

WHY A PRESIDENT CANNOT AUTHORIZE THE MILITARY  
TO VIOLATE (MOST OF) THE LAW OF WAR

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ABSTRACT

*Waterboarding and “much worse,” torture, and “tak[ing] out” the family members of terrorists: President Trump endorsed these measures while campaigning for office. After his inauguration, Trump confirmed his view of the effectiveness of torture and has not clearly rejected other measures forbidden by international law. This Article therefore examines whether a President has the power to order or authorize the military to violate international humanitarian law, known as the “law of war.” Rather than assess whether the law of war generally constrains a President as Commander-in-Chief, however, its focus is the extent to which Congress requires the U.S. military to comply with the law of war in its disciplinary code, the Uniform Code of Military Justice (UCMJ). It clarifies how Article 18 of the UCMJ empowers military criminal courts, known as courts-martial, to try and punish not only conduct denominated a “war crime” by international law but also any other conduct for which the law of war permits punishment by military tribunal. Punishable conduct under Article 18 includes any law of war violation that entails or results in a criminal offense under the UCMJ. Put differently, this Article clarifies why reasonable compliance with the*

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*law of war is necessary to justify war measures that are otherwise common crimes such as murder, maiming, and assault, that are defined and made punishable by the UCMJ. This Article then explains why this execution of the law of war in the UCMJ limits a President's authority as Commander-in-Chief: a President does not possess constitutional power to override congressional regulation of the military, particularly in matters of military discipline. So long as the law of war component of Article 18 remains unchanged, no President may order or authorize war crimes or most other law of war violations that entail or result in a UCMJ offense.*

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## INTRODUCTION

As a candidate, President Trump said that he would authorize waterboarding and “much worse,” that he believes “torture works,” and if not, “they [referring to ‘terrorists’] deserve it anyway, for what they’re doing.”<sup>1</sup> After his inauguration, the President said he would defer to his Secretary of Defense and Central Intelligence Agency (CIA) Director about the need for torture, but that “[i]f they do wanna [sic] do [it], then I will work toward that end. I wanna [sic] do everything I can within the bounds of what you’re allowed to do legally.”<sup>2</sup> Torture is an international war crime in both international<sup>3</sup> and non-international<sup>4</sup> armed conflict as well as a violation of the War Crimes Act, which is a generally applicable federal criminal law.<sup>5</sup> These statements therefore suggest that the President might seek an exemption from applicable federal criminal laws and simply ignore international law prohibitions.

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1. *E.g.*, Jenna Johnson, *Trump Says ‘Torture Works,’ Backs Waterboarding and ‘Much Worse,’* WASH. POST (Feb. 17, 2016), [https://www.washingtonpost.com/politics/trump-says-torture-works-backs-waterboarding-and-much-worse/2016/02/17/4c9277be-d59c-11e5-b195-2e29a4e13425\\_story.html?utm\\_term=.75496ecfcc54](https://www.washingtonpost.com/politics/trump-says-torture-works-backs-waterboarding-and-much-worse/2016/02/17/4c9277be-d59c-11e5-b195-2e29a4e13425_story.html?utm_term=.75496ecfcc54) [<https://perma.cc/82JP-8ZVY>].

2. *E.g.*, Nolan D. McCaskill, *Trump Says He’ll Defer to Mattis and Pompeo on Waterboarding*, POLITICO (Jan. 25, 2017, 3:13 PM), <http://www.politico.com/story/2017/01/trump-waterboarding-mattis-pompeo-234174> [<https://perma.cc/PPR4-HXWM>].

3. *See, e.g.*, Rome Statute of the International Criminal Court art. 8(2)(a)(ii), July 17, 1998, 2187 U.N.T.S. 3 [hereinafter ICC Statute] (prescribing the war crime of “[t]orture or inhuman treatment”); *id.* art. 8(2)(b)(xxi) (prescribing the war crime of “[c]ommitting outrages upon personal dignity, in particular humiliating and degrading treatment”).

4. *Id.* art. 8(2)(c)(i) (prescribing the war crime of “[v]iolence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture”); *id.* art. 8(2)(c)(ii) (prescribing the war crime of “[c]ommitting outrages upon personal dignity, in particular humiliating and degrading treatment”).

5. *See* 18 U.S.C. §§ 2340-2340A (2012). Federal law defines and generally prohibits torture. Additionally, the War Crimes Act prohibits “any conduct ... defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949.” *Id.* § 2441(c)(1). Those conventions apply to international armed conflict and identify torture as a grave breach. *See, e.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 50, Aug. 12, 1949, 6 U.S.T. 3114 [hereinafter GC I]. For non-international armed conflict, the War Crimes Act also prohibits any conduct that “constitutes a grave breach of common Article 3,” 18 U.S.C. § 2441(c)(3), and is defined to include “[t]orture,” *id.* § 2441(d)(1)(A), and “[c]ruel or [i]nhuman [t]reatment,” *id.* § 2441(d)(1)(B). Therefore, the War Crimes Act prohibits torture in both international and non-international armed conflict, as well as in other circumstances pursuant to the general torture prohibition.

