B) (2016) [hereinafter MCM] (providing for a maximum punishment of forfeiture of two-thirds pay per month for 3 months and confinement for 3 months for dereliction of duties through neglect or culpable inefficiency; providing for a maximum punishment of a bad conduct discharge, forfeiture of all pay and allowance, and 18 months confinement for dereliction of duties through neglect or culpable inefficiency results in death or grievous bodily

a conviction of a commander for being derelict is rather trivial. Furthermore, there exists a drastic and obvious difference between a simple dereliction conviction and one that imputes the actual war crimes to commander.

The DoD Law of War Manual is an excellent resource for commanders and legal practitioners and provides a long overdue update across a number of legal topics. It restates the long held principle that commanders may be liable for the war crimes of their subordinates.[90] But, as the Bemba case portrays, substantive changes in U.S. domestic law are necessary so that the United States may fall into line with the international community and apply the doctrine of command responsibility to its own service members should the need arise.

## III. The Case: *Prosecutor v. Jean-Pierre Bemba Gombo*

### A. Bemba's Forces

While the facts and circumstances as to Bemba's rise to prominence are not at issue in the case, they do provide some context as to the eventual commission of the brutalities that formed the basis of the conviction. Bemba was born on November 4, 1962 in Bokada, Équateur Province, Democratic Republic of Congo (DRC).[91] His father was a successful businessman and close ally of the former Congolese dictator, Mobutu Sese Seko.[92] Bemba enjoyed a privileged childhood, spending his early years shuttling between Brussels, Belgium, and the Congolese capital of Kinshasa.[93] He was well-educated, eventually earning a master's degree in finance from the Institut Catholique dese Hautes Etudes Commerciales business management school in Brussels.[94] In 1997, at the age of thirty,

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harm; providing for a maximum punishment of a bad conduct discharge, forfeiture of all pay and allowance, and confinement for 6 months for willful dereliction of duty cases; and, providing for a maximum punishment of a dishonorable discharge, forfeiture of all pay and allowance, and confinement for 2 years for willful dereliction of duty resulting in death or grievous bodily harm).

[90] LAW OF WAR MANUAL, *supra* note 10, para. 18.23.3.

[91] Final Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo, *supra* note 17, ¶ 1.

[92] *Profile: Jean-Pierre Bemba*, BBC NEWS (Apr. 26, 2010, 4:30 PM), http://news.bbc.co.uk/2/hi/africa/6085536.stm [hereinafter *Profile: Jean-Pierre Bemba*].

[93] *Id.*

[94] Integrated Regional Information Networks (IRIN) Profile, *Jean-Pierre Bemba Gombo-Mouvement de libération du Congo*, IRIN (Aug. 23, 2006), http://www.irinnews.org/news/2006/08/23/profile-jean-pierre-gombo-bemba-

Mobutu named Bemba as a personal assistant advising on financial matters.[95] However, this post proved short-lived as forces loyal to Laurent Kabila overthrew Mobutu and gained control of the DRC in May of 1997.[96] Approximately one year later, with the help of Uganda, Bemba formed a rebel group named the *Mouvement de libération du Congo* (MLC) to oppose Mr. Kabila's regime with a goal of overthrowing his government.[97] He also became the Commander-in-Chief of the MLC's paramilitary division, the *Armée de libération du Congo* (ALC).[98] The MLC [99] quickly succeeded in capturing much of the territory of northwestern DRC including the Équateur Province and the provincial capital city of Gbadolite.[100] In 2003, after a period fighting both MLC forces and those loyal to other rebel groups, Mr. Kabila eventually entered into a peace deal and a power-sharing arrangement where Bemba became one of four vice-presidents.[101] Thereafter, Bemba established himself as a politician, running, but losing a bid for the presidency against Joseph Kabila, the son of former dictator, Laurent Kabila.[102] In 2008, at the time of his arrest in Belgium he was a senator in Congo and leader of the MLC.[103] However, the facts that form the basis of this case begin in October 2002.[104] To the northwest of the DRC is the Central African

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mouvement-de-lib%C3%A9ration-du-congo. Located in Brussels, the Institut Catholique dese Hautes Etudes Commerciales (ICHEC) business management school offers both bachelors and master's degrees in business engineering and business management. ICHEC, http://www.ichec.be (last visited Dec. 28, 2016 9:39am).

[95] *Id.*

[96] *Profile: Jean-Pierre Bemba*, *supra* note 92.

[97] *Id. See also* The Prosecutor v. Jean–Pierre Bemba Gombo, Case No. ICC-01/05-01/08-3343, Summary of Judgment Pursuant to Art. 74 of the Statute 3 (Mar. 21, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_02238.pdf [hereinafter Summary of Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo].

[98] Final Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo, *supra* note 17, ¶ 1.

[99] The ICC's final judgment and much of the other documents referenced in the case refer to the atrocities committed by the *Mouvement de libération du Congo* (MLC) as opposed to the military specific, *Armée de libération du Congo* (ALC). *See generally* Final Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo, supra note 17.

[100] Final Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo, *supra* note 17, ¶ 382.

[101] *Profile: Jean-Pierre Bemba Gombo*, *supra* note 92.

[102] *Id.*

[103] Wairagala Wakani, *Bemba Found Guilty over Rapes, Murders in Central African Republic*, INT'L JUST. MONITOR (Mar. 21, 2016), https://www.ijmonitor.org/2016/03/bemba-found-guilty-over-rapes-murders-in-central-african-republic.

[104] Summary of Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo, *supra* note 97, ¶ 11.

Republic (CAR).[105] At some point in October 2002, rebel forces loyal to General François Bozizé, the former Chief of Staff of the CAR forces known as the *Forces armées centrafricaines* (FACA), advanced from Chad through the CAR.[106] These rebel forces were composed of former FACA soldiers and Chadian nationals.[107] The rebels engaged the FACA troops and captured various towns before entering the capital city of Bangui on October 25, 2002.[108] Forces loyal to the CAR president, President Ange-Félix Patassé responded with force to repel the attack.[109] President Patassé, in an attempt to further defend against the rebels and preserve his grip on power, sought Bemba's assistance in the form of his MLC forces located across the border in the DRC.[110] Thereafter, Bemba ordered the deployment of three MLC battalions totaling 1,500 men to the CAR to aid the forces of President Patassé in repelling General Bozizé's rebels.[111]

Beginning on October 26, 2002, MLC forces, along with a limited number of accompanying FACA troops, entered a number of towns and villages in the CAR.[112] The fighting between MLC forces supporting President Patassé and General Bozizé's rebels continued at various locations in the CAR beginning toward the end of October 2002 and culminating with an attack on the town of Mongoumba by MLC forces on 6 March 2003.[113] However, by 15 March 2003, MLC forces had completely withdrawn from the CAR across the border to the DRC.[114]

The ICC found that MLC forces committed a number of atrocities during the five-month period they were located in the CAR. First, the ICC found beyond a reasonable doubt that MLC forces committed the war crime of murder and the crime against humanity of murder by killing three

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[105] *See* GOOGLE MAPS, https://www.google.com/maps/place/Democratic+Republic+of+the+Congo/@-3.9834054,12.6744027,5z/data=!3m1!4b1!4m5!3m4!1s0x1979facf9a7546bd:0x4c63e5eac93f141!8m2!3d-4.038333!4d21.758664 (last visited Jan. 18, 2017) (current map of Africa).

[106] Summary of Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo, *supra* note 97, ¶¶ 11-12.

[107] *Id.* ¶¶ 11-13.

[108] *Id.* ¶ 11.

[109] *Id.*

[110] *Id.* ¶ 12.

[111] *Id.* ¶ 13.

[112] *Id.* ¶ 14.

[113] *Id.* ¶ 14.

[114] *Id.* ¶ 15.

persons in their homes who were unarmed and not taking part in the hostilities.[115] Second, the ICC found that MLC forces committed the war crime of rape and the crime against humanity of rape as part of a widespread attack directed against the civilian population of the CAR.[116] Specifically, the court found twenty-eight persons were victims of rape, with some victims assaulted multiple times and sometimes with multiple MLC forces engaged in the conduct.[117] Lastly, the ICC found MLC forces committed the war crime of pillaging by taking property without consent from twenty-nine persons.[118]

### B. Bemba's Knowledge of the Allegations and His Actions During the Five-Month Operation

Unlike the command responsibility cases of Yamashita and Medina,[119] the ICC found that Bemba had actual knowledge of the allegations leveled against his troops in the CAR.[120] Furthermore, his actions fell short of the affirmative duties in Article 28(a)(ii) of the Rome Statute to take all necessary and reasonable measures within his power to prevent or repress their commission or to submit the matter to the competent authorities for the investigation and prosecution.[121]

Although he was located primarily in Gbadolite, DRC, during the five-month operation, the ICC found that Bemba maintained ultimate authority over military operations and strategy, including making decisions regarding personnel, discipline, and finances.[122] However, despite his lack of proximity to his forces, he communicated directly to commanders in the field via radio, mobile phones, satellite phones, and other communications devices, and received constant updates about the status of the MLC and the operation.[123] Through his field commanders and intelligence apparatus, he received periodic intelligence reports detailing not only operational information, but also allegations of crimes committed

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[115] Final Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo, *supra* note 17, ¶ 625. The court did find there was insufficient evidence to enter findings for the five additional alleged murders. *Id*. ¶ 623.
[116] *Id*. ¶ 631.
[117] *Id*. ¶¶ 632-633.
[118] *Id*. ¶¶ 639-640.
[119] *See* discussion *supra* Section II.
[120] Final Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo, *supra* note 17, ¶ 710.
[121] *Id*. ¶ 734.
[122] *Id*. ¶ 733.
[123] *Id*. ¶ 707.

by MLC forces.[124] Additionally, the ICC found that Bemba had direct knowledge that MLC forces were committing acts of rape, pillaging, and murder against the CAR civilian population from a number of media outlets.[125] In particular, international media outlets like the Radio France Internationale, the British Broadcasting Corporation, the Associated Press, the Integrated Regional Information Networks, and the Voice of America consistently reported the allegations as did local CAR media accessible in French to MLC troops.[126]

The evidence shows that Bemba discussed the media allegations with his senior officials and decided to take various measures during the course of the operation.[127] Early in the operation, upon first learning of the allegations and discussing them with senior MLC officials, he established the Mondonga Inquiry charged with investigating allegations of rape, murder and pillaging.[128] The inquiry, completed by MLC Colonel Germain Mondonga, substantiated allegations of rape and pillaging by MLC forces and caused Bemba to convene a publically broadcasted court-martial against seven MLC troops.[129] Because of further allegations of pillaging and rape made during the court-martial, Bemba established the Zongo Commission.[130] Comprised of MLC officials, this commission was unable to corroborate MLC forces committed the pillaging allegations raised at the court-martial, but did substantiate other actions of pillaging by MLC forces in the CAR.[131]

Approximately one month into the operation, Bemba traveled to the CAR after hearing reports against his troops.[132] While in the CAR, he met with the United Nations (U.N.) representative in the CAR, General Cissé, and President Patassé, promising to take measures in response to the allegations.[133] Additionally, he gave a speech reprimanding his soldiers

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[124] *Id.* ¶ 708.
[125] *Id.* ¶ 709.
[126] *Id.* ¶¶ 576-577.
[127] *Id.* ¶ 711.
[128] *Id.*
[129] *Id.* ¶¶ 582-589. The Mondonga Inquiry did not address the responsibility of the commanders in the field that may have known or should have known about the allegations. *Id.* ¶ 589. Additionally, convictions of the seven soldiers were for low-level offenses relating to pillaging a few items and small sums of money. *Id.* ¶ 589.
[130] *Id.* ¶ 722.
[131] *Id.* ¶ 713.
[132] *Id.* ¶ 719.
[133] *Id.*

for their mistreatment of the civilian population.[134] In February 2003, toward the end of the operation, Bemba established the Sibut Mission following media allegations of crimes committed by MLC forces in the towns of Bozoum and Sibut.[135] While the exact nature of this group's primary purpose is unclear from the ICC's final judgement, it appears Bemba formed this group to be yet another quasi-investigative body charged with looking into MLC allegations.[136]

On 4 January 2003, Bemba engaged in correspondence with General Cissé after reports of MLC abuse.[137] The letter advised General Cissé of appropriate and remedial measures taken and requested assistance in further investigations of allegations by MLC forces.[138] In response, General Cissé offered support and participation in any inquiries.[139]

Lastly, on February 13, 2003, the International Federation on Human Rights (FIDH) issued a report into its investigation and visit to Bangui, CAR between November 25 and December 1, 2002.[140] Based on interviews with a number of individuals, including CAR authorities, representatives of non-governmental organizations (NGOs), international organizations, medical personnel and victims, the FIDH report found various acts of rape, pillaging, and murder attributable to MLC forces.[141] Bemba responded to the allegations by letter to FIDH president, Sidiki Kaba, articulating the actions taken once he became aware of the MLC allegations, including the court-martial of the seven MLC soldiers and vowing to work in concert with the FIDH to discover the facts of the events in Bangui.[142]

A reasonable observer of a military commander's response to wrongdoing by their subordinates might find Bemba's actions sensible and

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[134] *Id*.
[135] *Id*. ¶ 725.
[136] *Id*. ¶¶ 725-728.
[137] *Id*. ¶ 723.
[138] *Id*.
[139] *Id*.
[140] *Id*. ¶ 607. The International Federation on Human Rights (FIDH) (or in French, *Fédération internationale des ligues des droits de l'Homme)* is a non-governmental organization federating 184 organizations from 122 countries. *What is FIDH*, THE INT'L FED'N ON HUMAN RIGHTS, https://www.fidh.org/en/about-us/What-is-FIDH (last visited Jan. 12, 2016).
[141] Final Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo, *supra* note 17, ¶¶ 607-608.
[142] *Id*. ¶¶ 610-611.

measured. Forming a few investigative committees, calling publically for his forces to cease any unlawful acts against the local population, court-martialing a handful of offended soldiers, and generally agreeing to work with NGO's in further investigations all seem like practical responses by a military commander. Certainly, these responses are ample to absolve a commander of liability when viewed in light of previous command responsibility cases. Yet, as the following sections of this article will demonstrate, the Bemba case unsettles many of the command responsibility norms and highlights potential flaws in the current U.S. system.

## IV. Revisiting the U.S. Commander in Light of Bemba's ICC Conviction

### A. Actions after Learning of War Crime Allegations

The fictional scenario involving the U.S. commander in the introduction of this article generally tracks the facts of the Bemba case.[143] Similar to Bemba, the U.S. commander became aware of the allegations against his Ssoldiers through media reports and periodic situational reports. Additionally, like Bemba, the U.S. commander took a number of measures in an attempt to punish the perpetrators and deter future misconduct. These actions included, for example, convening courts-martial, ordering retraining, and commissioning a number of investigations. However, because these actions may not be sufficient under the law, questions remain as to how to dispose of the case against the U.S. commander.

As a threshold matter, it is important to examine the decisions made by the commander upon becoming aware of the allegations against his subordinate soldiers. As previously noted, under FM 27-10 and the DoD Law of War Manual, commanders are responsible if they fail to take "necessary and reasonable steps to ensure their subordinates comply with

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[143] There are a few differences between the cases. For example, Bemba exercised complete control over his MLC forces. *See* Final Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo, *supra* note 17, ¶¶ 399-403. As commander-in-chief of the MLC forces, he exercised broad authority over strategic military decisions, issuing orders through his general staff or directly to subordinate field commanders. *Id*. Additionally, he had authority to convene courts-martial and dispense justice through the appointing officials and judges to hear cases. *Id*. He also held ultimate authority for all personnel matters as far as promotions and appointments within the MLC, including arresting, sanctioning, and dismissing leaders and soldiers. *Id*.

the law of war."[144] Without additional evidence and the benefit of a developed record, it is difficult to conclude whether the U.S. commander's actions conclusively ran afoul of the command responsibility standard. Yet, the Bemba case provides an excellent vehicle to analyze the limits of these actions according to the ICC.

The ICC summarily dismissed as inadequate all of Bemba's actions upon becoming aware of the allegations against the MLC forces.[145] The ICC found that the investigation completed by MLC Colonel Mondonga was self-serving, incomplete, failed to pursue relevant leads, and omitted the responsibility of commanders.[146] Likewise, the Zongo Commission, established in light of serious allegations of murder, rape, and pillaging, addressed only the pillaging of goods and failed to scrutinize the more serious charges.[147] Additionally, the ICC found this commission, composed primarily of MLC forces, made a poor attempt at uncovering the facts by only questioning witnesses that had public functions or worked directly for the MLC.[148] Similarly, the ICC found Bemba's Sibut Mission was not a genuine investigation and designed more along the lines of a public relations mission to counter the continued allegations.[149]

According to the ICC, Bemba's public warnings to his troops proved to be nothing more than empty threats as he failed to follow up with concrete measures to repress and further deter the commission of the crimes.[150] Furthermore, the ICC found Bemba's exchange with General Cissé, the U.N. representative, and Mr. Kaba, of the FIDH, were primarily motivated to counter the public allegations against the MLC and to restore its image.[151]

In finding all of Bemba's actions as grossly inadequate to repress and prevent the crimes, the ICC retrospectively offered a number of measures it deemed sufficient to absolve Bemba of liability. Other than the actions he took, according to the ICC, Bemba could have:

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[144] *See* FM 27-10, *supra* note 10; LAW OF WAR MANUAL, *supra* note 10, para. 18.23.3.
[145] Final Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo, *supra* note 17, ¶¶ 719-741.
[146] *Id.* ¶ 720.
[147] *Id.* ¶ 722.
[148] *Id.*
[149] *Id.* ¶ 725.
[150] *Id.* ¶ 721.
[151] *Id.* ¶¶ 726-728.

> (i) ensured that the MLC troops in the CAR were properly trained in the rules of international humanitarian law, and adequately supervised during the 2002-2003 CAR operation; (ii) initiated genuine and full investigations into the commission of crimes, and properly tried and punished any soldiers alleged of having committed crimes, and properly tried and punished those responsible; (iii) issued further and clear orders to the commanders of the troops in the CAR to prevent the commission of crimes; (iv) altered the deployment of troops, for example, to minimize contact with civilian populations; (v) removed, replaced, or dismissed officers and soldiers found to have committed or condoned any crimes in the CAR; and/or (vi) shared relevant information with the CAR authorities or others and supported them in any efforts to investigate criminal allegations.[152]

Had Bemba Gombo taken action similar to one or more of these six measures, it is possible to deduce that such measures would have been sufficient to excuse him from liability.

However, before turning back to the U.S. commander and the fictional scenario, the ICC's articulation of adequate command actions in its final judgment provide insight into the ICC's view of appropriate responses to subordinate war crime allegations. For instance, the adequate training of personnel on the law of war and the requirement to conduct genuine and thorough investigations are two examples where U.S. military leaders exercise substantial influence to prevent possible violations of the law of war.[153]

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[152] *Id*. ¶ 729.

