TIME FOR CONGRESSIONAL ACTION: THE NECESSITY OF DELINEATING THE JURISDICTIONAL RESPONSIBILITIES OF FEDERAL DISTRICT COURTS, COURTS-MARTIAL, AND MILITARY COMMISSIONS TO TRY VIOLATIONS OF THE LAWS OF WAR

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Abstract

[a.1] This article: 1) explains the jurisdictional scope of U.S. prosecutions of violations of laws of war; and, 2) shows Congress needs to update the system to clearly delineate the jurisdiction of the three domestic legal fora available for war crimes prosecutions. It does so by first providing an overview of the Constitutional roles of the President and Congress in sanctioning violations of the laws of war. It then examines the three primary legal fora available under U.S. law for criminal prosecutions: federal district courts, courts-martial, and military commissions. After that, the article outlines the sources of punitive criminal law that can be applied in U.S. legal fora to prosecute violations of humanitarian international law: the U.S. Code, the Uniform Code of Military Justice, and customary international humanitarian law itself. It then discusses how the law violated impacts which forum can try a particular crime. The article then details the domestic legal restrictions on the President's authority in selecting the forum in which to prosecute a case. Next, the article explains how international law restricts the President's authority in this area. Finally, this article concludes by arguing that: 1) significant jurisdictional gaps in the U.S.'s ability to prosecute violations of international humanitarian law appear to exist; and, 2) congressional action is warranted to provide a clear and effective legal regime to empower decisive Presidential action in this area.

Table of Contents

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I. INTRODUCTION

> A list shall be compiled by the United Nations of all major criminals other than those provided for by local jurisdiction. . . . Thereafter the persons named on the approved list will, by solemn decree of the 32 United Nations, be declared world outlaws. No penalty will be inflicted on anyone who puts them to death in any circumstances. . . . As and when any of these persons falls into the hands of any of the troops or armed forces of the United Nations, the nearest officer of rank or equivalent of Major-General will forthwith convene a Court of Inquiry, not for the purpose of determining the guilt or innocence of the accused but merely to establish the fact of identification. Once identified, the said officer will have the outlaw or outlaws shot to death within six hours and without reference to higher authority. . . . By this means we should avoid all the tangles of legal procedure.
>
> Winston Churchill, November 9, 1943[1]

[I.1] Fortunately, or unfortunately depending on your views, the draconian methods and limited procedural due process espoused by Winston Churchill during the height of World War II are not currently legally available to the U.S. in responding to the modern day war criminals who now attack U.S. citizens and interests around the globe. Consequently, it is necessary that the U.S. be able to employ effective laws and procedures to enable it to exercise jurisdiction over and prosecute persons accused of violating the body of laws alternatively known as international humanitarian law, the laws of war, or the law of armed conflict, i.e. war criminals.[2] The recent need to apply such laws

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[1] Winston Churchill, *The Punishment Of War Criminals*, W.P. (43) 496, Nov. 9, 1943 (archived at the Churchill Archives Centre, Churchill College, Cambridge under reference number CHUR 04/310/105, on file with the author, and quoted in part in Gary J. Bass, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 185-86 (2000)). While Churchill may have initially proposed such harsh measures, ultimately a different tact was taken in the punishment of Axis war criminals following World War II.

[2] *See* Gabor Rona, International Law Under Fire: Interesting Times for International Humanitarian Law: Challenges from the "War on Terror,", 27 FLETCHER F. WORLD AFF. 55, n. 1 (2003) ("The terms 'international humanitarian law,' 'humanitarian law,' 'law of armed conflict,' '*jus in bello*,' and 'laws of war' are interchangeable. The term 'war' is somewhat archaic in (continued...)

and procedures has brought to the forefront of American discourse the issue of what is the proper domestic legal forum[3] for prosecuting war criminals captured during the current "War on Terrorism." In consideration of that issue, this article has two goals. The first goal is to explain the current state of the law regarding the jurisdictional scope of U.S. domestic prosecutions of violations of the laws of war. The second goal is to show that Congress needs to update the system currently in place in order to clearly delineate the jurisdictional responsibilities of the different U.S. legal fora now in existence. Such an update would prevent jurisdictional gaps from undermining the U.S.'s ability to effectively prosecute all individuals accused of violating the laws of war to the detriment of U.S. interests around the globe. Further, congressional action would provide a clear mandate on if and when the U.S. is willing to settle for diminished due process in prosecuting war criminals,[4] an issue that is not being answered clearly today in an era when the very concept of war and combatants appears to be in flux.

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international law, having been replaced by 'armed conflict.' The distinction reflects a change from past times, in which wars were declared, to the present, in which facts on the ground are rightfully given greater emphasis over the declarations of parties to conflict."); Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (April, 2000) (briefly discussing the interchangeable use of these terms).

[3] While the U.S. could arguably turn an accused over to a foreign country or an international tribunal, such as the International Criminal Court, this article will only be discussing U.S. options for trying war criminals in U.S. courts or tribunals.

[4] *Cf. Hamdi v. Rumsfeld*, 124 S. Ct. 2633,2660 (2004) (Scalia, J., dissent) (noting the ability of Congress to authorize the suspension of the writ of habeas corpus as a tool in the War on Terrorism and arguing that if "civil rights are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires . . .").

A. A Background of The Issue

[I.A.1] In the U.S., there are three domestic legal fora available for war crimes prosecutions, each offering varying degrees of due process: federal district courts, courts-martial, and military commissions. Variations in the due process protections afforded by these differing fora created controversy around the Bush Administration's decision to try war criminals captured in Afghanistan and elsewhere before military commissions,[5] i.e., the legal forum perceived to have the least inherent due process protections. Since that announcement following September 11, 2001, many legal, political, military, and media commentators have focused on the broad discretion claimed by the President in his decision to try suspected terrorists/war criminals before military commissions and not federal district courts.[6] Critiques of the President's exercise of this authority have often focused on two areas. On the one hand, some challenge the President's claim to unfettered authority to try alleged war criminals via ad hoc procedures established without the explicit authorization of Congress or subject to review from the Judiciary.[7] On the other hand, some challenge the decision

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[5] *See* Military Order, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

[6] *See* Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1 (2001); Daniel A. Rezneck & Jonathan F. Potter, *Military Tribunals, the Constitution, and the UCMJ*, 2002 FED. CTS. L. REV. (June 2002, at 3); Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, ARMY LAW. , Mar. 2002, at 19; THE CONSTITUTION PROJECT, RECOMMENDATIONS FOR THE USE OF MILITARY COMMISSIONS (2002).

[7] The Supreme Court decision in *Rasul v. Bush* demonstrates that at least some form of habeas corpus review will almost certainly be available to any persons tried pursuant to the President's current plans to use military commissions to prosecute war criminals linked to Al Qaeda. *See Rasul v. Bush* 124 S. Ct. 2686 (2004). In *Rasul*, the Court found that alleged enemy combatants being detained without trial at Guantanamo Bay, Cuba, by U.S. Armed Forces do have the right to bring habeas corpus claims in U.S. federal district courts to contest the legality of their detention. If such individuals have the right to contest their detention without trial, they presumably would also be able to contest the legality of any criminal prosecutions and ensuing periods of incarceration that could (continued...)

to try foreign combatants without regard to traditional U.S. due process protections, arguing that this is little more than "victor's justice" that threatens to impugn the validity of any judgments that may ultimately be handed down.

[I.A.2] While the issue of how the U.S. should try war criminals has come to the fore in the context of U.S. domestic prosecutions of members of Al Qaeda and other stateless terrorist organizations, its significance goes far beyond that limited arena. As current U.S. military operations in Iraq, Afghanistan, and elsewhere demonstrate, the war criminals the U.S. may try in the foreseeable future may not all be cut from the same cloth as those of Al Qaeda. It is conceivable that the U.S. may find itself prosecuting legitimate members of a foreign country's armed forces, or even foreign heads of state.[8] Such prosecutions could stem from either actions taken against U.S. Armed Forces and nationals or for actions foreign combatants took against their own citizenry. Further, as U.S. military operations under hostile conditions continue, the U.S. is beginning to find itself faced with the responsibility of trying U.S. nationals for alleged actions that could constitute war crimes.[9]

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eventually occur. This is especially so considering the possibility that some such individuals could receive sentences of death. *See* Military Order, 66 Fed. Reg. 57,833 (November 13, 2001) (Presidential Order allowing the military commissions established following September 11 to adjudge sentences of life imprisonment or death.).

[8] *See* Susan Sachs, *The Capture of Hussein: Ex-Dictator*, N.Y. TIMES, Dec. 15, 2003, at A1 (describing the U.S. capture of Saddam Hussein, the former President of Iraq); *see also* Statement of Ruth Wedgwood Before The United States Senate Committee on Governmental Affairs, Prosecuting Iraqi War Crimes: A Consideration of the Different Forum Options (Apr. 10, 2003), *at* http://www.senate.gov/~gov_affairs/041003wedgewood.htm (discussing possible fora for the prosecution of Saddam Hussein and members of his regime).

[9] For descriptions of the scandals surrounding allegations of U.S. military mistreatment of prisoners captured during armed conflicts in Afghanistan and Iraq, *See* Eric Schmitt, *Three Soldiers Are Charged With Assault On Prisoners*, N.Y. TIMES, Nov. 19, 2003 at A10; Farnaz Fassihi, *U.S. Begins Prisoner-Abuse Probes: Photos of Iraqi Detainees Mistreated by Americans Spark*
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[I.A.3] As discussed in greater detail in the Sections below, with a change in nationality and/or combatant status of an accused comes variations in which domestic U.S. legal forum has jurisdiction to hear the case, i.e. not all U.S. fora can try all persons accused of all war crimes. Accordingly, this article will examine U.S. domestic prosecutions in terms of three distinct groups: 1) members of the U.S. Armed Forces; 2) U.S. nationals accompanying U.S. Armed Forces or otherwise located in an area of armed conflict, such as civilian contractors working for the U.S. Armed Forces, government employees like CIA paramilitaries,[10] or U.S. mercenaries or bounty hunters;[11] and, 3) foreign

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International Anger, Wall St. J., May 3, 2004; Douglas Jehl & Eric Schmitt, *Army Discloses Criminal Inquiry on Prison Abuse*, N.Y. TIMES, May 5, 2004; Neil A. Lewis & Eric Lichtblau, *Red Cross Says That For Months It Complained Of Iraq Prison Abuses To The U.S.*, N.Y. TIMES, May 7, 2004; Tony Perry & Esther Schrader, *Marines Were Investigated For Iraq Jail Abuse: The 2003 Cases Of Eight Reservists, Including One In Which An Inmate Died, Prompted Officials In The Corps To Change How Their Prisons Are Run*, L.A. Times, May 7, 2004; James Risen & David Johnston, *Photos Of Dead May Indicate Graver Abuse*, N.Y. Times, May 7, 2004; Dana Priest & Joe Stephens, *The Road To Abu Ghraib: Secret World Of U.S. Interrogation*, WASH. POST, May 11, 2004; Rajiv Chandrasekaran & Scott Wilson, *Mistreatment Of Detainees Went Beyond Guard's Abuse: Ex-Prisoners, Red Cross Cite Flawed Arrests, Denial of Rights*, WASH. POST, May 11, 2004; David Johnston & Thom Shanker, *Pentagon Approved Intense Interrogation Techniques For Sept. 11 Suspect At Guantanamo*, N.Y. TIMES, May 21, 2005; Greg Miller & Richard A. Serrano, *Army Widens Abuse Probe: Two Soldiers Are Ordered To Stay In Iraq As Officials Try To Learn Whether Intelligence Officers, Not Just Rogue MPs, Were Behind Mistreatment*, L.A. TIMES, May 24, 2004; Douglas Jehl & David Rohde, *Afghan Deaths Linked To Unit At Iraq Prison*, N.Y. TIMES, May 24, 2004 (all describing the scandal surrounding allegations of U.S. military mistreatment of prisoners captured during the armed conflicts in Afghanistan and Iraq); *Captives: TV Report Says Marine Shot Prisoner*, N.Y. Times, Nov. 16, 2005 (news report claiming a U.S. Marine shot and killed a wounded and apparently unarmed Iraqi prisoner during assault on insurgent positions in Falluja, Iraq); *see also* Jordan Paust, *Abuse of Iraqi Detainees at Abu Ghraib: Will Prosecution and Cashiering of a Few Soldiers Comply with International Law*, JURIST, May 10, 2004, *at* http://jurist.law.pitt.edu/forum/paust1.php (discussing the U.S. government's obligation to both prevent and prosecute war crimes committed by U.S. Armed Forces).

[10] *See* Clayton Collins, *War-Zone Security Is A Job For…Private Contractors?*, CHRISTIAN SCI. MONITOR, May 3, 2004; Greg Jaffe, *Legal Loophole Arises in Iraq*, Wall St. J., May 4, 2004; Joel Brinkley & James Glanz, *Contract Workers Implicated In February Army Report On Prison Abuse Remain On The Job*, N.Y. TIMES, May 4, 2004; David Johnston & Neil A. Lewis, *U.S. Examines* (continued...)

combatants, either in U.S. custody as prisoners of war or as unlawful combatants.[12] Further, while many crimes may be committed while an armed conflict is occurring, this article will only focus on individuals accused of violations of international humanitarian law. These violations are usually considered to encompass: 1) grave breaches of the Geneva Conventions of 1949; 2) violations of Common Article 3 of the Geneva Conventions of 1949; 3) genocide; 4) crimes against humanity; and, 5) violations of the laws and customs of war.[13]

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Role of C.I.A. And Employees In Iraq Deaths, N.Y. TIMES, May 6, 2004; Vince Crawley, *Small Army Of Civilian Security Workers Has No Clear Guidance, Rumsfeld Acknowledges*, ARMY TIMES, May 5, 2004; Joel Brinkley & James Glanz, *Contractors in Sensitive Roles, Unchecked*, N.Y. TIMES, May 6, 2004, at A15; Dan Eggan & Walter Pincus, *Ashcroft Says U.S. Can Prosecute Civilian Contractors For Prison Abuse*, WASH. POST, May 7, 2004; Renae Merle & Ellen McCarthy, *6 Employees From CACI International, Titan Referred for Prosecution*, WASH POST, Aug. 26, 2004, at A18; Ellen McCarthy & Renase Merle, *Contractors and the Law: Prison Abuse Cases Renew Debate*, WASH. POST, Aug. 27, 2004, at E01 (all discussing the role and criminal liability of civilian contractors and C.I.A. employees in combat and combat support operations during the armed conflicts in Afghanistan and Iraq).

[11] *See* Amir Shah, *Afghans Allege Three Americans Ran Jail in Kabul: U.S. Says It Has No Ties To Purported Security Agents*, WASH. POST, July 9, 2004, at A15; David Rohde, *Portrait of a U.S. Vigilante in Afghanistan*, N.Y. TIMES, July 11, 2004; Mark McDonald, *A U.S. Prison Torture Trial – In Kabul: Bounty Hunter Is Accused of Running His Own Afghan Jail*, PHILADELPHIA INQUIRER, July 21, 2004; Hamida Ghafour, *Three Alleged U.S. Vigilantes are Sentenced in Afghanistan: The Men, Accused of Torturing Detainees in a Private Prison in Kabul, Receive Lengthy Terms*, L.A. TIMES, Sept. 16, 2004, at A3; Tim O'Brien, *U.S. Due Process Claims Fall Flat in Afghanistan Court: 'Soldier of Fortune' Gets 10 Years for Running Private Jail, Allegedly with Pentagon Approval*, N.J. LAW JOURNAL, Sept. 27, 2004 (all discussing the arrest, trial, and conviction in Afghanistan of a number of "freelancing" American "soldiers of fortune" for kidnapping and torturing alleged terrorist suspects).

[12] *See infra* notes 221-236 and accompanying text discussing the distinction between foreign combatants held as prisoners of war and those held as unlawful combatants.

[13] *See* Statute of the International Tribunal for the Former Yugoslavia, Articles 1-5, U.N. Doc. S/25704, Annex (1993) *reprinted in* 32 I.L.M. 1192 (1993) [hereinafter ICTY Statute] (identifying grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity, as "serious violations of international humanitarian law"); Statute of the
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B. A Roadmap of This Article

[I.B.1] As stated at the outset, this article has two goals: to detail the current state of the law on U.S. jurisdiction over war crimes prosecutions and to argue that Congress should act to modify that law as it now stands. To reach the first goal, this article will examine in detail the three domestic legal fora available for prosecuting war crimes. Detailing the legal restrictions that exist on the President's authority to determine which of these domestic legal fora to utilize will be an essential aspect of this examination. In this process, two points will become apparent. First, both domestic and international law significantly restrict the President's authority to select the forum in which to proceed when prosecuting persons accused of committing war crimes. Second, even with recourse to all three of the domestic legal fora currently available, including military commissions, jurisdictional gaps may exist in the U.S.'s ability to prosecute individuals accused of violating the laws of war. Any such gaps would become even more pronounced should current cases winding

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International Tribunal for Rwanda, Articles 1-4, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598 (1994) [hereinafter ICTR Statute] (identifying genocide, crimes against humanity, and violations of Common Article 3, as "serious violations of international humanitarian law"); Rome Statute of the International Criminal Court, July 17, 1998, Articles 5-8, UN Doc. A/CONF.183/9*, *reprinted in* 37 I.L.M. 999 (1998) [hereinafter ICC Statute] (identifying genocide, crimes against humanity, grave breaches of the Geneva Conventions, violations of Common Article 3, and violations of the laws and customs of armed conflict, as "serious crimes of concern to the international community as a whole"). S*ee also infra* notes 61-83 and accompanying text providing definitions for these crimes under customary international humanitarian law. It should be noted that while the ICTY Statute limits crimes against humanity to acts occurring during armed conflicts, i.e. during war, neither the ICTR Statute nor the ICC Statute requires such a nexus. Similarly, both U.S. domestic law and international law acknowledge that the crime of genocide may occur during times of war and peace. Therefore, it could be asked whether crimes against humanity and genocide should actually be considered true "war crimes." *See generally* M. Cherif Bassiouni, *Introduction to the Symposium: The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 199, 200-01 (1998) (stating that 20th Century proscriptions of crimes against humanity and genocide "expanded the general scope of the term 'international humanitarian law'").

their way through the federal courts be decided in such a way that limits the use of military commissions to try violations of the laws of war.[14] For these reasons this article concludes that congressional action is necessary in order to provide a clear jurisdictional framework for the effective enforcement of international humanitarian law by the U.S.