Mr. Trump also stated that America should “take out the[] families” of terrorists,<sup>6</sup> a view he has not clearly renounced since becoming President.<sup>7</sup> Intentionally attacking innocent civilians in an armed conflict is an international war crime,<sup>8</sup> and also a violation of the War Crimes Act.<sup>9</sup> The legality of a family member’s death under the law of war, however, depends upon the circumstances under which it occurs. For example, if family-member deaths were incidental to an attack upon a lawful target in an armed conflict, and not excessive in relation to the military advantage anticipated from that attack, they would likely be lawful.<sup>10</sup> Unlike torture, which is categorically prohibited, the legality of an attack and its consequences often depends upon a contextual analysis of facts that were or should have been known to the person ordering it.<sup>11</sup> Commentators have observed that the President’s prior statements may lead to criminal accusations against U.S. service members every time family-member deaths occur unless he clearly disavows them.<sup>12</sup>

Previous presidential administrations have expressed different views regarding a President’s authority to authorize violations of international or domestic law in war. Relying on the commander-in-chief power, the George W. Bush Administration asserted condi-

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6. *E.g.*, Tom LoBianco, *Donald Trump on Terrorists: ‘Take out Their Families,’* CNN, (Dec. 3, 2015, 12:19 PM), <http://www.cnn.com/2015/12/02/politics/donald-trump-terrorists-families/index.html> [<https://perma.cc/M7LX-6HHD>].

7. *See, e.g.*, Adam Taylor, *Trump Said He Would ‘Take out’ the Families of ISIS Fighters. Did an Airstrike in Syria Do Just That?*, WASH. POST (May 27, 2017), [https://www.washingtonpost.com/news/worldviews/wp/2017/05/27/trump-said-he-would-take-out-the-families-of-isis-fighters-did-an-airstrike-in-syria-do-just-that/?utm\\_term=.be157295541e](https://www.washingtonpost.com/news/worldviews/wp/2017/05/27/trump-said-he-would-take-out-the-families-of-isis-fighters-did-an-airstrike-in-syria-do-just-that/?utm_term=.be157295541e) [<https://perma.cc/X6K7-AHFR>] (indicating that Trump, besides a statement in March 2016 that he “would not kill terrorists’ families but only ‘go after them,’” has not explicitly disavowed his intention to target families of terrorists since becoming President).

8. *See, e.g.*, ICC Statute, *supra* note 3, art. 8(2)(b)(i), (e)(i) (identifying the war crimes of intentionally attacking the civilian population or “individual civilians not taking direct part in hostilities” for both international and non-international armed conflict).

9. *See* 18 U.S.C. § 2441(c)(1) (international armed conflict); *id.* § 2441(d)(1)(D) (non-international armed conflict).

10. It is an international war crime when the anticipated loss of civilian lives or injury to civilians and damage to civilian objects is “clearly excessive in relation to the concrete and direct ... military advantage anticipated” from an attack. *See, e.g.*, ICC Statute, *supra* note 3, art. 8(2)(b)(iv) (emphasis added).

11. *See id.*

12. *See* Steven J. Barela & Amos Guiora, *Campaign Promises of War Crimes: Now a Stain on the Military*, JUST SECURITY (Feb. 6, 2017, 9:43 AM), <https://www.justsecurity.org/37348/campaign-promises-war-crimes-stain-military/> [<https://perma.cc/R8E8-7EDE>].

tional constitutional authority to violate not only the torture prohibition of international law, but also the generally applicable federal criminal statutes implementing it.<sup>13</sup> The Obama Administration claimed that its policies complied with applicable international and domestic law,<sup>14</sup> but did not clarify the extent to which either bind the President in his role as Commander-in-Chief. Obama claimed to have developed “a policy framework to ensure that ... the United States not only meets but also in important respects exceeds the safeguards *that apply as a matter of law* in the course of an armed conflict.”<sup>15</sup> He never clarified whether the Constitution or other domestic law made this “policy framework” obligatory or whether the “safeguards” to which he referred included international law of war obligations.<sup>16</sup>

Ambiguity regarding a President’s obligation to comply with international law, including the law of war, arises from general uncertainty about the relationship of international law to the Constitution and laws of the United States.<sup>17</sup> Although international legal norms are always obligatory from the perspective of international law, the extent to which they are obligatory or enforceable in the U.S. legal system is not always clear.<sup>18</sup> Courts and commentators have offered various theories about the circumstances under which international treaty or customary norms either are or become obligatory in domestic law and enforceable in federal courts.<sup>19</sup>

Because of this ambiguity, commentators analyzing the President’s war powers take diverse approaches to the issue of whether

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13. See, e.g., Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), reprinted in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 172, 200 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (asserting “if an interrogation method arguably were to violate” a federal criminal statute prohibiting torture, “the statute would be unconstitutional if it impermissibly encroached on the President’s constitutional power to conduct a military campaign”).

14. See *THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS*, at i (2016).

15. *Id.* (emphasis added).

16. *Id.* The report referred to safeguards regarding “the preservation of civilian life, transparency, and accountability.” *Id.*

17. See John C. Dehn, *Customary International Law, the Separation of Powers, and the Choice of Law in Armed Conflicts and Wars*, 37 *CARDOZO L. REV.* 2089, 2093-94 (2016).

18. See *id.*

19. I have concisely surveyed the range of scholarly opinion elsewhere. See *id.*

a President must comply with the law of war. Some commentators argue that international law, including the law of war, is part of the laws that a President is constitutionally obligated to “take Care” to “faithfully execute[.]”<sup>20</sup> Other commentary addresses whether statutes authorizing military force should be interpreted to require compliance with the law of war.<sup>21</sup> I have elsewhere argued that legal theory, Supreme Court case law, and early American legal commentary support the view that customary laws of war inherently apply to armed conflicts with foreign entities and are enforceable in federal courts.<sup>22</sup> The focus of most such commentary however is whether, *as a general legal matter*, a President acting as Commander-in-Chief must comply with applicable international laws of war.

This Article more narrowly focuses on congressional regulation of the military, specifically, the extent to which Congress requires the

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20. U.S. CONST. art. II, § 3; *see, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 50 (2d ed. 1996) (“U.S. treaties and customary international law that have domestic normative quality ... are also law of the land, and Presidents have asserted responsibility (and authority) ... to see that they are ‘faithfully executed.’”); David Golove, *Military Tribunals, International Law, and the Constitution: A Frankian-Madisonian Approach*, 35 N.Y.U. J. INT’L L. & POL. 363, 378-80 (2003); Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT’L L. 811, 856 (2005) (“Under the Constitution, the President is expressly bound to faithfully execute the laws, which include treaty law and customary international law.” (footnote omitted)); Michael D. Ramsey, *Torturing Executive Power*, 93 GEO. L.J. 1213, 1231-35 (2005); Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 335-36 (2008).