[153] Army Regulation 600-20, paragraph 1-5c(4)(c), charges Army commanders with developing disciplined and cohesive units with a high state of readiness. AR 600-20, *supra* note 2, para. 1-5c(4)(c). Furthermore, AR 350-1, paragraph G-23, lays out the specifics for annual training on the law of war by Army leaders and Soldiers. U.S. DEP'T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT para. G-23 (19 Aug. 2014). This provision of AR 350-1, along with the guidance in AR 600-20, provides commanders wide latitude and opportunities to provide law of war training. As far as investigating allegations of law of war violations, DoD policy requires "[A]ll reportable incidents committed by or against U.S. personnel, enemy persons, or any other individual are reported promptly, investigated thoroughly, and, where appropriate, remedied by corrective action." U.S. DEP'T OF DEF., DIR. 2311.01E, DOD LAW OF WAR PROGRAM para. 4.4 (9 May 2006, Certified Current as of 22 Feb. 2011). The requirements to report and investigate, coupled with the Army's administrative investigative process outlined in AR

Assuming the U.S. commander's actions, like Bemba's, were inadequate and failed as reasonable and necessary steps to ensure that the U.S. Soldiers complied with the law of war, the next questions are what charges could the commander face, and what forum should adjudicate the case. Because the United States is not a signatory to the Rome Statute,[154] and has sought to shield its service members from the ICC by entering into Article 98 agreements,[155] at present, the ICC exercises limited jurisdiction over U.S. service members for which the court has subject matter jurisdiction (genocide, crimes against humanity, war of aggression, and war crimes).[156] While the validity of Article 98 agreements is the subject of considerable debate, it is highly likely a U.S. court-martial would adjudicate the case of the U.S. commander.[157] Yet, questions remain as to what charges the commander may face in a court-martial.

B. How to Charge the U.S. Commander under a Theory of Command Responsibility?

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15-6, articulates to commanders what they must do upon receiving a report of an alleged war crime and how they are to impartially ascertain the facts. *See* U.S. DEP'T OF THE ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (1 Apr. 2016).

[154] *See The States Parties to the Rome Statute*, *supra* note 16 (listing 124 current signatories to the Rome Statute, of which the United States is not among).

[155] Each signatory to Article 98 agreements promise not to hand over each other's citizens to the ICC unless both parties consent. Rome Statute, *supra* note 16, art. 98.

[156] Lieutenant Colonel James T. Hill, Jus in Bello Futura Ignotus: The United States, The International Criminal Court, and The Uncertain Future of the Law of Armed Conflict, 223 MIL. L. REV. 672, 680-83 (2015) [hereinafter Hill].

[157] *Id*. (citing Ryan Goodman, *President Certifies U.S. Forces in Mali Not at Risk of International Criminal Court, but is that Legally Valid?*, JUSTSECURITY (Feb. 3, 2014, 9:24AM), http:justsecurity.org/6702/president-certifies-armed-forces-mali-risk-international-criminal-court-legally-valid/ (arguing Article 98 agreements defeat the object and purpose of the Rome Statute and therefore the agreements are invalidated by Article 18 of the Vienna Convention on the Law of Treaties); Jeffrey S. Dietz, *Protecting the Protectors: Can The United States Successfully Exempt U.S. Persons From The International Criminal Court with U.S. Article 98 Agreements?*, 27 HOUS. J. INT'L. L. 137, 157 (2004) (arguing Article 98 agreements do not defeat the object and purpose of the Rome Statute as Article 98 expressly contemplates surrender requests may conflict with a State's international obligation not to surrender an accused); Ruth Wedgewood, *The Irresolution of Rome*, 64 LAW & CONTEMP. PROBS. 193, 207 (2001) (explaining that that Article 98(2) agreements do not stop the ICC from exercising its jurisdiction up to the point of arrest)).

*1. Principal and Conspirator Liability*

An examination of the UCMJ provides a number of potential charges for which an accuser may choose to prefer against the U.S. commander. Like the Rome Statute, the UCMJ has vicarious liability provisions that permit holding an individual responsible for the crimes of another.[158] Article 77 of the UCMJ establishes principal liability for non-perpetrators if they "(i) assist, encourage, advise, instigate, counsel, command or procure another to commit, or assist, encourage, advise, counsel, or command another in the commission of the offense; and (ii) share in the criminal purpose or design" with the perpetrator.[159] Article 81 of the UCMJ establishes co-conspirator liability for persons entering into an agreement where one or more of the persons performs an overt act in furtherance of the conspiracy.[160]

When applying the two aforementioned articles to the case of the U.S. commander, it appears neither will suffice in securing a conviction. The commander certainly had a duty to act once he had actual knowledge of the allegations against his subordinates,[161] and, in fact, did so by ordering a number of investigations, convening courts-martial to try the wrongdoers, and ordering additional training. However, the evidence shows the commander's actions upon learning of the allegations, while possibly insufficient like Bemba's, were not actionable under Article 77, UCMJ. Clearly, the commander's actions do not meet the required elements of Article 77, UCMJ, in that his actions did not rise to the level of assisting, counseling or encouraging his subordinates to commit the

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[158] *See* UCMJ, *supra* note 23, art. 77, 81. Likewise, the Rome Statute's vicarious liability provisions are embodied in Article 25.3(a), (b), and (c). Rome Statute, *supra* note 16, art. 25.3.

[159] MCM, *supra* note 89, pt. IV, ¶1b(2)(b)(i)-(ii). The DoD Law of War Manual provides,

> In some cases, these theories of liability may be viewed as ways of attributing an offense that is committed by one person to another person. In other cases, these theories of liability may be viewed as distinct offenses; for example, a first offense is committed by one person and a second offense is committed by another person that is somehow related to the first offense.

LAW OF WAR MANUAL, *supra* note 10, para. 18.23.

[160] MCM, *supra* note 89, pt. IV, ¶ 5b(1)-(2).

[161] LAW OF WAR MANUAL, *supra* note 10, para. 18.23.3.

atrocities. Additionally, there is a lack of evidence that he shared in his soldiers' criminal design or purpose.

Similarly, Article 81, UCMJ, is an unsuitable charge to prosecute the U.S. commander. Specifically, Article 81(2), UCMJ, covers a conspiracy offense under the law of war resulting in the death of one or more victims.[162] In this case, Article 81(2), UCMJ, is inapplicable to the scenario because there is no evidence the commander entered into an agreement with his subordinates to commit law of war violations. Thus, the question becomes what charge or charges remain and are best suited to pursue criminal action against the U.S. commander.

*2. Using Article 92, Dereliction of Duty, for Command Responsibility Offenses*

While Articles 77 and 81 of the UCMJ appear unsuitable to the situation, another course of action may be using a dereliction of duty charge. Article 92, UCMJ, sets out the three elements for dereliction of duty: (a) that the accused had certain duties; (b) that the accused knew or reasonably should have known of the duties; and, (c) that the accused either willfully, or through neglect or culpable inefficiency, was derelict in the performance of those duties.[163] In 2015, Article 92b(3), UCMJ, was amended to account for more serious cases involving death or grievous bodily harm, and the following element was added: (d) that such dereliction of duty resulted in death or grievous bodily harm.[164] Essentially, the addition of this element provided an aggravating factor for cases where the result was more serious.

Consequently, the 2015 amendments increased the maximum punishment for dereliction of duty charges that result in death or grievous bodily harm.[165] For cases resulting in death or grievous bodily harm where the dereliction of duty is through neglect or culpable inefficiency, the maximum confinement sentence is 18 months.[166] For cases resulting in death or grievous bodily harm where the dereliction of duty is willful, the

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[162] MCM, *supra* note 89, pt. IV, ¶ 5b(2).
[163] *Id*. pt. IV, ¶ 16b(3).
[164] *Id*. art. 92 analysis, at A23.
[165] *Id*. The previous version of Article 92b(3) made no mention of cases where the dereliction of duty resulted in death or grievous bodily harm. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 16b(3) (2012).
[166] MCM, *supra* note 89.

maximum confinement sentence is 2 years.[167] These changes resulted from a report, entitled, "Report of the Subcommittee on Military Justice in Combat Zones," issued in May 2013 by the Defense Legal Policy Board (DLPB).[168]

At first glance, these changes seem to remedy some of the failures embodied in the UCMJ to hold leaders responsible under a command responsibility theory. After all, the 2015 amendment for dereliction cases resulting in death or grievous bodily harm more than tripled the previous maximum term of confinement for dereliction of duty.[169] Furthermore, the discussion to Article 92 in the Manual for Courts-Martial states, "[I]f the dereliction of duty resulted in death, the accused may also be charged under Article 119 or Article 134 (negligent homicide), as applicable."[170] However, attempting to cobble together a number of punitive articles in the UCMJ in the hopes of pursuing a conviction under a command responsibility theory serves to highlight the inherent problems with the current criminal code.

At the heart of the concept of command responsibility is that offending commanders are liable for the very offenses committed by their subordinates even if they took no part in the commission of the actual

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[167] *Id*. pt. IV, ¶ 16e(3)(D).

[168] *Id.* art. 92 analysis, at A23 (2016). On 30 July 2012, the Secretary of Defense (SecDef) established this Subcommittee of the Defense Legal Policy Board (DLPB). DEF. LEGAL POLICY REVIEW BD., REPORT OF THE SUBCOMMITTEE ON MILITARY JUSTICE IN COMBAT ZONES (Final Report, May 30, 2013), http://www.caaflog.com/wp-content/uploads/20130531-Subcommittee-Report-REPORT-OF-THE-SUBCOMMITTEE-ON-MILITARY-JUSTICE-IN-COMBAT-ZONES-31-May-13-2.pdf. The SecDef charged the board to review and assess the application of military justice in combat zones in which service members were alleged to have committed offenses against civilians. *Id*. The committee found that leaders should be held accountable for failures to appropriately respond to civilian casualty incidents. *Id*. at 45. As it then stood, the current maximum punishment for dereliction of duty offenses failed to "provide a credible deterrence to such misconduct or to provide a sense of justice to the local population in cases where such dereliction of duty results in, or aggravates, civilian casualties." *Id*. In making their recommendation, the committee examined the Haditha cases and the role of the Marine battalion commander in failing to accurately and promptly report the events, and failing to investigate the allegations that Marines under his command were involved in unlawfully killing civilians. *Id*. at 128-29.

[169] MCM, *supra* note 89, pt. IV, ¶ 16e(3)(A)-(B) (providing for a maximum sentence of forfeiture of two-thirds pay per month for three months and confinement for three months for dereliction through neglect or culpable inefficiency; and providing for a maximum sentence of a bad-conduct discharge, forfeiture of all pay and allowance, and confinement for six months for cases of willful dereliction).

[170] *Id*. pt. IV, ¶ 16 Discussion.

offenses.[171] This was clearly the case where the ICC found, beyond a reasonable doubt, that Bemba was criminally responsible under Article 28(a) of the Rome Statute for the crimes committed by his subordinates even though he took no part in the rapes, murders, or pillaging.[172] Yet, a conviction under Article 92, UCMJ, is not akin to an authentic command responsibility verdict because the article does not impute the criminal acts of subordinates against the offending commander.[173] In fact, even if a commander is criminally responsible for being derelict in some command duty as it relates to his subordinates, that commander does not sustain a conviction as a principal for the actual war crimes.[174] Instead, the commander is simply liable for a violation of Article 92, UCMJ, and appropriately sentenced under the maximum punishment standards.[175]

Admittedly, an academic distinction exists between a conviction under an Article 92, UCMJ, dereliction of duty offense and one under a genuine command responsibility theory. In either case, the offender sustains a criminal conviction. However, a most glaring difference exists between a commander that was derelict for failing to investigate, prevent, and suppress war crimes and one that, for the purposes of the law, affirmatively raped and murdered civilians. Under an Article 92, UCMJ, conviction of a commander is simply a failure, whereas a commander with imputed command responsibility is a war criminal. Furthermore, as a practical matter, a noteworthy discrepancy exists in maximum punishments between a derelict commander and a commander who is a war criminal. The maximum confinement for a commander convicted of willfully derelict actions that result in civilian death is two years[176]—very different from the fate of General Yamashita or even Bemba.[177]

In the fictional case of the U.S. commander, it is arguable whether the commander even committed an offense actionable under Article 92, UCMJ. As the current U.S. command responsibility standard makes clear, commanders may be punished directly for their failures to take "necessary and reasonable measures" to ensure that their subordinates do not commit

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[171] *See* SOLIS, *supra* note 6, at 381.
[172] Final Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo, *supra* note 17, ¶ 741.
[173] Hansen, *supra* note 12, at 396.
[174] *Id.*
[175] *Id.*
[176] MCM, *supra* note 89, pt. IV, ¶ 16e(3)(D).
[177] General Yamashita was executed and Bemba Gombo was sentenced to eighteen years confinement. In re Yamashita, 327 U.S. 1, 5 (1946); Sentence Decision, The Prosecutor v. Jean–Pierre Bemba Gombo, *supra* note 19, ¶ 97.

violations of the law of war.[178] Essentially, under this concept, commanders have an affirmative duty to act and must do everything that is "necessary and reasonable" within their power to avoid criminal liability.[179] Conversely, Article 92, UCMJ, takes a different approach and defines derelict action as either willful, negligent, or culpably inefficient.[180] Thus, a person may avoid criminal responsibility under Article 92, UCMJ, if they simply avoid taking willfully derelict action, but do slightly more than what is negligent or culpably inefficient.[181] In short, the affirmative duty of commanders to act comprehensively, as embodied in the theory of command responsibility, is a far higher standard than the one embodied in Article 92, UCMJ, which only requires minimum performance that rises above negligence.

When applying this analysis to the U.S. commander, it is possible to envision the commander's actions as being sufficient to withstand a dereliction of duty charge. Upon becoming aware of the allegations, the commander took action by ordering the matters investigated, reprimanding his subordinates, ordering retraining, and punishing through convening courts-martial. While these actions probably meet the standard of care required under Article 92, UCMJ, it is not so clear that they meet the higher threshold required under a theory of command responsibility. In considering the dichotomy between derelict performance and one that requires "necessary and reasonable" measures, it is possible to envision command actions that rise above negligence or culpable inefficiency but do little to prevent, repress, and deter war crimes.

As the foregoing indicates, charges under Article 92, UCMJ, are insufficient to adjudicate, categorically, commanders for all command responsibility failures. The punitive article does not fully incorporate the longstanding concept of command responsibility into the UCMJ, and the range of punishments prescribed for the offense are unacceptable for egregious war crime allegations.[182] For these reasons, the United States should consider remedying the limitations contained in the UCMJ to resolve command responsibility cases.

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[178] LAW OF WAR MANUAL, *supra* note 10, para. 18.23.3. *See also* FM 27-10, *supra* note 10, para. 501.
[179] Hansen, *supra* note 12, at 396.
[180] MCM, *supra* note 89, pt. IV ¶ 16e(3)(c). *See also* Hansen, *supra* note 12, at 396.
[181] Hansen, *supra* note 12, at 396.
[182] *Id*. at 397.

## V. Command Responsibility in the UCMJ

### A. Benefits to Addressing Command Responsibility in the UCMJ

For a number of reasons, both practical and theoretical, the United States should consider making substantive changes to the UCMJ to account for command responsibility cases. Since *Yamashita* and the development of the modern concept of command responsibility, the United States has shown a willingness to try enemies for command failures and exact the most severe punishment on those liable.[183] As recently as 2009, the United States used the long-established legal standard for command responsibility for persons tried in the post-9/11 military commissions.[184] Contained in the Military Commissions Act of 2006 (and amended in 2009) is a punitive article that represents a mode of liability where, in military commissions, alien unprivileged enemy belligerents may face principal liability.[185] The particular article states:

> Any person is punishable under this chapter who—…(3) is a superior commander who, with regard to acts punishable under this chapter, knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and who failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof, is a principal.[186]

Altering the UCMJ to account for the same standard found in military commissions is a fair and reasonable course of action the United States should consider. In fact, the United States has proposed nearly the same standard for command responsibility as that found in the military commission's statute and the Rome Statute during the 1974-77 deliberations to the drafting of AP I to the 1949 Geneva Conventions.[187]

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[183] *See, e.g.*, In re Yamashita, 327 U.S. 1, 14 (1946); U.S. v. von Leeb Case No. 12 (1948) "The High Command Case" *reprinted in* 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 512 (1950); U.S. v. von List, Case No. 7, "The High Hostage Case" *reprinted in id.* at 759.; U.S. v. Araki, Majority Judgment, 48 (Int'l Mil. Trib. for the Far East (1946)) *reprinted in* NEIL BOISTER & ROBERT CRYER, DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: CHARTER, INDICTMENT, AND JUDGMENTS 102 (2008).

[184] Military Commissions Act § 8, 10 U.S.C. § 950q (2009).

[185] *Id.*

[186] *Id.*

[187] DRAFT, ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ICRC OFFICIAL RECORDS, vol. 1, pt. 3, at 25; Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable to Armed

Perception in the international community is also an important consideration the United States should acknowledge when analyzing what changes to consider regarding the doctrine of command responsibility and the UCMJ. Presently, it may appear that U.S. commanders have a greater degree of protection when conducting military operations than those of other nations.[188] The lack of a clear legal standard applicable to both U.S. commanders and coalition partners may adversely affect building international military partnerships and executing joint operations. Furthermore, as a world leader in conducting global military operations, incorporating the long standing, internationally accepted doctrine of command responsibility into U.S. domestic law, may influence the development of the rule of law and encourage military leaders to act accordingly. At a minimum, it would certainly give both critics and enemies of U.S. military operations pause when attempting to shape the narrative that U.S. military leaders, and U.S. national security policies, are unrestrained and freed from the boundaries of international law.[189]

While many nations with powerful, standing militaries have become signatories to the Rome Statute, including, for example, Australia, France, and the United Kingdom, [190] this article advocates only for the incorporation of the doctrine of command responsibility into U.S. domestic law. There is a delicate balance between subjecting U.S. military commanders to the same legal standard as that of other nations that either have become signatories to the Rome Statute or incorporated its standard into domestic law, and subjecting U.S. commanders to the jurisdiction of the ICC. While the ICC does provide a forum for international justice in

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Conflicts, Geneva, I/306 vol. III, at 328 (1974-1977); COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 1949 1013 (S. Pictet et. al. eds., 1958).

[188] Smidt, *supra* note 12, at 211-12.

[189] Hill, *supra* note 156, at 682 (citing Ruth Wedgewood, *The Irresolution of Rome*, 64 LAW & CONTEMP. PROBS. 193, 198 (2007)); *see also* William G. Eckhardt, *Lawyering for Uncle Sam When He Draws His Sword*, 4 CHI. J. INT'L L. 431, 441 (2003). Eckhardt states:

> Knowing that our society so respects the rule of law that it demands compliance with it, our enemies carefully attack our military plans as illegal and immoral and or execution of those plans as contrary to the law of war. Our vulnerability here is what philosopher of war Carl von Clausewitz would term our "center of gravity."

Id.

[190] *The States Parties to the Rome Statute*, *supra* note 16.

the global fight to end impunity,[191] its cases and decisions may have wide-ranging repercussions that conflict with the United States' interpretation of the law of armed conflict (LOAC) or are adverse to U.S. national security interests. Because the ICC is still in its infancy as far as having a fully developed body of case law,[192] at present, it is difficult to fully articulate whether the ICC's LOAC jurisprudence does, in fact, conflict with the interests of the United States. Nevertheless, along these lines, one criticism of the ICC's Bemba decision highlights why the United States should favor a less altruistic motive for modifying the UCMJ as it relates to command responsibility.

There is considerable scholarship on the role of the ICC and whether the exercise of its primary function as the arbiter of international justice spills into, arguably, its less appropriate role as a leader in the development of the LOAC and CIL.[193] In the Bemba decision, the ICC found that all of Bemba's actions after becoming aware of the allegations against his MLC forces failed to prevent or repress the commission of war crimes by his forces.[194] In making this, and other determinations, the ICC raised a host of difficult questions. For example, did the ICC alter or modify the United States' understanding, and those of the international community at large, of what are "necessary and reasonable" command actions after receiving knowledge of war crimes allegations? [195] Does the United States' practice of ordering investigations, convening courts-martial, and holding subordinates accountable still comport with what is "necessary and reasonable" to prevent and repress the commission of war crimes? Is it permissible for an international judicial body to decide which internal investigations are authentic and fully developed and which are seemingly

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[191] INT'L CRIM. CT., *supra* note 16, at 3.