[I.B.2] This article will take the following course. First, Section II will provide a brief overview of the roles that the Constitution sets for the President and Congress in sanctioning violations of the laws of war. Next, Section III will examine the three primary legal fora available under U.S. law for criminal prosecutions: federal district courts, courts-martial, and military commissions. Then, Section IV will outline the sources of punitive criminal law that can be applied in U.S. legal fora to prosecute violations of international humanitarian law: the U.S. Code, the Uniform Code of Military Justice, and customary international humanitarian law itself. It will also discuss how the law violated impacts which forum can try a particular crime. In Section V, this article will detail the domestic legal restrictions on the President's authority in selecting the forum in which to prosecute a case. Specifically, this Section will examine how the President's ability to choose the forum in which to proceed is effected by the location of the crime, the existence of an armed conflict, and the combatant status and nationality of the accused. Next, Section VI will explain how international law restricts the President's authority in this area. Finally, this article will conclude by arguing that: 1) significant jurisdictional gaps in the U.S.'s ability to prosecute violations of international humanitarian law appear to exist; and, 2) congressional action is warranted in order to provide a clear and effective legal regime to empower decisive Presidential action in this area.

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[14] *See Hamdan v. Rumsfeld*, No. 04-1519 (D.D.C. Nov. 8, 2004), (D.C. District Court judge's order halting the trial before a military commission of an accused Al Qaeda terrorist held in Guantanamo Bay, Cuba); Neil A. Lewis, *Judge Halts War-Crime Trial at Guantanamo*, N.Y. TIMES, Nov. 9, 2004 (discussing the aforesaid order).

C. A Few Points to Consider at the Outset

[I.C.1] In the Conclusion, this article will argue that any congressional action in this area should focus on answering the following ten questions, questions that should also be kept in mind by the reader at the outset of this article:

1) For the purposes of prosecutions in U.S. domestic fora, what triggers the existence of an armed conflict such that the laws of war apply to persons taking part in the hostilities? Is it a Presidential finding of fact, a Congressional declaration of war, or the de facto existence of hostilities sufficiently intense to objectively warrant being called an armed conflict?

2) During armed conflicts to which the U.S. is a party, which U.S. fora can and cannot try U.S. nationals, loyal or subversive, for war crimes?

3) In armed conflicts to which the U.S. is a party, which U.S. fora can and cannot try U.S. Armed Forces for war crimes?

4) During armed conflicts to which the U.S. is a party, which U.S. fora can and cannot try enemy prisoners of war for war crimes?

5) During armed conflicts to which the U.S. is a party, which U.S. fora can and cannot try unlawful enemy combatants for war crimes?

6) During armed conflicts to which the U.S. is a party, when can U.S. fora try non-U.S. combatants for actions not taken against U.S. Armed Forces, U.S. nationals, or U.S. Allies?

7) When do U.S. fora have jurisdiction over war crimes occurring in armed conflicts to which the U.S. is not a party? And does the answer depend on whether the victims and/or perpetrators are U.S. nationals?

8) When should U.S. fora try persons for violations of the laws of war instead of trying them for analogous common crimes, such as murder, rape, assault, theft, etc?

9) What mechanism should be used to determine whether detained enemy combatants are prisoners of war or unlawful combatants for purposes of criminal prosecution?[15] Does the forum trying the combatant determine this or should it be bound by a determination of the President or some other type of deliberative tribunal?

10) If the jurisdiction of federal district courts, courts-martial, and military commissions to try war crimes is to be concurrent, what criteria should the President use when determining which fora to utilize? Should such criteria even exist or should it be left to the sole discretion of the President?[16]

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[15] The related issue of what procedure should be used to determine whether a detained person is even an enemy combatant justifying detention is beyond the scope of this article. *Cf.* *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004)(finding that a U.S. citizen being held as an enemy combatant should have a meaningful opportunity to contest the factual basis for his detention); *Rasul v. Bush*, 124 S. Ct. 2686 (finding U.S. courts have jurisdiction to consider challenges to the detention of alleged enemy combatants held at Guantanamo Bay, Cuba).

[16] *See generally* MANUAL FOR COURTS-MARTIAL, UNITED STATES, (2002), app. 3 (containing the 1984 Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Certain Crimes which "establishes policy for the Department of Justice and the Department of Defense with regard to the investigation and prosecution of criminal matters over which the two Departments have jurisdiction"). The Manual for Courts Martial is a publication of the Executive Branch that comprises the Uniform Code of Military Justice, the Military Rules of Evidence, the Rules for Courts-Martial, and numerous other supplementary material concerned with the administration of justice within the military. *See infra* note 37and accompanying text discussing the Uniform Code of Military Justice and *infra* notes 39-41and accompanying text discussing the Military Rules of Evidence and the Rules for Courts-Martial.

II. THE CONSTITUTIONAL FRAMEWORK UNDERPINNING PRESIDENTIAL AND CONGRESSIONAL ROLES IN SANCTIONING VIOLATIONS OF THE LAWS OF WAR

[II.1] Under the U.S. Constitution, the President is responsible for both the execution of military force and the enforcement of U.S. criminal laws.[17] As such, the burden of determining what specific legal and military actions to take to protect the U.S. and its citizenry from attack falls upon him. However, as discussed in much greater detail in the following Sections, Congress does have the ability to limit, or expand, the options open to the President in executing those powers. This is because the Constitution grants Congress the powers to declare war,[18] establish legal systems for the regulation and discipline of the U.S. Armed Forces,[19] pass laws regulating the conduct of U.S. and foreign combatants during armed conflicts,[20] and suspend, or authorize the suspension of, the writ of habeas corpus.[21] Therefore, in terms of Constitutional prerogatives, it can be said that the

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[17] U.S. CONST. art. II, § 2 ("The President shall be the Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into actual Service of the United States . . . "); U.S. CONST. art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed….").

[18] U.S. CONST. art. I, § 8 ("The Congress shall have the Power . . . To declare War . . .").

[19] U.S. CONST. art. I, § 8 ("The Congress shall have the Power . . . To make Rules for the Government and Regulation of the land and naval Forces"); *see also Coleman v. Tennessee*, 97 U.S. 509, 514 (1878) ("As Congress is expressly authorized by the Constitution 'to raise and support armies, and to make rules for the government and regulation of the land and naval forces,' its control over the whole subject of the formation, organization, and government of the national armies, including therein the punishment of offences committed by persons in the military service, would seem to be plenary.")

[20] Article I of the Constitution grants Congress the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations," a power which would include the authority to define what is and is not a violation of the laws of war. U.S. CONST. art. I, § 8.

[21] U.S. CONST. art. I, § 9 ("[P]rivilege of the Writ of Habeas Corpus shall not be suspended, (continued...)

President and Congress share responsibility in the area of providing for the enforcement of the laws of war.

[II.2] When considering the President's authority to determine which domestic legal fora to utilize in prosecuting war crimes violations and what procedures to apply, it is worth considering Justice Jackson's concurring opinion in *Youngstown Sheet & Tube v. Sawyer*.[22] There, Justice Jackson provided a concise analytical framework for examining the scope of the President's authority to take actions pursuant to his foreign affairs and commander in chief powers. Justice Jackson described three scenarios in which the President may find himself. First, the President may act in concurrence with Congress:

> *When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum*, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. [An action] executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.[23]

Second, the President may act when Congress has remained silent and not expressed its will:

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unless when in Cases of Rebellion or Invasion the public Safety may require it."); *Hamdi*, 124 S. Ct. at 2665 (Scalia, J., dissenting) (Citing *Ex parte Bollman,* 8 U.S. (4 Cranch) 75, 101, (1807) and *Ex parte Merryman*, 17 F. Cas. 144, 151-52 (C.D. Md. 1861) (No. 9487) for the proposition that, "[a]lthough this provision does not state that suspension must be effected by, or authorized by, a legislative act, it has been so understood, consistent with English practice and the Clause's placement in Article I.").

[22] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

[23] *Youngstown Sheet & Tube Co.*, 343 U.S. at 635-37 (emphasis added).

> *When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers*, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.[24]

Finally, the President may act in contravention to the will of Congress:

> *When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.* Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.[25]

In light of this framework, as well as the understanding that Congress and the President share authority in the area of sanctioning violations of the laws of war, this article proceeds from the understanding that Congress can, and has, limited the President's ability to decide what forum in which to proceed and the procedures that must be followed when sanctioning violations of the laws of war. Such restrictions could, and have, come about through the passage of statutes and/or the ratification of treaties.[26] As a plurality of the Supreme Court recently noted in *Hamdi v. Rumsfeld*,

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[24] *Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (emphasis added).

[25] *Youngstown Sheet & Tube Co.*, 343 U.S. at 637-38 (emphasis added).

[26] U.S. CONST. art. VI ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . "

a case involving the detention without trial of an alleged enemy combatant who was also a U.S. citizen:

> We have long since made clear that *a state of war is not a blank check for the President* when it comes to the rights of the Nation's citizens. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.[27]

III. LEGAL FORA AVAILABLE UNDER U.S. FEDERAL LAW FOR CRIMINAL PROSECUTIONS

[III.1] In prosecuting individuals accused of violations of the laws of war, the U.S. has three legal fora available for use, each with distinct characteristics: federal district courts, courts-martial, and military commissions.[28] The importance of clearly distinguishing between these three fora, as will

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[27] *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2650 (2004) (O'Connor, J., plurality opinion) (emphasis added). In *Hamdi*, the Court was faced with the U.S.'s detention without trial of a U.S. citizen who was an alleged member of the Taliban captured in Afghanistan. Hamdi alleged that his detention, among other faults, violated 18 U.S.C. § 4001(a), which provides that no "citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. §4001(a) (2000).The plurality opinion refused to reach the question of whether Article II granted the President plenary authority to detain alleged enemy combatants without explicit congressional authorization. Instead, the Court found that the Authorization for the Use of Military Force passed by Congress following September 11 did authorize Hamdi's detention, provided Hamdi was given a "meaningful opportunity to contest the factual basis for that detention." *Hamdi*, 124 S. Ct. at 2635-39.

[28] At the outset, one note on terminology is warranted. Many older judicial opinions have used the term "military tribunal" when referring to both courts-martial and military commissions, at times using all three terms interchangeably. While both fora are generically tribunals conducted by the military, courts-martial and military commissions are distinct legal fora. *See generally* U.S. DEP'T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 13 (1956) ("In the Army of the United States, military jurisdiction is exercised through the following military tribunals: *a.* Courts-martial. *b.* Military commissions. *c.* Provost courts. *d.* Other military tribunals."). Further, the term "military tribunal" is now predominately used in conjunction with military commissions, such that the two terms appear to have been used interchangeably in the President's Military Order of Nov. 13, 2001. *See* Military Order, 66 Fed. Reg. 57,833 (November 13, 2001) (compare Section 1(e) and Section 7(b)(1), using the term "military tribunal," with the rest of the text, which uses the (continued...)

be discussed in detail in Sections IV and V, is that their jurisdictions are neither mutually exclusive nor do they neatly overlap each other in exact concurrence.

A. Article III Federal District Courts

[III.A.1] Preeminent among U.S. legal fora are the federal district courts that sit in each state. Article III, Section 1 of the Constitution vests the federal Judicial power in one Supreme Court and in such inferior courts as established by Congress.[29] In application of that provision, Congress established the various federal district courts, dictating that:

> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.[30]

As such, federal district courts are part of the Judicial Branch of the federal government, co-equal with Congress and the President.

[III.A.2] Unique to federal district courts, in comparison to the other fora discussed in this article, are the constitutionally mandated independent nature of their judges[31] and the due process protections inherent in their procedures. As the Supreme Court noted in *United States ex rel. Toth v. Quarles*:

(...continued)
term "military commission").

[29] "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

[30] 18 U.S.C. § 3231 (2000).

[31] Article III of the Constitution ensures the independence of federal judges by requiring life appointments and mandating that the pay of federal judges may not be diminished during their tenure. U.S. CONST. art. III, § 1.

> Article III provides for the establishment of a court system as one of the separate but coordinate branches of the National Government. It is the primary, indeed the sole business of these courts to try cases and controversies between individuals and between individuals and the Government. This includes trial of criminal cases. These courts are presided over by judges appointed for life, subject only to removal by impeachment. … The provisions of Article III were designed to give judges maximum freedom from possible coercion or influence by the executive or legislative branches of the Government. But the Constitution and the Amendments in the Bill of Rights show that the Founders were not satisfied with leaving determination of guilt or innocence to judges, even though wholly independent. They further provided that no person should be held to answer in those courts for capital or other infamous crimes unless on the presentment or indictment of a grand jury drawn from the body of the people. Other safeguards designed to protect defendants against oppressive governmental practices were included.[32]

Due to these and other constitutionally mandated protections, such as the right to trial by jury and to a speedy and public trial, the Supreme Court has time and time again reiterated that federal criminal prosecutions, with few exceptions, should occur in civilian federal district courts.[33]

B. Courts-Martial Under the Uniform Code of Military Justice (UCMJ)

[III.B.1] Since the U.S. Revolutionary War, courts-martial have stood alongside Article III federal district courts as a distinct and separate system of criminal justice available for prosecuting members of the U.S. Armed Forces.[34] Unlike federal district courts grounded in the Judicial Power of Article

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[32] *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15-16 (1955).

[33] *Reid v. Covert*, 354 U.S. 1, 21 (1957) ("Under the grand design of the Constitution civilian courts are the normal repositories of power to try persons charged with crimes against the United States."); *see infra* notes 186-209 and accompanying text (discussing the Supreme Court's limitations on the use of courts-martial to prosecute U.S. civilians).

[34] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 47-49 (2d ed. 1920); *see also generally* Kevin J. Barry, *A Face Lift (And Much More) For An Aging Beauty: The Cox Commission Recommendations To Rejuvenate The Uniform Code Of Military Justice*, 2002 L. REV. M.S.U.-D.C.L. 57 (Spring, 2002); Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements* (continued...)

III, the courts-martial system derives its authority from the Article I powers of Congress.[35] Although Article II, Section 2, of the Constitution establishes the President as the Commander in Chief of the Armed Forces, Article I, Section 8, grants Congress authority to pass laws for the regulation of the land and naval forces.[36] In execution of that authority, Congress in 1950 passed legislation that became the Uniform Code of Military Justice (UCMJ),[37] reforming the system that had previously controlled military justice in the U.S. Armed Forces.[38] Today, the UCMJ is the statutory foundation of the courts-martial system used to prosecute members of the U.S. Armed Forces and certain others for crimes committed while a part of or connected to the Armed Forces.

(...continued)
of Military Governance in a Madisonian Democracy, 70 GEO. WASH. L. REV. 649 (August 2002) (both discussing the history and background of the military justice system).

[35] *See Dynes v. Hoover*, 61 U.S. 65, 79 (1858) (Stating that the Constitution demonstrates that "Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other."); WINTHROP, *supra* note 34, at 47-49; *see also* ERWIN CHEMERINSKY FEDERAL JURISDICTION 207-45 (2d ed. 1994) (discussing other legislative courts utilized within the federal system).

[36] "The Congress shall have the Power … To make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. I, § 8.

[37] *See Barry, supra* note 34 (discussing the history of the military justice system). The Uniform Code of Military Justice (UCMJ) comprises 10 U.S.C. §§ 801-946, which are internally numbered as Articles 1-146 and cited as Articles 1-146, UCMJ. Articles 18, 19, and 20, UCMJ, distinguish between general, special, and summary courts-martial. Art. 18, 19, 20, UCMJ, 10 U.S.C. §§ 818, 819, 820 (2000). General courts-martial are the rough equivalent of felony trials and have the authority to sentence an accused to death.

[38] *See United States v. Norfleet*, 53 M.J. 262, 266 (C.A.A.F. 2000) (citing Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953) for the proposition that, "[t]he substantial criticism of the military justice system as it operated in World War II led to enactment of the Uniform Code of Military Justice, which contained a wide variety of reforms designed to minimize the influence of command over the court-martial process.").

[III.B.2] While fundamental differences exist between the constitutional foundation of federal district courts and courts-martial, both fora do essentially follow the same fundamental "script" inherent to the American adversarial process.[39] This stems in large part from the guidance Congress gave to the President for setting the rules and procedures to be used in courts-martial:

> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
>
> (b) All rules and regulations made under this article shall be uniform insofar as practicable.[40]

In accord with this guidance, the Rules for Court-Martial and the Military Rules of Evidence adopted by the President and contained within the Manual for Courts-Martial generally track the Federal Rules of Criminal Procedure and the Federal Rules of Evidence respectively.[41]

[III.B.3] Despite these similarities in procedure, the unique nature and purpose of the Armed Forces mandates that a number of the constitutional protections inherent in federal district courts simply

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[39] *See Willenbring v. Neurauter*, 48 M.J. 152, 157 (C.A.A.F. 1998) ("Congress and the courts have ensured that military trials are similar in many respects to civilian proceedings, but it is well established that courts-martial – which are authorized by statutes enacted pursuant to Article I of the Constitution – need not provide a military accused with the same procedural rights available to a civilian defendant in a criminal trial conducted under Article III.").

[40] Art. 36, UCMJ, 10 U.S.C. § 836 (2000).

[41] *See* James A. Young III, *The Accomplice In American Military Law*, 45 A.F. L. REV. 59, 67 (1998) ("The Rules for Courts-Martial . . . are based, where possible, on the Federal Rules of Criminal Procedure."); *United States v. Grant*, 56 M.J. 410, 414 (2002) ("the Military Rules of Evidence are largely derived from the Federal Rules of Evidence…").

do not apply in courts-martial.[42] The most notable are the rights to trial before an independent Article III judge, trial by civilian jury, and indictment by grand jury.[43] As such, when confronted with the case of an overseas service member's spouse who had been tried by court-martial in 1953, the Supreme Court stated:

> *Under the grand design of the Constitution civilian courts are the normal repositories of power to try persons charged with crimes against the United States.* And to protect persons brought before these courts, Article III and the Fifth, Sixth, and Eighth Amendments establish the right to trial by jury, to indictment by a grand jury and a number of other specific safeguards. By way of contrast *the jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. I, § 8, and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law.* Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections.[44]

[III.B.4] In sum, because courts-martial are separate from Article III courts, a number of the constitutional protections inherent in those courts do not apply. However, because those rights do

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[42] It should also be noted that some substantive Constitutional protections, like freedom of speech and association, are more readily restricted within the U.S. Armed Forces than within civilian society. *See United States v. Moore*, 58 M.J. 466, 468 (C.A.A.F. 2003) (citing, in part, *Parker v. Levy*, 417 U.S. 733, 743 (1974)).