21. *Compare* Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. REV. 293, 299 (2005) (“The participation of the political branches in the development of international humanitarian law, the formal and informal commitments made by the Executive Branch to follow that law during armed conflict, the long-standing nature of the *Charming Betsy* canon, and other factors all provide sound reasons for the courts to conclude that general authorizations for the use of force do not embrace violations of international law by the President.”), *with* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2098-99 (2005) (“There is a significant question whether the canon applies in the very different context of a grant of discretionary enforcement authority to the President, especially when the grant of discretionary enforcement authority, like the AUMF, overlaps with the President’s independent constitutional powers. Assuming that the canon does apply in this context, it would not follow that the AUMF should be read to prohibit violations of international law. The canon simply requires that ambiguous statutes be construed not to violate international law. At most, then, application of the canon to the AUMF would yield the interpretation that the AUMF does not authorize the President to violate international law. It would not yield the quite different interpretation that the AUMF affirmatively prohibits the President from violating international law.” (footnotes omitted)).

22. *See generally* Dehn, *supra* note 17.

military to comply with the law of war in its disciplinary code, the Uniform Code of Military Justice (UCMJ). Article 18 of the UCMJ vests military criminal courts, called courts-martial, with “jurisdiction to try persons subject to [the UCMJ] for any offense made punishable by [the UCMJ]” and also “to try any person who by the law of war is subject to trial by a military tribunal and [to] adjudge any punishment permitted by the law of war.”<sup>23</sup> This Article explains how these jurisdictional grants are complementary and effectively implement most of the law of war in U.S. military criminal law. Stated concisely: Article 18 empowers courts-martial to identify and punish (1) law of war violations denominated war crimes by international law, (2) certain activities by or on behalf of an enemy for which the law of war provides no immunity from punishment, and (3) any other law of war violation by U.S. service members or any civilians accompanying them that entails or results in a crime under the UCMJ.<sup>24</sup> In other words, both service members and any civilians accompanying them in an armed conflict may be punished for a law of war violation, as such, or a UCMJ offense, such as murder and assault,<sup>25</sup> that are entailed in or result from a law of war violation.<sup>26</sup>

This Article then addresses why this implementation of the law of war in the UCMJ limits the President’s authority as Commander-in-Chief. Because Congress has plenary constitutional authority to regulate the armed forces, particularly in matters of discipline,<sup>27</sup> the UCMJ necessarily limits the President’s authority as Commander-in-Chief. Even assuming a President possesses some modicum of general constitutional authority to violate international law, no President may order or authorize the military to violate the UCMJ,

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23. 10 U.S.C. § 818(a) (Supp. IV 2017).

24. *See id.*

25. The crime of murder is codified at 10 U.S.C. § 918 (2012), *amended by* 10 U.S.C. § 918 (Supp. IV 2017); assault is codified at 10 U.S.C. § 928 (2012), *amended by* 10 U.S.C. § 928 (Supp. IV 2017). Other crimes applicable to typical battlefield behavior include, but are not limited to: maiming, 10 U.S.C. § 924 (2012), *amended by* 10 U.S.C. § 928a (Supp. IV 2017); arson, 10 U.S.C. § 926 (2012), *amended by* 10 U.S.C. § 926 (Supp. IV 2017); and burglary, 10 U.S.C. § 929 (2012), *amended by* 10 U.S.C. § 929 (Supp. IV 2017).

26. Crimes defined in the UCMJ are applicable “in all places.” 10 U.S.C. § 805 (2012).

27. Among its powers, Congress may “make Rules for the Government and Regulation of the land and naval Forces.” U.S. CONST. art. I, § 8, cl. 14.

including its binding implementation of the law of war.<sup>28</sup> As this Article will later explain, however, the law of war sometimes requires the exercise of judgment based upon available information.<sup>29</sup> This means a President might order or authorize acts that are technically illegal under the circumstances but would not be known or understood to be clearly unlawful by those ordered or authorized to engage in them.<sup>30</sup>

To explain the intricate relationship between the law of war and the UCMJ, this Article proceeds in five Parts. Part I demonstrates the current ambiguity in U.S. military administrative publications and federal judicial decisions regarding the extent to which U.S. law, including the UCMJ, requires compliance with the law of war. Part II reviews the evolution of military criminal tribunal jurisdiction that led to the adoption of Article 18 in order to clarify Article 18's purpose and effect. Part III considers three issues of statutory interpretation: the legal effect of Article 18, the correct understanding of the term "law of war" referenced in it, and two of the main categories of offenses for which it effectively creates municipal criminal offenses and authorizes punishment. Part IV explains the relationship of law of war violations to the crimes defined in the punitive articles of the UCMJ. It clarifies why almost all law of war violations may be punished by courts-martial, and why law of war compliance is necessary to provide a public authority justification defense for acts of war that entail or result in common crimes that are prescribed in and made punishable by the UCMJ. Part V explains why the binding implementation of the law of war in the UCMJ necessarily limits a President's authority to authorize or order most law of war violations by the members of the armed forces or by civilians accompanying the military in armed conflict. It then briefly examines the practical effect of this limitation.

A few initial caveats are necessary. First, this Article deals only with the law regulating the conduct of hostilities and protection of victims in armed conflict, known as the *jus in bello*. It does not address domestic constitutional authority to *initiate* war in light of international law regulating the resort to force, known as the *jus ad*

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28. See *infra* text accompanying notes 54-60.