[192] Currently, the ICC's docket contains twenty-three cases at various stages of the proceedings with only four convictions and one acquittal. *Cases*, INT'L CRIM. CT., https://www.icc-cpi.int/Pages/cases.aspx (last visited Feb. 1, 2017).

[193] *See generally* Hill, *supra* note 156 (citing Michael Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT'L L. 795, 816-37 (2010) (discussing the growing influence of non-state actors and international tribunals on the development of the law of armed conflict)); Allison Danner, *When Courts Make Law: How the International Criminal Court Tribunals Recast the Laws of War*, 39 VAND. L. REV. 1, 23-33; Leena Grover, *A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court*, 21 EUR. J. INT'L L. 543, 558 (2010).

[194] Final Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo, *supra* note 17, ¶¶ 719-742.

[195] LAW OF WAR MANUAL, *supra* note 10, para. 18.23.3. *See also*, FM 27-10, *supra* note 10, para. 501.

incomplete and self-serving?[196] Lastly, must commanders cooperate with non-governmental organizations and state authorities when receiving allegations of subordinate war crimes?[197] The answer to these questions are difficult and illustrate the challenges of the United States conducting military operations while comporting with judicially altered changes to the LOAC.

The United States's role as a leader in worldwide military operations positions it as an essential actor in the continued development and interpretation of the LOAC; while, at the same time, provides an opportunity to protect its military commanders from what it considers incorrect interpretations of international law. Thus, while this article advocates for changes to domestic law via the UCMJ, it does not advocate the United States becoming a party to Rome Statute. A measured and realistic approach to remedying the flaws in the UCMJ provides the most suitable course action.

## B. Proposals Concerning Command Responsibility and the UCMJ

At least two scholars have proposed measures aimed at incorporating command responsibility into the UCMJ.[198] One proposal advocates for a wholesale approach while the other supports using the current form absent congressional amendment to the UCMJ.[199] The remainder of this section will analyze both proposals, while considering the concerns of other commentators.

### *1. Working with the Current System*

In 2000, Michael Smidt wrote an article advocating for Congress to amend the UCMJ and adopt the *Yamashita* standard of command responsibility.[200] In particular, he called for expanding the scope of Article 77, UCMJ dealing with principal liability by providing a third basis

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[196] *See* Final Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo, *supra* note 17, ¶ 728.
[197] *Id*. ¶¶ 728-729.
[198] S*ee generally* Hansen, *supra* note 12; Smidt, *supra* note 12.
[199] S*ee generally* Hansen, *supra* note 12 (wholesale approach); Smidt, *supra* note 12 (current form).
[200] Smidt, *supra* note 12, at 233.

of liability.[201] Smidt sought to incorporate language very similar to Article 28(a) of the Rome Statute.[202] The amendment he proposed to Article 77, UCMJ was as follows:

> (3) in the case of a military commander or a person effectively acting as a military commander, while on a military operation outside the territory of the United States, however the operation is characterized, where forces under his or her effective command and control as the case may be, as a result of his or her failure to exercise proper control over such forces, where
>
> (i) That military commander or person either knew or owing to the circumstances a[t] the time, should have known that the forces were committing or about to commit a crime under this chapter; and
>
> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission; is a principal.[203]

This proposed amendment is also similar to the punitive article that covered principal liability in the military commission.[204] However, realizing the likelihood of Congress taking action to amend the UCMJ was remote, Smidt proposed an alternative solution that called for working within the existing construct of the UCMJ.[205] He proposed using Article 18, UCMJ, for charging Soldiers and commanders for violations of the law of war rather than the corresponding violations of the UCMJ.[206] Specifically, because Article 18, UCMJ, provides for charging law of war violations, Smidt suggested that the internationally recognized command responsibility standard in *Yamashita* be applied in domestic courts-martial, forestalling the need to amend the UCMJ.[207]

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[201] *Id*. at 217.
[202] *Id*.
[203] *Id.*
[204] Military Commissions Act § 8, 10 U.S.C. § 950q (2009).
[205] Smidt, *supra* note 12, at 219.
[206] *Id*.
[207] *Id*.

Smidt's proposal to amend Article 17, UCMJ, or in the alternative, use Article 18, UCMJ, for law of war charges stands in contrast with a more comprehensive proposal by a scholar using the Abu Ghraib atrocities as a backdrop.

### *2. Going for Broke*

Victor Hansen also recognized the need to make changes to the UCMJ, especially after the Abu Ghraib abuses.[208] Hansen took a different approach than Smidt, proposing the amendment of Article 92, UCMJ, by using dereliction of duty to prosecute commanders rather than prosecuting them as a principal.[209] Hansen proposes that the article apply to persons effectively acting as a military commander and lays out a number of factors to consider when making a threshold determination of whether someone meets the requirements for prosecution.[210] In an attempt to ensure his command responsibility article does not impose criminal sanctions for any command action, he uses the 1996 War Crimes Act to delineate the scope of law of war violations prosecutable under this article.[211] Additionally, he proposes three levels of *mens rea* standards under the article: actual knowledge, recklessness, and gross negligence.[212] He also takes the position that the commander's failure must be the proximate cause of the subordinate's war crimes.[213] With causation satisfied, Hansen lays out a punishment scheme with varying ranges of punishment depending on the *mens rea* of the commander and type of failure.[214]

### *3. The Better Proposal*

Both the proposals of Smidt and Hansen have merit and satisfy the objective to incorporate the doctrine of command responsibility into the UCMJ. However, the Smidt proposal is a more measured approach that will satisfy the need to ensure compliance with, and deter violations of,

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[208] S*ee generally* Hansen, *supra* note 12.
[209] *Id*.
[210] *Id*. at 402.
[211] *Id*. at 403.
[212] *Id*. at 403-08.
[213] *Id*. at 410.
[214] *Id*. at 411-13.

the law of war, without disrupting the well-established and historical development of the command responsibility doctrine.

While Smidt's recommendation provides for an immediate impact for prosecuting command responsibility actions under Article 18, UCMJ, in practice, whether military practitioners will employ such a charging strategy is an altogether different question. Smidt's course of action to prosecute command responsibility actions under the existing UCMJ construct requires an examination of Article 18, UCMJ, and the procedures for the employment of such a scheme.

The UCMJ does not expressly include prohibited conduct that may violate the laws of war.[215] It makes multiple references regarding violations of the laws of war without specifically articulating what, exactly, constitute such violations.[216] The UCMJ does, however, seem to reference and incorporate violations of the laws of war that may be triable in general courts-martial. Specifically, Article 18, UCMJ, provides relevant part:

> 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.[217]

In addition to providing for the incorporation of law of war violations triable in general courts-martial, this clause also appears to satisfy the juridical basis for criminal jurisdiction: subject matter and personal jurisdiction.

While the UCMJ does not codify express violations of the laws of war, it does provide a comprehensive list of predicate crimes that may form the basis for violations of the law of war. These crimes include, *inter alia*, murder,[218] rape,[219] and pillaging.[220] Consequently, it follows, that courts-martial may try U.S. forces for specific violations of the UCMJ as is usually the case or for general law of war violations incorporated by reference into the jurisdiction of general courts-martial.

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[215] *See generally* UCMJ, *supra* note 23.
[216] *Id.*
[217] UCMJ art. 18(a) (2012).
[218] UCMJ art. 118 (2012).
[219] UCMJ art. 120 (2012).
[220] UCMJ art. 103 (2012).

There appears at least two impediments to Smidt's proposal. First, defining the precise law of war violation at issue may prove difficult when using Article 18, UCMJ, but is not fatal to its application to cases tried under a command responsibility theory. In fact, command responsibility is a well-established norm of customary and conventional international law.[221] Furthermore, the concept of command responsibility is a well-entrenched part of U.S. military doctrine as evidenced by its reference in FM 27-10 and the DoD Law of War Manual.[222] As such, incorporating and properly defining command responsibility actions triable in general courts-martial affords U.S. military accused ample notice of the charged offenses. Additionally, it permits military practitioners to use well-known and accepted legal theory as a basis for prosecution instead of resurrecting a novel prosecution theory.

The second impediment to Smidt's proposal requires a revision of long-standing U.S. policy to try Soldiers for enumerated offenses under the UCMJ rather than for general law of war violations established in various treaties or custom. As discussed *supra*, this well-established policy is contained in FM 27-10, paragraph 507b.[223] In pertinent part, this section provides:

> The United States normally punishes war crimes as such only if they are committed by enemy nationals or by persons serving the interests of the enemy State. Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code. Violations of the law of war committed within the United States by other persons will usually constitute violations of federal or state criminal law and preferably will be prosecuted under such law.[224]

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[221] Smidt, *supra* note 12, at 201 (citing FM 27-10, *supra* note 10, para. 501); The Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 1060 (1945)). The United States still considers the *Yamashita* standard for command responsibility and its later adoption into the FM 27-10 as reflective of customary international law with the recent publication of the DoD Law of War Manual. *See* LAW OF WAR MANUAL, *supra* note 10, para. 18.23.3. *See* discussion *supra* Section II.

[222] LAW OF WAR MANUAL, *supra* note 10, para. 18.23.3; FM 27-10, *supra* note 10, para. 501.

[223] *See* discussion *supra* Section II.C.

[224] FM 27-10, *supra* note 10, para. 507b (Change No. 1 1976).

While this policy does appear to favor charging violations of regular articles as opposed to law of war violations, it is rooted in policy, not statute, and would simply require an update to FM 27-10 and the DoD Law of War Manual.

Despite these two obstructions, as the foregoing illustrates, using Smidt's immediate proposal to try command responsibility cases under the UCMJ via Article 18 does provide a reasonable course of action. However, military courts and practitioners are likely to shy away from using Smidt's Article 18, UCMJ, proposal as to date it is untried.[225] Instead, amending Article 77, UCMJ, is the most agreeable of his proposals and the one most able to deal with the issues raised in this article and highlighted by the Bemba case.

Smidt's proposed Article 77, UCMJ, amendment tracks closely with the standard established in *Yamashita* and later codified in AP I, the Rome Statute and the Military Commissions Act of 2006. Furthermore, this amendment also comports with military policy as articulated in FM 27-10 and the DoD Law of War Manual. As previously outlined, the current form of the UCMJ is ill suited to adjudicate equitably cases like Bemba or that of the fictitious U.S. military commander. Simply amending the UCMJ and adding a definitive and clear charge for command responsibility provides both substantive and practical advantages over using Smidt's Article 18, UCMJ, recommendation.

## VI. Conclusion

The time is ripe for the United States to make substantive changes to the UCMJ and incorporate the doctrine of command responsibility. On 23 December 2016, President Obama signed into law the National Defense Authorization Act for Fiscal Year 2017.[226] Included in this law was the Military Justice Act of 2016, providing for an extensive overhaul of the military justice system, perhaps the most significant changes to the UCMJ since the Military Justice Act of 1983.[227] However, missing from this

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[225] A Westlaw search of Article 18, UCMJ, charges for law of war violations preferred against U.S. service members confirms this assertion.

[226] National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

[227] *Id.*; *see* Zachary D. Spilman, *Top Ten Military Justice Stories of 2016-#1: The Military Justice Act of 2016*, NIMJ BLOG-CAAFLOG (Jan 2. 2017), http://www.caaflog.com/category/military-justice-legislation/.

legislation were any amendments to account for command responsibility actions.

Despite the many opportunities over the past seventy years to apply the same legal standard to its own leaders as its enemies, the U.S has yet to do so. The Bemba case illustrates that command responsibility cases remain relevant and actionable. As the most recent judicial body to consider a command responsibility case, the ICC's Bemba decision provides an excellent case study on the state of the doctrine and the measures commanders must take upon becoming aware of war crime allegations. Additionally, applying the current articles found in the UCMJ to the facts of both the Bemba case and the case involving the fictional U.S. commander demonstrates the inherent shortcomings of the U.S. military justice system. Amending the UCMJ to account for actions under a theory of command responsibility will alleviate some of these limitations and provide an independent basis to hold commanders accountable. More specifically, Smidt's proposed Article 77, UCMJ, formulation addresses the current inadequacies in the UCMJ and provides a mechanism to account for criminal command failures.[228]

Although this proposal may alarm some U.S. military leaders, it is consistent with the concept of command authority. United States law and doctrine vests military commanders with near plenary authority to achieve a wide-ranging set of missions. Essential in this concept of command authority is that commander's may share in the successes and achievements of their subordinates.[229] Yet, they may, in some instances, share in their failures because the responsibility of command also extends to maintaining control of subordinates and taking necessary and reasonable measures to punish and deter subordinate misconduct.[230] To the extent U.S. commanders view the concept of command responsibility as a burden, they should view it as a natural function of their command authority. After all, because U.S. commanders exercise such vast authority over their subordinates and command such lethality, it is only reasonable that the military justice system is equally equipped and possesses ample means to deter and punish command failures. In deciding to incorporate command responsibility into the UCMJ, the United States should heed the lessons of the Bemba case, and draw encouragement that

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[228] *See* discussion *supra* Section V.B.
[229] *See* AR 600-20, *supra* note 2, para. 2-1b ("Commanders are responsible for everything their command does or fails to do.").
[230] *Id.*

it has struck an equitable balance between the exercise of great power and command accountability.

# MILITARY COMPETENCY REVIEWS: A HOBSON'S CHOICE CONDITIONED ON A CATCH-22

MAJOR MATTHEW J. AIESI*

*"There was only one catch and that was Catch-22, which specified that a concern for one's safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he were sane he had to fly them. If he flew them he was crazy and didn't have to, but if he didn't want to he was sane and had to. Captain Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle."*[1]

## I. Introduction

The legitimacy of U.S. criminal justice, whether within the military or in the civilian sector, historically rests on certain presumptions of fairness in the process. Criminally punishing

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[1] JOSEPH HELLER, CATCH-22, 52 (1999).

individuals, be they civilian defendants or accused service members,[2] for their volitional acts, and only doing so when those individuals are competent to stand trial, are foundational legal notions that can be traced into antiquity.[3] Competency and sanity are two distinct legal issues.[4] The military has long recognized that fairness in the military justice system rests on the twin pillars of an accused service member's mental health: that he is both competent to aid in his defense during trial[5] and that he was not insane at the time he committed the offense.[6]

Current military justice rules governing the competency and sanity inquiries of an accused do not protect service members's fundamental Fifth Amendment right against self-incrimination[7] nor their

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[2] In the military, a service member that has formally been charged with crimes is referred to as the "accused." *See generally* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019). This is equivalent to the more traditional title of "defendant" in civilian criminal proceedings referring to an individual charged with a crime. *Defendant*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[3] *See generally* ARISTOTLE, THE NICOMACHEAN ETHICS (350 B.C.E.). Aristotle stated that something "[d]one under compulsion means that the cause is external, the agent or patient contributing nothing towards it; as, for instance, if he were carried somewhere by a whirlwind . . . ." *Id.*

[4] *See generally* The Law Dictionary, *What's the difference between the insanity plea and incompetency?* THE LAW DICTIONARY, http://thelawdictionary.org/article/whats-difference-insanity-plea-incompetency/.

[5] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 393 (2d ed. 1920) [hereinafter WINTHROP]:

> Where the fact is shown in evidence, or developed upon the trial, that the accused has become insane since the commission of the offense, here also the court will most properly neither find nor sentence, but will communicate officially to the convening authority the testimony or circumstances and its action thereon, and adjourn to await orders.

*Id.*

[6] *Id.*

> Where indeed the evidence quite clearly shows that the accused was insane at the time of the offence, whether or not the insanity is specially pleaded as a defence [sic], there can of course properly be ***no conviction*** and therefore ***no sentence.*** (Emphasis in original.)

*Id.*

[7] U.S. CONST. amend. V [hereinafter U.S. CONST.] ("No person shall . . . be compelled in any criminal case to be a witness against himself. . .").

Constitutional due process right to be tried only when legally competent.[8] The military justice system has antiquated rules that combine determining the distinct issues of an accused's competency to stand trial with the accused's sanity at the time of the alleged crimes, into a joint evaluation. The military's joint sanity-competency evaluation system unjustifiably compels the accused, whose competency to make legal decisions is reasonably doubted, to waive their right to remain silent in order to challenge his competency; or, waive their due process right to only be tried while competent to preserve his right against self-incrimination. Because of the rules and the nature of joint sanity-competency evaluations, the accused cannot assert their due process rights to be tried only while competent without a violation of his Fifth Amendment right to remain silent. This catch-22[9] puts the accused in the untenable position of making legal decisions about waiving his rights— something that only a competent person can do—in order to ensure he is competent to make legal decisions about asserting or waiving his rights.

The military's current mental evaluation rules violate a service members' right to remain silent and their due process rights. Neither rules reflect the current state of the law, nor align with federal civilian practice. Also, the American Bar Association specifically advocates against the practice of joint evaluations.[10] The practice of joint evaluations is opposed because of its legal implications and ethical concerns.[11] Moreover, the military's adherence to the historical practice of joint evaluations undermines the legitimacy of military justice and slows down the administration of justice. Therefore, the Rules for Courts-Martial (RCM)[12] should be changed to protect service members's fundamental rights against self-incrimination and to due process to be tried only when competent. Doing so will align military justice practice with federal civilian practice, and improve the legitimacy and

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[8] The criminal trial of an incompetent defendant violates due process. *See* Medina v. California, 505 U.S. 437, 453 (1992); Drope v. Missouri, 420 U.S.162, 172-3 (1975); and Pate v. Robinson, 383 U.S. 375, 385 (1966).

[9] A "catch-22" is defined "as a problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule." *Catch-22*, MERRIAM-WEBSTER (2018).

[10] AMERICAN BAR ASSOCIATION, AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, para. 7-3.1 (1989) [hereinafter ABA CJS].

[11] Ronna J. Dillinger & Stephen L. Golding, *The Bifurcation of Competency and Sanity Evaluations*, WYO. LAW., Oct. 2010, at 20 [hereinafter Dillinger & Golding].

[12] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 706 (2019) [hereinafter MCM].

administration of justice in the military.

This article will demonstrate how and why joint evaluations cause these violations, and how bifurcating competency and sanity evaluations will promote justice and judicial efficiency without infringing on the commander's ability to enforce and maintain good order and discipline in their formations. First, this article discusses the historical development and standards of competency and sanity in federal civilian and military law. Next, this article discusses the ethical problems created by joint evaluations. Then, it analyzes how the military's rules violate a service member's Fifth Amendment and due process rights, and compares the military justice framework to the Federal Rules of Criminal Procedure and the American Bar Association (ABA) Criminal Justice Standards (CJS).[13] This article also explains why such a revision to the military rules ensures that protecting the due process rights of an accused does not come at the expense of the commander's authority in military justice. Lastly, it proposes amended language for RCM 706 that resolves these constitutional and ethical problems while improving military justice.

## II. What is Competency and Sanity?

As psychiatric techniques and standards developed,[14] case law and statutes evolved to better address the two separate, but commonly comingled issues—competency to stand trial and the defense of insanity. When a court finds an accused incompetent or insane, these findings have drastically different effects on a criminal case as well as the corresponding obligations on the government for the care, treatment, and protection of these individuals.[15] Competency and sanity will be addressed in turn.