[43] *See Weiss v. United States*, 510 U.S. 163, 179-81 (1994) (approving the use of military judges lacking not just a life term but any fixed term of office); *Palmore v. United States*, 411 U.S. 389, 404 (1973) (noting that the constitution allows for non-Article III judges to be used in courts-martial); *United States v. Crawford*, 15 C.M.A. 31, 48 (1964) ("The right of trial by jury guaranteed by the 6th Amendment to the Constitution of the United States is not applicable in a trial by military court-martial."); *United States v. Kirsch*, 15 U.S.C.M.A. 84, 96 (1964) (noting that grand jury proceedings were not applicable to the military justice system); *see also* Colonel Fredric I. Lederer & Lieutenant Colonel Frederic L. Borch, *Does The Fourth Amendment Apply To The Armed Forces?*, 144 MIL. L. REV. 110 (1994) (discussing the applicability of the Bill of Rights to the military justice system).

[44] *Reid v. Covert*, 354 U.S. 1, 21 (1957) (emphasis added).

not apply, the Supreme Court, as will be seen in more detail in Section IV, has severely limited the jurisdictional reach of courts-martial to try those outside the U.S. Armed Forces.

C. Common Law Military Commissions

[III.C.1] Distinct from both Article III federal district courts and Article I courts-martial are military commissions. Military commissions are common law war courts whose procedures and jurisdiction are currently neither established by statute nor specifically referenced by the Constitution.[45] Put simply, military commissions are ad hoc tribunals convened out of necessity by military authorities during times of war or armed conflict in order to expediently punish criminals of many types.[46] As

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[45] *See Madsen v. Kinsella*, 343 U.S. 341, 346-47 (1952). However, the Manual for Courts-Martial does state that"[s]ubject to any applicable rule of international law or to any regulations prescribed by the President or by other competent authority, military commissions and provost courts shall be guided by the appropriate principals of law and rule of procedure and evidence prescribed for courts-martial." *Supra* note 16 at pmbl. ¶ 2(b)(2).

[46] This article will only discuss the use of military commissions to try violations of the laws of war. As made clear in *Madsen*, military commissions can be used to try violations of normal criminal statutes in areas of armed conflict or in occupied territories. *See Madsen*, 343 U.S. at 356; *see also Duncan v. Kahanamoku*, 327 U.S. 304 (1936) (discussing and rejecting the use of military commissions in Hawaii after a state of "martial law" had been declared following the attack on Pearl Harbor). The exercise of such types of "military jurisdiction" is explicitly envisioned in the Manual for Courts-Martial, which states that military jurisdiction can be exercised by:

> (1) A government in the exercise of that branch of the municipal law which regulates its military establishment. (Military law).
>
> (2) A government temporarily governing the civil population within its territory or a portion of its territory through its military forces as necessity may require. (Martial law).
>
> (3) A belligerent occupying enemy territory. (Military government).
>
> (4) A government with respect to offenses against the law of war.

Manual for Courts-Martial, *supra* note 16, at pmbl ¶ 2(a). The exercise of military jurisdiction for purposes other than prosecuting offenses against the law of war is beyond the scope of this article.

the noted military justice scholar Colonel William Winthrop commented:

> [I]t is those provisions of the Constitution which empower Congress to "declare war" and "raise armies," and which, in authorizing the initiation of war, authorize the employment of all necessary and proper agencies for its due prosecution, from which this tribunal derives its original sanction. Its authority is thus the same as the authority for the making and waging of war and for the exercise of military government and martial law. The commission is simply an instrumentality for the more efficient execution of the war powers vested in Congress and the power vested in the President as Commander-in-chief in war. In some instances … Congress has specifically recognized the military commission as the proper war-court, and in terms provided for the trial thereby of certain offenses. In general, however, it has left it to the President, and the military commanders representing him, to employ the commission, as occasion may require, for the investigation and punishment of violations of the laws of war and other offenses not cognizable by court-martial.[47]

[III.C.2] While Congress has not codified the structure and use of military commissions, various provisions of the UCMJ specifically acknowledge the continued relevance and efficacy of military commissions to conduct trials during times of armed conflict.[48] In addition to the previously quoted

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[47] WINTHROP, *supra* note 34, at 831, cited in *Madsen*, 343 U.S. at 346 n.9.

[48] Likewise, as recently as 1996, the House Judiciary Committee acknowledged the continuing relevancy of military commissions, noting that:

> The jurisdiction of military commissions has traditionally been thought of as limited:
>
> (T)he classes of persons who in our law may become subject to the jurisdiction of military commissions are the following: (1) Individuals of the enemy's army who have been guilty of illegitimate warfare or other offences in violation of the laws of war; (2) Inhabitants of enemy's country occupied and held by the right of conquest; (3) Inhabitants of places or districts under martial law; (4) Officers and soldiers of our own army, or persons serving with it in the field, who, in time of war, become chargeable with crimes or offences not cognizable, or triable, by the criminal courts or under the

(continued...)

Article 36, UCMJ, which grants to the President the authority to establish the trial procedures to be used in both courts-martial and military commissions, in Article 21, UCMJ, Congress specifically acknowledged that military commissions' jurisdiction can and will overlap with courts-martial:

> The provisions of this chapter [i.e. the UMCJ] conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by law of war may be tried by military commissions, provost courts, or other military tribunals.[49]

[III.C.3] While their legal pedigree is not as recognized as that of Article III federal district courts or Article I courts-martial, Supreme Court precedent has repeatedly approved the use of military commissions to try individuals who have committed violations of the laws of war.[50] In discussing the nearly identical predecessor to Article 21, UCMJ, the Supreme Court in the 1942 case *Ex parte Quirin* stated:

> From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals. . . . By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its

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Articles of war.

Report on The War Crimes Act of 1996, H.R. Rep. No. 104-698 (1996), *reprints in* 1996 U.S.C.C.A.N. 2166, 2171.

[49] Art. 21, UCMJ, 10 U.S.C. § 821 (2000).

[50] *See generally In re Yamashita*, 327 U.S. 1 (1946); *Ex parte Quirin*, 317 U.S. 1 (1942) (both approving of the use of military commissions to try, respectively, Japanese and German war criminals during World War II).

> authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals. And the President, as Commander in Chief, by his Proclamation in time of war has invoked that law.[51]

While the Supreme Court in *Ex parte Quirin* upheld the constitutionality of the military commissions that the President utilized during World War II, it was also careful to note that it was unnecessary "to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation" because in that case "Congress [had] authorized trial of offenses against the law of war before such commissions."[52] In no case since then has the Supreme Court had the opportunity to examine that question.

[III.C.4] Finally, it should be noted that in approving their use, the Supreme Court has left control over trial procedures such as modes of admitting evidence and the admissibility of hearsay largely to military authorities with little or no recourse available for judicial review.[53] As discussed in

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[51] *Quirin*, 317 U.S. at 27-28.

[52] *Quirin*, 317 U.S. at 29.

[53] *Yamashita*, 327 U.S. at 18-21. Notably, the dissent in *Yamashita* argued that the Supreme Court was effectively ruling that the due process protections of the Fifth Amendment did not apply in military commissions. *Yamashita*, 327 U.S. at 26 (Murphy, J., dissenting). *But see* A. Christopher Bryant & Carl Tobias, *Quirin Revisited*, 2003 WIS. L. REV. 309 (2003) (arguing that developments in the law of habeas corpus since World War II should provide for much greater judicial review of military commissions today). Even if judicial review of the procedures applied during military commissions is limited, nothing dictates that the President can not choose to imbue military commissions with the same procedural safeguards inherent in federal district courts or courts-martial. *See* Paust, *supra* note 6, at 1-5 (discussing intra-governmental proposals for military commissions which would follow the Federal Rules of Criminal Procedure). While Supreme Court precedent may set a relatively low bar for constitutional due process protections in military (continued...)

greater detail in Section IV below, because of this apparent due process limitation, the President's recourse to trial by military commission is severely limited.

[III.C.5] In summary, three domestic legal fora exist within the U.S. for the prosecution of violations of international humanitarian law: federal district courts, UCMJ courts-martial, and military commissions. While federal district courts are traditionally the preferred forum for ordinary criminal prosecutions within the U.S., the Supreme Court has approved the use of courts-martial and military commissions to try cases within certain narrowly restricted areas which will be detailed below.

IV. SOURCES OF PUNITIVE CRIMINAL LAW THAT MAY BE APPLIED IN U.S. LEGAL FORA

[IV.1] In prosecuting individuals accused of violating the laws of war, one of the first issues to be resolved is determining the specific body of law the individual will be accused of violating. Only when that issue is resolved can it be determined which legal forum has jurisdiction to prosecute the case. Three distinct sources of criminal law may be applied in U.S. legal fora when prosecuting acts that amount to violations of international humanitarian law: the U.S. Code, the UCMJ,[54] and international humanitarian law itself. However, as will be explained below, no single U.S. forum has clear jurisdiction to try violations under all three sources of law. Further, these sources of law

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commissions, there is also the question of what due process protections are required by customary international law and U.S. treaty obligations. *See* Antonio Cassesse, INTERNATIONAL CRIMINAL LAW 309-10 (2003) (discussing the requirements international law imposes on national war crimes trials); Paust, *supra* note 6 (discussing the requirements of international law); Evan J. Wallach, *Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander?*, ARMY LAW., Nov. 2003, at 18. (arguing that if U.S. military commissions failed to meet current international law standards for trials of war criminals, any participant in such a trial of a person protected by the Geneva Conventions would, in turn, be guilty of a breach of those Conventions).

[54] Which is itself a part of the U.S. Code.

do not all equally prohibit the same conduct. Before examining the specific war crimes laws codified in the U.S. Code and the UCMJ, a discussion of international humanitarian law itself is necessary to provide adequate context.

A. International Humanitarian Law

[IV.A.1] Article I of the Constitution grants to Congress the power "To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations."[55] Inherent in this grant of power is an understanding that a "Law of Nations" separate and apart from the domestic law of the U.S. exists.[56] This "Law of Nations" is embodied in both customary international law and international treaties that have attained the status of customary international law or which have codified pre-existing customary international law.[57] Existing as a subset of this "Law of Nations" is the field of international humanitarian law, a branch of law:

> [T]hat applies in situations of armed conflict and which principally regulates and restrains the conduct of warfare or the use of violence so as to diminish its effects on the victims of hostilities. The victims of armed conflict who are afforded this protection include civilians, prisoners of war, and any other members of armed forces placed hors de combat by sickness, wounds, detention or any other cause and who have fallen into the hands of an adverse party.

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55 U.S. CONST. art. I, § 8, cl. 10.

56 *See Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2764 (2004) ("For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations."); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (holding that customary international law is part of the law of the United States to the limited extent that "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations").

57 While all treaties between countries implicate international law, such treaties do not bind anyone beyond their signatories unless they codify customary international law in some way. *See* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 131 (2000).

> International humanitarian law is applicable during armed conflicts, that is to say whenever there is a resort to armed force between states or low intensity and armed confrontations between State authorities and organized armed groups or between such groups within a State. In this respect, armed conflicts may be of an international or non-international nature, which in turn affects the specific international rules that apply to a conflict.[58]

[IV.A.2] As with the "Law of Nations," the boundaries and contents of international humanitarian law are likewise circumscribed by a combination of customary international law and international treaties codifying customary international law. While ordinary methods of statutory interpretation are readily available in interpreting treaties and determining what conduct they prohibit, customary international law is not a codified set of rules, being more akin to the English Common Law.[59] The result of this is that, unlike with typical statutes, the exact parameters of the acts encompassing violations of international humanitarian law are not always clear. As one legal scholar has noted when discussing this area, "Selecting what is and what is not part of custom is not only a challenging legal exercise, but one that is fraught with political considerations."[60]

1. *Grave Breaches of the Geneva Conventions of 1949*

[IV.A.1.1] Foremost among the treaties codifying international humanitarian law are the Geneva Conventions of 1949 that establish accepted international norms regarding the treatment of the

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[58] INTER-AM. COMM'N ON HUMAN RIGHTS, REPORT ON TERRORISM AND HUMAN RIGHTS 52 at ¶¶ 58-59 (2002), *available at* http://www.cidh.oas.org/Terrorism/Eng/toc.htm.

[59] The Third Restatement of Foreign Relations states: "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement (Third) of Foreign Relations § 102(2) (1987).

[60] *See* Bassiouni, *supra* note 13, at 220. *See also* CASSESSE, *supra* note 53, at 54 (arguing that "no authoritative and legally binding list of all war crimes exists in customary law").

following classes of persons during international armed conflicts: sick and wounded personnel,[61] shipwrecked and wounded personnel at sea,[62] prisoners of war,[63] and civilians under the control of opposing forces.[64] It is unquestioned that "grave breaches" of these conventions during international armed conflicts are considered to be "war crimes."[65] The term "grave breach" is used throughout the Conventions to denote violations of certain provisions of the Conventions that all contracting Parties are required to criminally prosecute, no matter where committed or by whom. Those grave breaches encompass nine specific acts:

> 1 – willful killing of protected persons, i.e. wounded members of the armed forces, prisoners of war, and civilians under the control of opposing forces;
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> 2 – torture or inhumane treatment of protected persons;
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> 3 – willfully causing great suffering or serious bodily injury to protected persons;
>
> 4 – extensive destruction or appropriation of property not justified by military necessity;
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> 5 – compelling a prisoner of war or a protected person to serve in the forces of the hostile Power;
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> 6 – willfully depriving a prisoner of war or a protected person of the rights of a fair and regular trial prescribed in the Convention;

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[61] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I].

[62] Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva II].

[63] Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III].

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

[65] LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 45-46 (2d ed. 2000).

7 – unlawful deportation or transfer of a protected person;

8 – unlawful confinement of a protected person; and

9 – taking of hostages.[66]

In accordance with the requirement to prosecute such breaches, the Geneva Conventions require the contracting Parties, which includes the U.S., "to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed," any of those grave breaches.

2. *Violations of Common Article 3 of the Geneva Conventions*

[IV.A.2.1] It has also become generally accepted that the protections of Common Article 3 of the Geneva Conventions of 1949, which applies during non-international armed conflicts, have become part of customary international law.[67] Violations of Common Article 3 include the following acts taken against non-combatants and other protected persons:

> 1 – violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> 2 – taking of hostages;
>
> 3 – outrages upon personal dignity, in particular humiliating and degrading treatment;

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[66] *See Geneva I*, *supra* note 61, art. 49; *Geneva II*, *supra* note 62, art. 50; *Geneva III*, *supra* note 63, art. 129; *Geneva IV*, *supra* note 64, art. 146.

[67] *See Prosecutor v. Tadic*, Appeal on Jurisdiction, No. IT-94-1-AR72, paras. 129-136 (I.C.T.Y. Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996), *available at* http://www.un.org/icty (holding that "customary international law imposes criminal liability for serious violations of common Article 3"); *see also* Major Lisa L. Turner & Major Lynn G. Norton, *Civilians At The Tip Of The Spear*, 51 A.F. L. REV. 1, 76 n534 (2001). The significance of this acknowledgment is that "grave breaches" are traditionally only considered to occur during "international armed conflicts," that is armed conflicts between two states. In contrast, Common Article 3 applies on its face to armed conflicts between non-state actors or between a state and a non-state actor (the moniker Common Article 3 is used to indicate that Articles 3 in all 4 Conventions are identical).

> 4 – the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.[68]

3. *Genocide*

[IV.A.3.1] In much the same way, the definition of genocide contained in the Convention on the Prevention and Punishment of the Crime of Genocide[69] has risen to the level of customary international law binding on all states.[70] That treaty defines genocide as:

> [A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.[71]

4. *Crimes Against Humanity*

[IV.A.4.1] Crimes against humanity stand in contrast to the above cited violations of the laws of war codified in widely ratified international treaties. While numerous attempts have been made to define

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[68] *Geneva I*, *II*, *III*, and *IV*, *supra* notes 61, 62, 63, and 64, common art. 3.

[69] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9. 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

[70] *See* CASSESSE, *supra* note 53, at 27.

[71] Genocide Convention, *supra* note 69, art. II.

crimes against humanity, no one definition is readily accepted. As one legal scholar has argued, this lack of clarity is:

> [E]vident in the eleven international instruments that have been elaborated between 1907 and 1998 and that define, in different though similar ways, "crimes against humanity." Thus, "crimes against humanity" remain part of customary law, with a mixed baggage of certainty as to some of its elements, and uncertainty as to others and to their applicability to non-state actors.[72]

While not controlling, the recent definition for crimes against humanity utilized by the International Criminal Court provides some insight into how crimes against humanity are generally defined:

> 1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> (a) Murder;
> (b) Extermination;
> (c) Enslavement;
> (d) Deportation or forcible transfer of population;
> (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
> (f) Torture;
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
> (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
> (i) Enforced disappearance of persons;
> (j) The crime of apartheid;

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[72] *Bassiouni*, *supra* note 13, at 212.

> (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.[73]

5. *Violation of the Laws and Customs of War*

[IV.A.5.1] The final generally accepted violation of international humanitarian law is often amorphously termed "violations of the laws and customs of war." Violations of the laws and customs of war are a combination of customary international norms, only some of which are codified in generally accepted international treaties.[74] This body of law was first partially codified in the Hague Convention Respecting the Laws and Customs of War on Land.[75] That convention however is not exhaustive, and a number of other less successful attempts have been made to further codify the law in this area. In general terms, this series of legal restrictions relates to the prohibition of certain tactics, weapons, and other modes of attack utilized during periods of armed conflict.[76] While a definition of the exact boundaries of this area is beyond the scope of this article, examples include prohibitions on intentional attacks on civilian populations or individual civilians, the use of poisonous gases, using a "human shield" to protect a military target, and the unnecessary destruction of religious and cultural buildings and monuments.[77]

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[73] ICC Statute, *supra* note 13, art. 7.

[74] *See Prosecutor v. Tadic*, Appeal on Jurisdiction, No. IT-94-1-AR72, paras. 86-95 (I.C.T.Y. Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996), *available at* http://www.un.org/icty (discussing the scope of the "laws and customs of war" as utilized in the ICTY Statute).

[75] Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 632 [hereinafter Hague 1907].

[76] *See* ICC Statute, *supra* note 13, art. 8.2(b) and (e) (providing an extensive list of acts considered to be prohibited in international and non-international armed conflicts).