29. See *infra* Part IV.B.2.

30. See *infra* Part V.B.

*bellum*, or the related international crime of aggression.<sup>31</sup> Additionally, this Article does not address military operations to which the international law of war does not apply.<sup>32</sup> And finally, given its focus on U.S. military law, this Article does not address whether a President may order or authorize civilian government employees who are not part of or accompanying the military in an armed conflict to violate the law of war.

### I. AMBIGUITY REGARDING LAW OF WAR COMPLIANCE

One week after the September 11, 2001, attacks, Congress adopted an Authorization for Use of Military Force (2001 AUMF).<sup>33</sup> It sanctions the President's "use [of] all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided [the September 11th attacks], or harbored such organizations or persons."<sup>34</sup> The executive branch has relied upon this authorization to conduct military operations against an array of non-state armed groups for over fifteen years.<sup>35</sup> And yet, these many years later, the scope and nature of "necessary and appropriate" military measures authorized by the 2001 AUMF remains largely unsettled. Importantly, it is still

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31. See, e.g., Amendments to the Rome Statute of the International Criminal Court art. 8 *bis*, June 11, 2010, C.N.651.2010.TREATIES-8.

32. This Article does not address uses of force against non-state actors that do not occur within or create an armed conflict.

33. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2012)). This Article uses "AUMF" as shorthand for any congressional authorization to use military force. When referring to a specific AUMF, it adds the year of its adoption.

34. *Id.* § 2.

35. See Stephen W. Preston, Gen. Counsel, Dep't of Def., The Legal Framework for the United States' Use of Military Force Since 9/11 (Apr. 10, 2015), <https://www.defense.gov/News/Speeches/Speech-View/Article/606662/> [<https://perma.cc/VTC9-54PS>] ("[T]he groups and individuals against which the U.S. military [has taken] direct action (that is, capture or lethal operations) under the authority of the 2001 AUMF, includ[e] ... al-Qa'ida, the Taliban and certain other terrorist or insurgent groups in Afghanistan; al-Qa'ida in the Arabian Peninsula (AQAP) in Yemen; and individuals who are part of al-Qa'ida in Somalia and Libya. In addition, over the past year, we have conducted military operations under the 2001 AUMF against the Nusrah Front and, specifically, those members of al-Qa'ida referred to as the Khorasan Group in Syria. We have also resumed such operations against the group we fought in Iraq when it was known as al-Qa'ida in Iraq, which is now known as ISIL."); see also Address to the Nation on United States Strategy to Combat the Islamic State of Iraq and the Levant (ISIL) Terrorist Organization, 2014 Daily Comp. Pres. Doc. 1-2 (Sept. 10, 2014).

not clear whether the military measures undertaken pursuant to the 2001 AUMF must comply with international law regulating armed conflict, known as international humanitarian law or the “law of war.”

There are at least two significant sources of ambiguity. First, Department of Defense (DoD) guidance does not adequately clarify whether members of the U.S. military are legally obligated to comply with the law of war and suggests, without clarifying, that an executive branch official may authorize violations of it. Second, recent judicial decisions do not clarify the extent to which the U.S. Constitution or other domestic law requires law of war compliance by the President and military. This Part briefly outlines key aspects of current DoD guidance and recent judicial opinions that demonstrate this ambiguity.

#### A. *Department of Defense Guidance*

The seminal DoD guidance on the law of war is an administrative directive titled the *DoD Law of War Program*. It states, “It is DoD policy that: ... [m]embers of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.”<sup>36</sup> If the law of war truly is “law” for our armed forces, it is not clear why compliance is required by “policy.” Perhaps the directive intends only to clarify that operational planners should assume that the law of war applies. What is clear, however, is that if law of war compliance is required only by DoD policy rather than federal law, an authorized DoD official or a President may grant general or specific exceptions to the policy and authorize law of war violations.

This same directive also specifies that the *Department of Defense Law of War Manual (Law of War Manual)* is “the authoritative statement on the law of war within the Department of Defense.”<sup>37</sup> The *Law of War Manual*, however, is equivocal regarding the extent to which law of war compliance is obligatory under the UCMJ

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36. Dep’t of Def. Directive 2311.01E, DoD Law of War Program, para. 4.1 (2006) (emphasis added). It is also policy that contractors comply with U.S. law of war obligations. *Id.* para. 4.2.

37. *Id.* para. 5.1.3.

or other domestic law. In a foreword, the DoD General Counsel states only that obeying the law of war “is the right thing to do.”<sup>38</sup> Rather than clearly state whether law of war compliance is legally required, however, the *Law of War Manual* provides, “The specific legal force of a law of war rule under U.S. domestic law *may depend* on whether that rule takes the form of a self-executing treaty, non-self-executing treaty, or customary international law.”<sup>39</sup> With regard to treaties, the manual declares that although they “are part of U.S. law,” “[t]he terms ‘self-executing’ and ‘non-self-executing’ *may* be used to explain how a treaty is to take effect in U.S. domestic law.”<sup>40</sup> With respect to customary international law, the manual states that it, too, “is part of U.S. law” but only “insofar as it is not inconsistent with any treaty to which the United States is a Party, or a controlling executive or legislative act.”<sup>41</sup> The *Law of War Manual* does not clarify what might qualify as a self-executing treaty or what a “controlling executive or legislative act” might be.

Although the *Law of War Manual* later declares that law of war violations may be prosecuted under the UCMJ,<sup>42</sup> this statement requires clarification in light of the ambiguities just mentioned. If a “controlling executive act” might sometimes displace, or excuse compliance with the law of war, then any executive branch official possessing authority to adopt one may potentially authorize law of war violations. Furthermore, although the *Law of War Manual* asserts that law of war violations may be charged as violations of various UCMJ punitive articles, it does not clarify precisely how the law of war relates to the crimes defined in the UCMJ.<sup>43</sup>

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38. OFFICE OF GEN. COUNSEL, DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL ii (2015 & Supp. Dec. 2016) [hereinafter LAW OF WAR MANUAL].