### A. Competency

[13] ABA CJS, *supra* note 10 (discussing pretrial evaluations and expert testimony); *see also* William H. Erickson et al., *Mental Health, Mental Retardation and Criminal Justice: General Professional Obligations*, *in* AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE MENTAL HEALTH STANDARDS (1989).

[14] *See generally* Paul Montalbano, *Sanity Board Evaluations*, *in* FORENSIC AND ETHICAL ISSUES IN MILITARY BEHAVIORAL HEALTH (2014).

[15] *See generally* MCM, *supra* note 12, R.C.M. 909, 916(k), and 1102A.

Competency is a legal issue determined by the judge that addresses whether the accused is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature of the proceedings against him or to conduct or cooperate intelligently in the defense of the case.[16] An inquiry into the accused's competency is focused on his present mental state.[17]

### B. Sanity

On the other hand, the sanity (or insanity) at the time of the offense is a factual matter for the fact finder to determine. Insanity is a defense to a crime, and a two-part sanity evaluation first addresses whether the accused, at the time of the criminal conduct was suffering a severe mental disease or defect.[18] Then the inquiry turns to the question of whether or not the accused was unable to appreciate the nature and quality or wrongfulness of his or her conduct because of that severe mental disease or defect.[19] Unlike competency evaluations that focus on the present state of mind of the accused, sanity inquiries are forensic and historic in nature, focusing on the accused's mental state at the time of the offense.[20]

## III. How Competency and Sanity Have Developed

Understanding how the separate legal issues of competency and sanity developed over time highlights the current failure of the military system. Since competency and sanity determinations are distinct legal issues addressing different states of mind of the accused at different times, they require different psychiatric testing,[21] and are governed by

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[16] *Id.* at R.C.M. 909(a) ("No person may be brought to trial by court-martial if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against them or to conduct or cooperate intelligently in the defense of the case."). The accused is presumed to have capacity to stand trial. *Id.* at R.C.M. 909(b).

[17] Dillinger & Golding, *supra* note 11.

[18] MCM, *supra* note 12, R.C.M. 706.

[19] *Id.*

[20] Dillinger & Golding, *supra* note 11, at 20.

[21] *See generally*, Douglas Mossman, et al., *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, J. Am. Acad. Psychiatry Law, Dec. 2007, at S3-S72 (Supp. 2007) [hereinafter Mossman].

different rules of procedure, rules of evidence, and standards of proof.[22] These differing rules aim to fairly balance the public's interest in prosecuting and punishing criminals on one side, against protecting the constitutional rights of a defendant or an accused on the other.

Competency to stand trial is rooted in the Due Process Clause of the Constitution.[23] The military rules governing competency are deeply rooted in history, dating back to as early as 1920.[24] Today, competency is governed in military and civilian courts by the standard articulated in the 1960 Supreme Court case *Dusky v. United States.*[25] *Dusky* held that due process requires that a defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and . . . a rational as well as factual understanding of the proceedings against him."[26] RCM 909 reflects this standard.[27]

The second distinct mental health issue an accused may assert is the issue of their sanity and the corresponding affirmative defense of insanity. The defense of insanity is recognized in forty-six states,[28] and is codified in the U.S. Code[29] and the Uniform Code of Military Justice (UCMJ).[30]

Historically, the insanity defense in civilian and military jurisdictions was governed by the English case of Daniel M'Naghten, and is known as the *M'Naghten* rule.[31] The *M'Naghten* rule required that the defendant show he was suffering from a mental disease or defect that either caused him to not know that the act was wrong, or be unable to appreciate the

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[22] *See generally* MCM, *supra* note 12, R.C.M. 909(c) and 916(k), and MIL. R. EVID. 302 and 513(d)(7).
[23] U.S. CONST., *supra* note 7 ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."). *See supra* note 8.
[24] *See* WINTHROP, *supra* note 5.
[25] Dusky v. United States, 362 U.S. 402, 402 (1960) [hereinafter Dusky].
[26] *Id.*
[27] MCM, *supra* note 12, R.C.M. 909(a). No person may be brought to trial by court-martial if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against them or to conduct or cooperate intelligently in the defense of the case. The accused is presumed to have capacity to stand trial. *Id.* at 909(b).
[28] Idaho, Kansas, Montana, and Utah do not recognize the insanity defense as a complete defense. Idaho Code § 18–207 (2004); Kan. Stat. Ann. § 22–3220 (1995); Mont. Code Ann. §§ 46–14–102, 46–14–311 (2005); Utah Code Ann. § 76–2–305 (LexisNexis 2003).
[29] 18 U.S.C. § 17 (1984).
[30] 10 U.S.C. § 850a. Art. 50a (1986).
[31] Daniel M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843).

nature of the committed act.[32] The insanity defense was judicially adopted and further defined in most U.S. jurisdictions, including the military.[33] Congress passed the Insanity Defense Reform Act in 1984, clarifying some of the differing judicial interpretations that developed among the circuits and making the insanity defense an affirmative defense that the defendant must prove.[34] In 1987, Article 50(a) of the UCMJ, which mirrors the federal law for the insanity defense as applied to courts-martial, was added to the Manual for Courts-Martial (MCM).[35]

Together, competency and sanity are the twin pillars of the minimum mental-health standards in the legal community that an accused must possess to be tried, convicted, and punished for his actions across state, federal, and military jurisdictions.[36] Military and civilian federal courts, and the American Bar Association Criminal Justice Standards (ABA CJS), have common *standards* regarding competency and sanity determinations.[37] However, the military's *procedural and evidentiary rules* differ greatly from the federal civilian courts and the ABA CJS rules in ways that violate an accused's right to remain silent if he wishes to establish or challenge his competency.

## IV. Military Rules Governing Competency and Sanity

The military's current system that combines sanity and competency evaluations into a joint inquiry is functionally the same system that has been in place since 1951, before the Supreme Court articulated the current competency standard in *Dusky* in 1960 (see the

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[32] *Id.*

[33] *See* MILITARY JUSTICE REVIEW GROUP, U.S. DEP'T OF DEF., REPORT OF THE MILITARY JUSTICE REVIEW GROUP, 449-51 (2015).

[34] 18 U.S.C. § 17 (1984).

[35] National Defense Authorization Act FY 1987, Pub. L. No. 99-661, tit. VIII, 100 Stat. 3905; 10 U.S.C. § 850a.

[36] The Supreme Court has never directly ruled on whether or not the insanity defense is required by the Constitution. *See* Clark v. Arizona, 548 U.S. 735, 752 (2006) ("We have never held that the Constitution mandates an insanity defense, nor have we held that the Constitution does not so require. This case does not call upon us to decide the matter.") However, *see, e.g.*, Delling v. Idaho, 133 S. Ct. 504, 506 (2012) (Bryer, J., dissenting) ("I would grant the petition for certiorari to consider whether Idaho's modification of the insanity defense is consistent with the Fourteenth Amendment's Due Process Clause.").

[37] *See generally* the Fed. R. Crim. Pro.; ABA CJS, *supra* note 10; and MCM, *supra* note 12.

footnote for a complete textual comparison of the 1951 and current rule).[38] The 1951 edition of the MCM combined what is currently recognized as the separate legally significant mental health issues of competency and insanity, into a singular definition.[39] At that time, military law defined *insanity* as when "[a] person is insane . . . if he lacked mental responsibility at the time of the offense as defined in 120b [lack of mental responsibility], or if he lacks the requisite mental capacity at the time of trial as stated in 120c [mental capacity at time of trial]."[40]

Thus, an accused service member could be determined to be 'insane' in one of two distinct ways under the singular definition of *insanity*: either insane at the time of the offenses, relying on the two-part *M'Naughten* rule, or insane at the time of trial. The 1951 MCM framework utilized a single inquiry to determine if an accused was either variant of "insane."[41]

It was not until the 1984 version of the MCM[42] that competency (mental capacity) and insanity (mental responsibility) were distinguished from one another as independent bases for ordering an examination of the accused.[43] The 1984 version of RCM 706 was largely a holdover from the 1969 MCM version.[44] However, even though competency and sanity were recognized as legally different mental health issues, the evaluation for competency and sanity were still combined into a single inquiry regardless of the basis for the inquiry, just as it was since 1951.[45] This is still the case in the 2019 MCM.[46] Despite changes in the law, the rules governing the initiation and scope of a sanity inquiry have remained functionally identical from 1951 until now.[47] Therefore, an accused service member

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[38] Dusky, *supra* note 25.
[39] UCMJ art. 120(a) (1951) [hereinafter UCMJ].
[40] *Id.*
[41] *Id.*
[42] Since 1951, the MCM was significantly amended in 1968, 1969, 1984, 1986, 1987, 1994, 1995, 1998, 2000, 2002, 2005, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, and 2018.
[43] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 706a (1984) [hereinafter 1984 MCM].
[44] MCM, *supra* note 43, App. 21, R.C.M. 706(a).
[45] MCM, *supra* note 43, R.C.M. 706(c)(2)(A-D).
[46] MCM, *supra* note 12, R.C.M. 706(a), uses the term "preliminary hearing officer" vice "investigating officer" as is found in the 1984 version, but are otherwise identical.
[47] The analysis in MCM, *supra* note 12, App. 21, R.C.M. 706, states "[t]his rule is taken from paragraph 121 of MCM, 1969 (Rev.). Minor changes were made in order to conform with the format and style of the Rules for Courts-Martial." However, the 1969 version is functionally the same as the 1951 version. Below is paragraph 121 from the

who only wishes to assert their due process right to competency cannot do so without undergoing an evaluation determining their sanity at the time of the offense. This happens regardless of whether or not the accused is competent to knowingly waive his Fifth Amendment right to remain silent as is usually required during a sanity evaluation,[48] or whether or not the accused even chooses to assert the insanity defense. This occurs because the rules are based on the 1951 singular definition of sanity.

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1951 version of The MANUAL FOR COURTS-MARTIAL that governed a 'sanity' inquiry (with clarifying reference added in the brackets):

> 1951 UCMJ paragraph 121: "If it appears to any commanding officer who considers the disposition of charges as indicated in 32 [immediate commander], 33 [Summary Court-Martial Convening Authority], and 35 [General Court-Martial Convening Authority] or to any investigating officer (34) [Article 32 Investigating Officer / Preliminary Hearing Officer], trial counsel, or defense counsel that there is reason to believe that the accused is insane (120c) [competency / mental capacity ] or was insane at the time of the alleged offense (120b) [insanity / mental responsibility], that fact and the basis of the observation should be reported through appropriate channels in order that an inquiry into the mental condition of the accused may be conducted before trial… The board should be fully informed of the reasons for doubting the sanity of the accused and, in addition to other requirements, should be required to make separate and distinct findings as to each of the … following questions…"

Id. Compare this with the 2019 MCM rules in R.C.M.'s 706(a) and 706(c)(2):

> 706(a): "If it appears to any commander who considers the disposition of charges, or to any preliminary hearing officer, trial counsel, defense counsel, military judge, or the members that there is reason to believe that the accused lacked mental responsibility for any offense charged or lacks capacity to stand trial, that fact and the basis of the belief or observation shall be transmitted through appropriate channels to the officer authorized to order an inquiry into the mental condition of the accused. The submission may be accompanied by an application for a mental examination under this rule.
>
> (c)(2). When a mental examination is ordered under this rule, the order shall contain the reasons for doubting the mental capacity or mental responsibility, or both, of the accused, or other reasons for requesting the examination. In addition to other requirements, the order shall require the board to make separate and distinct findings as to each of the following questions . . . .

[48] Montalbano, *supra* note 14, at 53.

Thomas Ward's 1688 simple poem called "England's Reformation" eloquently conveys the familiar *take it or leave it* decision, also known as a *Hobson's* choice, "Where to elect there is but one, 'Tis Hobson's choice—take that, or none."[49] The military creates a *Hobson's* choice for an accused who wishes to establish or challenge his competency. The accused can assert his due process right to be tried only when competent and allow for the violation of his right against self-incrimination in the process, or leave unexercised his due process right to be tried only while competent to protect his Fifth Amendment right to remain silent. Not only is this an unconstitutional dilemma for an accused, it is truly an ethical dilemma for medical professionals conducting the examination and defense counsel advising their client, which is only the start of the problems with joint evaluations.

## V. The Problems with Joint Evaluations

### A. The Medical Community's Ethical Problem with Joint Evaluations

As the law and rules regarding sanity and competency diverged outside of the military, these issues remain comingled within the military, creating ethical problems for the medical community. Ethical problems within the medical community conducting joint evaluations arise in two ways. First, if there is a legitimate basis to question an accused's competency—or it is being challenged—a joint evaluation forces the accused to make a legal decision about waiving their right to remain silent and consider the risks and benefits of pursuing an insanity defense before he is determined competent. Making the choice to assert the affirmative defense involves understanding and weighing the risks of this unique affirmative defense, the burdens of proof for the accused, choosing to testify under oath and subject oneself to cross examination, as well as the collateral consequence if the fact-finder finds him not guilty by reason of insanity. If the competency of the accused is legitimately at issue when he is forced to make a decision about waiving his right to remain silent, he may not understand the consequences of these choices when he is forced to make them, and, if he is actively psychotic, he likely cannot

[49] THOMAS WARD, ENGLISH REFORMATION, A POEM 373 (New York: D.& J. Sadlier eds., 1853).

provide reliable information to begin with.[50] Second, if the accused has not raised the insanity defense, then conducting an intrusive forensic evaluation forces the medical provider to conduct unnecessary testing and examinations without the consent of the accused and against his rights to remain silent because the findings of such examinations are irrelevant to any disputed factual matter.[51]

Bifurcated evaluations would not put the accused or medical professionals in this dilemma. An accused, either found competent or presumed competent without challenge, would be able to make informed decisions about voluntarily waiving his rights and submitting to intrusive psychiatric testing in order to assert the insanity defense.

B. The Constitutional and Practical Problems of Joint Evaluations[52]

Military rules governing mental health inquiries are statutory leftovers from 1951 that have not kept pace with changes in case law. Exploring the problems created by these outdated joint evaluations highlights the self-incrimination and due process violations an accused suffers and the practical problems joint evaluations create for the military justice system.

During a court-martial, the trial counsel, defense counsel, military judge, commanders, and even the court members, can make a request to the convening authority to conduct an inquiry if there is a reason to believe the accused's mental capacity or mental responsibility is at issue.[53] These inquiries are often referred to as a *706 board* or *sanity board*. The board usually consists of one or more persons, each being either a physician or a clinical psychologist.[54] Normally, at least one member of the board is either a psychiatrist or a clinical

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[50] Dillinger & Golding, *supra* note 11. *See also* Mossman, *supra* note 21, at 53 (". . . it may be wise to establish competency to stand trial before this specific [sanity] inquiry is conducted.)

[51] AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW, ETHICS GUIDELINES FOR THE PRACTICE OF FORENSIC PSYCHIATRY, Art. III (2005).

[52] The specific burdens of proof, and which party must meet those burdens, in order to obtain a competency or sanity evaluation are generally similar for the federal civilian courts, the American Bar Association Criminal Justice Standards, and military courts-martials, and as such will not be discussed for purposes of the this article.

[53] MCM, *supra* note 12, R.C.M. 706(a).

[54] *Id.* at 706(c)(1).

psychologist.[55] The order must contain the reasons for doubting the mental capacity or mental responsibility, or both, of the accused.[56] The convening authority or military judge is statutorily required to order the board to make separate and distinct findings as to each of the following questions:[57]

> (A) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect?
>
> (B) What is the clinical psychiatric diagnosis?
>
> (C) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct?
>
> (D) Is the accused presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense?[58]

Therefore, regardless of the factual underpinnings as to why a sanity board is sought for the accused, whether it is a doubt solely of his current mental capacity or solely of his mental responsibility at the time of the crime, every military sanity board is a joint inquiry that evaluates both aspects of an accused's mental health. Neither civilian federal courts[59] nor the ABA CJS[60] follow this practice. The American Academy for Psychiatry and Law specifically opposes joint inquiries because "[t]his practice [of combining competency and sanity evaluations into a single inquiry] may create ethics-related problems for a prosecution-retained or court-appointed psychiatrist when it appears that an evaluee is

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[55] *Id.*
[56] *Id.*
[57] *Id.* at 706(c)(2).
[58] *Id.*
[59] 18 U.S.C. § 4241 (2006) (governs competency); 18 U.S.C. § 4242 (2006) (governs sanity).
[60] ABA CJS, *supra* note 10, para. 7.4-4 ("Unless a joint evaluation has been requested by the defendant or for good cause shown … the evaluation [of the defendant's competency to stand trial] should not include an evaluation into the defendant's sanity at the time of the offense, civil commitment, or other matters collateral to the issues of competence to stand trial.")

incompetent to stand trial and is revealing potentially incriminating information."[61]

Even the medical community in the military itself acknowledges "[c]ombining these inquiries can raise practical and logistic issues as well as legal and ethical concerns."[62] This is due in part because a sanity evaluation implicates an accused's Fifth Amendment right against self-incrimination.[63] This article turns next to a comparison of the military rules, federal civilian rules, and ABA CJS rules to demonstrate how the military's rules fail to safeguard the rights of the accused while adding inefficiency to the court-martial system.

## VI. Comparative Analysis

The military's joint evaluation framework is the exact opposite of the federal civilian rules governing the same matters. The U.S. Code has separate statutes governing inquiries into a defendant's competency to stand trial[64] and their sanity at the time of the offense.[65] Similarly, the ABA CJS states, "[a] competency decision is fundamentally unlike resolution of the affirmative defense of mental nonresponsibility [insanity]. The issue of incompetency can be injected in a criminal proceeding by either a court or prosecuting attorney over defense objection, unlike [the insanity] defense that can be asserted only by defendants."[66]

In all three frameworks—the federal civilian courts, the ABA CJS,[67] and the military courts-martial—the purpose of competency and sanity examinations are generally the same. All three frameworks treat competency as a legal and factual matter to be determined by the court following *Dusky*, [68] allowing the judge to sua sponte order a competency evaluation, compel a competency hearing on motion by the government, and order a competency hearing at the request of the

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[61] Mossman, *supra* note 21, at 23.
[62] Montalbano, *supra* note 14, at 39.
[63] Estelle v. Smith, 451 U.S. 454, 465 (1981) [hereinafter Estelle].
[64] 18 U.S.C. § 4241 (2006).
[65] 18 U.S.C. § 4242 (2006).
[66] ABA CJS, *supra* note 11, para. 7-4.4 (commentary).
[67] The American Bar Association Criminal Justice Standards are not an actual 'jurisdiction,' but a legal model.
[68] Dusky, *supra* note 25.

accused.[69] Insanity, on the other hand, is an affirmative defense to be decided by the trier of fact as it relates to findings on the merits.[70] To highlight the constitutional and pragmatic problems for a military accused in the military justice system, the following comparative analysis will primarily focus on the problems created by the military's antiquated rules governing joint evaluations: specifically when an accused challenges his competency, undergoes a joint evaluation, and the issues created by the disclosure of these reports post-evaluation.

It is military practice that during these inquiries that the 706 board directly inquire into the accused's version of the alleged crimes,[71] but cautions "for legal and ethical reasons, it may be wise to establish competency to stand trial before this specific inquiry is conducted."[72]

The military's joint evaluation system puts the defense counsel in the untenable position of explaining the legal ramifications of waiving the right to remain silent in order to make a competency determination to a client that they have a 'bona fide doubt'[73] is not able to aid in his or her own defense. Conditioning the due process right to be tried only when competent on a violation of the right to remain silent, is itself a due process violation the accused is forced to suffer in the military.