[77] *Id.*

6. *The Link to an Armed Conflict*

[IV.A.6.1] As noted previously, the prohibitions of international humanitarian law are "applicable during armed conflicts."[78] However, as discussed above, the grave breach provisions of the Geneva Conventions are only applicable during international armed conflicts while Common Article 3's prohibitions apply during non-international armed conflicts.[79] In contrast, the International Criminal Tribunal for the Former Yugoslavia (ICTY) found that the prohibitions contained within the laws and customs of war generally apply equally to both non-international conflicts and international conflicts.[80] Unique to this field, neither crimes against humanity nor genocide require a nexus to an armed conflict.[81]

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[78] INTER-AM. COMM'N ON HUMAN RIGHTS, *supra* note 58, at ¶ 52, *available at* http://www.cidh.oas.org/Terrorism/Eng/toc.htm.

[79] However, it has also been argued that Common Article 3 establishes a set of minimum standards equally applicable to international armed conflicts. *See Hamdan v. Rumsfeld*, No. 04-1519, slip op. at 19-21 (D.D.C. Nov. 8, 2004), (rejecting the U.S. government's argument that Common Article 3 was meant to only "cover local and non international conflicts"); *see also Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 114 (June 27), *available at* http://www.icj-cij.org/icjwww/icases/inus/inus_ijudgment/inus_ijudgment_19860627.pdf, stating:

> Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity."

[80] *See Prosecutor v. Tadic*, Appeal on Jurisdiction, No. IT-94-1-AR72, paras. 96-136 (I.C.T.Y. Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996), *available at* http://www.un.org/icty (discussing the application of these prohibitions to non-international armed conflicts).

[81] *See* Genocide Convention, art. 1 (stating that genocide can be committed in time of war or peace); *Tadic*, No. IT-94-1-AR72, at para. 141 (discussing the lack of a need for a link between (continued...)

B. U.S. Domestic Criminal Law as Codified in the U.S Code

[IV.B.1] While the Constitution grants Congress the power to "To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations,"[82] U.S. domestic criminal law has only recently seen the adoption of limited provisions explicitly prohibiting the violations of international humanitarian law listed above. Specifically, two sections added to the U.S. Code in 1988 and 1996 criminalize: 1) genocide;[83] and, 2) "war crimes" defined to include grave breaches of the Geneva Conventions, violations of Common Article 3, and limited aspects of

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(...continued)
crimes against humanity and an armed conflict); CASSESSE, *supra* note 53, at 73-74 and 96 (2003) (noting that following World War II, the link between crimes against humanity and genocide and an armed conflict was "gradually dropped"); GREEN, *supra* note 65, at 42-43 (noting that genocide can occur in time of war or peace and that genocide is merely a "specific form of crime against humanity"); 18 U.S.C. § 1091(a) (2000) (prohibiting genocide in time of war or peace).

[82] U.S. CONST. art. I, § 8, cl. 10.

[83] 18 U.S.C. § 1091(a) (2000) defines as guilty of genocide:

> Whoever, whether in time of peace or in time of war, in a circumstance described in subsection (d) and with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such–
>
> (1) kills members of that group;
> (2) causes serious bodily injury to members of that group;
> (3) causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques;
> (4) subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part;
> (5) imposes measures intended to prevent births within the group; or
> (6) transfers by force children of the group to another group . . . .

18 U.S.C. § 1091(a) (2000).

the violations of the laws and customs of war.[84] In addition to the subject matter limitations contained in their scope, these two statutes also contain jurisdictional requirements that restrict their application. For example, 18 U.S.C. § 1091, criminalizing genocide, is only applicable when an accused's actions take place within the U.S., or if the accused is a U.S. national.[85] Likewise, 18 U.S.C. § 2441, criminalizing "war crimes," only applies to acts committed by or against members of the U.S. Armed Forces or other U.S. nationals.[86] Though the U.S. Code does not explicitly

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[84] As used in 18 U.S.C. § 2441, "war crimes" means 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 violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; 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.

18 U.S.C. § 2441(c) (2000).

[85] 18 U.S.C. § 1091(d) states as follows: "Required circumstance for offense. The circumstance referred to in subsections (a) and (c) is that (1) the offense is committed within the United States; or (2) the alleged offender is a national of the United States [as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. § 1101)]".

[86] 18 U.S.C. § 2441 states:

> (a) Offense. Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or

(continued...)

prohibit crimes against humanity and many of the violations of the "laws and customs of war," it does criminalizes a number of the "predicate" offenses that underlie those and most other war crimes.[87] As with the genocide and "war crimes" statutes, these statutes also contain certain jurisdictional requirements that restrict their application. For purposes of clarity, these predicate crime statutes should be analyzed as falling within three separate categories.

[IV.B.2] The first category of predicate crime statutes centers around what is called the "special maritime and territorial jurisdiction of the United States." This special form of federal criminal jurisdiction applies to only a small number of geographic areas and locations listed in 18 U.S.C. § 7, including among them federal lands within the U.S., U.S. government property in foreign countries such as diplomatic buildings and military bases, U.S. spacecraft in flight, U.S. vessels on the high seas, and U.S. aircraft flying over the high seas.[88] Congress has passed a number of statutes

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(...continued)

> any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.
>
> (b) Circumstances. The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act [8 USCS § 1101]).

The possibility of a broader application for 18 U.S.C. § 2441 was considered and rejected in 1996 when it was added to the U.S. Code. *See* Report on the War Crimes Act of 1996, H.R. Rep. No. 104-698 (1996), *reprinted in* 1996. U.S.C.C.A.N. 2166, 2171-74.

[87] By predicate offense, the author means those crimes that under the appropriate contexts are considered to transform into war crimes. The most obvious example is the crime of murder, which under certain circumstances of intent and magnitude will more accurately be entitled an act of genocide or a crime against humanity.

[88] 18 U.S.C. § 7 (providing a complete definition of the areas which fall within the special maritime and territorial jurisdiction of the U.S.).

providing for the federal prosecution of "common law" crimes that occur within these areas; "common law" crimes often considered the province of the individual states and outside the normal federal criminal jurisdiction. This extension of federal criminal jurisdiction has been justified on the basis that: 1) many of these areas do not fall within the criminal jurisdiction of a U.S. state or a foreign country; and, 2) even when a U.S. state or foreign country does have concurrent jurisdiction over the area, those local authorities may be unwilling or unable to effectively exercise it.[89]

[IV.B.3] In order to enforce U.S. interests in combating crime in these areas, Congress has passed a number of statutes prohibiting a wide variety of criminal conduct occurring within them. For instance, where the special maritime and territorial jurisdiction of the U.S. encompasses areas situated within a U.S. "State, Commonwealth, territory, possession, or district" or which are a part of the U.S. territorial sea lying outside that "State, Commonwealth, territory, possession, or district," Congress has adopted as federal criminal law the criminal laws of that jurisdiction, inasmuch as they do not overlap or conflict with already existing federal criminal statutes.[90] Congress has also passed specific statutes applicable to all areas of the special maritime and territorial jurisdiction. These

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[89] *United States v. Corey*, 232 F.3d 1166, 1171 (9th Cir. 2000) ("Taken as a whole, 18 U.S.C. § 7 extends the jurisdiction of the federal criminal laws to areas where American citizens and property need protection, yet no other government effectively safeguards those interests.").

[90] 18 U.S.C. § 13. This provision, known as the Federal Assimilative Crime Act, would not apply where the area within the special maritime and territorial jurisdiction is in a foreign country.

statutes include proscriptions on arson,[91] assault,[92] maiming,[93] theft,[94] homicides,[95] kidnaping,[96] damaging real property,[97] robbery,[98] and sexual abuse;[99] all predicate crimes that could be used to prosecute a "war criminal" whose actions occurred within the special maritime and territorial jurisdiction of the U.S. While the jurisdictional reach of these crimes is generally not limited by the nationality of the victim or accused, three subsections of 18 U.S.C. § 7 do limit U.S. jurisdiction to offenses committed "by or against a national of the United States."[100] The most notable of those limitations is the limitation on U.S. criminal jurisdiction over offenses committed at overseas U.S. diplomatic buildings and military bases.[101]

[IV.B.4] The ongoing prosecution of David A. Passaro in federal district court in North Carolina demonstrates the utility of the special maritime and territorial jurisdiction in providing a method of prosecuting war crimes in federal district court. That prosecution is centered on allegations that

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91 18 U.S.C. § 81.

92 18 U.S.C. § 113.

93 18 U.S.C. § 114.

94 18 U.S.C. § 661.

95 18 U.S.C. §§ 1111, 1112, 1113.

96 18 U.S.C. § 1201.

97 18 U.S.C. § 1363.

98 18 U.S.C. § 2111.

99 18 U.S.C. §§ 2241, 2242, 2243, 2244.

100 18 U.S.C. § 7(7), (8) and (9).

101 18 U.S.C. § 7(9). *See infra* note 105 and accompanying text discussing the extraterritorial reach of the special maritime and territorial jurisdiction of the U.S.

Passaro, a civilian CIA contract employee, unlawfully assaulted an Afghani national during an interrogation at a U.S. military camp in Afghanistan.[102] The basis for jurisdiction in the case is that the assaults occurred on a U.S. military facility in Afghanistan which fell within the scope of 18 U.S.C. § 7. While there had previously been some dispute whether the special maritime and territorial jurisdiction of the U.S. was intended to apply extraterritorially to U.S. military bases and diplomatic areas overseas,[103] the PATRIOT Act specifically extended the scope of 18 U.S.C. § 7 to reach crimes committed by or against U.S. nationals in those areas.[104] It should be noted, however, that had Passaro not been a U.S. national, 18 U.S.C. § 7 would have provided no recourse for prosecution.

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[102] *See* Indictment, *United States v. Passaro*, No. 5:03-CR-211-1 (E.D.N.C. Jun. 17, 2004), *available at* http://www.cdi.org/news/law/cia-contractor-indictment-passaro.pdf; Farah Stockman, *CIA Contractor Is Charged In Beating Of Afghan Detainee*, THE BOSTON GLOBE, June 18, 2004, at A1 (describing the indictment of David A. Passaro, for the beating death of a suspected Afghan militant).

[103] *See United States v. Corey*, 232 F.3d 1166, 1172 (9th Cir. 2000) ("We conclude therefore that subsection 7(3) applies to Americans in all territory, wherever situated, that is acquired for the use of the United States and under the exclusive or concurrent jurisdiction of the federal government."); *United States v. Gatlin*, 216 F.3d 207, 223 (2d Cir. 2000) ("Congress has not provided any jurisdiction to try civilians like Gatlin who commit crimes on military installations abroad"); *United States v. Erdos*, 474 F.2d 157, 160 (4th Cir. 1973) (finding 18 U.S.C. 7 was "a proper grant of 'special' territorial jurisdiction embracing an embassy in a foreign country acquired for the use of the United States"); *see also* Jung Yoon, *International Law: Closing The Gap On Extraterritorial Jurisdiction One Way Or The Other*, 14 FLA. J. INT'L L. 503 (Spring 2002); Jason A. Cincilla, *Jurisdictional Gap In Reality Or Only In Law Reviews? – The Circuit Split On The Extraterritorial Application Of 18 U.S.C. § 7(3)*, 105 DICK. L. REV. 419 (Spring 2001); Jordan J. Paust, *Non-Extraterritoriality Of "Special Territorial Jurisdiction" Of The United States: Forgotten History And The Errors Of Erdos*, 24 YALE J. INT'L L. 305 (Winter 1999).

[104] *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, § 804, 115 Stat. 272, 377 (2001) (codified at 18 U.S.C. 7(9) (2004)).

[IV.B.5] The second category of predicate crime statutes centers around the Military Extraterritorial Jurisdiction Act of 2000 (MEJA),[105] an Act which is functionally similar to but quite distinct from 18 U.S.C. § 7. While the reach of the special maritime and territorial jurisdiction of the U.S. centers on the location of the crime,[106] MEJA's jurisdictional reach centers on the employment or familial status of the offender, without reference to the location of the crime other than that it must occur outside the United States. 18 U.S.C. § 3261, the operative provision of MEJA, works by criminalizing actions by individuals who are members of the U.S. Armed Forces,[107] employed by

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[105] Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, 114 Stat. 2488 (2000). MEJA was codified at 18 U.S.C. § 3261 *et seq*, and states in part:

> (a) Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States
>
> (1) while employed by or accompanying the Armed Forces outside the United States; or
>
> (2) while a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice),
>
> shall be punished as provided for that offense.

18 U.S.C. § 3261; *see also* Glenn R. Schmitt, *Closing the Gap in Criminal Jurisdiction Over Civilians Accompanying the Armed Forces Abroad -- A First Person Account of the Creation of the Military Extraterritorial Jurisdiction Act of 2000*, 51 CATH. U.L. REV. 55 (Fall 2001).

[106] Except with regard to those sections that contain the additional provision that the offense in question must have been "committed by or against a national of the United States." 18 U.S.C. §7(7), (8) and (9).

[107] This grant of jurisdiction is limited to military members who have either left the Armed Forces or who acted with civilian co-defendants. 18 U.S.C. § 3261(d).

the U.S. Armed Forces,[108] or accompanying the U.S. Armed Forces,[109] if those actions would have

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[108] Defined to mean:

> (A) employed as–
>
> (i) a civilian employee of–
>
> (I) the Department of Defense (including a nonappropriated fund instrumentality of the Department); or
>
> (II) any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas;
>
> (ii) a contractor (including a subcontractor at any tier) of–
>
> (I) the Department of Defense (including a nonappropriated fund instrumentality of the Department); or
>
> (II) any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas; or
>
> (iii) an employee of a contractor (or subcontractor at any tier) of–
>
> (I) the Department of Defense (including a nonappropriated fund instrumentality of the Department); or
>
> (II) any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas;
>
> (B) present or residing outside the United States in connection with such employment; and
>
> (C) not a national of or ordinarily resident in the host nation.

18 U.S.C. § 3267(1). In October 2004, this definition was expanded to its current form in order to include civilian employees and contractors not employed by or contracting with the Department of Defense, but whose employment related to supporting the mission of the Department of Defense overseas. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1088, 118 Stat. 1811 (2004); H. R. Rep. 108-767, at § 1088 (2004), http://thomas.loc.gov/cgi-bin/cpquery/0?&&dbname=cp108&&&r_n=hr767.108&&sel=DOC&.

[109] Defined to mean:

(continued...)

been punishable by imprisonment for more than 1 year if they had occurred within the special maritime and territorial jurisdiction of the U.S.[110] Rather than actually extending the special maritime and territorial jurisdiction to this class of individuals, 18 U.S.C. § 3261 instead creates a new federal crime that assimilates those crimes which apply within the special maritime and territorial jurisdiction.[111] For example, a civilian employee of the U.S. Armed Forces committing an off base murder would be charged with violating 18 U.S.C. § 3261, as opposed to violating 18 U.S.C. § 1111 which is the underlying murder statute enforceable within the special maritime and territorial jurisdiction.[112] In essence, while 18 U.S.C. § 7 only sets jurisdictional boundaries for when other substantive statutes apply, 18 U.S.C. § 3261 both sets jurisdictional boundaries and

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(...continued)

> (A) a dependent of–
>
> (i) a member of the Armed Forces;
>
> (ii) a civilian employee of the Department of Defense (including a nonappropriated fund instrumentality of the Department); or
>
> (iii) a Department of Defense contractor (including a subcontractor at any tier) or an employee of a Department of Defense contractor (including a subcontractor at any tier);
>
> (B) residing with such member, civilian employee, contractor, or contractor employee outside the United States; and
>
> (C) not a national of or ordinarily resident in the host nation.

18 U.S.C. § 3267(2).

[110] 18 U.S.C. § 3261(a).

[111] *See* Schmitt, *Closing the Gap*, 51 CATH. U.L. REV. at 113-14.

[112] While it might appear that those individuals subject to 18 U.S.C. § 3261 who actually committed a crime such as murder on an overseas military base within the special maritime and territorial jurisdiction of the U.S. would be subject to prosecution under either 18 U.S.C. § 3261 or 18 U.S.C. § 1111, 18 U.S.C. § 7(9) specifically states that it does not apply to acts which fall under 18 U.S.C. § 3261. 18 U.S.C. § 7(9). *But see* Schmitt, *Closing the Gap*, 51 CATH. U.L. REV. at 114 ("In some cases, conduct may violate both section 3261 and another federal statute having extraterritorial application.").

prohibits a broad category of specific conduct. In doing so, 18 U.S.C. § 3261 provides an additional method for prosecuting war crimes committed overseas by individuals affiliated with the U.S. Armed Forces.

[IV.B.6] The final category of predicate crimes statutes is made up of a number of generally applicable and largely unrelated U.S. Code provisions that vary greatly in their jurisdictional reach, but which are distinctly federal in character.[113] One example is 18 U.S.C. § 2340, which criminalizes the use of torture committed outside the U.S.[114] by either a U.S. national or a foreign national who later enters the U.S.[115] Similarly, 18 U.S.C. § 1203 criminalizes hostage taking where:

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[113] Federal in character as opposed to the common law crimes prosecutable under the special maritime and territorial jurisdiction of the U.S. or under MEJA.

[114] For purposes of this statute, the "'United States' means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States." 18 U.S.C. § 2340(3). This language was substituted into 18 U.S.C. § 2340(3) in October 2004 in order to replace language that prevented the torture statute from applying to acts occurring within the special maritime and territorial jurisdiction of the U.S. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1089, 118 Stat. 1811 (2004).

[115] 18 U.S.C. § 2340 states:

> (a) Offense. Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.
>
> (b) Jurisdiction. There is jurisdiction over the activity prohibited in subsection (a) if–
>
> > (1) the alleged offender is a national of the United States; or
> > (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

(continued...)

1) the act occurs inside the U.S.; or, 2) the act occurs outside the U.S. if committed against a U.S. national, if the offender later enters the U.S., or if the U.S. government is the target of coercion by the hostage taker.[116] Finally, 18 U.S.C. § 2332 criminalizes the murder or assault of a U.S. national

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(...continued)

> (c) Conspiracy. A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

18 U.S.C. § 2340 (2000).

[116] 18 U.S.C. § 1203 states:

> (a) Except as provided in subsection (b) of this section, whoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injury, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts or conspires to do so, shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.
>
> (b)
>
> > (1) It is not an offense under this section if the conduct required for the offense occurred outside the United States unless–
> >
> > > (A) the offender or the person seized or detained is a national of the United States;
> > > (B) the offender is found in the United States; or
> > > (C) the governmental organization sought to be compelled is the Government of the United States.
> >
> > (2) It is not an offense under this section if the conduct required for the offense occurred inside the United States, each alleged offender and each person seized or detained are nationals of the United States, and each alleged offender is found in the United States, unless the governmental organization sought to be compelled is the Government of the United States.