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

40. *Id.* at 38-39 (emphasis added). While those familiar with self-execution doctrine related to treaties know to what this passage refers, the *Law of War Manual* does little to clarify it and creates further ambiguity by using the term “may.” For a concise review of the debate surrounding self-execution doctrine, see David H. Moore, Response, *Law(Makers) of the Land: The Doctrine of Treaty Non-Self-Execution*, 122 HARV. L. REV. F. 32 (2008); and Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008); see also Dehn, *supra* note 17, at 2093-94.

41. LAW OF WAR MANUAL, *supra* note 38, at 39.

42. *Id.* at 1119.

43. The *Law of War Manual's* treatment of this topic is discussed in more detail in Part IV.

### B. *Judicial Ambiguity*

The *Law of War Manual's* opacity on these issues likely stems from the fact that recent judicial opinions provide little clarity. Supreme Court decisions addressing the 2001 AUMF have been vague regarding the precise status of the law of war as “law” for the President and military. In *Hamdi v. Rumsfeld*, five members of the Supreme Court—a plurality of four and Justice Clarence Thomas in dissent—interpreted the 2001 AUMF to include the power to detain an enemy belligerent indefinitely.<sup>44</sup> According to the plurality, such detention power “is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.”<sup>45</sup> In other words, when applicable,<sup>46</sup> law of war norms inform the nature of military measures that the 2001 AUMF authorizes. Unfortunately, the Court has not clarified the extent to which the law of war inherently *limits* the 2001 AUMF, nor has it explained which law of war treaties are “self-executing” or what a “controlling executive act” might be.<sup>47</sup>

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44. 542 U.S. 507, 518-21 (2004); *id.* at 587-88 (Thomas, J. dissenting) (“[T]he power to detain does not end with the cessation of formal hostilities.” (citing *Madsen v. Kinsella*, 343 U.S. 341, 360 (1952); *Johnson v. Eisentrager*, 339 U.S. 763, 786 (1950); *Moyer v. Peabody*, 212 U.S. 78, 84 (1909))).

45. *Id.* at 518 (plurality opinion).

46. The plurality clarified that its conclusion was conditional upon the nature of the hostilities resulting from an AUMF. *Id.* at 521 (“[W]e understand Congress’ grant of authority for the use of ‘necessary and appropriate force’ to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.”).

47. Some courts and commentators point to the Court’s statement in *The Paquete Habana* that “[i]nternational law is part of our law,” 175 U.S. 677, 700 (1900), as evidence that international law is federal law in the U.S. legal system. *See, e.g.,* *Igartúa v. United States*, 626 F.3d 592, 619 (1st Cir. 2010) (“We commence by stating what is beyond cavil: ‘[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice....’ This is not a new or remarkable concept. International law has been an integral part of our constitutional system since the founding of our Nation.” (alteration and omission in original) (quoting *Habana*, 175 U.S. at 700)); Carlos M. Vázquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position*, 86 NOTRE DAME L. REV. 1495, 1516 (2011) (“The canonical expression of the modern position is the statement in *The Paquete Habana* that ‘[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.’” (footnote omitted) (alteration in original)). I have elsewhere argued this statement might mean that international law must be observed by federal courts in

In 2006, the Supreme Court implicitly held that when the law of war is incorporated by reference in an applicable federal statute, a President must comply with it. In *Hamdan v. Rumsfeld*, a majority of the Supreme Court found President Bush's 2001 military commissions order did not comply with a law of war obligation that it concluded had been implemented by the UCMJ.<sup>48</sup> Specifically, the Court found that UCMJ Article 21, which then regulated all military commissions,<sup>49</sup> required compliance with a provision of the four 1949 Geneva Conventions known as "Common Article 3."<sup>50</sup> Because the Court found the President's order did not comply with Common Article 3, it held that the President's order violated Article 21 and was unlawful.<sup>51</sup> Unfortunately, resolution of this case did not require the Court to clarify the full extent to which the UCMJ generally incorporates and requires compliance with applicable laws of war.

More recently still, the District of Columbia Circuit Court of Appeals deliberately avoided addressing whether the law of war inherently limits the 2001 AUMF by declining en banc review in *Al-Bihani v. Obama*.<sup>52</sup> An earlier panel opinion in that case declared

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appropriate cases, but not as part of federal law. *See generally* Dehn, *supra* note 17.

48. 548 U.S. 557, 612-13, 628 (2006) (referring to 10 U.S.C. § 821 (2006)); Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

49. The Military Commissions Acts of 2006 and 2009 amended and supplemented this statute. It no longer applies to military commissions convened pursuant to those Acts and codified at Title 10, chapter 47A. *See* 10 U.S.C. § 821 (2012) ("This section does not apply to a military commission established under chapter 47A of this title."); *see also* Military Commissions Act of 2009, Pub. L. No. 111-84, sec. 1802, 123 Stat. 2190, 2575 (codified at 10 U.S.C. § 948b (2012)); Military Commissions Act of 2006, Pub. L. No. 109-366, § 4, 120 Stat. 2600, 2631.