The ABA CJS standards explicitly explain that "[a]n evaluation of defendant's present mental competency should not be combined with an

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[69] 18 U.S.C. § 4241(a); MCM, *supra* note 12, R.C.M. 706; ABA CJS, *supra* note 11, para. 7-4.4.

[70] MCM, *supra* note 12, R.C.M. 916(k); 18 U.S.C. § 17 (1984).

[71] Montalbano, *supra* note 14, at 53 ("It is recommended that there be a section in the 706 titled 'Accused's Current Version of the Alleged Offense.'").

[72] *Id.* The inquiry into the accused's version of events is not a glossary exposition, but an in-depth examination. The military practitioner's guides specifically recommends that:

> It is often helpful to have the accused describe in detail his or her thoughts, feelings, and behaviors starting in the hours or days leading up to the alleged instant offense and then continuing for some time after. Once this narrative has been obtained the evaluator can encourage the accused to fill in gaps and comment on information in the official criminal investigation, as well as on his or her own prior statements or witnesses' statements. After obtaining this information, it is often helpful to ask the accused to review the sequence of events again and ask about discrepancies or gaps.

*Id.*

[73] Pate, *supra* note 8.

evaluation of defendant's mental condition at the time of the alleged crime, or with an evaluation for any other purpose, unless defendant so requests or, for good cause shown, the court so orders."[74] The ABA CJS drafted the rules this way to promote what the ABA calls a "targeted" evaluation to minimize the legal and ethical problems involved in joint inquiries.[75]

When only competency is at issue, it is legally irrelevant to determine the accused's sanity at the time of the offense if it has not been challenged because sanity is already presumed.[76] A sanity evaluation that is historic and forensic in nature, involving significant investigation, testing, and evaluation, is a time-consuming endeavor that slows down the military justice system while needlessly violating an accused's Fifth Amendment rights against self-incrimination.[77] This inefficiency hinders the commander's ability to swiftly establish and maintain good order and discipline by delaying court-martial proceedings.

## VII. Disclosure of the Competency and Sanity Reports

The constitutional, ethical, and practical problems regarding the military's joint mental health inquiries are compounded by both the military's overly-broad rules governing the disclosure of the sanity board's findings and the inadequate evidentiary rules designed to protect the accused's coerced statements.[78] After the 706 board completes its evaluation, two separate reports, often called the "long" and "short" form reports are produced.[79] The long-form is the board's full report, including the testing utilized, details of the examination, a factual narrative of the accused's version of the facts regarding the charged crimes, any other evidence considered, its findings, and the basis of its conclusions.[80] The long-form report is given to the defense

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[74] ABA CJS, *supra* note 10, para. 7-3.5.
[75] *Id.*
[76] MCM, *supra* note 12, R.C.M. 916(k)(3)(A).
[77] Dillinger & Golding, *supra* note 11.
[78] Military Rule of Evidence 302 is written to protect any evidence resulting from the accused's statement to the sanity board, and evidence derivative thereof, with limited exceptions, based on the theory ". . . which treats the accused's communication to the sanity board as a form of coerced statement required under a form of testimonial immunity." MCM, *supra* note 12, App. 22 , MIL. R. EVID. 302.
[79] MCM, *supra* note 12, R.C.M. 706(c).
[80] *Id.*

team, however, numerous other individuals, including the accused's commander, may gain access to it.[81] The military judge can also order its release and disclosure.[82]

The short-form report is limited to "a statement consisting only of the board's ultimate conclusions as to all the questions specified in the order."[83] The trial and defense counsel, the investigating officer, convening authority, and the military judge receive the short-form.[84]

While the constitutional, statutory, and procedural nuances surrounding disclosure of an accused's statements to a sanity board are highly fact and circumstance dependent, it is generally accepted that an accused's Fifth Amendment right against self-incrimination apply during compelled competency and sanity evaluations.[85] Because there is no way to limit the scope of the inquiry to issues solely pertaining to competency,[86] combined with the practice of 706 boards to make detailed inquiries into the "accused's current version of the alleged crimes" during the sanity evaluation,[87] the joint nature of military sanity inquiries almost always creates Fifth Amendment violations for an accused whose competency is challenged.

This problem is highlighted by the intrusive nature of the sanity portion of the evaluation and the requirement that *all* diagnoses of the accused, regardless of the basis of the evaluation, are reported and given

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[81] *Id.* R.C.M. 706(c)(3)(B). Note that this rule allows the accused's commander to request and receive the full and unredacted long-form report without any stated purpose or justification. *Id.* Medical personnel may also request and receive it without any notification or protest of the accused. *Id.*

[82] MCM, *supra* note 12, R.C.M. 706(c)(3)(C). "That neither of the contents of the full report nor any matter considered by the board during its investigation shall be released by the board or other medical personnel to any person not authorized to receive the full report, except pursuant to an order by the military judge." *Id.*

[83] MCM, *supra* note 12, R.C.M. 706(c)(3)(A).

[84] *Id.*

[85] *See generally* Estelle, *supra* note 63. "The fact that respondent's statements were uttered in the context of a psychiatric examination does not automatically remove them from the reach of the Fifth Amendment." *Id. at* 465. "A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him. . . ." *Id*. at 468.

[86] MCM, *supra* note 12, R.C.M. 706(c)(2).

[87] Montalbano, *supra* note 14, at 53.

to the government in the short-form.[88]

In addition to the rules of procedure and the constitutional problems for a military accused, the military rules of evidence further ensure that an accused who only wants to challenge his competency before the court cannot do so without being compelled to violate his Fifth Amendment right to remain silent because the rules governing the inquiry mandate that all 706 evaluations are joint sanity and competency inquiries. If an accused independently commissioned a competency evaluation, in order to limit the inquiry strictly to competency, he is nonetheless unable to introduce any of it without first submitting to a compelled joint 706 inquiry.

Military Rule of Evidence (MRE) 302 authorizes the military judge to "prohibit an accused who refuses to cooperate in a mental examination authorized under [RCM] 706 from presenting any expert medical testimony as to any issue that would have been the subject of the mental examination."[89] It is likely government counsel would oppose such an effort by the accused because the prosecution would be left without the broad disclosures contained in the short-form. This leaves the accused with the *Hobson*'s choice of either submit to an invasive joint inquiry in violation of his rights against self-incrimination that provides the short-form report to the prosecution, or not exercise his due process right to be tried only while competent.

Unlike the military courts' broad disclosure rules, the federal civilian court system operates under a more precise and efficient statutory scheme governing the release of mental health reports.

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[88] MCM, *supra* note 12, R.C.M. 706(c)(2)(B). Because the prosecution gets the short-form containing all current diagnoses of the accused, military officials can glean damaging information about the accused derived from that information and use in hard to quantify ways. For example, consider a hypothetical Soldier is pending charges of being Absent Without Leave (AWOL) in violation of UCMJ Art. 86, who is undergoing a 706 board due to a bona fide doubt as to his competency. He will undergo an intrusive forensic examination that may result in the board learning of other criminal misconduct, which corresponds to a diagnosis that has nothing to do with competency, such as illegal drug use (Opioid Abuse / Withdrawal), larcenies, and simple assaults committed during AWOL (Anti-Social Personality Disorder). How the government could use this information to relook at an investigation or interview, keep a watchful eye on an accused, or consider it during plea negotiations are murky at best.

[89] MCM, *supra* note 12, MIL. R. EVID. 302(d) allows the military judge to ". . . prohibit an accused who refuses to cooperate in a mental examination authorized under R.C.M. 706 from presenting any expert medical testimony as to any issue that would have been the subject of the mental examination." *Id.*

Under the federal rules, once the evaluation regarding *either* competency or sanity is complete, a report that is limited to the examiners specific findings for the specific type of inquiry[90] is filed with the court, government counsel, and defense counsel.[91] When a defendant gives notice of his intent[92] to rely on the defense of insanity, the court can then order that a psychiatric or psychological examination of the defendant be conducted.[93] The Supreme Court, in *Estelle v. Smith*, recognized the balance between the governments need to effectively challenge expert testimony with respect to the insanity defense and the defendant's Fifth Amendment right against self-incrimination.[94] The Court stated "[w]hen a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the [s]tate of the only effective means it has of controverting his proof on an issue that he interjected into the case."[95] However, it is not until the defense confirms its intent to assert the defense that the government receives those reports. Then, the government is limited to only introducing evidence derived from the accused's evaluation on an issue regarding a mental condition on which the defendant has introduced.[96]

Unlike the military system, in federal civilian courts the defendant makes the decision. Once found competent—or so presumed if he did not challenge his competency—to either submit to a sanity evaluation (or to release the mental responsibility report to the government if both evaluations were conducted) once the defendant chooses to assert the

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[90] 18 USCA § 4247(c)(4) (2006). There are also additional disclosure rules restricting government access to mental health reports in capital cases, preventing the government from receiving them before the sentencing phase begins, if the defense does not offer expert testimony of mental health issues during the merits phase of trial. *See* FED. R. CRIM. P. 12.2(c)(2). The military has no additional rules for disclosure of mental health reports in a capital case.

[91] 18 USCA § 4247(c)(4) (2006). As the limited report is given to both government and defense counsel, competency inquiries do not go into the defendant's version of events regarding the charged crimes, and thus does not create a Fifth Amendment issue.

[92] FED. R. CRIM. P. 12.2(a).

[93] 18 U.S.C. § 4242(a) (2006).

[94] Estelle, *supra* note 63. *See also* United States v. Clark, 62 M.J. 195, 200 (C.A.A.F. 2005) (citing Buchanan v. Kentucky, 483 U.S. 402, 422–23 (1987)) ("The Supreme Court has concluded that if a defendant requests the psychiatric evaluation or presents an insanity defense, '[t]he defendant would have no Fifth Amendment privilege against the introduction of [testimony from his psychiatric evaluation] by the prosecution.' Because Appellant requested the sanity board, he may not claim a Fifth Amendment violation because the Government did not compel his appearance at the board.").

[95] Estelle, *supra* note 63.

[96] FED. R. CRIM. P. 12.2(c)(4).

insanity defense.[97] This system is judicially efficient. By conditioning the reports' disclosure on the defense's intent to use the same, it strikes the right balance between the defendant's rights to remain silent and to be tried only when competent, against the state's need to prepare its own expert witnesses.[98]

The ABA CJS model is also efficient and protective of a defendant's Fifth Amendment and due process rights. The ABA CJS states that once the competency evaluation is complete, the corresponding report "should not contain information or opinions concerning either defendant's mental condition at the time of the alleged crime or any statements made by defendant regarding the alleged crime or any other crime."[99] The defense would receive the report once the evaluation is completed, but the government would not receive the report until the "defendant has given notice of an intention to utilize the testimony of a mental health or mental retardation professional to support a defense claim resting on the defendant's mental condition at the time of the alleged crime."[100] Whereas the federal civilian courts and the ABA CJS use rules of procedure to protect the accused's statements to a sanity board from going into the possession of the government, the military uses the rules of evidence to make the accused's statements a matter of evidentiary privilege.

Military Rule of Evidence 302 is a rule of privilege governing the accused's statement made during a sanity evaluation, and the disclosure of the 706 board's report and usage of those statements.[101] It is also fundamentally broken because it is premised on the condition that an accused is forced to violate the right against self-incrimination in the exercise of his due process rights. Military Rule of Evidence 302 only addresses the symptoms of the self-incrimination violation, and not the self-inflicted due process violation that is created by RCM 706. The commentary to MRE 302 discusses how it evolved over time

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[97] FED. R. CRIM. P. 12.2(d).

[98] Estelle, *supra* note 63 (When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist.").

[99] ABA CJS, *supra* note 10, at para.7-3.8.

[100] *Id.* at para. 7-3.4.

[101] MCM, *supra* note 12, MIL. R. EVID. 302.

to address challenges created by military case law with respect to the affirmative defense of insanity, and makes no mention of changes in the law regarding competency.[102] The rule creates a form of "testimonial immunity" intended to protect an accused from the government's use of anything he said during a mental examination, while balancing the need to allow the government to prosecute its case in a judicially efficient manner.[103] However, the rule fails to fix the recognized "natural consequence . . . between the right against self-incrimination and the favored position occupied by the insanity defense."[104] MRE 302 is neither efficient for judicial economy nor protective of the accused's constitutional right against self-incrimination.

Much like RCM 706 is a statutory leftover from 1951, MRE 302 has not changed to address the differences in law regarding competency and sanity. The military rules of procedure allow the government to coerce incriminating statements from an accused—that are otherwise fully protected by the Fifth Amendment—pursuant to a joint evaluation, and then attempts to immunize those coerced statements with additional "unclear" rules.[105] It is fundamentally better to avoid the acknowledged constitutional wound in the first place, than to statutorily attempt to triage the hemorrhaging after the fact. Bifurcating competency and sanity evaluations permanently cures this injury without the need of legal Band-Aids.

## VII. Bifurcation of Sanity and Competency Evaluations in the Military is Necessary

The accused who has not put their mental health forward as a defense to the charged crimes is left in two equally untenable positions. Under the UCMJ, after a bona fide doubt that the accused is incompetent is established, but before he is found competent, the accused must make legally significant decisions about waiving his rights against self-incrimination to the sanity board in order to exercise his due process rights. Also, the rules regarding what may be elicited during such a hearing or trial that "opens the door" for the government to use the accused's

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[102] MCM, *supra* note 12, App. 22, MIL. R. EVID. 302.
[103] *Id.*
[104] *Id.*
[105] *Id.*

statements to a 706 board and for what purpose are "unclear."[106]

For a military accused found incompetent by a sanity board, or for an accused who is challenging a perceived erroneous finding of competency, the military judge must conduct a hearing on the matter.[107] During the hearing, the accused can introduce evidence, call medical experts to testify—which includes the 706 board members who examined the accused—call other witnesses to support him, testify on his own behalf, confront and cross-examine government witnesses, and counsel can make arguments to the court.[108]

The accused must simultaneously do this while navigating unclear evidentiary waters to limit those witnesses from discussing anything he said about his alleged crimes, which the prosecution could use later. This proposition is even more confounding if the accused is challenging their competency determination, arguing that the 706 board improperly relied on information it discovered during the 'sanity portion' of the evaluation, in violation of their right to remain silent.

Defense counsel, especially those representing clients with mental illnesses,[109] are equally in an untenable position. The defense counsel must both advise their client that the law is unclear regarding the potential consequence of their waived right to remain silent in order to establish or challenge competency, and then obtain a decision from them on how they wish to proceed. The unclear rules surrounding the use of the accused's compelled statements creates confounding ethical problems for defense counsel, which in turn, invites unnecessary and time consuming litigation as defense counsel rightfully and zealously protects their clients' interests.[110] This friction in the military justice

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[106] *Id.* At present, what constitutes "opening the door" is unclear. An informed defense counsel must proceed with the greatest of caution being always concerned that what may be an innocent question may be considered to be an "open sesame." *Id.*

[107] This is for post-referral competency hearings. The pre-referral phase of military criminal case is the period between the preferral of charges against the service member and the convening authority's referral of the case for court-martial. *See generally* MCM, *supra* note 12, R.C.M.'s 307 and 601. Different rules, not relating to this article, apply to a finding of incompetency pre-referral. *Id.* at R.C.M. 909(c).

[108] *See generally* Major David C. Lai, Military Justice Incompetence over Competency Determinations, 224 MIL. L. REV. 48, 64 (2016).

[109] *See generally* Major Jeremy A. Ball, Solving the Mystery of Insanity Law: Zealous Representation of Mentally Ill Servicemembers, ARMY LAW. December 2005, 1.

[110] *See generally* MCM, *supra* note 12, MIL. R. EVID. 302(c). These issues potentially

system would simply not exist if competency and sanity evaluations were bifurcated.

Bifurcating mental health inquiries in the military has a number of practical advantages. First, it resolves the *Hobson's* choice interplay of the current RCMs that compel an accused to choose between exercising their constitutional due process right to be tried only when competent at the cost of their constitutional right against self-incrimination. Secondly, the gathering of detailed interviews of third parties, reviewing investigative reports, and obtaining and reviewing prior mental health and medical records that is usually required for a sanity evaluation is judicially inefficient if sanity is not raised by the defense. Third, it ends the ethical problems sanity board members may face.

In 1775, General George Washington stated "[d]iscipline is the soul of an army. It makes small numbers formidable; procures success to the weak, and esteem to all."[111] The efficient administration of military justice has been linked to military discipline and readiness since the founding of this nation.[112] Given that the goals of military justice are not equivalent to the civilian criminal justice system, the unique needs and role of the military in some circumstances require a different approach to administering justice.[113] However, there is no military readiness, justice, or discipline justification for the current rules mandating joint evaluations. A commander still has the authority to ensure the fitness of those service members under his or her charge,[114] and the proposed change of bifurcating the evaluations do not alter that—it actually enhances military justice efficiency.

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include litigation over what portions of the 706 long-form report must be redacted or not; what constitutes derivative evidence or not; and all the associated appellate litigation, including ineffective assistance of counsel.

[111] U.S. Army Center of Military History, *Washington Takes Command of Continental Army in 1775*, *ARMY NEWS SERVICE* (June 5, 2014), https://www.army.mil/article/40819.

[112] *Id.*

[113] Curry v. Sec'y of Army, 595 F.2d 873 (1979) ("The Supreme Court has recognized that the military is 'a specialized society separate from civilian society,' and its unique circumstances and needs justify a departure from civilian legal standards.") *See also* Parker v. Levy, 417 U.S. 733, 743-44 (1974) ("[F]undamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.").

[114] *See generally* U.S. DEP'T OF DEF., INSTR. 6490.04, MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE MILITARY SERVICES (2013).

## V. Conclusion

Amending RCM 706 to bifurcate mental health inquiries to address the distinct legal issues of competency and sanity separately will elevate the military justice system out from its archaic rules and provide the due process and Fifth Amendment protections guaranteed to all citizens—including service members. The current rules are judicially inefficient, which degrades readiness and the administration of justice across the Armed Forces. These rules also create ethical problems for medical professionals who are forced to perform these evaluations and defense counsel trying to zealously representing their clients. Captain Yossarian's respectful whistle can still be heard echoing in military court rooms across the world every time an accused, whose counsel has a bona fide doubt as to his client's competency to make legal decisions, is forced to make legal decisions about waiving his rights, in order to establish whether or not he is competent to make those very decisions.[115]

[115] Heller, *supra* note 1.

Appendix A. Proposed Amended Language to Rule for Courts-Martial 706

(a) *Initial action.* If it appears to any commander who considers the disposition of charges, or to any preliminary hearing officer, trial counsel, defense counsel, military judge, or member that there is reason to believe that the accused lacked mental responsibility for any offense charged or lacks capacity to stand trial, that fact and the basis of the belief or observation shall be transmitted through appropriate channels to the officer authorized to order an inquiry into the mental condition of the accused. The submission may be accompanied by an application for a mental examination under this rule. (Unchanged.)

(b) *Ordering an inquiry.* (Unchanged.)

(1) *Before referral.* Before referral of charges, an inquiry into the mental capacity or mental responsibility of the accused may be ordered by the convening authority before whom the charges are pending for disposition. (Unchanged.)

(2) *After referral.* After referral of charges, an inquiry into the mental capacity or mental responsibility of the accused may be ordered by the military judge. The convening authority may order such an inquiry after referral of charges but before beginning of the first session of the court-martial (including any Article 39(a) session) when the military judge is not reasonably available. The military judge may order a mental examination of the accused regardless of any earlier determination by the convening authority. (Unchanged.)