(continued...)

outside the U.S. if the intent of the attacker was to coerce or intimidate a government or civilian population, i.e. if the killing or assault was an act of terrorism.[117]

(...continued)

> (c) As used in this section, the term "national of the United States" has the meaning given such term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)).

18 U.S.C. § 1203 (2000).

[117] 18 U.S.C. § 2332 states:

> (a) Homicide. Whoever kills a national of the United States, while such national is outside the United States, shall,--
>
> (1) if the killing is murder (as defined in section 1111(a)), be fined under this title, punished by death or imprisonment for any term of years or for life, or both;
>
> (2) if the killing is a voluntary manslaughter as defined in section 1112(a) of this title, be fined under this title or imprisoned not more than ten years, or both; and
>
> (3) if the killing is an involuntary manslaughter as defined in section 1112(a) of this title, be fined under this title or imprisoned not more than three years, or both.
>
> (b) Attempt or conspiracy with respect to homicide. Whoever outside the United States attempts to kill, or engages in a conspiracy to kill, a national of the United States shall–
>
> (1) in the case of an attempt to commit a killing that is a murder as defined in this chapter [18 USCS § 2331 et seq.], be fined under this title or imprisoned not more than 20 years, or both; and
>
> (2) in the case of a conspiracy by two or more persons to commit a killing that is a murder as defined in section 1111(a) of this title, if one or more of such persons do any overt act to effect the object of the conspiracy, be fined under this title or imprisoned for any term of years or for life, or both so fined and so imprisoned.
>
> (c) Other conduct. Whoever outside the United States engages in physical violence--
>
> (1) with intent to cause serious bodily injury to a national of the United States; or
>
> (2) with the result that serious bodily injury is caused to a national of the United States;

(continued...)

[IV.B.7] As all of the provisions discussed above hopefully make clear, while the U.S. has not wholesale incorporated international humanitarian law into its domestic civilian criminal law, the U.S. Code does have a number of methods for prosecuting many acts that would be considered war crimes, even if they are not denominated as war crimes *per se*.

C. U.S. Military Law as Codified in the UCMJ

[IV.C.1] Unlike the U.S. Code, the UCMJ does not expressly include any violations of the laws of war among the list of specifically prohibited conduct that it contains. However, the UCMJ effectively incorporates all such violations by reference, stating generally that violations of the laws of war may be tried in general courts-martial:

> Subject to section 817 of this title (article 17), general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter. *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.* However, a general court-martial of the kind specified in section 816(1)(B) of this title (article 61(1)(B)) shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred

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(...continued)

> shall be fined under this title or imprisoned not more that ten years, or both.
> (d) Limitation on prosecution. No prosecution for any offense described in this section shall be undertaken by the United States except on written certification of the Attorney General or the highest ranking subordinate of the Attorney General with responsibility for criminal prosecutions that, in the judgment of the certifying official, such offense was intended to coerce, intimidate, or retaliate against a government or a civilian population.

18 U.S.C. § 2332 (2000).

to trial as a noncapital case.[118]

The UCMJ does not, however, actually spell out which specific crimes included within the "law of war" are "subject to trial by a military tribunal." This "incorporation by reference" is akin to 18 U.S.C. § 1651's criminalizing "piracy as defined by the law of nations,"[119] which relies on customary international law to provide the definition of what is prohibited by U.S. domestic law. As 18 U.S.C. § 1651 and its predecessor have repeatedly been upheld as constitutional,[120] it follows that a prosecution could go forward in a court-martial utilizing similarly non-codified international humanitarian law.[121] Such a prosecution would by its very nature require military courts to independently define the contents of international humanitarian law.

[IV.C.2] In contrast, it should be noted that the UCMJ, like the U.S. Code, contains an extensive list of prohibited conduct that largely includes those predicate crimes that undergird the field of international humanitarian law.[122] These include conspiracy,[123] unlawful detention,[124] assault,[125]

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[118] Art. 18, UCMJ, 10 U.S.C. § 818 (2000) (emphasis added); *see also* JOHN M. ROGERS, INTERNATIONAL LAW AND UNITED STATES LAW 106-27 (1999) (discussing international law being incorporated into U.S. domestic law by reference in the U.S. Code).

[119] 18 U.S.C. § 1651 states that: "Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life." 18 U.S.C. § 1651 (2000).

[120] *See Ex parte Quirin*, 317 U.S. at 11; *United States v. Palmer*, 16 U.S. 610 (1818); *United States v. Smith*, 18 U.S. 152 (1820).

[121] This conclusion is supported by House Report 104-698, which clearly states that Congress understands that Article 18, UCMJ, allows courts-martial to try service-members for "violations of the laws of war." Report on the War Crimes Act of 1996, H.R. Rep. No. 104-698 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2166, 2170.

[122] For example, First Lieutenant William Calley, of My Lai Massacre infamy, was tried for the predicate offense of murder as opposed to any specified "war crime." *See United States v. Calley*, 46 C.M.R. 1131, 1138 (A.C.M.R. 1973) ("Although all charges could have been laid as war crimes, (continued...)

rape,[126] forcible sodomy,[127] larceny,[128] maiming,[129] cruelty and maltreatment,[130] and murder.[131] Thus, courts-martial have the option of trying U.S. service members, and others subject to their jurisdiction, for either specific violations of international humanitarian law or for any underlying offense, like murder, that under the appropriate circumstances could be considered a war crime.

D. What Law is Being Enforced: Does the Forum Have Jurisdiction to Try Allegations That a Particular Law Has Been Broken?

[IV.D.1] The answer to the question of what body of law has been violated will often control which U.S. judicial forum can prosecute an accused. That is because there are limitations on which U.S. fora can enforce which laws.

(...continued)
they were prosecuted under the UCMJ."); *see also* Adam Liptak, *First Baghdad Court-Martial May Set Table For Later Ones*, N.Y. TIMES, May 11, 2004 (discussing the prosecution of a U.S. service member implicated in the Iraq prisoner abuse scandal for enumerated offenses under the UCMJ rather than for specific "war crimes").

123 Art. 81, UCMJ, 10 U.S.C. § 881 (2000).

124 Art. 84, UCMJ, 10 U.S.C. § 884 (2000).

125 Art. 128, UCMJ, 10 U.S.C. § 928 (2000).

126 Art. 120, UCMJ, 10 U.S.C. § 920 (2000).

127 Art. 125, UCMJ, 10 U.S.C. § 925 (2000).

128 Art. 121, UCMJ, 10 U.S.C. § 921 (2000).

129 Art. 124, UCMJ, 10 U.S.C. § 924 (2000).

130 Art. 93, UCMJ, 10 U.S.C. § 893 (2000).

131 Art. 118, UCMJ, 10 U.S.C. § 918 (2000).

1. *Federal District Courts and the U.S. Code*

[IV.D.1.1] Within a few decades of the adoption of the U.S. Constitution, the Supreme Court established without question that the criminal jurisdiction of federal district courts is limited to prosecuting violations of congressional statutes, i.e., the U.S. Code. As the Supreme Court stated, before a criminal prosecution can go forward, "The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence."[132] Similarly, absent implementation by Congress, an international treaty, even one to which the U.S. is a Party,[133] cannot by itself create federal criminal law.[134] The clear import of this is that without implementing legislation by Congress, international humanitarian law cannot be utilized in federal district court as the basis for a criminal prosecution. Further, while the UCMJ is a part of the U.S. Code, the UCMJ has been interpreted to only be applicable in trials by court-martial,[135] that is, criminal charges under the UCMJ cannot be brought in federal district court.[136]

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[132] *United States v. Hudson*, 11 U.S. 32, 34 (1812).

[133] A "Party" to a treaty is a state that has consented to be bound to a treaty that has entered into force. A multilateral treaty, such as the Geneva Conventions of 1949, will only enter into force when a certain number of parties have indicated their consent to be bound. That consent to be bound is often demonstrated by signature, or in the case of the U.S., ratification via the constitutional advice and consent process. *See* AUST, *supra* note 57, at 131.

[134] *See The Over The Top*, 5 F.2d 838, 845 (Dist. D. Conn 1925); ROGERS, *supra* note 91, at 78.

[135] *Toth v. Quarles*, 350 U.S. 11, 21 (1955) (while violations of UCMJ could constitutionally be prosecuted in federal district courts, Congress has not granted that authority); *United States v. Russell,* 33 C.M.R. 892, 898 (A.F.B.R. 1963); *United States v. Gilliard*, 42 C.M.R. 1029, 1034 (A.F.C.M.R. 1970) (holding that 18 U.S.C. § 3231 does not vest District Courts with the ability to try violations of the UCMJ). *But see* Jordan J. Paust, *Note And Comment: Correspondence*, 91 AM. J. INT'L L. 90 (1997) (arguing that 18 U.S.C. § 3231 incorporates all crimes punishable pursuant to the UCMJ and allows prosecutions under the UCMJ to occur in federal district court).

[136] Military members can, of course, be prosecuted in federal district court for violations of (continued...)

Thus, regarding prosecutions of war crimes, federal district courts only have jurisdiction to hear prosecutions based on those limited provisions of the U.S. code discussed above in Section IV.B.

2. *Courts-Martial and the UCMJ*

[IV.D.2.1] Courts-martial can prosecute any and all violations of the UCMJ.[137] Further, as discussed previously, Article 18, UCMJ, specifically provides general courts-martial the authority to prosecute crimes under the "laws of war."[138] Finally, Article 134, UCMJ, allows courts-martial to prosecute noncapital offenses contained within the U.S. Code.[139] This grant of authority is limited, having been construed by military appellate courts to mean that courts-martial do not have jurisdiction to try capital offenses contained in the U.S. Code, whether the government seeks the death penalty or not.[140] As the U.S. code's proscription against genocide and "war crimes" are both capital offenses

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(...continued)
other applicable sections of the U.S. Code. Further, 18 U.S.C. § 3261 extends the U.S.'s special maritime and territorial jurisdiction to members of the U.S. Armed Forces and civilians accompanying the Armed Forces under certain conditions. 18 U.S.C. § 3261 (2000).

[137] Art. 18, UCMJ, 10 U.S.C. § 818 (2000); *see also Solorio v. United States*, 483 U.S. 435 (1987) (overruling previous precedent that required prosecutions in courts-martial to be for crimes "connected" to military service).

[138] Art. 18, UCMJ, 10 U.S.C. § 818 While not explicitly stated by either the Supreme Court or military appellate courts, courts-martial presumably are, however, generally limited in their ability to utilize the common law as a basis for prosecution. *See United States v. Rapolla*, 34 M.J. 1268, 1270 n.4 (A.F.C.M.R. 1992) (positively citing *United v. Hudson*, 11 U.S. 32 (1812) in dicta for the proposition that prosecutions in the federal system cannot be based on common law); WINTHROP, MILITARY LAW AND PRECEDENTS 146 ("Every military Charge must be predicated upon a violation of an existing Article of war or other statute of the United States….").

[139] Art. 134, UCMJ, 10 U.S.C. § 934 (2000).

[140] *See United States v. French*, 10 C.M.A. 171, 175-80 (C.M.A. 1959). In light of Congress's recent expansion of district court authority to try members of the U.S. Armed Forces for specific "war crimes" now codified in the U.S. Code, Article 134, UCMJ's limitation on trying noncapital crimes raises an interesting issue of statutory interpretation. That is, could Congress's codification (continued...)

when the crime results in the death of a victim,[141] courts-martial jurisdiction to try charges beyond the bounds of the predicate offenses contained in the UCMJ and international humanitarian law as incorporated by reference in the UCMJ is limited.

3. *Military Commissions and the Laws of War*

[IV.D.3.1] The limitations on the laws that can be applied in federal district courts, and to some extent in courts-martial, are in stark contrast to the jurisdiction of military commissions. As common law war courts, the Supreme Court has stated that military commissions are authorized to try individuals for all violations of the laws of war.[142] In *In re Yamashita*, where the Supreme Court was interpreting the nearly identical predecessor to Articles 21, UCMJ, the Court stated:

> Congress, by sanctioning trial of enemy combatants for violations of the law of war by military commission, had not attempted to codify the law of war or to mark its precise boundaries. Instead, by Article 15 it had incorporated, by reference, as within the preexisting jurisdiction of military commissions created by appropriate military command, all offenses which are defined as such by the law of war, and which may constitutionally be included within that jurisdiction.

(...continued)
of those war crimes as capital crimes also deprive courts-martial of jurisdiction over those crimes? In effect, Congress's action has placed into conflict Article 18, UCMJ's grant of jurisdiction over "war crimes" and Article 134, UCMJ's limitation on trying federal capital crimes. While reconciling the two provisions would be an interesting exercise in statutory interpretation, the quick answer is most likely that congressional intent, as embodied in House Report 104-698, discussed *supra* notes 48, 86, and 121, would appear to authorize concurrent jurisdiction. This is because that report indicates that Congress believed courts-martial have jurisdiction over all war crimes and displayed no intention of altering that situation with the expansion of district court authority. Report on the War Crimes Act of 1996,H.R. Rep. No. 104-698 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2166, 2170.

[141] *See* 18 U.S.C. §§ 1091(b), 2441(b) (2000).

[142] *In re Yamashita*, 327 U.S. 1, 7 (1946); *Ex parte Quirin*, 317 U.S. 1, 35, 45-46 (1942) (military commissions are appropriate tribunals for the trial and punishment of offenses against the laws of war); *see also* Article 18, 21 UCMJ, 10 U.S.C. § 818, 821 (referring to military commissions as having the authority to try offenses under the "laws of war").

> It thus adopted the system of military common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts . . . .[143]

[IV.D.3.2] In accordance with this, Supreme Court precedent demonstrates that in practice, individuals can be tried for war crimes without reference to U.S. domestic legislation prohibiting the conduct in question.[144] As the U.S. Army Field Manual on the Law of Armed Conflict states:

> As the international law of war is part of the law of the land in the United States, enemy personnel charged with war crimes are tried directly under international law without recourse to the statutes of the United States.[145]

It is doubtful that military commissions would even need to apply the U.S. Code or the UCMJ to punish violations of international humanitarian law.[146] This is because, as noted above, the common

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[143] *Yamashita*, 327 U.S. at 7-8.

[144] *See Yamashita*, 327 U.S. at 13-18 (discussing the prosecution of a Japanese general following World War II for failure to control the actions of his subordinates).

[145] U.S. DEP'T OF THE ARMY, *supra* note 28, at para. 505.e (1956).

[146] At the same time, looking to Articles 104 and 106, UCMJ, and applying the principle of *expressio unius est exclusio alterius* (mention of one thing means exclusion of another), it would appear that almost all of the specific prohibitions contained in the UCMJ could not be charged within a military commission. This is because Articles 104 and 106, UCMJ, aiding the enemy and spying, both state they may be tried by courts-martial *or* military commissions. Arts. 104, 106, UCMJ, 10 U.S.C. §§ 904, 906 (2000). No other crime under the UCMJ contains this language. It could therefore be argued that should the U.S. attempt to try a member of the U.S. Armed Forces or other person subject to the UCMJ in a military commission, the charged crime would have to specifically be a "war crime" under international humanitarian law vice one of the predicate crimes contained in the UCMJ, such as murder or rape. This reading would be consistent with Article 21, UCMJ, which states that courts-martial have concurrent jurisdiction with military commissions over offenses under "the law of war." Art. 21, UCMJ, 10 U.S.C. § 121 (2000). It does not say that courts-martial share jurisdiction with military commissions over other common criminal offenses enumerated in the UCMJ. *See also* Winthrop, MILITARY LAW AND PRECEDENTS 841 ("[Military commissions] have no jurisdiction of the purely military offenses specified in the Articles of war and made punishable by sentence of court-martial; and in repeated cases where they have assumed such jurisdiction their proceedings have been declared invalid in General Orders.").

law of war applicable in military commissions reaches all "war crimes" while the U.S. Code and the specific prohibitions within the UCMJ do not. Further, it should also be noted that outside of incidences of occupation of foreign territory or internal civil war, military commissions have almost no authority to prosecute crimes outside of violations of the laws of war;[147] as the Supreme Court has stated, military commissions cannot place an accused "on trial unless the charge preferred against him is of a violation of the law of war."[148]

[IV.D.3.3] In summary, three sources of criminal law may be applied within U.S. domestic legal fora to prosecute violations of international humanitarian law: the U.S. code, the UCMJ, and international humanitarian law itself. While the U.S. Code prohibits only certain specific violations of international humanitarian law, the UCMJ, rather than enumerating specific prohibitions, incorporates the entire law of war by reference. In applying these sources of law, federal district courts only have jurisdiction to try violations of the U.S. code (the UCMJ not included). In contrast, courts-martial can try all violations of the UCMJ, all violations of the laws of war, and any non-capital provisions of the U.S. Code. Finally, military commissions, as common law war courts, have the latitude to try all violations of international humanitarian law without recourse to the specific statutory prohibitions within the U.S. Code or the UCMJ.

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147 *See supra* notes 46-48 (discussing the limited areas beyond the prosecution of war crimes where military commission may have jurisdiction); *cf. Madsen v. Kinsella*, 343 U.S. 341 (1952) (military commissions established during the occupation of post World War II Germany applied the domestic German Criminal Code).

148 *Yamashita*, 327 U.S. at 13; *see also* Major Michael A. Newton, *Continuum Crimes: Military Jurisdiction Over Foreign Nationals Who Commit International Crimes*, 153 MIL. L. REV. 1 (1996) (arguing for an expansion of the UCMJ to allow U.S. military commissions to try international crimes beyond violations of the laws of war).