50. *Hamdan*, 548 U.S. at 628 ("[R]egardless of the nature of the rights conferred on Hamdan [by the Geneva Conventions of 1949], they are ... part of the law of war [with which 10 U.S.C. § 821 requires compliance.]" (citing *United States v. Rauscher*, 119 U.S. 407 (1886))). "Common Article 3" refers to the identical third article of the four Geneva Conventions. *See* GC I, *supra* note 5, art. 3; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316 [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516 [hereinafter GC IV]. There are 196 states party to these conventions. *See* INT'L COMM. OF THE RED CROSS, STATE PARTIES TO THE FOLLOWING INTERNATIONAL HUMANITARIAN LAW AND OTHER RELATED TREATIES AS OF 14-DEC-2017, at 6 (2017), <https://ihl-databases.icrc.org/ihl> [<https://perma.cc/7HET-CRHJ>].

51. *Hamdan*, 548 U.S. at 635.

52. 619 F.3d 1, 1 (D.C. Cir. 2010) (Sentelle, C.J., and Ginsburg, Henderson, Rogers, Tatel,

“mistaken” “the premise that the war powers granted by the [2001] AUMF ... are limited by the international laws of war.”<sup>53</sup>

Some judges, however, chose to clarify their views on the topic. In one concurrence, a judge noted that “international norms outside of those explicitly incorporated into our domestic law by the political branches are not part of the fabric of the law enforceable by federal courts.”<sup>54</sup> In a separate concurrence, Judge Brett Kavanaugh argued, “[T]he 1949 Geneva Conventions are not self-executing treaties and thus are not domestic U.S. law.”<sup>55</sup> He further posited that “absent incorporation into a statute or a self-executing treaty ... customary-international-law principles are not part of the domestic law of the United States that is enforceable in federal court.”<sup>56</sup>

Conceding that at least some of the law of war was relevant, Judge Kavanaugh acknowledged, “Congress has enacted a considerable amount of legislation limiting wartime actions by the Executive and military.”<sup>57</sup> He explained, “When Congress passed the AUMF in 2001, it did so against the background of an expansive body of domestic U.S. law prohibiting wartime actions by the Executive that contravene American values.”<sup>58</sup> Judge Kavanaugh cited several federal laws that incorporate law of war limitations, including specific but limited aspects of the UCMJ, the War Crimes Act, the federal criminal prohibition of torture, the Genocide Convention Implementation Act, and the Detainee Treatment Act of 2005.<sup>59</sup> For Judge Kavanaugh, “This comprehensive set of domestic U.S. laws of war demonstrates that Congress knows how to control wartime conduct by the Executive Branch.”<sup>60</sup> Note that Judge Kavanaugh assumes, without explanation or analysis, that a President may not violate an applicable federal law incorporating the law of war.

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Garland, and Griffith, JJ., concurring in the denial of rehearing en banc) (“We decline to en banc this case to determine the role of international law-of-war principles in interpreting the AUMF because, as the various opinions issued in the case indicate, the panel’s discussion of that question is not necessary to the disposition of the merits.”).

53. *Al-Bihani v. Obama*, 590 F.3d 866, 871 (D.C. Cir. 2010).

54. *Al-Bihani*, 619 F.3d at 6 (Brown, J., concurring in the denial of rehearing en banc).

55. *Id.* at 20 (Kavanaugh, J., concurring in the denial of rehearing en banc).

56. *Id.* at 23.

57. *Id.* at 28.

58. *Id.*

59. *Id.* at 28-30.

60. *Id.* at 28.

Missing from Judge Kavanaugh's lengthy opinion is an explanation of the extent to which Congress has empowered courts-martial to punish law of war violations in UCMJ Article 18. For example, Judge Kavanaugh stated that "the UCMJ ... prohibits members of the U.S. Armed Forces from committing murder, manslaughter, or rape."<sup>61</sup> But he then ambiguously claimed, "Those provisions apply to U.S. soldiers' conduct in war, including both conduct directed toward civilians and conduct directed toward enemy belligerents outside of actual hostilities."<sup>62</sup>

This cryptic statement is, at best, incomplete, and at worst, clearly erroneous. It appears to suggest that the crimes he listed only apply to matters ancillary to the conduct of hostilities between contending armed forces in war. This is not true. For example, if Judge Kavanaugh meant that civilians may never be purposefully killed in war, he is clearly incorrect. Civilians taking a direct part in the hostilities of an armed conflict may be intentionally targeted.<sup>63</sup>

Furthermore, Judge Kavanaugh appears to suggest that it is only "murder" to kill enemy belligerents "outside of actual hostilities." If so, he apparently believes law of war violations that are an integral part of lethal operations against enemy belligerents are not murder. This, too, is inaccurate. For example, killing an enemy belligerent is generally permitted in war, but doing so while feigning a status protected by the law of war is not. Such a killing is considered treacherous or perfidious and a war crime,<sup>64</sup> as is reflected in the Military Commissions Act.<sup>65</sup> As Parts III and IV will further explain, such treacherous or perfidious killing by a person subject to the UCMJ would be punishable either as a war crime or as murder. In short, although Judge Kavanaugh's vague statement may be correct to some very limited extent, he does not explain whether or how the law of war informs the analysis of these crimes.

No recent court, judge, government agency, or commentator has comprehensively addressed the purpose and effect of the law of war

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61. *Id.* at 29.

62. *Id.*

63. See *infra* notes 441-43 and accompanying text.

64. See ICC Statute, *supra* note 3, art. 8(2)(b)(xi) (international armed conflict); *id.* art. 8(2)(e)(ix) (non-international armed conflict).

65. See Military Commissions Act of 2009, Pub. L. No. 111-84, sec. 1802, 123 Stat. 2574, 2609-10 (codified at 10 U.S.C. § 950(t)(17) (2012)).

component of UCMJ Article 18. Article 18 states that “[g]eneral courts-martial ... 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.”<sup>66</sup> The precise effect of this statutory language and its relationship to the punitive articles of the UCMJ is not readily apparent. To the extent it authorizes the punishment of war crimes and other law of war violations by members of the U.S. military, however, it too is part of what Judge Kavanaugh called the “domestic U.S. laws of war.”<sup>67</sup> It is therefore essential to examine the precise legal effect of Article 18.