(c) *Inquiry.*

(1) *By whom conducted.* When a mental examination is ordered under subsection (b) of this rule, the matter shall be referred to a board consisting of one or more persons. Each member of the board shall be either a physician or a clinical psychologist. Normally, at least one member of the board shall be either a psychiatrist or a clinical psychologist. The board shall report as to the mental capacity or mental responsibility or both of the accused. (Unchanged.)

(2) *Matters in inquiry.* When a mental examination is ordered under this rule, the order shall contain the reasons for doubting the mental capacity or mental responsibility, or both, of the accused, or other

reasons for requesting the examination. In addition to other requirements, the order shall require the board to make separate and distinct findings as to each of the following questions *for the type of examination ordered*:

*(A) Mental Responsibility.*

*(i)* At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? (The term "severe mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or minor disorders such as nonpsychotic behavior disorders and personality defects.)

(ii) What is the clinical psychiatric diagnosis *regarding mental responsibility*?

(iii) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct?

*(B) Mental Capacity.*

*(i) Is the accused presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense?*

*(ii) What is the clinical psychiatric diagnosis regarding mental capacity?*

Other appropriate questions may also be included.

(3) *Directions to board.* In addition to the requirements specified in subsection (c)(2) of this rule, the order to the board shall specify:

*(A) Mental Responsibility.*

*(i)* That upon completion of the board's investigation, a statement consisting only of the board's ultimate conclusions as to all questions specified in the order shall be submitted to the *defense counsel; and* ~~officer ordering the examination, the accused's commanding officer, the preliminary hearing officer, if any, appointed pursuant to Article 32 and to all counsel in the case, the convening authority, and, after referral, to the military judge~~;

*(ii)* That the full report of the board may be released by the board or other medical personnel only to other medical personnel for medical purposes, ~~unless otherwise~~ *if* authorized by the convening authority or, after referral of charges, by the military judge, except that a copy of the full report shall be furnished to the defense *counsel*. ~~and, upon request, to the commanding officer of the accused; and~~

*(B) Mental Capacity.*

*(i) That upon completion of the board's investigation regarding mental capacity, a statement consisting only of the board's ultimate conclusions as to all questions specified in the order shall be submitted to the officer ordering the examination, the accused's commanding officer, the preliminary hearing officer, if any, appointed pursuant to Article 32 and to all counsel in the case, the convening authority, and, after referral, to the military judge; and*

*(ii) That the full report of the board may be released by the board or other medical*

*personnel only to other medical personnel for medical purposes, if authorized by the convening authority or, after referral of charges, by the military judge, except that a copy of the full report, including raw test data, shall be furnished to the defense counsel.*

*(C) If a mental examination is ordered to evaluate both the mental responsibility and mental capacity of the accused, or mental capacity and another purposes, the examination for mental capacity shall occur first. If the board, upon completion of its evaluation, concludes the accused is unable to understand the nature of the proceedings against the him or her, or to conduct or cooperate intelligently in the defense, the board shall notify the ordering authority, trial counsel, and defense counsel, and shall not conduct any further examination of the accused until so ordered by the convening authority or military judge.*

*(D) That neither the contents of the full report nor any matter considered by the board during its investigation shall be released by the board or other medical personnel to any person not authorized to receive the full report, except pursuant to an order by the military judge.*

(4) *Additional examinations.* Additional examinations may be directed under this rule at any stage of the proceedings as circumstances may require. (Unchanged.)

(5) *Disclosure to trial counsel.* No person, other than the defense counsel, accused, or, after referral of charges, the military judge may disclose to the trial counsel any statement made by the accused to the board or any evidence derived from such statement. (Unchanged.)

# ADMINISTRATIVE INVESTIGATIONS IN AN ERA OF INCREASED GOVERNMENT SCRUTINY: AN ANALYSIS OF ARMY REGULATION 15-6 AND ITS PERCEIVED LACK OF INDEPENDENCE

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## I. Introduction

The death of Corporal (CPL) Pat Tillman, the Abu Ghraib detainee scandal, and the Doctors Without Borders[1] hospital strike are only a few examples of controversial and heavily criticized Army administrative investigations that drew widespread attention.[2] The public perception that these internal investigations lacked impartiality contributed to some going

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[1] Doctors Without Borders is also known by its French name: Médecins Sans Frontières. *Founding of MSF*, MÉDECINS SANS FRONTIÈRES—DOCTORS WITHOUT BORDERS, http://www.doctorswithoutborders.org/founding-msf, (last visited Mar. 14, 2017).

[2] *See* Keith Rohman, *Diagnosing and Analyzing Flawed Investigations: Abu Ghraib as a Case Study*, 28 PENN ST. INT'L L. REV. 1 (2009) (analyzing the deficiencies of the Abu Ghraib detainee abuse investigations); Mick Brown, *Betrayal of an American Hero*, THE TELEGRAPH (Oct. 7, 2010, 3:00 PM), http://www.telegraph.co.uk/culture/8046658/Betrayal-of-an-all-American-hero.html; Jessica Schulberg, *U.S. Military Investigates And Finds Itself Not Guilty Of War Crimes In Afghan Hospital Bombing*, HUFFINGTON POST (Apr. 29, 2016, 1:53 PM), http://www.huffingtonpost.com/entry/us-not-guilty-war-crimes-kunduz-hospital_us_57236ddfe4b0b49df6ab0ada; Kunduz hospital attack.

as far as to call these investigations "cover ups."[3] Similar perceptions are not limited to high profile investigations. A typical installation legal office may encounter public criticism of seemingly routine administrative investigations concerning topics such as allegations of toxic command climate, suspected suicide, or poor treatment of wounded warriors.[4]

This article analyzes the public's attacks on Army administrative investigations and whether the newly revised Army Regulation (AR) 15-6 sufficiently accounts for perceived shortfalls in impartiality. Army administrative investigations suffer from outside criticism because internal investigations inherently lack a level of independence that would otherwise exist if an outside organization were responsible for its execution. Poorly executed high-profile investigations simply spotlight this lack of independence. However, the Army's most recent updates to AR 15-6 sufficiently address many of these concerns. The updates strike the right balance between providing commanders an effective fact-finding tool and maintaining public trust in the Army by ensuring investigations are fair and impartial.[5]

Part II of this article provides a brief overview of AR 15-6 and a commander's authority to investigate. The second half of Part II also provides notable examples of substantially scrutinized AR 15-6 investigations. Part III discusses specific criticism of AR 15-6 related to perceived lack of independence. It also analyzes the sufficiency of the AR 15-6 updates in addressing the criticism and discusses the feasibility of measures intended to minimize lingering independence concerns.

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[3] Brown, *supra* note 2; HUMAN RIGHTS WATCH, DARFUR AND ABU GHRAIB: COVER-UP AND SELF-INVESTIGATION (Jan. 2005), https://www.hrw.org/legacy/wr2k5/darfurandabughraib/4.htm [hereinafter *Darfur and Abu Ghraib*].

[4] This assertion is based on the author's past professional experiences as an Administrative Law Attorney, Office of the Staff Judge Advocate, 4th Infantry Division and Fort Carson, from June 2014 to July 2015 and December 2015 to July 2016 [hereinafter Professional Experiences]. For example, in 2015, National Public Radio (NPR) took aim at an Office of the Surgeon General (OTSG) directed investigation into allegations that behavioral healthcare providers at Fort Carson were failing to treat patients with dignity and respect. Daniel Zwerdling, *Missed Treatment: Soldiers with Mental Health Issues Dismissed for Misconduct*, NAT'L PUB. RADIO (Oct. 28, 2015, 3:53 PM), http://www.npr.org/2015/10/28/451146230/missed-treatment-soldiers-with-mental-health-issues-dismissed-for-misconduct [hereinafter *Missed Treatment*].

[5] *See* Colonel Charles D. Allen (USA Retired) & Colonel William G. Braun III (USA Retired), *TRUST Implications for the Army Profession*, MIL. REV., September-October 2013, at 73 ("Maintenance of trust between the Army profession and the American public is critical to its legitimacy within our democratic society.").

## II. Background

### A. Command Authority to Investigate and an Overview of AR 15-6

Army commanders possess a wide range of authorities and responsibilities[6] which are vital for exercising "primary command authority over" their assigned units or "territorial area."[7] The successes and failures of a command fall squarely on the shoulders of its commander. Commanders have a duty and responsibility to maintain good order and discipline, and ensure members of their command abide by all Department of Defense (DoD), Department of the Army (DA), and command policies.[8] It logically follows that the commander has inherent authority to investigate matters within his or her organization.[9]

The Army has a variety of investigative organizations[10] and investigative methods;[11] however, the default administrative investigation procedure is codified in AR 15-6.[12] This regulation is applicable to all

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[6] *See generally* U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (6 Nov. 2014) [hereinafter AR 600-20] (prescribing "the policy and responsibility of command, which includes readiness and resiliency of the force, military and personal discipline and conduct, the Army Equal Opportunity Program, Prevention of Sexual Harassment, and the Army Sexual Assault Prevention and Response Program and the Sexual Harassment/Assault Response and Prevention Program . . . .").

[7] *Id.* para. 1-5.*a*.

[8] *Id.* paras 2-1.*b*, 4-1.*c*,1-4.*g*.

[9] *See also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 303 (2012) [hereinafter MCM] ("Upon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses.").

[10] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES (29 Nov. 2010) [hereinafter AR 20-1] (prescribing "the responsibility and policy for the selection and duties of inspectors general throughout the Army"); U.S. DEP'T OF ARMY, REG. 190-30, MILITARY POLICE INVESTIGATIONS (1 Nov. 2005) [hereinafter AR 190-30] (establishing "operational procedures" for the conduct of military police investigations); U.S. DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES (9 Jun. 2014) [hereinafter AR 195-2] (delineating "responsibility and authority between Military Police and U.S. Army Criminal Investigation Command.").

[11] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 600-8-4, LINE OF DUTY POLICIES, PROCEDURES AND INVESTIGATIONS ch. 3 (4 Sept. 2008) (prescribing procedures for administrative investigations into the cause of Soldier injuries); U.S. DEP'T OF ARMY, REG. 735-5, PROPERTY ACCOUNTABILITY POLICES ch. 13 (9 Nov. 2016) (providing procedures for investigations surrounding the loss, damage, or destruction of Army property).

[12] U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR ADMINISTRATIVE INVESTIGATIONS AND BOARDS OF OFFICERS para. 1-1 (1 Apr. 2016) [hereinafter AR 15-6].

levels of command[13] and establishes the procedural framework for the initiation and conduct of "preliminary inquiries, administrative investigations, and boards of officers when such procedures are not established by other regulations or directives."[14] The purpose of these procedures is to determine facts, "document and preserve evidence," and report the results to the approval authority.[15] AR 15-6 investigating officers (IO) are required to "thoroughly and impartially" determine and consider the facts from all relevant perspectives.[16] The end result should be a comprehensive and unbiased investigation which provides the commander a better perspective of an issue or set of circumstances so they can make an informed decision on how to dispose of the matter.[17]

In the past five decades, AR 15-6 has gone through a number of revisions, to include the most recent update from 1 April 2016.[18] The latest version is a substantial revision nearly doubling the page count.[19] While the original framework of AR 15-6 remains intact, the newest version builds on that framework to provide more clarity. The 2016 version restructures the types of fact-finding inquiries that may be conducted.[20] It also provides revisions and more detailed instructions in a number of areas concerning appointing authority qualifications and

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[13] *Id.* para. 2-1*b* (stating that "[a] commander at any level" may appoint a preliminary inquiry or administrative investigation pursuant to AR 15-6); *contra id.* para. 2-1*a* (limiting the level of appointing authority for boards to higher level commands).

[14] *Id.* para. 1-1.

[15] *Id.* para. 1-8. The approval authority is the person designated by AR 15-6 to take "action on an administrative investigation or board . . . ." *Id.* para 2-8*a*. In most cases the appointing authority also acts as the approval authority. *Id.*

[16] *Id.*

[17] THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, COMMANDER'S LEGAL HANDBOOK at 100 (2015) [hereinafter COMMANDER'S LEGAL HANDBOOK] (stating reasons for conducting an investigation are "[t]o discover information upon which to make decisions" and "[t]o learn lessons, sustain success and correct mistakes."); Professional Experiences, *supra* note 4.

[18] *See, e.g.*, AR 15-6, *supra* note 14; U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (30 Sept. 1996) (RAR 2 Oct. 2006) [hereinafter AR 15-6 dtd 2006]; U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS CONDUCTING INVESTIGATIONS (12 Aug. 1966).

[19] *See* AR 15-6, *supra* note 14.

[20] *Id.* para. 1-6 (stating "[t]here are three types of fact-finding or evidence-gathering procedures under this regulation: preliminary inquiries, administrative investigations, and boards of officers.").

authorities,[21] IO qualifications and responsibilities,[22] and the role of the legal advisors and legal reviewer.[23]

B. Criticism of AR 15-6 Investigations

While AR 15-6 is an invaluable fact-finding mechanism for commanders,[24] high profile Army administrative investigations tend to be intensely scrutinized and criticized by outside observers.[25] One of the biggest post-9/11 Army controversies involved the Army's mishandling of the reporting and investigation into the friendly fire death of CPL Patrick Tillman.[26] A 2007 DoD Inspector General (DoD IG) report determined multiple levels of command errors in assigning administrative investigative jurisdiction and determined the first two of three AR 15-6 investigations were "tainted by the failure to preserve evidence, a lack of thoroughness, the failure to pursue logical investigative leads, and conclusions that were open to challenge based on the evidence provided."[27] The mishandling of these investigations greatly contributed to the perception that the Army covered up the cause of CPL Tillman's death.[28]

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[21] *Id.* para. 2-1.
[22] *Id.* para. 2-3.
[23] *Id.* sec. II.
[24] *See* COMMANDER'S LEGAL HANDBOOK, *supra* note 19, at 100 (listing reasons the Army conducts AR 15-6 investigations).
[25] *See, e.g.*, Inspector Gen., U.S. Dep't of Def., No. 06-INTEL-10, Review of DoD-Directed Investigations of Detainee Abuse (25 Aug. 2006) [hereinafter DoD IG Abu Ghraib Report] (providing a detailed review of all the Department of the Army (DA) and Department of Defense (DoD) investigations into the Abu Ghraib detainee scandal); Inspector Gen., U.S. Dep't of Def., No. IPO2007E001, Review of Matters Related to the Death of Corporal Patrick Tillman (26 Mar. 2007) [hereinafter DoD IG Tillman Report] (providing a detailed review of the circumstances surrounding the deficiencies in reporting and investigating the death of Corporal (CPL) Patrick Tillman).
[26] *See* Tom Bowman, *Committee Traces Army's Handling of Tillman Death*, NAT'L PUB. RADIO (Aug. 1, 2007, 4:00 PM), http://www.npr.org/templates/story/story.php?storyId=12430130; Lawrence Donegan, *The Footballer who Became a War Hero who Became a Scandal*, GUARDIAN (Mar. 8, 2006, 9:21 PM), https://www.theguardian.com/sport/2006/mar/09/comment.gdnsport3; Josh White, *Army Withheld Details About Tillman's Death*, WASH. POST (May 4, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/05/03/AR2005050301502.html?noredirect=on.
[27] DoD IG Tillman Report, *supra* note 27, at 2.
[28] *Id.* "Several Members of Congress also questioned the series of events that led to Corporal Tillman's death, subsequent investigations, the need to establish accountability in matters concerning the death and its aftermath, and the possibility of an Army cover-

The CPL Tillman scandal was a public relations disaster not only for the Army, but also for the Bush Administration, which was simultaneously managing the fallout from the Abu Ghraib detainee scandal.[29] Much of the criticism surrounding the Abu Ghraib scandal included the U.S. government's investigatory efforts into detainee abuse in Iraq.[30] Fourteen separate Army and DoD level investigations looked into the allegations of detainee abuse, yet the public believed the investigations failed to uncover the complete truth.[31]

Another AR 15-6 investigation that drew worldwide criticism was a U.S. Central Command (CENTCOM) investigation into the accidental strike on the Doctors Without Borders hospital in Kunduz City, Afghanistan, in October 2015.[32] Despite a thorough and timely investigation amassing over 700 pages, there was, significant international concerns about the investigation's finding that war crimes were not committed.[33] While numerous personnel, including one general officer,

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up." *Id*. at foreword; *see also*, Donegan, *supra* note 28; *Soldier: Army Ordered Me Not to Tell Truth About Tillman*, CNN (Apr. 25, 2007, 10:39 AM), http://www.cnn.com/2007/POLITICS/04/24/tillman.hearing.

[29] *See* HUMAN RIGHTS WATCH, GETTING AWAY WITH TORTURE? COMMAND RESPONSIBILITY FOR THE U.S. ABUSE OF DETAINEES (2005), https://www.hrw.org/reports/2005/us0405/us0405.pdf [hereinafter GETTING AWAY WITH TORTURE] (providing an example of the vocal and harsh criticism the Bush Administration encountered with the Abu Ghraib detainee scandal); Brown, *supra* note 2; *Darfur and Abu Ghraib*, *supra* note 3; Donegan, *supra* note 27.

[30] *See* GETTING AWAY WITH TORTURE, *supra* note 30; Brown, *supra* note 2; *Darfur and Abu Ghraib*, *supra* note 3 (explaining that the IOs "lacked the authority to scrutinize senior Pentagon officials" who many thought were complicit); Donegan, *supra* note 28.

[31] Rohman, *supra* note 2, at 2, 8-9; *see Darfur and Abu Ghraib*, *supra* note 3.

[32] *See* Press Release, Amnesty International, Kunduz Bombing Needs Independent Investigation (Apr. 28, 2016), http://www.amnestyusa.org/news/press-releases/kunduz-bombing-needs-independent-investigation [hereinafter Amnesty International Press Release]; Press Release, Médecins Sans Frontières/Doctors Without Borders, Initial Reaction to Public Release of U.S. Military Investigative Report on the Attack on MSF Trauma Hospital (Apr. 29, 2016), https://www.msf.org/kunduz-initial-reaction-public-release-us-military-investigative-report-attack-msf-trauma-hospital [hereinafter MSF Press Release]; *see generally* Major General William Hickman, Army Regulation 15-6 Report of Investigation on the Airstrike on the Médecins Sans Frontières (MSF)/Doctors Without Borders Trauma Center, Kunduz City, Afghanistan, on 3 October 2015 (21 Nov. 2015) [hereinafter Major General Hickman, AR 15-6 Investigation].

[33] Schulberg, *supra* note 2; Amnesty International Press Release, *supra* note 34; MSF Press Release, *supra* note 34. The investigation determined that some personnel failed to abide by the rules of engagement and the law of armed conflict; however, no war crimes were committed because those involved thought they were attacking an insurgent-controlled compound and did not know it was a medical facility. Memorandum from Commander, U.S. Central Command, subject: Summary of the Airstrike on the MSF

were issued a variety of potentially career-ending administrative and disciplinary actions for their involvement in the strike,[34] many in the international community demanded an independent investigation and expressed skepticism of the U.S. Army's ability to impartially investigate itself on the matter.[35]

## III. Analysis

### A. Independence Concerns Within AR 15-6

Public or media criticism of Army administrative investigations is usually for lack of independence in the investigative process.[36] AR 15-6 contains significant procedural requirements outwardly conveying legitimacy in the process.[37] However, internal investigations in any organization are still self-policing mechanisms that draw suspicion among a public that values transparency and accountability.[38] When done well, Army administrative investigations can be an effective fact-gathering tool,

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Trauma Center in Kunduz, Afghanistan on October 3, 2015, Investigation and Follow-on Actions (n.d.) [hereinafter CENTCOM Kunduz Memo].