V. DOMESTIC LAW LIMITATIONS ON CHOICE OF FORUM

[V.1] When domestically prosecuting violations of international humanitarian law, the President is faced with a number of factors in determining which U.S. legal fora are available in which to prosecute an accused. The previous Section explained that not all domestic U.S. legal fora can hear prosecutions under all the same laws. This Section will demonstrate that the location of the crime, the existence of an armed conflict, and the nationality and combatant status of the accused, will also impact whether the different U.S. legal fora have jurisdiction to hear criminal complaints that a U.S. law has been violated. As one legal scholar has explained:

> To bring the alleged authors of international crimes to book, States need to have not only laws, statutes, or some sort of judge-made legal regulation punishing those crimes, but also legal provisions authorizing courts to prosecute and punish the alleged perpetrators. These legal provisions normally empower State courts to take proceedings if the offense, its alleged author, or its victim have some sort of link with the State.[149]

[V.2] This "link" between a State and the crime being prosecuted is the traditional basis for that State to assert jurisdiction over an alleged criminal. States have traditionally asserted the link based on one of four principles: 1) territoriality, which exists when the offense charged occurred within the State's borders;[150] 2) active nationality, based on the alleged perpetrator being a national of the prosecuting State;[151] 3) passive nationality, reflecting the assertion of jurisdiction based on the

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[149] CASSESSE, *supra* note 53, at 277.

[150] CASSESSE, *supra* note 53, at 277-80 (explaining the principle of territoriality); Restatement of (Third) Foreign Relations § 402 (1987).

[151] CASSESSE, *supra* note 53, at 281-82 (explaining the principle of active nationality); Restatement of (Third) Foreign Relations § 402 (1987).

victim or victims of a crime being nationals of the prosecuting State;[152] and, 4) protection of national interests, for crimes committed abroad by foreign nationals that impact on that State's national interests, such as counterfeiting.[153] Additionally, a number of States will assert jurisdiction based on the principle of universality, i.e., that some crimes are so heinous that any and all States can prosecute the perpetrators.[154] As will be seen below, the U.S. has applied combinations of these principles when asserting jurisdiction over violations of international humanitarian law, creating a lack of uniformity in the jurisdictional reach of federal district courts, courts-martial, and military commissions.

A. Location of the Crime and the Court: Territorial Limitations of U.S. Laws and of U.S. Courts

[V.A.1] Two inter-related issues are vital in determining which U.S. legal forum may assert jurisdiction over an act violating the laws of war: 1) whether the law being prosecuted applies where the criminal act occurred; and, 2) whether the judicial forum in question has been provided jurisdiction to try cases originating in that location.

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[152] CASSESSE, *supra* note 53, at 282-84 (explaining the principle of passive nationality); Restatement of (Third) Foreign Relations § 402 (1987); *United States v. Yunis*, 681 F. Supp 896, 901-03 (D.D.C. 1988) (discussing the application of the passive principle in the U.S. legal system).

[153] CASSESSE, *supra* note 53, at 277 (briefly explaining the protective principle); Restatement of the Law, Third, Foreign Relations § 402 (1987).

[154] CASSESSE, *supra* note 53, at 284-95 (explaining the principle of universality); Restatement of the Law, Third, Foreign Relations § 404 (1987); *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985) ("This 'universality principle' is based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people. Therefore, any nation which has custody of the perpetrators may punish them according to its law applicable to such offenses."); *cf.* Luc Reydams, *International Decision:* Niyonteze v. Public Prosecutor, 96 AM. J. INT'L L. 231 (2002) (describing a Swiss military tribunal's exercise of universal jurisdiction over a war criminal from Rwanda).

1. *Federal District Courts and the U.S. Code*

[V.A.1.1] Traditionally, U.S. domestic criminal law has disfavored attempts to prosecute individuals for crimes committed outside the U.S. The criminal jurisdiction of the U.S. Code has accordingly been based on the territorial principle, which is reflected in the understanding that U.S. criminal statutes are not generally given extra-territorial effect, i.e., the U.S. Code is read to apply only in the U.S. unless it says otherwise.[155] Despite this, it should be recognized that Congress does have the broad authority to legislate extraterritorially.[156] Further, while the Supreme Court has looked for explicit assertions of such extraterritoriality in most statutes, it has also recognized that some statutes' extraterritoriality is implicit from the nature of their subject matter.[157]

[V.A.1.2] In terms of violations of international humanitarian law prosecuted under the U.S. Code, this issue has clearly been taken into account in the genocide and "war crimes" statues. Both statutes specifically indicate the scope of their applicability inside and outside of the U.S. While

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[155] *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949) ("legislation of Congress, unless a contrary legislative intent appears, is meant to apply only within the territorial jurisdiction of the United States"); *United States v. Flores*, 289 U.S. 137 (1933).

[156] *See EEOC v. Arabian Amer. Oil Co.*, 499 U.S. 244, 248 (1991) ("Both parties concede, as they must, that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States.").

[157] As stated in *United States v. Bowman*, 260 U.S. 94, 98 (1922),

> Some such offenses can only be committed within the territorial jurisdiction of the Government because of the local acts required to constitute them. Others are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense.

the genocide statute applies inside the U.S. without regard to the nationality of the perpetrator or victim, outside of the U.S. it only prohibits acts committed by U.S. nationals. In contrast, "war crimes" committed both inside and outside the U.S. are prosecutable only if committed by or against a member of the U.S. Armed Forces or other U.S. national.[158] As such, neither statute reaches a swath of conduct that the U.S. Executive could legitimately desire to prosecute in federal district court.[159]

[V.A.1.3] A final point to consider regarding prosecutions in federal district court is that of venue, which is the issue of which federal district court can assert jurisdiction once it has been determined that a violation of the U.S. Code has occurred. Absent specific authorization by Congress, a federal district court constitutionally does not have the authority to hear cases where the crime in question occurred outside its particular district.[160] Acknowledging this constitutional limitation, Congress,

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[158] *See supra* notes 84-119 and accompanying text (discussing the U.S. Code provisions prohibiting violations of international humanitarian law).

[159] Examples would include acts of genocide committed overseas against U.S. nationals, or war crimes committed by foreign combatants against foreign nationals in foreign territories occupied by U.S. Armed Forces, such as the intentional terror bombing of Afghani or Iraqi civilians in the current conflicts in Afghanistan or Iraq. While issues of international comity would likely push the U.S. government to leave the criminal prosecution of such war crimes to the developing Afghani and Iraqi governments, it is not unforeseeable that under some circumstances the U.S. may desire to try such a case in federal district court.

[160] U.S. CONST. art. III, § 2:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where said Crimes shall have been committed; but when not committed within any State the Trial shall be at such Place or Places as the Congress may by Law have directed.

See also United States v. Lutton, 486 F.2d 1021, 1022 (5th Cir. 1973) (territorial jurisdiction of a federal district court in criminal cases depend on some part of the criminal activity having occurred (continued...)

in 18 U.S.C.S. § 3238, specifically established a process allowing certain district courts to hear cases where the offense did not occur in any federal district; a process based on either the district in which the offender is first returned to after arrest overseas or on his or her last known address.[161]

2. *Courts-Martial and the UCMJ*

[V.A.2.1] Unlike federal district courts applying the U.S. Code, UCMJ courts-martial jurisdiction is largely unaffected by the issues of the location of the crime or the court. Article 5, UCMJ, states the UCMJ's criminal prohibitions "applies in all places."[162] However, the territorial limitations of the U.S. Code do apply when violations of the U.S. Code are prosecuted in courts-martial.[163] Finally, unlike federal district courts, courts-martial are not standing tribunals and are not tied to any specific location or district.[164] As the Manual for Courts-Martial states:

(...continued)
within its territory).

[161] 18 U.S.C.S. § 3238 states:

> The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.

18 U.S.C.S. § 3238 (2000).

[162] Art. 5, UCMJ; 10 U.S.C. § 805 (2000).

[163] *See* MANUAL FOR COURTS-MARTIAL, *supra* note 16, at Pt. IV, ¶ 60c(4)(c).

[164] *See* WINTHROP, *supra* note 34, at 49-50.

> The jurisdiction of a court-martial with respect to offenses under the code is not affected by the place where the court-martial sits. The jurisdiction of a court-martial with respect to military government or the law of war is not affected by the place where the court-martial sits except as otherwise expressly required by this Manual or applicable rule of international law.[165]

Accordingly, unlike federal district courts there is no venue concept in the UCMJ that requires prosecutions by a court-martial sitting within the district or territory where the crime was committed.

3. *Military Commissions and the Laws of War*

[V.A.3.1] Unlike the U.S. Code and in some way the UCMJ, the laws of war by their very nature apply wherever there is an armed conflict:

> Temporally and geographically, international humanitarian law applies "from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there."[166]

While the existence of an armed conflict is in and of itself a major jurisdictional limitation, no restrictions exist regarding whether the crime being prosecuted occurred inside or outside the U.S.[167]

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[165] R. COURTS-MARTIAL 201(a)(3), MANUAL FOR COURTS-MARTIAL *supra* note 16.

[166] INTER-AM. COMM'N ON HUMAN RIGHTS, *supra* note 58, at ¶ 60, *available at* http://www.cidh.oas.org/Terrorism/Eng/toc.htm, (*citing Prosecutor v. Tadic*, Appeal on Jurisdiction, No. IT-94-1-AR72, para. 70 (I.C.T.Y. Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996), *available at* http://ww.un.org/icty).

[167] *See Ex parte Quirin*, 317 U.S. 1 (1942) (prosecution before a military commission of a U.S. national working for the Germans during WWII who committed violations of the laws of war inside the U.S.); *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (military commission sitting in China trying German nationals detained in China for war crimes committed in China); *In re Yamashita*, 327 U.S. 1 (1946) (military commission sitting in the Philippines trying a Japanese national detained in the Philippines for war crimes committed in the Philippines).

Regarding the physical location of a military commission sitting to try violations of the laws of war, Colonel Winthrop wrote:

> It has further been held by English authorities that, to give jurisdiction to the war-court, the *trial* must be had within the theatre of war, military government, or martial law; that, if held elsewhere, and where the civil courts are open and available, the proceedings and sentence will be *coram-non judice*. Thus it is considered by Finlason that the trial, by a military court, of Wolf Tone in 1798, was illegal because he was tried in Dublin, outside of the region of war and martial law.
>
> These rules which have their origin in the fact that war, being an exceptional status, can authorize the exercise of military power and jurisdiction only within the limits – as to place, time and subjects – of its actual existence and operation, have not always been strictly regarded in our practice.[168]

If such a rule of venue was ever actually followed in the U.S., a point even Colonel Winthrop seems to question, it appears to have been abandoned at least in part by the time of *Ex Parte Quirin*. In that World War II era case, the Supreme Court approved the use of a military commission on the mainland U.S. when the civilian courts were still open.[169] Accordingly, similar to courts-martial, there do not appear to be any clear cut restrictions on the ability of U.S. military commissions to try individuals for violations of the laws of war based on the location of the commission.

B. Who is Being Prosecuted and When: How the Existence of an Armed Conflict, and the Combatant Status and Nationality of the Accused and Victim Affect Jurisdiction

[V.B.1] Perhaps the most complicated feature impacting the jurisdiction of U.S. legal fora are the inter-related issues of: 1) the existence of an armed conflict when and where an accused committed his crime; 2) the combatant status of an accused, i.e. whether he was a member of the U.S. Armed

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168 *See* WINTHROP, MILITARY LAW AND PRECEDENTS 836-37 (citations omitted).

169 *See Ex parte Quirin*, 317 U.S. at 45-46.

Forces or otherwise a participant in an armed conflict; and, 3) the nationality of an accused. These factors directly impact both what laws apply to an accused and which legal fora have jurisdiction to try an accused.

[V.B.2] Fundamental to the prohibitions contained in international humanitarian law is the understanding that they apply during periods of armed conflict.[170] Therefore, for an accused to be convicted of violating the laws of war, it must be determined that the accused's actions took place during the conduct of such an armed conflict.[171] In illustration, as the Geneva Conventions regulate the conduct of parties engaged in armed conflicts, an accused obviously could not be convicted of committing grave breaches of the Conventions unless his acts actually occurred in the context of an armed conflict.[172] In federal district court, the existence of an armed conflict and an accused's participation in it would be analyzed as merely elements of the crime that must be proven at trial.[173]

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[170] *See* INTER-AM. COMM'N ON HUMAN RIGHTS, *supra* note 58, at ¶ 59 (2002), *available at* http://www.cidh.oas.org/Terrorism/Eng/toc.htm. Of course, as indicated in *supra* notes 80-83, the nature of crimes against humanity and genocide have developed to the point where they are considered to apply outside scope of armed conflicts.

[171] This is in contrast to those crimes this article has labeled predicate crimes, such as torture under the U.S. Code or murder under the UCMJ, which can be charged regardless of the existence of an armed conflict.

[172] A case in point would be Timothy McVeigh. While McVeigh's actions certainly amounted to one of the worst acts of terrorism the U.S. has ever seen, because they did not occur during the course of an armed conflict with the U.S. it cannot accurately be said that McVeigh was a war criminal. *See generally United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998) (appellate court decision approving the death sentence of McVeigh).

[173] The mechanics of how the existence of an armed conflict would be proven during trial in a federal district court, either by judicial notice, judicial determination, or by recourse of the trier-of-fact to the facts and circumstances surrounding the events in question, is beyond the scope of this article. *Cf. United States v. New*, 55 M.J. 95 (C.A.A.F. 2001) (discussing treating the element of the lawfulness of an order in a prosecution for violating a lawful military order as a legal issue to be decided by the trial judge).

However, as explained in detail below, the existence of an armed conflict is also a jurisdictional hurdle that must be met for courts-martial and military commissions to even hear war crimes cases. This distinction between federal district courts on the one hand and courts-martial and military commissions on the other stems from the understanding that the latter are fora of limited jurisdiction, jurisdiction that at many times is directly premised on the existence of an armed conflict.

[V.B.3] Three possible triggers could be used to determine the existence of an armed conflict for the purpose of activating the law of war jurisdiction of courts-martial and military commissions.[174] First, jurisdiction could be triggered when the President unilaterally determines, through some form of finding of fact or similar mechanism, that the U.S. was engaged in an armed conflict sufficient to trigger the requirements of the laws of war.[175] Second, jurisdiction could be triggered by a congressional declaration of war.[176] Third, jurisdiction could be triggered:

> [W]henever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.[177]

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[174] *Cf.* John Alan Cohan, *Legal War: When Does It Exist, and When Does It End?*, 27 HASTINGS INT'L & COMP. L. REV. 221 (2004) (discussing the problems of determining when war exists and ends).

[175] *Cf.* R. COURTS-MARTIAL 103(19), MANUAL FOR COURTS-MARTIAL *supra* note 16, (For the sole purposes of increasing the maximum punishment of some crimes and for satisfying the elements of certain others, this section defines a "time of war" to mean "a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants a finding that a 'time of war' exists.").

[176] "The Congress shall have the power . . . To declare War. . . ." U.S. CONST. art. I, § 8.

[177] *Prosecutor v. Tadic*, Appeal on Jurisdiction, No. IT-94-1-AR72, para. 70 (I.C.T.Y. Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996), *available at* http://www.un.org/icty.

Under this type of de facto analysis, formal declarations of war or findings by the President could be viewed as unnecessary for the determination of the existence of an armed conflict. Such an analysis is consistent with international law, such as the Geneva Conventions which note that an "armed conflict … may arise between [States], even if the state of war is not recognized by one of them."[178] As will be explained momentarily in Sections V.B.2 and V.B.3, it is not entirely clear which of these triggers would be applied by U.S. fora.

1. *Federal District Courts, the U.S. Code, and the Nationality of the Accused and Victim*

[V.B.1.1] While the existence of an armed conflict may serve as a jurisdictional hurdle for courts-martial and military commissions, the real hurdle for federal district courts is the nationality of the accused and victim. Even though federal district courts can hear cases against U.S. nationals and non-nationals alike, the U.S. Code provisions enforcing international humanitarian law are directly linked to the issue of the nationality of the accused and the victim. As discussed previously, the U.S. Code provisions prohibiting genocide only apply to acts occurring inside the U.S. or to actions outside the U.S. taken by U.S. nationals.[179] Likewise, the "war crimes" statute, regardless of the location of the crime, only applies where U.S. nationals and members of the U.S. Armed Forces are perpetrators or victims.[180] As discussed previously in Section V.A.1, the effect of this is clear: scenarios could develop where the federal district courts will provide no avenue for prosecution of an individual accused of violations of international humanitarian law.

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[178] *Geneva I*, II, III, and IV, *supra* notes 61, 62, 63, and 64, common art. 2.

[179] *See supra* notes 84-119 and accompanying text (discussing the U.S. Code provisions prohibiting violations of international humanitarian law).

[180] *See supra* notes 84-119 and accompanying text (discussing the U.S. Code provisions prohibiting violations of international humanitarian law).

2. *Courts-Martial, the UCMJ, and Time of War*

[V.B.2.1] The UCMJ contains two distinct provisions establishing to whom court-martial jurisdiction applies: Article 2, UCMJ, and Article 18, UCMJ. Article 2, UCMJ, lists distinct categories of persons subject to the specific code of common criminal prohibitions contained within the UCMJ,[181] prohibitions that include the predicate offenses discussed previously. More amorphously, Article 18, UCMJ, states that general courts-martial can try persons subject to the laws of war for violations subject to trial by military tribunal, without defining those terms.[182] While Article 2, UCMJ, and Article 18, UCMJ, are distinct provisions, an examination of the Supreme Court's and military court's interpretations of Article 2, UCMJ, will be helpful in considering the jurisdictional reach of Article 18, UCMJ.

[V.B.2.2] Article 2, UCMJ, states that the UCMJ applies to: 1) members of U.S. Armed Forces;[183] 2) prisoners of war;[184] 3) civilians accompanying the U.S. Armed Forces overseas;[185] 4) civilians serving with or accompanying the U.S. Armed Forces in "time of "war";[186] and, 5) certain other groups closely affiliated with the U.S. Armed Forces.[187] These provisions do not make distinctions on the basis of nationality, i.e. the UCMJ purports to apply to any "person" accompanying U.S. Armed Forces during "time of war." While it is unquestioned that members of the U.S. Armed

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181 Art. 2, UCMJ, 10 U.S.C. § 802 (2000).

182 Art. 18, UCMJ, 10 U.S.C. § 818 (2000).

183 Art. 2(a)(1), UCMJ, 10 U.S.C. § 802(a)(1) (2000).

184 Art. 2(a)(9), UCMJ, 10 U.S.C. § 802(a)(9) (2000).

185 Art. 2(a)(10), UCMJ, 10 U.S.C. § 802(a)(10) (2000).

186 Art. 2(a)(11), UCMJ, 10 U.S.C. § 802(a)(11) (2000).

187 Art. 2, UCMJ, 10 U.S.C. § 802 (2000).

Forces (whether U.S. nationals or not) can be tried by courts-martial in time of war or peace for violations of the code of conduct contained in the UCMJ, the Supreme Court has struck down a number of attempts to apply the UCMJ as broadly as the text of Article 2, UCMJ, would allow. In so doing, the Supreme Court has established a number of bright line constitutional rules restricting the jurisdiction of courts-martial to try civilians in times of "peace" pursuant to Article 2, UCMJ.