## II. MILITARY TRIBUNALS, THE COMMON LAW, AND THE PATH TO ARTICLE 18

To better understand UCMJ Article 18 and the relationship of its law of war component to the crimes defined in the UCMJ, a review of the military criminal tribunals leading to its adoption is essential. Congressional codes creating a distinct American military disciplinary system have existed since 1775,<sup>68</sup> and were first fully enacted under the Constitution in 1806.<sup>69</sup> They did not generally empower courts-martial to punish offenses against the law of war until 1916,<sup>70</sup> and did not expressly define common law and other non-military crimes until 1950.<sup>71</sup> Prior to that time, a military code commonly known as the “Articles of War” regulated primarily internal military matters, although general articles authorized punishment of some common crimes in limited circumstances.<sup>72</sup>

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66. 10 U.S.C. § 818(a) (Supp. IV 2017).

67. *Al-Bihani*, 619 F.3d at 28.

68. See American Articles of War of 1775, reprinted in WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 953-60 (2d ed. 1920).

69. See American Articles of War of 1806, reprinted in WINTHROP, *supra* note 68, at 976-85.

70. See *infra* notes 121-24 and accompanying text.

71. See Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107, 133-43 (1950) (codified as amended at 10 U.S.C. §§ 877-934 (Supp. IV 2017)).

72. See, e.g., *Solorio v. United States*, 483 U.S. 435, 444 (1987) (“The authority to try soldiers for civilian crimes may be found in the much-disputed ‘general article’ of the 1776 Articles of War, which allowed court-martial jurisdiction over ‘[a]ll crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline.’” (quoting American Articles of War of 1776, Section XVIII, Article 5, reprinted in 2 WINTHROP 1503)).

Initially, the executive branch independently convened other military tribunals to punish common law crimes and offenses against the law of war in theaters of war and military occupation.<sup>73</sup> Retracing the evolution of the subject matter and personal jurisdiction of these military tribunals and their relationship to current court-martial jurisdiction clarifies the purpose and effect of Article 18.

### A. *The Mexican War Tribunals*

William Winthrop's authoritative military law treatise traced the origins of modern military tribunal jurisdiction to the occupation of Mexico in 1847.<sup>74</sup> There, a military tribunal called the "military commission" tried and punished "mainly criminal offences of the class cognizable by the civil courts in time of peace."<sup>75</sup> These offenses included, among other crimes, "[a]ssassination, murder, poisoning, rape, ... attempt[s] ..., malicious stabbing or maiming, malicious assault and battery, robbery, theft, ... and the destruction, except by order of a superior officer, of public or private property."<sup>76</sup> Military commissions punished these offenses "whether committed by Mexicans or other civilians in Mexico against individuals of the U.S. military forces, or by such individuals against other such individuals or against Mexicans or civilians."<sup>77</sup> In other words, military commissions exercised jurisdiction over a broad range of Anglo-American common law crimes when committed by or against anyone in occupied foreign territory, including members of the local population and members of the U.S. military.

During this occupation, military commanders also established a separate tribunal called a "*council of war*" to adjudicate offenses "against the *laws of war*."<sup>78</sup> Winthrop noted this tribunal did not significantly "differ[] from the military commission except in the

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73. See generally David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT'L L. 5 (2005) (retracing the inception and development of military tribunals other than courts-martial).

74. WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 832 (2d ed. 1920).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

class of cases referred to it.”<sup>79</sup> These cases included “[g]uerilla warfare or [v]iolation of the [l]aws of [w]ar by Guerilleros, and [e]nticing or [a]ttempting to entice soldiers to desert.”<sup>80</sup> Guerilleros were irregular fighters who engaged in armed hostilities against an army without formal commission or authority from a sovereign state.<sup>81</sup>

Although the Supreme Court never directly reviewed the constitutional power to use these tribunals, it did favorably acknowledge them. In *Jecker v. Montgomery*, the Court held that military prize courts, also established as part of the Mexican occupation, were unconstitutional because the Constitution and federal statutes assigned jurisdiction over such cases to Article III federal courts.<sup>82</sup> In dicta, however, the Court noted that the other military tribunals in Mexico “were nothing more than the agents of the military power, to assist it in preserving order in the conquered territory, and to protect the inhabitants in their persons and property while it was occupied by the American arms.”<sup>83</sup> Thus, the Court strongly suggested that these tribunals were a legitimate exercise of war powers possessed by Congress and the President. Winthrop likewise noted that these military tribunals were “an instrumentality for the more efficient execution of war powers vested in Congress and the power vested in the President as Commander-in-Chief in war.”<sup>84</sup>

The military tribunals in Mexico were clearly created to fill jurisdictional gaps in the Articles of War. Because the Articles of War primarily authorized the punishment of internal disciplinary infractions, courts-martial lacked general authority to punish common law crimes and offenses against the law of war, particularly when the offender was not part of the U.S. military.<sup>85</sup> In Mexico, therefore, where the military exercised only temporary and limited

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79. *Id.*

80. *Id.* at 833.

81. *Id.* at 783.

82. 54 U.S. (13 How.) 498, 515 (1851). Prize cases involve adjudicating rights to ships and cargo captured during war. See generally FRANCIS H. UPTON, THE LAW OF NATIONS AFFECTING COMMERCE DURING WAR: WITH A REVIEW OF THE JURISDICTION, PRACTICE AND PROCEEDINGS OF PRIZE COURTS (John S. Voorhies ed., 2d ed. 1863).

83. *Jecker*, 54 U.S. (13 How.) at 515.

84. WINTHROP, *supra* note 74, at 831.

85. See, e.g., *Solorio v. United States*, 483 U.S. 435, 444 (1987) (citing American Articles of War of 1776, Section XVIII, Article 5, reprinted in 2 WINTHROP 1503).