[34] CENTCOM Kunduz Memo, *supra* note 35; General John F. Campbell, Department of Defense Press Briefing by General Campbell via teleconference from Afghanistan (Nov. 25, 2015), https://www.defense.gov/News/Transcripts/Transcript-View/Article/631359/department-of-defense-press-briefing-by-general-campbell-via-teleconference-fro [hereinafter General Campbell Press Briefing].

[35] Schulberg, *supra* note 2; Amnesty International Press Release, *supra* note 34; MSF Press Release, *supra* note 34.

[36] *See* Rohman, *supra* note 2, at 5; Amnesty International Press Release, *supra* note 34 (expressing concern about the "Department of Defense's questionable track record of policing itself" and stating "[t]he decision to prosecute members of the armed forces for criminal conduct should be made by an independent prosecutor to avoid the conflict of interest inherent in allowing commanders to make such decisions.").

[37] *See generally* AR 15-6, *supra* note 14 (outlining several procedural and substantive requirements such as appointment procedures, "[r]ules of evidence and proof of facts," and due process afforded to subjects or respondents); *see also* Rohman, *supra* note 2, at 4.

[38] *See* Transparency and Open Government, 74 Fed. Reg. 4,685 (Jan. 26, 2009); Freedom of Information Act, 74 Fed. Reg. 4,683 (Jan. 21, 2009) [hereinafter President Obama's FOIA Memorandum] (stating that "[a] democracy requires accountability, and accountability requires transparency" and implementing a presumption that, when in doubt, openness prevails when administering FOIA); Attorney General Eric Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 51,879 (Oct. 8, 2009) [hereinafter Attorney General Holder's FOIA Memorandum] (reiterating President Obama's presumption for openness and providing more detailed instructions on implementation).

which assist commanders in taking appropriate action within their ranks and answer questions from outside sources.[39] Nonetheless, the lack of complete independence in the process is susceptible to criticism when the subject matter draws scrutiny and procedures are not followed.[40]

Such criticism is not unique to the Army.[41] Corporations[42] and local government, [43] similarly receive harsh criticism for conducting their internal investigations. Common to all internal investigations is the potential failure to uncover the full truth.[44]

> Investigations that are purely internal to the military, however competent, cannot examine the whole picture . . . . Internal investigations, by their nature, also suffer from a critical lack of independence. Americans have never thought it wise or fair for one branch of government to

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[39] The stated primary function of investigations under AR 15-6 is to "ascertain facts, document and preserve evidence, and then report the facts and evidence to the approval authority." AR 15-6, *supra* note 14, para. 1-8. AR 15-6 investigations are commonly used by commanders to answer questions from the media and public. Professional Experiences, *supra* note 4. This use is clearly contemplated by AR 15-6 which acknowledges the investigation may be used in various ways to include release to "the general public via a FOIA [Freedom of Information Act] request." AR 15-6, *supra* note 14, para. C-4*d*. Furthermore, the regulation requires legal reviewers to conduct a comprehensive review that "anticipates future uses of the investigation." *Id*. para. 2-7*b*. *See, e.g.*, Kyle Jahner, *Fort Stewart Commander Fired for Giving Medical Care to Unauthorized Civilians*, ARMY TIMES (June 6, 2016), https://www.armytimes.com/story/military/2016/06/06/fort-stewart-commander-fired-giving-medical-care-unauthorized-civilians/85522860/; Michelle Tan, *Investigation: Fort Carson Soldier Rightly Pulled from Promotion List*, ARMY TIMES, (Aug. 4, 2016), https://www.armytimes.com/story/military/careers/army/enlisted/2016/08/04/investigation-fort-carson-sodliers-rightly-pulled-promotion-list/88179930/.

[40] *See generally*, Rohman, *supra* note 2 (addressing the failures of the Abu Ghraib investigations and the scrutiny those investigations drew from the public); DoD IG Tillman Report, *supra* note 27 (discussing the various procedural and substantive failures in the reporting and investigating of CPL Tillman's death which contributed to a public perception of an Army cover-up).

[41] Rohman, *supra* note 2, at 3-4.

[42] *Id.* at 3; Kathleen Day & Ben White, *When Companies Investigate Themselves*, WASH. POST, Dec. 31, 2004, at E01.

[43] *See, e.g.*, Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 Loy. L. Rev. 545 (2001); Rohman, *supra* note 2, at 3-4; Stephen M. Katz, *Following Police Shootings, Experts and Departments Differ on How to Investigate*, THE VIRGINIAN-PILOT (Mar. 26, 2016), http://pilotonline.com/news/local/crime/following-police-shootings-experts-and-departments-differ-on-how-to/article_132f231f-349a-5864-82c2-5ef4eed523d3.html.

[44] Rohman, *supra* note 2, at 1-3.

> police itself. But that has been exactly the case in many of the abuse inquiries to date.[45]

The primary concerns related to lack of independence in AR 15-6 investigations include the following: (1) the appointing authority's power to define the scope of the investigation, (2) the appointing authority's power to select the IO, and (3) the effect of Army organizational culture on the conduct of the investigation.

### *1. Scope of the Investigation*

One of the first and most critical steps in an investigation is properly defining the scope of the investigation.[46] A well-defined scope is imperative because it charts the course of the investigation for the IO.[47] The scope drives evidence gathering and analysis, and the ultimate findings and recommendations provided to the appointing authority.[48] The appropriate scope of an investigation should be defined after the appointing authority receives legal counsel,[49] however, the power to make the final decision on the scope remains with the appointing authority.[50]

Furthermore, these investigations are frequently used to respond to outside inquiries, especially into controversial matters; therefore, the scope educates the public on the investigation's goal and may be one of the first yardsticks the public uses to measure the relative success of the investigation.[51] A poorly defined scope may create a perception that the appointing authority is attempting to shape the outcome by limiting the

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[45] *Id.* at 15 (quoting retired generals and admirals calling for President Bush to appoint an independent commission to investigate U.S. detention and interrogation practices at Abu Ghraib).

[46] AR 15-6, *supra* note 14, para. 2-2, 2-*6a.*; Rohman, *supra* note 2, at 12.

[47] Rohman, *supra* note 2, at 12. The scope is so critical that AR 15-6 expressly requires the legal advisor to provide the appointing authority advice on the scope of the investigation. *See* AR 15-6, *supra* note 14, para. 2-6*a*.

[48] Rohman, *supra* note 2, at 12. "The IO or board normally will not exceed the scope of the investigation authorized by the appointing authority without approval[], but should address issues encountered during the investigation that are related to policies, procedures, resources, or leadership, if the IO or board determines that those issues are relevant to the matters under investigation[]. It might be appropriate for the IO or board to recommend additional inquiry into issues that are outside the scope of the investigation." AR 15-6, *supra* note 14, para.3-10.

[49] AR 15-6, *supra* note 14, para. 2-6.

[50] *See id.* para 2-2.

[51] Rohman, *supra* note 2, at 12; *see also* Jahner, *supra* note 41; Tan, *supra* note 41.

subject matter or shielding certain people from the investigation.[52] Such circumstances have the potential to undermine the legitimacy of the investigation.

For example with respect to Abu Ghraib, Lieutenant General (LTG) Ricardo Sanchez, the commander of Combined Joint Task Force 7 (CJTF-7), [53] requested that the CENTCOM Commander appoint an IO to investigate allegations of detainee abuse.[54] LTG Sanchez appointed Major General (MG) Antonio Taguba[55] to conduct an investigation solely limited to the 800th Military Police Brigade.[56] No other adjacent units were to be investigated despite the fact that special operations units and a military intelligence brigade were also involved with detainee operations at the prison.[57] The narrow scope created an appearance that the Army was trying to hide unfavorable information, especially when the public discovered LTG Sanchez may have approved policies that led to widespread and systemic abuse.[58]

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[52] *See* DoD IG Abu Ghraib Report, *supra* note 27, at 38 (acknowledging the scope of Major General (MG) Antonio Taguba's investigation was limited to "detainee-related issues only within the 800th MP Brigade."); Rohman, *supra* note 2, at 12-13 (noting that MG Taguba's investigation was a good example of how an organization can limit the scope to "control a report's outcome.").

[53] Rohman, *supra* note 2, at 13. As the Commander of Combined Joint Task Force 7 (CJTF-7), Lieutenant General (LTG) Sanchez served as the coalition's senior commander in Iraq. DONALD P. WRIGHT & TIMOTHY R. REESE, ON POINT II: TRANSITION TO THE NEW CAMPAIGN 147 (2008).

[54] Major General Antonio Taguba, Army Regulation 15-6 Report of Investigation of the 800th Military Police Brigade (n.d.) [hereinafter Major General Taguba, AR 15-6 Investigation] (on file with author).

[55] When appointed, MG Taguba was serving as the Deputy Commanding General (Support), Coalition Forces Land Component Command (CFLCC), Operation Iraqi Freedom. Major General Antonio Taguba Resume (Aug. 11, 2009), http://www.gomo.army.mil (on file with author).

[56] Rohman, *supra* note 2, at 7, 12-13.

[57] Seymour M. Hersh, *The General's Report: How Antonio Taguba, Who Investigated the Abu Ghraib Scandal, Became one of its Casualties*, THE NEW YORKER (June 25, 2007), http://www.newyorker.com/magazine/2007/06/25/the-generals-report.

[58] *Id.* Major General Taguba's "orders were clear . . . he was to investigate only the military police at Abu Ghraib, and not those above them in the chain of command." *Id.* While conducting the investigation, Major General "Taguba came to believe that Lieutenant General Sanchez . . . and some of the generals assigned to the military headquarters in Baghdad had extensive knowledge of the abuse of prisoners in Abu Ghraib even before Joseph Darby came forward with the CD. Taguba was aware that in the fall of 2003— when much of the abuse took place— Sanchez routinely visited the prison, and witnessed at least one interrogation. According to Taguba, 'Sanchez knew exactly what was going on.'" *Id.*

*2. Selection of the Investigating Officer*

The next potential area of concern is the appointing authority's selection of the IO. Army administrative investigations require IOs "be those persons who, in the opinion of the appointing authority, are best qualified for the duty by reason of their education, training, experience, length of service, demonstrated sound judgment and temperament."[59] The importance of IO selection is emphasized by the fact that this language closely mirrors the language found in Article 25, Uniform Code of Military Justice (UCMJ), which provides the criteria convening authorities must consider when selecting panel members for courts-martial.[60]

AR 15-6 further requires that the IOs are "impartial, unbiased, [and] objective."[61] Yet, despite this mandate, legitimate concerns from an independence standpoint may still remain. The public may be concerned that an appointing authority will seek to control the results of an investigation by selecting a sympathetic IO. This perception existed with various DA and DoD investigations into the Abu Ghraib scandal.[62] It was also present in the third AR 15-6 investigation into CPL Tillman's death when the IO[63] returned findings that clearly diminished the culpability of various commanders, including the appointing authority, despite logical leads that suggested otherwise.[64]

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[59] AR 15-6, *supra* note 14, para. 2-3.

[60] "When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best-qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." UCMJ, art. 25(c)(2) (2012).

[61] AR 15-6, *supra* note 14, para. 2-3.

[62] *See* Rohman, *supra* note 2, at 14. The "appointment of Lieutenant General (Anthony Jones) was a direct statement that his investigation would go no higher on the chain of command than another Lieutenant General . . . .". *Id.* One DoD investigation that used civilian investigators comprised of former senior level members of the armed forces management structure and while they were "technically independent," their "collective histories with DoD raised significant questions about their functional independence." *Id.*

[63] At the time of the investigation, the IO, Brigadier General (BG) Gary Jones, was the Commander, U.S. Army Special Forces Command (Airborne) and was a subordinate commander of Lieutenant General (LTG) Philip Kensinger who commanded U.S. Army Special Operations Command (Airborne). DoD IG Tillman Report, *supra* note 27, at 3.

[64] *Id.* at 43 (stating BG Jones failed to follow appropriate investigative leads despite evidence possibly implicating LTG Kensinger); David S. Cloud, *9*

*3. The Effect of the Army's Organizational Culture on the Conduct of the Investigation*

The Army's unique organizational culture[65] is another perceived obstacle to achieving unbiased administrative investigations. The Army's strict and disciplined hierarchical structure is seen as a hindrance to an IO's ability to be candid if doing so would jeopardize the IO's professional advancement.[66] This structure may inhibit IOs from pursuing logical leads when the chain of command is implicated.[67] Furthermore, those outside the military have argued the IO's indoctrination within the Army is an implicit and pervasive bias that could affect the outcome of an investigation.[68]

Implied in hierarchical organizations are power relationships that are "absolute and autocratic."[69] As a result, this organizational culture has a tendency to "suppress subordinates from questioning, disagreeing, or raising alternative points of view" which in turn "has the potential to squash conflict and disallow dissent."[70] This potential danger is addressed in AR 15-6's requirement that IOs outrank subjects of investigations;[71]

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*Officers Faulted for Aftermath of Tillman Death*, N.Y. TIMES, at A15, Mar. 27, 2007.

[65] "Organizational culture refers to 'the taken-for-granted values, underlying assumptions, expectations, collective memories, and definitions present in an organization.'" Stephen J. Gerras, Leonard Wong, & Charles D. Allen, Organizational Culture: Applying a Hybrid Model to the U.S. Army at 2 (November 2008) (unpublished, U.S. Army War College) https://ssl.armywarcollege.edu/dclm/pubs/Organizational%20Culture%20Applying%20a%20Hybrid%20Model%20to%20the%20U.S.%20Army%20Nov%2008.pdf.

[66] STEPHEN J. GERRAS & LEONARD WONG, CHANGING MINDS IN THE ARMY: WHY IT IS SO DIFFICULT AND WHAT TO DO ABOUT IT 21 (2013); Rohman, *supra* note 2, at 13, 15.

[67] *See* DoD IG Tillman Report, *supra* note 27, at 38 (stating BG Jones failed to clarify misstatements made by his direct supervisor and the appointing authority, LTG Kensinger); Hersh, *supra* note 60 (explaining that MG Taguba considered himself "legally prevented from investigating into higher authority").

[68] *See* GERRAS & WONG, *supra* note 68, at 6 (explaining that "frames of reference" are developed early in a career and shattering one's frame of reference is much easier said than done); Rohman, *supra* note 2, at 15 (discussing the fact that the civilian investigators appointed by Secretary Rumsfeld were not functionally independent of DoD when their collective histories were with DoD which colored their perspectives).

[69] *Id.* at 21.

[70] *Id.* 21-22.

[71] AR 15-6, *supra* note 14, para. 2-3*f*.

however, within a hierarchical organization problems still arise when an IO may be hesitant to express candor to the appointing authority when unfavorable or displeasing information about higher levels of command are uncovered.[72] Honest feedback could have a negative effect on an IO's career and may discourage a thorough investigation. MG Taguba experienced this firsthand when he opined he was "forced into retirement" by senior Pentagon officials due to his honest yet scathing report on detainee abuse.[73] Given these concerns, there is always danger that an IO, especially a less mature and confident one, will only deliver the news he thinks his commander wants to hear. This is particularly risky when the subject matter is controversial and has the potential to embarrass the command.

An additional concern in past investigations was the perception that the hierarchical structure may effectively prevent the IO from pursuing logical leads when the chain of command is implicated in wrongdoing.[74] In the first Abu Ghraib AR 15-6 investigation, MG Taguba quickly realized senior level officials, including the appointing authority, had knowledge of the abuse or were involved in the development and approval of policies that led to the abuse.[75] Other DA and DoD investigations into the Abu Ghraib scandal also failed to follow the leads up the chain of command despite evidence pointing to senior leader involvement.[76] In the third AR 15-6 investigation conducted into the Tillman scandal, the IO

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[72] Such circumstances may arise when a favored commander or officer is under investigation. An example of this perception is seen in recent reporting that General (GEN) Martin Dempsey disapproved a finding of adultery for a subordinate commander, Major General (MG) John Custer, in an AR 15-6 investigation conducted by the Department of the Army (DA) Inspector General (IG). Tom Vanden Brook, *Army Brass, Led by Future Joint Chiefs Head Martin Dempsey, Gave Amorous General a Pass*, USA TODAY (Mar. 9, 2017, 12:30 PM), http://www.usatoday.com/story/news/politics/2017/03/09/general-martin-dempsey-major-general-john-custer-military-sexual-harassment-abuse/98686906/. While it appears this investigation was forthright about MG Custer's behavior, there are instances where more junior IOs could be tempted to minimize misconduct of a favored commander or officer who is under investigation. Professional Experiences, *supra* note 4.

[73] David S. Cloud, *General Says Prison Inquiry Led to His Forced Retirement*, N.Y. TIMES, June 17, 2007, http://www.nytimes.com/2007/06/17/washington/17ghraib.html ("'They always shoot the messenger,' General Taguba said. 'To be accused of being overzealous and disloyal – that cuts deep into me. I was ostracized for doing what I was asked to do.'").

[74] *See* Rohman, *supra* note 2, at 14, 25-30.

[75] *Id.* at 13; Hersh, *supra* note 59.

[76] Rohman, *supra* note 2, at 17-18.

failed to appropriately pursue a logical lead that implicated the appointing authority[77] in his misrepresentations concerning next-of-kin notifications to the Tillman family.[78]

Finally, the fact that the IO works for the same institutional organization he is investigating raises suspicions on his impartiality because the Army very likely shaped his "frame of reference" early on in his career.[79] Based on this, an IO's frame of reference will very likely affect the conduct of the investigation and the findings and recommendations made to the appointing authority. While there is certainly a benefit for an IO to have familiarity with the organization he or she is investigating,[80] there may be instances where an IO's frame of reference may be difficult to overcome,[81] especially if the IO is a more senior officer and the investigation involves new policies that may be controversial among an older generation of service members.[82]

B. The New AR 15-6 and Its Sufficiency in Addressing Independence Concerns

Absent replacing the current AR 15-6 framework with a completely independent investigator, it is nearly impossible to eradicate all perceptions of a lack of independence in internally conducted investigations.[83] However, the latest revision of AR 15-6 appropriately addresses and mitigates many concerns discussed in the preceding section. Specific language was added to AR 15-6 that provides disqualifying

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[77] DoD IG Tillman Report, *supra* note 27, at 43.
[78] *Id.*
[79] GERRAS & WONG, *supra* note 68, at 10-11. A frame of reference is the "complex knowledge structure" that one develops through "personal and professional experiences that influence" and often limit the way one approaches a problem. *Id.* at 6.
[80] Rohman, *supra* note 2, at 16.
[81] GERRAS & WONG, *supra* note 68, at 6 ("Unfortunately, shattering or unlearning our frames of reference is an action that is easy to espouse, yet incredibly difficult to execute.").
[82] *See e.g.*, Terri Moon Cronk, Def. Media Activity, *Officials Describe Plans to Integrate Women into Combat Roles*, U.S. DEP'T OF DEF., Feb. 2, 2016, https://www.defense.gov/News/Article/Article/648766/officials-describe-plans-to-integrate-women-into-combat-roles; DEPARTMENT OF DEFENSE TRANSGENDER POLICY, https://www.defense.gov/News/Special-Reports/0616_transgender-policy (last visited Mar. 15, 2017).
[83] Rohman, *supra* note 2, at 15, 16, 36; *see also* Katz, *supra* note 45 (expressing the public's sentiment that an "outside agency will be impartial, while an internal criminal investigation will not.").

criteria for appointing authorities who appear to be biased or have a conflict of interest[84] and the required legal support during all stages of the investigation is vastly improved.[85]

### *1. Addressing Appointing Authority Bias and Conflict of Interest*

Under the previous version of AR 15-6, the only qualifying criteria for an appointment authority concerned the officer's grade and whether they were in command.[86] Nowhere did the regulation comment on conflict of interest or bias as disqualifying factors.[87]

Contrast this with the latest version of AR 15-6, which retains similar guidance, but expressly forbids any "individual who is reasonably likely to become a witness to an inquiry, investigation, or board" from appointing one.[88] The regulation further states any "individual who has an actual or perceived bias for or against a potential subject of the investigation, or an actual or perceived conflict of interest in the outcome of the investigation, should not appoint an inquiry, investigation, or board."[89] When bias or a conflict exists the "potential appointing authority" is required to forward the subject matter to the "next superior commander or appointing authority" who will decide whether the subject matter needs to be investigated.[90] The regulation provides a couple examples of actual or perceived bias and conflicts of interest. [91]

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[84] AR 15-6, *supra* note 14, para. 2-1*f*.
[85] *Id.* para. 2-6, 2-7.
[86] AR 15-6 dtd 2006, *supra* note 20, ch. 2.
[87] *See generally*, *id.*
[88] AR 15-6, *supra* note 14, para. 2-1*f*.
[89] *Id.*
[90] *Id.*
[91] *Id.* para. 2-1*f*.(1)-(2).