[V.B.2.3] In *United States ex rel. Toth v. Quarles*,[188] the Supreme Court held that a U.S. civilian who had been released from the Armed Forces and returned to the U.S could not constitutionally be tried before a court-martial for UCMJ violations committed while previously stationed in Japan as a member of the U.S. Armed Forces.[189] This ruling was later expanded in *Reid v. Covert*,[190] *Grisham*

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188 *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

189 As the Court explained, the practical effect of this ruling was to prevent the prosecution of the accused. This is because no other provisions of the U.S. Code applied to the accused's crimes and, as discussed in *supra* notes 138-39, the UCMJ was interpreted as not being enforceable in federal district courts. This "jurisdictional gap" has since been filled by Congress with 18 U.S.C. § 3261. That provision expands the U.S.'s special maritime and territorial jurisdiction to civilians accompanying the Armed Forces overseas and to separated members of the Armed Forces whose crimes occurred overseas. *See* Susan S. Gibson, *Lack of Extraterritorial Jurisdiction Over Civilians: A New Look At An Old Problem*, 148 MIL. L. REV. 114 (1995) (describing the "jurisdiction gap"); Glenn R. Schmitt, *Closing the Gap in Criminal Jurisdiction Over Civilians Accompanying the Armed Forces Abroad - A First Person Account of the Creation of the Military Extraterritorial Jurisdiction Act of 2000*, 51 CATH. U.L. REV. 55 (2001) (describing how the "jurisdictional gap" was filled).

190 *Reid v. Covert*, 354 U.S. 1 (1957) (refusing to allow court-martial jurisdiction over dependent spouse stationed overseas who was accused of murdering her husband).

v. Hagan,[191] *Kinsella v. United States*,[192] and a number of other cases.[193] Together, these cases established the rule that civilians accompanying the U.S. Armed Forces overseas could not constitutionally be tried by courts-martial for violations of the non-war crimes provisions contained within the UCMJ.[194] As noted previously, the Supreme Court's concern with the broad application of courts-martial jurisdiction was with the limitations on due process rights in courts-martial as compared to federal district courts.[195]

[V.B.2.4] While dicta in *Reid* and *Madsen v. Kinsella* indicated the courts-martial of civilians accompanying the Armed Forces in "time of war" would be acceptable,[196] U.S. military courts have narrowly interpreted the meaning of "time of war" when determining the jurisdictional scope of Article 2, UCMJ. During the Vietnam War, the Court of Military Appeals in *United States v. Averette*[197] held that for purposes of court-martialing U.S. civilians accompanying or serving with the Armed Forces in "time of war" under Article 2(10), UCMJ, a formal declaration of war by

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191 *Grisham v. Hagan*, 361 U.S. 278 (1960) (refusing to allow court-martial jurisdiction over civilian employee of the Army stationed overseas who was accused of murder).

192 *Kinsella v. Singleton*, 361 U.S. 234 (1960) (refusing to allow court-martial jurisdiction over civilian dependents overseas charged with either capital or non-capital offenses).

193 *See generally* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE 166-67 (5th ed. 1999) (discussing the subject of court-martial jurisdiction over civilians).

194 *See id.* at 166-67.

195 *See id.*

196 *Reid*, 354 U.S. at 33-36; *Madsen*, 343 U.S. at 349-55.

197 *United States v. Averette*, 19 C.M.A. 363 (C.M.A. 1970).

Congress was required to establish jurisdiction.[198] In coming to this decision, the Court of Military Appeals was fully cognizant of the intensity of the ongoing armed conflict in Southeast Asia. Rather than focus on that factor in determining whether the crime occurred during a "time of war," the Court focused instead on the need to tread lightly "in the sensitive area of subjecting civilians to military jurisdiction."[199] Accordingly the Court stated,

> [W]e believe that a strict and literal construction of the phrase "in time of war" should be applied. A broader construction of Article 2(10) would open the possibility of civilian prosecutions by military courts whenever military action on a varying scale of intensity occurs.[200]

The practical effect of this decision, considering the paucity of declared wars since World War II, was to virtually extinguish the application of the UCMJ's non-war crimes provisions to civilians accompanying or serving with the Armed Forces during periods of armed conflict.[201]

[V.B.2.5] As noted above, Article 18, UCMJ, allows that general courts-martial can prosecute persons subject to the laws of war for violations subject to trial by military tribunal. Accordingly,

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198 *Id*. at 365. While the decision in *Averette* is over 30 years old and was a 2-1 split, it continues to be cited positively by the military's highest court, as well as other federal appellate courts, and the precedents and legal analysis upon which it rests remain intact. *See Willenbring v. Neurauter*, 48 M.J. 152, 157 n. 4 (C.A.A.F. 1998) (citing to *Averette* positively); *Zamora v. Woodson*, 19 C.M.A. 403, 404 (C.M.A. 1970) (relying on *Averette* in a similar case); *Robb v. United States*, 456 F.2d 768, 538-41 (Ct. Claims 1972) (relying on the decision in *Averette*); *cf. Lee v. Madigan*, 358 U.S. 228 (1959) (case prior to *Averette* applying a restrictive reading of the Articles of War, the UCMJ's predecessor, in order to limit military jurisdiction over civilians); *Latney v. Ignatius*, 416 F.2d 821 (D.C. Cir. 1969) (case prior to *Averette* also refusing to countenance an expansive view of military jurisdiction over civilians during the Vietnam War).

199 *Averette*, 19 C.M.A. at 165-66.

200 *Averette*, 19 C.M.A. at 166.

201 *See* Gibson, *supra* note 190 (describing the "jurisdiction gap" created by these precedents).

Article 18, UCMJ, has been interpreted by a number of writers to allow courts-martial to prosecute any combatants participating in an armed conflict, either enemy, allied, or U.S., who have committed violations of international humanitarian law.[202] However, due to the Court of Military Appeals decision in *Averette*, it could be argued that Article 18, UCMJ's extension of jurisdiction to prosecute violations of the laws of war only applies during periods of congressionally declared war. As this provision of Article 18, UCMJ, has never been invoked against anyone, let alone against a U.S. civilian combatant,[203] there is no easy answer to how the Courts would rule on *Averette's* applicability.[204] The effects of this uncertainty are magnified by the fact that Article 18, UCMJ, fails to distinguish between different classes of persons subject to the laws of war. Therefore, any application of the principal from *Averette* would arguably apply equally to enemy or allied combatants facing court-martial for war crimes violations, not just U.S. nationals.[205] Thus,

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[202] *See* Robinson O. Everett & Scott L. Silliman, *Forums For Punishing Offenses Against The Law Of Nations*, 29 WAKE FOREST L. REV. 509, 515-19 (1994); Mark S. Martins, *National Forums for Punishing Offenses Against International Law: Might U.S. Soldiers Have Their Day In the Same Court?*, 36 VA. J. INT'L L. 659, 673-74 (1996).

[203] The existence of U.S. civilian combatants is premised on the understanding that some U.S. civilian government employees, such as CIA paramilitaries, can and do participate in armed conflicts as active combatants subject to the laws of war. Whether such participation is legitimate under international law is beyond the scope of this article.

[204] *Compare* Marc L. Warren, *Operational Law - A Concept Matures*, 152 MIL. L. REV. 33, 67 n.141 (1996) ("Notwithstanding the holding in *Averette*, UCMJ Article 18 grants to general courts-martial the jurisdiction to try '*any* person who by the law of war is subject to trial by a military tribunal'"), *with* Gibson, *supra* note 190, at 140-41 ("If the military court-martialed a civilian under Article 18, the military courts could read the "law of war" language in Article 18 to require a congressionally declared war in accordance with *Averette*. To date, Article 18 remains untested").

[205] Of course, the line of precedents starting with *Toth* and *Reid* would make the case for applying *Averette* to U.S. civilians facing charges under Article 18, UCMJ, much stronger than the case for applying *Averette* to the court-martial of foreign combatants. Further, as discussed *infra* note 236, such a reading could extinguish the U.S.'s ability to prosecute foreign prisoners of war (continued...)

if the holding in *Averette* were to be read into Article 18, UCMJ, courts-martial would only have jurisdiction to try war criminals acting during a congressionally declared war.[206]

3. *Military Commissions as Common Law War Courts*

[V.B.3.1] The existence of an armed conflict and an accused's participation in it are the most important, if not only, jurisdictional questions that must be answered to authorize trial by military commission.[207] While those questions may seem simple, figuring out what process to use to determine their answers is not.

[V.B.3.2] The most perplexing question arises in determining when an armed conflict exists for the purposes of triggering the jurisdiction of military commissions. As stated previously, such a determination could be triggered alternatively by: 1) a Presidential finding of fact; 2) a congressional declaration of war; and/or, 3) the de facto existence of hostilities sufficiently intense to objectively warrant being called an armed conflict. In the principal Supreme Court cases discussing the use of military commissions, *Johnson v. Eisentrager*, *In re Yamashita*, and *Ex parte Quirin*,[208] the accuseds' actions occurred during World War II, an armed conflict formalized by a declaration of

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(...continued)
accused of war crimes during periods of non-congressionally declared war.

[206] *But see* Major Jan E. Aldykiewicz, *Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts*, 167 MIL. L. REV. 74 (2001) (arguing that UCMJ general courts-martial have jurisdiction to try foreign nationals accused of violations of international humanitarian law occurring in internal conflicts to which the U.S. was not a party).

[207] This, of course, presumes that the accused is charged with a war crime committed during that armed conflict. An accused's membership in a military unit or organization without a concurrent nexus between his criminal acts and the armed conflict in question should not be sufficient to engage the jurisdiction of a military commission.

[208] *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *In re Yamashita*, 327 U.S. 1 (1946); *Ex parte Quirin*, 317 U.S. 1 (1942).

war from Congress. It should therefore come as no surprise that these opinions did not focus on how to determine whether an armed conflict existed at the time of an accused's actions. And while Congress has expressly authorized the use of military commissions through Article 21, UCMJ, it has provided little to no explicit guidance on when those commissions can be utilized.

[V.B.3.3] It could be assumed that Congress intended that the jurisdictional reach of the "law of war" cited in Article 21, UCMJ, was limited to a "time of war" within the meaning of Article 2, UCMJ. If so, following the logic of *Averette* would lead to the result that the military commissions sanctioned by Article 21, UCMJ, only have express jurisdiction to try war crimes committed during congressionally declared wars. Even if such an inferential leap is made, some writers argue that the President's inherent authority to utilize military commissions applies during periods of de facto armed conflict, declared or otherwise.[209] In that vein, the fact that *Averette* was interpreting the congressional intent behind a specific statute, Article 2, UCMJ, as opposed to examining the boundaries of the President and Congress's shared constitutional authority to apply military jurisdiction during times of non-declared armed conflicts, makes recourse to *Averette* for the purpose of analyzing the President's inherent authority unpersuasive. Again, as with the interplay between *Averette* and Article 18, UCMJ's grant of law of war jurisdiction to courts-martial, this issue and different questions it raises makes the exact jurisdictional boundaries of U.S. domestic fora unclear, a fact noted by Congress during the passage of the War Crimes Act of 1996.[210]

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[209] *Paust*, *supra* note 6, at 5.

[210] *See Report on The War Crimes Act of 1996*, H. R. Rep. No. 104-698 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2166, 2171 ("[T]he Supreme Court condemned [military commissions] breadth of jurisdiction to uncertainty in *ex parte Quirin*, where it stated that '[w]e have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the laws of war.'").

[V.B.3.4] Due to this lack of clarity, an accused facing trial before a military commission in the current "War on Terrorism" might be expected to challenge via habeas corpus the jurisdiction of such a commission based on the holding in *Averette* in conjunction with the lack of a formal declaration of war by Congress. Such an attack would be akin to the habeas corpus attacks on jurisdiction made in *Ex parte Quirin* and *In re Yamashita* where the Supreme Court analyzed whether what the accuseds in those cases were being charged with were in fact war crimes susceptible to trial by military commission.[211] Considering the Supreme Court's recent decision in *Rasul*, it seems likely that the federal courts would claim jurisdiction to determine the question of what factual predicate triggers the law of war jurisdiction of military commissions.[212]

[V.B.3.5] A final question about the jurisdictional scope of military commissions arises in terms of whether military commissions can be used to try members of the U.S. Armed forces and other loyal

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[211] *See Quirin*, 317 U.S. 1 at 25-29. The court in *Yamashita* held that:

> We consider here only the lawful power of the commission to try the petitioner for the offense charged. … Congress by sanctioning trials of enemy aliens by military commission for offenses against the law of war had recognized the right of the accused to make a defense. … It has not foreclosed their right to contend that the Constitution or laws of the United States withhold authority to proceed with the trial. It has not withdrawn, and the Executive branch of the Government could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus.

Yamashita, 327 U.S. 1 (1946), at 8-9.

[212] *See supra* note 7discussing *Rasul* and its holding allowing alleged enemy combatants detained without trial at Guantanamo Bay, Cuba, by U.S. Armed Forces to bring habeas corpus claims in U.S. federal district courts to contest the legality of their detention.

U.S. nationals. In the earlier cited cases of *Eisentrager*, *In re Yamashita*, and *Ex parte Quirin*,[213] the Supreme Court made clear that military commissions can try enemy combatants accused of violations of the laws of war, irrespective of whether those acts occurred inside or outside the U.S. or where the combatants were found.[214] Further, in *Ex parte Quirin*, the Court made short work of the argument that U.S. citizens could not be considered enemy combatants and thus subject to trial by military commissions.[215] Taking the next logical step, some writers have argued that U.S. combatants, namely members of the U.S. Armed Forces and other U.S. civilian government employees, may also be subject to trial by military commission for violations of the laws of war.[216] This is because U.S. combatants are subject to the laws of war like all other combatants and in Article 21, UCMJ, Congress specifically stated that the jurisdiction of military commissions to try violators of the laws of war has not been limited by the UCMJ. Accordingly, military commissions would presumably have jurisdiction to try U.S. combatants, be they members of the U.S. Armed Forces or civilian combatants of one type or another. On the one hand, this interpretation is consistent with the understanding voiced by the Supreme Court that military commissions are

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213 *Eisentrager*, 339 U.S. 763 (1950); *Yamashita*, 327 U.S. 1 (1946); *Quirin*, 317 U.S. 1 (1942).

214 In terms of trying non-combatants, the Supreme Court's precedents appear to establish much more restrictive terms. Those precedents indicate that military commissions can try non-combatants in the following areas: (1) an area of the U.S. where the courts are no longer open and operating because of an armed conflict; (2) a foreign area of armed conflict; or (3) a foreign territory under U.S. occupation. *Ex Parte Milligan*, 71 U.S. 2, 120-22 (1866); *Reid v. Covert*, 354 U.S.1, 35 n.63 (1957); *see also United States v. Schultz*, 1 C.M.A. 512 (C.M.A. 1952) (allowing general court-martial jurisdiction over non-combatant U.S. national in occupied Japan for violation of Japanese criminal statute based on theory that court-martial and military commission jurisdiction are concurrent during occupation settings).

215 *Quirin*, 317 U.S. at 37-38.

216 Everett & Silliman, *supra* note 203, at 518-19.

common law courts of war, amenable to try all violations of the laws of war.[217] On the other hand, such a practice would pose significant problems because of military commissions limited due process guarantees in light of the *Toth*/*Reid* line of precedent.

[V.B.3.6] In summary, when determining which U.S. domestic forum has jurisdiction to try a purported violation of international law, the following factors must be examined: 1) the location of the crime; 2) the existence of an armed conflict; 3) the combatant status of the accused; and 4) the nationality of the accused. Reliance on these factors to establish jurisdiction creates distinct limitations in the individual reach of federal district courts, courts-martial, and military commissions. For example, federal district courts only have jurisdiction to try violations of the genocide act occurring inside the U.S. or occurring outside the U.S. if perpetrated by a U.S. national. Likewise, federal district courts can try violations of the "war crimes" act occurring inside or outside the U.S. as long as the perpetrator or victim is a U.S. national or member of the U.S. Armed Forces. In contrast, while UCMJ courts-martial can try members of the U.S. Armed Forces for all violations of the UCMJ (regardless of nationality or location), courts-martial only have jurisdiction to try civilians for violations of the UCMJ when accompanying the U.S. Armed Forces during the existence of a congressionally declared war (regardless of nationality or location). While the UCMJ

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[217] In line with that broad understanding, the U.S. Army Field Manual on the Law of Land Warfare notes that:

> The jurisdiction of United States military tribunals in connection with war crimes is not limited to offenses committed against nationals of the United States but extends also to all offenses of this nature committed against nationals of allies and of cobelligerents and stateless persons.

U.S. DEP'T OF THE ARMY, *supra* note 28, para. 507.a (paragraph 13 of the same Manual demonstrates that the term "military tribunal" is used to include both military commissions and courts-martial).

grants courts-martial the jurisdiction to try all violators of the laws of war (regardless of nationality or location), this provision has never been applied so it is not clear whether that grant is triggered by Presidential decree, a congressional declaration of war, or the existence of a *de facto* armed conflict. Similarly, while the Supreme Court has recognized that military commissions also have the authority to try all violators of the laws of war (regardless of nationality or location), it has neither dealt with the issue of what triggers the legal existence of an armed conflict nor whether U.S. Armed Forces and loyal nationals could be tried by military commission. Accordingly, the exact jurisdictional reach of courts-martial and military commissions to try violations of international humanitarian law is not clear.

VI. INTERNATIONAL LAW LIMITATIONS ON CHOICE OF FORUM

[VI.1.] The previous Sections explained in detail the various aspects of domestic U.S. law that impact the President's discretion when determining how to prosecute violations of the laws of war. This Section will explain the effects international law has in this area, or to be exact, the effects of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War.[218] While this article

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[218] *Geneva III*, *supra* note 63. Of course, many international treaties and customary international law principles can and should affect the procedures the U.S. uses to try individuals for violations of the laws of war. One such example would be Common Article 3's prohibition of:

> [P]assing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Geneva I, *II*, *III*, and *IV*, *supra* notes 61, 62, 63, and 64, common art. 3. Similarly, Article 84 of *Geneva III* states:

> In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in

(continued...)

has previously used the term "combatant" to refer to any person taking part in hostilities during an armed conflict, international law acknowledges two classes of combatants: lawful and unlawful, also referred to as privileged and non-privileged.[219] This distinction is based upon the understanding that only certain persons, i.e., lawful combatants, can legitimately engage in hostilities during armed conflicts. In contrast are unlawful combatants who are not legally entitled to engage in hostilities during armed conflicts. To be considered a lawful combatant entitled to prisoner of war status, an individual must fall into one of the following groups:

> (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
>
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
>
> > (a) that of being commanded by a person responsible for his subordinates;
> > (b) that of having a fixed distinctive sign recognizable at a distance;
> > (c) that of carrying arms openly;
> > (d) that of conducting their operations in accordance with the laws and customs of war.