> (1) A potential appointing authority may have an actual or perceived bias for or against a potential subject of an investigation if the potential subject is on the potential appointing authority's principal, special, or personal staff. (2) A potential appointing authority may have an actual or perceived conflict of interest in the outcome of an investigation if the investigation will examine the potential appointing authority's policies or decisions. Identifying an actual or perceived conflict of interest, however, does not necessarily mean that the potential appointing authority is a subject of the investigation. *Id*.

The revised AR 15-6 also includes new language expressly requiring immediate forwarding of allegations of "senior official"[92] misconduct to the Investigations Branch of the DA Inspector General (DAIG) and that the authority to appoint an investigation into senior officials is retained at the highest levels of the Army.[93] While this is not a change in policy,[94] the restatement of reporting requirements per DoD Directive vastly reduces the potential for errors in assigning investigative jurisdiction for senior official misconduct,[95] bolstering public confidence in the investigatory process.

The extent of these revisions makes it reasonable to conclude the drafters intended to address the independence concerns raised in high profile investigations of the past decade. While an honest and self-aware appointing authority may preemptively recuse himself after identifying his own biases and conflicts of interest, the responsibility to identify these issues and enforce the regulatory standards falls on the command's legal advisor.[96] The new AR 15-6 includes more guidance and a vastly expanded role for those providing legal support.[97]

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[92] *Id.* para. 1-7. Senior officials is defined as "general officers, promotable colonels, members of the civilian Senior Executive Service (SES), and other DA civilian employees of comparable grade or position." *Id.*

[93] *Id.* (stating "only the Secretary of the Army, Under Secretary of the Army, Chief of Staff of the Army, Vice Chief of Staff of the Army, and The Inspector General of the Army may authorize or direct an investigation into allegations or incidents of improprieties or misconduct" by senior officials).

[94] U.S. DEP'T OF DEF., DIR. 5505.06, INVESTIGATION OF ALLEGATIONS AGAINST SENIOR DOD OFFICIALS para. 3 (6 June 2013) [hereinafter DODD 5505.06].

[95] The potential for even experienced judge advocates to overlook requirements located in various regulations and directives exists. During the CPL Tillman investigations, field grade judge advocates failed to realize that Army policy required notification of friendly fire deaths through the chain of command and the Army Safety Center. DoD IG Tillman Report, *supra* note 27, at 2. They were also unaware of the fact that DoD guidance required Commander, CENTCOM, to appoint a legal investigation. *Id.* With the exception of the requirement that only a General Court-Martial Convening Authority (GCMCA) has the authority to appoint investigations into the death of a Soldier, all of the remaining reporting and investigative requirements were located in a variety of DA and DoD regulations and instructions, but not discussed directly in AR 15-6. *Id.* at 6-12 (outlining the various DA and DoD policy and regulatory requirements for reporting and investigating suspected friendly fire deaths); *see* AR 15-6 dtd 2006, *supra* note 20.

[96] *See* AR 15-6, *supra* note 14, para. 2-6, 2-7; *see also id.* at i (stating The Judge Advocate General is the proponent of AR 15-6).

[97] *Id.* para. 2-6, 2-7.

*2. Increased Role for Judge Advocates*

In practice, legal advisors always played an important role in administrative investigations;[98] however, the previous version of the regulation provided substantially less guidance and a less defined role for attorneys.[99] For instance, it was standard practice to formally assign legal advisors for informal investigations,[100] yet the prior version of AR 15-6 did not require a formally appointed legal advisor.[101] Furthermore, while legal reviews were done for nearly all administrative investigations,[102] the previous version of AR 15-6 did not make this a blanket requirement.[103]

The latest AR 15-6 enhances the judge advocate's role. Not only is the regulation filled with instructions requiring the appointing authority[104] and IO[105] consult with the servicing staff judge advocate or assigned legal advisor, there is also an entire section in Chapter 2 devoted to outlining the scope and stages of legal support.[106] In particular, paragraph 2-6, emphasizes judge advocate involvement at all stages of the investigation to include pre-appointment, conduct of the investigation, and the legal review of the completed investigation.[107]

During pre-appointment, the servicing legal advisor is required to advise the appointing authority on selecting the investigatory method, regulatory requirements, selecting the IO, scope of the investigation, and any other necessary "preparatory guidance."[108]

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[98] *See* COMMANDER'S LEGAL HANDBOOK, *supra* note 19, at 106-07 (describing the investigatory process and emphasizing the important role legal advisors play).
[99] *See* AR 15-6 dtd 2006, *supra* note 20, Ch. 2.
[100] COMMANDER'S LEGAL HANDBOOK, *supra* note 19, at 106.
[101] *See* AR 15-6 dtd 2006, *supra* note 20, para. 4-1 (explaining for informal investigations "[a]ppointment of advisory members or a legal advisor is unnecessary because persons with special expertise may be consulted informally whenever desired.").
[102] Professional Experiences, *supra* note 4; *see* COMMANDER'S LEGAL HANDBOOK, *supra* note 19, at 108.
[103] AR 15-6 dtd 2006, *supra* note 20, para. 2-3*b*. Legal reviews were required when dictated by "[o]ther directives that authorize investigations or boards," or when the cases involved "serious or complex matters, such as where the incident being investigated has resulted in death or serious bodily injury, or where the findings and recommendations may result in adverse administrative action (see para. 1-9), or will be relied upon in actions by higher headquarters." *Id*.
[104] *See, e.g.*, AR 15-6, *supra* note 14, para. 1-5, 1-6c(3), 2-6.
[105] *See, e.g.*, *id.* app. C-2*a*.
[106] *Id*. ch 2.
[107] *Id*. para. 2-6.
[108] *Id*. para. 2-6*a*.

Additionally, every IO is required to have a legal advisor who will provide advice on any issue the IO is concerned with for the duration of the investigation.[109] The legal advisor shall help the IO "develop an investigative plan," identify relevant witnesses, generate witness questions, ensure the rights of subjects are protected, verify all appointment requirements are met, and "ensure the evidence supports the findings" and the "recommendations are logically related to the findings."[110] The legal advisor should review the final product before it is submitted to another attorney for legal review.[111]

Finally, the legal review's scope expanded. It includes the prior requirements[112] and adds that the reviewing attorney ensures "the investigation does not raise questions that it leaves unanswered; anticipates future uses of the investigation; resolves internal inconsistencies; makes appropriate findings; and make recommendations that are feasible, acceptable, and suitable."[113]

This widely expanded role for judge advocates in AR 15-6 reflects the importance of an overseer or protector of the administrative investigation process. The Judge Advocate General (TJAG) is the proponent of AR 15-6, and therefore it is only natural for the official oversight responsibility to fall on judge advocates.[114] Yet, aside from this formal designation, as a practical matter, judge advocates are the officers best positioned to navigate such a task. As a member of the commander's personal and special staff, the servicing judge advocate has a direct line of communication to the commander.[115] The legal advisor is traditionally one of the few staff officers able to speak more candidly with the

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[109] *Id.* para. 2-6*b.*
[110] AR 15-6, *supra* note 14, para. 2-6*b.*
[111] *Id.* para. 2-7*b.*
[112] *Compare* AR 15-6 dtd 2006, *supra* note 20, para. 2-3*b*. (requiring a judge advocate's legal review to determine "[w]hether the proceedings comply with legal requirements . . . . [w]hat effects any errors would have . . . . [w]hether sufficient evidence supports the findings of the investigation or board or those substituted or added by the appointing authority . . . . [w]hether the recommendations are consistent with the findings."), *with* AR 15-6, *supra* note 14, para. 2-7 (requiring the aforementioned determinations but with more detail and additional requirements).
[113] AR 15-6, *supra* note 14, para. 2-7*b*.
[114] *Id.* at i.
[115] JOINT CHIEFS OF STAFF, JOINT PUB. 1-04, LEGAL SUPPORT TO MILITARY OPERATIONS I-7 (17 Aug. 2011) [hereinafter JP 1-04]; U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY para. 4-9 (18 Mar. 2013) [hereinafter FM 1-04].

commander despite the Army's hierarchical structure.[116] Therefore, the judge advocate should have the access and rapport to appropriately advise the commander on the requirements of AR 15-6 to include the second and third order effects of failing to abide by bias and conflicts of interest disqualifiers.[117]

If a commander refuses to follow AR 15-6 requirements, the judge advocate has a variety of tools at their disposal to rectify this issue and protect the best interests of the Army.[118] First, judge advocates are subject to technical supervision by a supervisory judge advocate outside the traditional chain of command.[119] In the event they cannot affect the necessary change within the traditional chain of command, the unit's legal advisor has support from other judge advocates who may provide advice on how to proceed with the commander or, if absolutely necessary, may even go as far as addressing the issue with the next superior level of command.[120]

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[116] *See* U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, rule 2.1 [hereinafter AR 27-26].

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant to the client's situation, but not in conflict with the law. *Id.* rule 2.1.

[117] *See* AR 15-6, *supra* note 14, para. 2-1*f*, 2-6.
[118] *See* AR 27-26, *supra* note 119, rule 1.13.

> If a lawyer for the Army knows that an officer . . . is engaged in action, intends to act or refuses to act in a matter related to the representation that is either a violation of a legal obligation to the Army or a violation of law which reasonably might be imputed to the Army the lawyer shall proceed as is reasonably necessary in the best interest of the Army. *Id*. rule 1.13*(c)*.

[119] U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 3-2 [hereinafter AR 27-1] ("JA officers perform their duties under commanders of their assigned or attached commands . . . . JA officers receive technical legal supervision from TJAG and from the SJAs of superior commands."); Policy Memorandum 14-04, Office of the Judge Advocate General, U.S. Army, subject: Use of Technical Channel of Communications (22 Jan 2014).
[120] *See* Renn Gade, *The U.S. Judge Advocate in Contemporary Military Operations: Counsel, Conscience, Advocate, Consigliere, or All of the Above?*, *in* U.S. MILITARY OPERATIONS: LAW, POLICY, AND PRACTICE 10 (Geoffrey S. Corn et als. eds., 2016) [hereinafter Gade].

Additionally, unlike other staff officers, the judge advocate is beholden to both Army professional responsibility regulations and civilian professional conduct requirements.[121] The judge advocate's client is the Army, as officially represented by the commander.[122] When a commander decides to do something that may substantially injure the Army, the judge advocate must remind the commander that they should reconsider their decision.[123] If that does not work, they may be obliged to consult their technical chain of supervision in order to preserve the interest of the Army.[124] These ethical obligations are another reason why the judge advocate is the best-positioned officer on the staff to hold the command accountable to the requirements of AR 15-6.

In addition to advising the appointing authority, another critical area of judge advocate involvement is providing legal advice to the IO. The IO's legal advisor can positively influence an investigation by providing the IO perspective and guidance when independence concerns emerge.[125] If an IO discovers the appointing authority is implicated in the investigation, the legal advisor can pass this information to their supervisory judge advocate who may address it with the appointing authority's next superior commander.[126] This provides the IO an outlet to be candid and reveal critical information affecting the independence of the investigation without the fear of directly confronting the appointing authority and jeopardizing their career.

Moreover, as an objective party, the legal advisor may be able to combat an IO's frame of reference that is improperly shaping or affecting the investigation by providing another perspective. For example,

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> The major at the brigade level can and should seek out the SJA at the division level, and the SJA at the division level can and should seek out the SJA at the corps level for support and assistance on professional areas of interest. Unlike the formal chain of command applicable to everyone in every unit, the technical chain seeks to facilitate assistance among the JAs in the unit hierarchy. The nature of the legal profession often requires a stronger technical chain of supervision along JAGC channels than in other branches or communities of interest. *Id*.

[121] AR 27-26, *supra* note 119, at i; *see* AR 27-1, *supra* note 122, para. 3-3*b*(2).
[122] AR 27-26, *supra* note 119, rule 1.13.
[123] *Id*.
[124] *Id*.; Gade, *supra* note 123, at 10.
[125] *See* AR 15-6, *supra* note 14, para. 2-6*b*.
[126] *See* AR 15-6, *supra* note 14, para. 1-7; AR 27-26, *supra* note 119, rule 1.13*(c)*(5); Gade, *supra* note 123, at 10.

educating an IO on future use and disclosure of the investigation pursuant to the Freedom of Information Act (FOIA) should help the investigator stay within his scope and write to a specific audience by limiting redacted material.[127] If the IO's frame of reference is distorting the investigation to a point where it constitutes actual or implied bias, the legal advisor can immediately identify this and address it with the appointing authority and technical supervision to determine if another IO needs to be appointed.[128] This expanded role affirmatively empowers the legal advisor to be a proactive referee making the hard calls on sensitive issues.

Finally, it is important to note that AR 15-6 provides an additional check on the process by requiring a legal review of all investigations conducted pursuant to the regulation and strongly encouraging the review to be done by an attorney who has not already provided legal support to the investigation.[129] This provides a second set of legally trained eyes to review the investigation and look for any deficiencies or concerns that may affect the future use of the investigation.[130]

The value judge advocate oversight provides to the process is contingent upon one thing: well-trained and competent attorneys who are up to the task of making hard calls. Given the increasing responsibilities attorneys have in the AR 15-6 process, it is essential that all judge advocates are properly trained on their roles in the process and that they have strong support from the technical supervision chain.

### *3. Additional Considerations*

Despite the positive changes in AR 15-6, there are people who will never be satisfied with Army administrative investigations because they inherently lack total independence.[131] For these skeptics, the only way to

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[127] *See* Freedom of Information Act, 5 U.S.C. § 552 (2016) (providing the public full or partial access to information within the control of the federal government); AR 15-6, *supra* note 14, at para. 2-6*b*, 2-7*b*.

[128] *See* AR 15-6, *supra* note 14, para. 2-3, 2-6.

[129] *Id*. para. 2-7 (stating "[w]henever possible, the legal advisor designated to support the investigation or board will not conduct the legal review.").

[130] *Id*. para. 2-7.

[131] Doctors Without Borders continues to be unsatisfied with the results of the Army's investigation into the Kunduz hospital strike despite the fact that the investigation was very comprehensive and generally well done. Their primary complaint is based on the belief that an internal Army investigation is never truly independent. *See* Amnesty

gain their confidence is to use an investigatory body functionally independent of the organization that is under investigation.[132] However, it is not in the interest of the Army to remove the AR 15-6 process from command authority, nor would it be prudent. While much consideration is given to public perception of the administrative investigation process, it is critical to keep in mind the primary purpose of AR 15-6: to provide commanders an efficient fact-finding method so they can make informed decisions on how to address matters within their commands and maintain good order and discipline.[133] Command authority should not be minimized merely to gain a modicum of public confidence, especially when the process is sound. Highly sensitive investigations or ones likely to draw national media scrutiny are already withheld to higher levels to minimize the risk of mishandling by less experienced commanders and IOs.[134] As it stands, the latest version of AR 15-6 is more than sufficient for achieving its purpose.

In Keith Rohman's case study of the flaws in the Abu Ghraib investigation, he suggests hiring subject matter consultants as members of the investigative team, which is similar to corporate practice when conducting internal investigations into employee misconduct.[135] While this may provide an outside perspective,[136] any gains in public perception of credibility in the process may only be incremental and the fact that the consultant is paid by the Army may undercut any desired appearance of independence.

An effective way to mitigate public misperception is by synchronizing efforts between judge advocates and public affairs offices (PAO) to ensure accurate messaging and expectations to the public.[137] As seen with the Doctors Without Borders incident, mixed messages may breed

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International Press Release, *supra* note 34; MSF Press Release, *supra* note 34; Schulberg, *supra* note 2.

[132] *See* Rohman, *supra* note 2, at 36; Amnesty International Press Release, *supra* note 34; MSF Press Release, *supra* note 34; Schulberg, *supra* note 2.

[133] AR 15-6, *supra* note 14, para. 1-8; COMMANDER'S LEGAL HANDBOOK, *supra* note 19, at 99-100.

[134] AR 15-6, *supra* note 14, paras. 1-7, 2-1*c*.

[135] Rohman, *supra* note 2, at 37-38; *see* Mark Oakes & Tara Tune, *Effective Corporate Investigations*, 45 THE BRIEF (Winter 2016) (discussing corporations hiring firms to conduct internal investigations into employee misconduct).

[136] Rohman, *supra* note 2, at 37-38.

[137] Professional Experiences, *supra* note 4.

skepticism.[138] Judge advocates must be proactive and work with commanders and PAOs to ensure expectations are appropriately set and managed throughout an investigation.[139]

## IV. Conclusion

While the Army suffered embarrassment from a variety of administrative investigations, it also learned from these mistakes and took valuable steps forward, namely, addressing the fundamental independence concerns in AR 15-6. Although it is impossible to eradicate all perceptions of a lack of independence, the latest regulatory update is better equipped to mitigate perceptions of bias, conflicts of interest, and other issues inherent to internally conducted investigations. Ultimately, the judge advocate is the key to combatting public misperceptions.

The updates, however, are only as effective as the judge advocates shepherding the process. The JAG Corps must ensure its attorneys are adequately trained to fully understand their vital roles throughout the investigatory process. Judge advocates must know the regulation, anticipate second and third order effects that may arise from the investigation, have the fortitude to provide candid advice, and actively ensure accurate information is disseminated. With these regulatory updates, the Army is in a better position to prevent the mistakes of the past and maintain the trust of the American people.

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[138] Jethro Mullen & Ashley Fantz, *Civilians 'Accidentally Struck' in Afghan Hospital Bombing*, CNN (Oct. 6, 2015), http://www.cnn.com/2015/10/05/asia/afghanistan-doctors-without-borders-hospital/index.html ("Today the U.S. government has admitted that it was their airstrike that hit our hospital in Kunduz . . . . Their description of the attack keeps changing -- from collateral damage, to a tragic incident, to now attempting to pass responsibility to the Afghanistan government.").

[139] *See* JP 1-04, *supra* note 118, I-15.