(...continued)

> particular, the procedure of which does not afford the accused the rights and means of defense provided for in Article 105.

Geneva III, *supra* note 63, art. 84. This article would, however, distinguish between the procedural requirements such provisions call for, and actual jurisdictional limitations created by international law.

[219] *See generally* GREEN, *supra* note 65, at 102-121 (discussing which lawful combatants may actively participate in armed conflict); *see also* Christopher C. Burris, *Re-Examining the Prisoner of War Status of PLO Fedayeen*, 22 N.C. J. INT'L L. & COM. REG. 943, 964-76 (1997).

> (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
>
> (4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.
>
> (5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.
>
> (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.[220]

[VI.2.] While lawful combatants are entitled to prisoner of war status and release at the end of hostilities if captured, unlawful combatants are liable to be criminally prosecuted for their actions during an armed conflict,[221] i.e., while a soldier may lawfully kill another soldier during combat, the same act taken by an unlawful combatant may be tried as murder. However, the mere fact of lawful combatant status does not immunize a soldier from prosecution for violations of the laws of war taken during hostilities.[222] This is because being a soldier does not afford free reign to kill and plunder indiscriminately. Accordingly, any lawful combatant, or unlawful combatant for that matter, who commits a violation of international humanitarian law is subject to trial for his actions,

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220 *Geneva III*, *supra* note 63, art. 4(a).

221 *See* GREEN, *supra* note 65, at 102-2.

222 *See id.* at 196-215.

either by his own government, the government of his captors, any government choosing to exercise universal jurisdiction over war crimes, or any international tribunal with appropriate jurisdiction.

[VI.3] In discussing the trial of prisoners of war by their captors, Article 84 of the Third Geneva Convention clearly favors military, not civil, prosecutions:

> A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war.[223]

In the same vein, Article 102 of the Third Geneva Convention requires that:

> A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.[224]

On their face, these provisions would require that the U.S. use the same courts and procedures used to try members of the U.S. Armed Forces when prosecuting foreign prisoners of war for all violations of international humanitarian law, i.e., they could only be tried in federal district courts or UCMJ courts-martial, not military commissions.[225] This point has apparently been acknowledged

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223 *Geneva III*, *supra* note 63, art. 84.

224 *Id.* at art. 102.

225 *See* MacDonnell, *supra* note 6, at 31-32 (arguing that even though the U.S. could theoretically try members of the U.S. Armed Forces before military commissions, the U.S.'s practice of only trying U.S. service members in courts-martial or federal district courts would prohibit the use of military commissions to try foreign prisoners of war); Martins, *supra* note 203, at 679-85. *But see* U.S. DEP'T OF THE ARMY, *supra* note 28, para. 178.b, interpreting Article 102 to mean that:

> Prisoners of war, including those accused of war crimes against whom judicial proceedings are instituted, are subject to the jurisdiction of United States courts-martial and military commissions.

(continued...)

by the U.S. government in recent civil litigation involving the trial of Guantanamo Bay detainees before military commissions.[226] However, some writers have argued that Article 102 applies only to prosecutions for crimes committed after capture.[227] In analyzing this issue one must first turn to *In re Yamashita*, where the Supreme Court interpreted an almost identical provision in the 1929 Geneva Convention.[228] At issue was whether a Japanese war criminal could be tried by a U.S. military commission, or whether recourse to a court-martial was required. The Supreme Court read the provision in the 1929 Geneva Convention to only apply to crimes occurring after capture, and let the conviction stand.[229]

[VI.4] Although at first glance this would appear to settle the issue, a number of writers have persuasively argued that the 1949 Geneva Conventions intentionally expanded the scope of Article 102 to apply to crimes occurring prior to capture in order to specifically avoid the outcome of *In re*

(...continued)

> They are entitled to the same procedural safeguards accorded to military personnel of the United States who are tried by courts-martial under the Uniform Code of Military Justice or by other military tribunals under the laws of war.

The import of this language is that prisoners of war tried for war crimes can be tried before U.S. military commissions, a position the U.S. Government apparently has decided to step away from.

[226] *See Hamdan v. Rumsfeld*, No. 04-1519, slip op. at 14 (D.D.C. Nov. 8, 2004), ("The government does not dispute the proposition that prisoners of war may not be tried by military tribunal.").

[227] *See* Everett & Silliman, *supra* note 203, at 516-17.

[228] *In re Yamashita*, 327 U.S. 1, 20-21 (1946) (The provisions being interpreted provided that, "Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power.").

[229] *Id*. at 20-23.

Yamashita.[230] In so arguing, they point to Article 85 of the 1949 Convention which states, "Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention."[231] Since one of those "benefits" would presumably be the protections of Article 102,[232] these two Articles read in conjunction would require that foreign prisoners of war be tried by federal district courts or courts-martial, not military commissions.[233]

[VI.5] Of course, such a conclusion raises the question of not only how to determine who is a prisoner of war as opposed to an unlawful combatant, but more importantly who makes that

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230 *See* MacDonnell, *supra* note 6, at 32.

231 *Geneva III*, *supra* note 63, art. 85.

232 Arguments that *Geneva III* is not self-executing within the domestic U.S. legal system, and that therefore Article 102 would provide no protections within a military commission, should be unavailing for two reasons. First, in *Hamdi*, six Justices joined Justice O'Connor's plurality opinion or Justice Souter's concurrence, both of which relied on *Geneva III*'s protections of prisoners of war in reaching the conclusion that Hamdi was entitled to a meaningful opportunity to contest the factual basis for his detention. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2641-42, 2657-58 (2004). This would appear to demonstrate that those Justices accept that *Geneva III* does provide protections applicable within the U.S. legal system. Second, as military commissions are creatures of international humanitarian law, Congress should not need to implement an international treaty dealing with the law of war for it to apply in military commissions. Or put another way, if grave breaches of the 1949 Geneva Conventions can be prosecuted before military commissions without congressional action, should not the jurisdictional requirements created by those same Conventions also apply equally? *See also* Martins, *supra* note 203, at 680 n110 (discussing the issue of whether *Geneva III* is self-executing); *United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002) (stating that Geneva Convention requirements for POW status are self-executing.).

233 *See* COMMENTARY III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 413-27 (Jean S. Pictet ed., 1960) (supporting the view that all of the protections of the Geneva Convention, including the judicial guarantees in Article 102, apply during trials for precapture offenses). Were this interpretation of Article 102 to be applied, it could seriously diminish the possibility that *Averette* would be applied to the court-martial of foreign prisoners of war. To do so would effectively extinguish the U.S.'s ability to prosecute many foreign prisoners of war for war crimes in the absence of a congressionally declared war.

decision. While the Bush Administration has argued that this determination is almost exclusively the sole province of the Executive, that argument has been hotly contested in the courts and has at time been rejected in whole or in part.[234] In the recent *Hamdan* case, the federal district court held that the Third Geneva Convention requires that prior to trial by a military commission, a determination of the prisoner of war status of an alleged unlawful combatant must be made by an independently organized tribunal.[235] The court there neither claimed authority for itself to determine Hamdan's prisoner of war status, nor specifically outline the parameters of what such a tribunal would look like. It merely held that recourse to such a tribunal, standing apart from the President's determinations, was required by the laws of war before Hamdan could be tried before a military commission. Meanwhile, in *United States v. Lindh*, the federal district court determined that it had the competency to determine whether Lindh was entitled to prisoner of war status. There, the district court reviewed the President's determination, admittedly under a deferential standard, in order to determine whether Lindh was immune from prosecution for his actions during the armed conflict in Afghanistan.[236] As district court opinions these cases are not decisive; however, they do demonstrate that the manner in which U.S. fora will determine the prisoner of war status of detained enemy combatants is open to question.

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[234] *See Hamdan v. Rumsfeld*, No. 04-1519, slip op. at 16-19 (D.D.C. Nov. 8, 2004); *United States v. Lindh*, 212 F. Supp. 2d 541, 554-55 (E.D. Va. 2002) (rejecting the argument that the "President's determination that Taliban members are unlawful combatants was made pursuant to his constitutional Commander-in-Chief and foreign affairs powers and is therefore not subject to judicial review or second guessing because it involves a quintessentially nonjusticiable political question.").

[235] *See Hamdan v. Rumsfeld*, No. 04-1519, slip op. at 16-26 (D. D.C. Nov. 8, 2004).

[236] *See Lindh*, 212 F. Supp. 2d at 552-58 (reviewing deferentially the President's interpretation of the Third Geneva Convention as it applied to the prisoner of war status of the defendant in that case).

[VI.6] In summary, international humanitarian law recognizes two categories of combatants participating in an armed conflict: lawful and unlawful combatants. While lawful combatants may participate in the hostilities of an armed conflict, unlawful combatants become subject to criminal prosecution for doing so. While both lawful and unlawful combatants may be prosecuted for their violations of international humanitarian law, the Third Geneva Convention appears to require that lawful combatants be tried in either federal district courts or UCMJ courts-martial rather than military commissions. No similar jurisdictional restriction exists for the criminal prosecution of unlawful combatants for violations of the laws of war. It is an open question how the prisoner of war status of enemy combatants facing trial in U.S. domestic fora should be determined.

VII. CONCLUSION

> The jurisdiction of United States military tribunals in connection with war crimes is not limited to offenses committed against nationals of the United States but extends also to all offenses of this nature committed against nationals of allies and of cobelligerents and stateless persons.…
>
> 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. … Commanding officers of United States troops must insure that war crimes committed by members of their forces against enemy personnel are promptly and adequately punished.
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> U.S. Dep't of the Army, Field Manual 27-10, The Law of Land Warfare para. 507 (1956).

[VII.1] This doctrinal statement issued during the height of the Cold War marks an attempt by the U.S. Armed Forces to explain when and how the U.S. will prosecute violations of the laws of war.

Assuming this statement was ever in fact accurate, a number of developments since its publication calls into question any relevance it may retain. While this statement envision a fairly clear division of labor by U.S. domestic fora in the prosecution of war crimes, the division of labor that has emerged today between federal district courts, courts-martial, and military commissions is anything but clear. This is because over the last half century two trends have worked at cross currents impacting how violations of the laws of war can and should be sanctioned within the U.S. legal system.

[VII.2] On one side is a trend pushing to both diminish the jurisdictional reach of courts-martial and military commissions and expand the reach of federal district courts into areas formerly left to those two fora. In the courts, this trend can be seen in the logic of the *Toth*/*Reid*/*Averette* line of cases that argues that the military jurisdiction[237] found in the Constitution should be a narrow exception to that of the federal district courts.[238] The impact of these precedents and the problems they created for holding U.S. civilians accountable for their overseas criminal actions led in part to the passage of the Military Extraterritorial Jurisdiction Act of 2000 and the PATRIOT Act provision expanding the special maritime and territorial jurisdiction of the U.S. to overseas military facilities. While these statutes greatly expanded the jurisdictional reach of U.S. federal district courts, so to did the passage of the U.S. Code provision criminalizing violations of the laws of war committed by and against U.S. Armed Forces. Through that statute, Congress allowed active duty U.S. military personnel and

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[237] *See* U.S. DEP'T OF THE ARMY, *supra* note 28, para. 13 ("Military jurisdiction is of two kinds: first, that which is conferred by that branch of a country's municipal law which regulates its military establishment; second, that which is derived from international law, including the law of war.").

[238] As argued previously, if utilized in interpreting the congressional intent behind Articles 18 and 21, UCMJ, this logic could limit courts-martial and military commissions to only prosecuting violations of the laws of war occurring during congressionally declared wars.

enemy combatants accused of war crimes to be brought before federal district courts and no longer just courts-martial or military commissions. By going beyond simply filling jurisdictional gaps created by the *Toth/Reid/Averette* line of cases and encroaching into the remaining jurisdictional domain of courts-martial and military commissions, Congress blurred any division of labor between the three fora that may have previously existed.

[VII.3] Running contrary to that trend has been the increasing impact of sub-national actors in armed conflicts around the world and the recognition that an effective response to those actors requires not just law enforcement action but also military action. Over the last half century, the World has seen stateless terrorist organizations and insurgent movements gain the ability to enter into hostilities with state governments at a level of intensity sufficient to arguably qualify as armed conflicts. Thus, it is no longer possible to assume that the modern day war criminals attacking U.S. citizens and interests will always be "enemy nationals" representing an "enemy state" during a time of congressionally declared war. In apparent recognition of this trend is the Bush Administration's stated intention of using military commissions to prosecute members of Al Qaeda captured in the current "War on Terrorism"; an intention that in effect acknowledges that the hostilities with Al Qaeda have reached the level of intensity of an armed conflict. This shift in policy takes terrorist activity that previously would have been treated as a civilian law enforcement issue and treats at least some of its permutations as military threats warranting military responses. This is notable because with this shift comes a partial transfer of jurisdictional responsibility from federal district courts to courts-martial and military commissions.

[VII.4] While these trends have worked at cross currents within the U.S. legal and political systems, those very systems have not kept pace with the changes going on around them. This fact can be seen in the previously discussed unanswered questions about how the jurisdictions of federal district

courts, courts-martial, and military commissions overlap and interact; questions that demonstrate that the U.S.'s jurisdictional regime for the prosecution and punishment of war crimes has become a patchwork quilt of conflicting precedent and policy that warrants congressional remediation. Such congressional action should focus on answering the following ten points:[239]

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[239] In legislating in this area, Congress may also wish to consider a number of other related issues. First is the desirability of expressly granting the President the authority to enter into Executive Agreements with foreign countries for the purpose of establishing multi-national military commissions for the purposes of trying war criminals, both U.S. and foreign. See Lord Martin Thomas, The Thomas of Gresfod OBE QC, Comments at the Military Tribunals Program in Washington D.C. sponsored by the American Bar Association and the National Institute of Military Justice (Jan. 16, 2002) (transcript on file with the author), stating:

> [M]ight I suggest, again, that perhaps as has happened in the past, there could be mixed commissions. If they are used, then United Kingdom personnel could be involved both as judges and, dare I say, as counsel, particularly when United Kingdom citizens are involved. And it might be well to spread the load. This is not simply the war of the United States against terrorism, it is the war of the democracies against terrorism.

Second is the desirability of providing a statutory basis for U.S. military government over and criminal jurisdiction in occupied territories. Third is the desirability of providing an explicit statutory basis for the detention of enemy combatants being held until the close of hostilities and those being held awaiting criminal prosecution for war crimes violations. *See Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (discussing whether 28 U.S.C. § 4001(a) provides a statutory basis for the detention of enemy combatants). Fourth is the desirability of providing the President the authorization to suspend the writ of habeas corpus in extraordinary cases subject to congressional oversight. *See Hamdi v. Rumsfeld*, 124 S. Ct. at 2633, 2660 (Scalia, J., dissenting) (noting the ability of Congress to authorize the suspension of the writ of habeas corpus as a tool in the War on Terrorism and arguing that if "civil rights are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires . . . ."). Fifth is the desirability of reaffirming or rejecting the principle, implicit in the plurality and concurrence in *Hamdi,* that the Geneva Conventions are self-executing and the rights they provide are enforceable in U.S. courts. *See supra* note 235; *see also Diggs v. Schultz*, 470 F.2d 461 (D.C. Cir. 1972) (recognizing Congress's authority to reject the international treaty obligations of the U.S.). *But cf.* AUST, *supra* note 57, at 247-48, stating:

> The termination or suspension of a treaty, or withdrawal of a party, does not affect the duty of a state to fulfil any obligation in the treaty

(continued...)

1) For the purposes of prosecutions in U.S. domestic fora, what triggers the existence of an armed conflict such that the laws of war apply to persons taking part in the hostilities? Is it a Presidential finding of fact, a Congressional declaration of war, or the de facto existence of hostilities sufficiently intense to objectively warrant being called an armed conflict?

2) During armed conflicts to which the U.S. is a party, which U.S. fora can and cannot try U.S. nationals, loyal or subversive, for war crimes?

3) During armed conflicts to which the U.S. is a party, which U.S. fora can and cannot try U.S. Armed Forces for war crimes?

4) During armed conflicts to which the U.S. is a party, which U.S. fora can and cannot try enemy prisoners of war for war crimes?

5) During armed conflicts to which the U.S. is a party, which U.S. fora can and cannot try unlawful enemy combatants for war crimes?

6) During armed conflicts to which the U.S. is a party, when can U.S. fora try non-U.S. combatants for actions not taken against U.S. Armed Forces, U.S. nationals, or U.S. Allies?

7) When do U.S. fora have jurisdiction over war crimes occurring in armed conflicts to which the U.S. is not a party? And does the answer depend on whether the victims and/or perpetrators are U.S. nationals?

8) When should U.S. fora try persons for violations of the laws of war instead of trying them

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(...continued)

> to which it would be subject under general international law…. For example, the substantive provisions of the four Geneva Conventions of 1949 are now accepted as representing customary international law. Thus if a party were to withdraw from the Conventions it would still be bound by customary law to respect the substantive rules set out in them.

for analogous common crimes, such as murder, rape, assault, theft, etc?

9) What mechanism should be used to determine whether detained enemy combatants are prisoners of war or unlawful combatants for purposes of criminal prosecution? Does the fora trying the combatant determine this or should it be bound by a determination of the President or some other type of deliberative tribunal?

10) If the jurisdiction of federal district courts, courts-martial, and military commissions to try war crimes is to be concurrent, what criteria should the President use when determining which fora to utilize? Should such criteria even exist or should it be left to the sole discretion of the President?

[VII.5] While congressional action in these areas may not prevent all legal attacks on any new jurisdictional framework, it would be a step forward in establishing effective laws and procedures to enable the U.S. to exercise jurisdiction over and prosecute persons accused of violating the laws of war. Further, congressional action would provide a clear mandate on if and when the U.S. is willing to settle for diminished due process in prosecuting war criminals, an issue that is not being clearly answered today in an era when the very concept of war and combatants appears to be in flux.