U.S. sovereignty in an area where the local civil authority had been displaced and to which the full authority of Article III courts did not extend,<sup>86</sup> commanders relied upon the nation's war powers and Anglo-American notions of common law to establish criminal tribunals and to identify the crimes they could prosecute.<sup>87</sup> Military commissions punished common law crimes for violence that was not a part of military operations.<sup>88</sup> Councils of war punished enemy offenses against the laws and customs of war,<sup>89</sup> sometimes called the "common law of war."<sup>90</sup>

### *B. The Civil War Tribunals*

Winthrop next chronicled that these separate common law military tribunals merged into one, the military commission, during the Civil War.<sup>91</sup> He also noted that Congress both accepted and employed the jurisdiction of military commissions. In 1863, Congress "provided that murder, manslaughter, robbery, larceny, and certain other specified crimes, when committed by military persons in time of war or rebellion, should be punishable by sentence of court-martial *or military commission*."<sup>92</sup> In 1864, Congress also vested military commissions with jurisdiction over both spies and guerilla fighters.<sup>93</sup> Thus, Congress clearly recognized and endorsed the constitutional authority of military commissions unilaterally convened by the executive branch to try crimes and impose punishment when permitted by statute or the law of war.

Congress's understanding of the lawfulness and authority of military commissions was contemporaneously endorsed by the

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86. In *Fleming v. Page*, the Supreme Court clarified that although the President and military "may invade the hostile country, and subject it to the sovereignty and authority of the United States," those "conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power." 50 U.S. (9 How.) 603, 615 (1850).

87. See WINTHROP, *supra* note 74, at 832.

88. See *id.*

89. See *id.* at 832-33.

90. See *id.* at 41.

91. *Id.* at 833.

92. *Id.* Curiously, Winthrop notes that "or military commission" had been inadvertently removed from the statute when inserted in the Revised Statutes. *Id.* at 833 n.71.

93. *Id.* at 833. This was likely deemed necessary to clarify that these individuals, punishable under the international law of war, were similarly punishable in a Civil War.

executive branch. In 1863, President Lincoln issued General Orders 100 (Orders 100), also known as the “Lieber Code,” which provided a more detailed explanation of the customary law of war and of the offenders and offenses subject to punishment by military tribunal.<sup>94</sup> Orders 100 first observed that “[m]artial law is [merely] military authority exercised in accordance with the laws and usages of war.”<sup>95</sup> It then declared that, during war, a hostile army suspends and replaces a displaced civil government and its civil and criminal laws with just military authority.<sup>96</sup> This authority did not depend upon comprehensive occupation of enemy territory, but merely upon the presence of a hostile army that had displaced a local civil authority.<sup>97</sup> Orders 100 also clarified that martial law generally extends not only to territory and property under military control,

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94. WAR DEP'T, GENERAL ORDERS 100: INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (1863) [hereinafter ORDERS 100], *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 3 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004). For a detailed examination of the use of military commissions in the Civil War to punish law of war violations both before and after issuance of Orders 100, see generally Gideon M. Hart, *Military Commissions and the Lieber Code: Toward a New Understanding of the Jurisdictional Foundations of Military Commissions*, 203 MIL. L. REV. 1 (2010).

95. ORDERS 100, *supra* note 94, art. 4.

96. *Id.* art. 3 (“Martial Law in a hostile country consists in the suspension, by the occupying military authority, of the criminal and civil law, and of the domestic administration and government in the occupied place or territory, and in the substitution of military rule and force for the same, as well as in the dictation of general laws, as far as military necessity requires this suspension, substitution, or dictation.”). Orders 100 qualified this vast authority by declaring:

Military oppression is not Martial Law: it is the abuse of the power which that law confers. As Martial Law is executed by military force, it is incumbent upon those who administer it to be strictly guided by the principles of justice, honor, and humanity—virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed.

*Id.* art. 4.

97. *Id.* art. 1 (“The presence of a hostile army proclaims its Martial Law.”). Its degree of implementation, however, depended upon the relative control of the territory in question. *Id.* art. 5 (“Martial Law should be less stringent in places and countries fully occupied and fairly conquered. Much greater severity may be exercised in places or regions where actual hostilities exist, or are expected and must be prepared for. Its most complete sway is allowed—even in the commander’s own country—when face to face with the enemy, because of the absolute necessities of the case, and of the paramount duty to defend the country against invasion. To save the country is paramount to all other considerations.”).

but also “to [all] persons, whether they are subjects of the enemy or aliens to that government.”<sup>98</sup>

The elements of Orders 100 addressing the jurisdiction of military tribunals generally followed the Mexican occupation approach. Orders 100 first explained that “[m]ilitary jurisdiction is of two kinds: First, that which is conferred and defined by statute; second, that which is derived from the common law of war.”<sup>99</sup> It continued, “In the armies of the United States the first is exercised by courts-martial, while cases which do not come within the ‘Rules and Articles of War,’ or the jurisdiction conferred by statute on courts-martial, are tried by military commissions.”<sup>100</sup>

Winthrop described the subject matter and personal jurisdiction of military commissions in greater detail:

[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 Articles of war.<sup>101</sup>

In light of Orders 100 and prior practice, Winthrop’s second and third categories of persons subject to military commission jurisdiction are sufficiently clear. They included inhabitants of any place where the U.S. military was present, engaged in hostilities or occupation, and the local civil authority was displaced by the conflict.<sup>102</sup>

Winthrop’s other two categories of punishable individuals and acts require clarification. The first included members of an enemy armed force punishable under the laws of war.<sup>103</sup> What currently constitutes “illegitimate warfare or other offences in violation of the

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98. *Id.* art. 7.

99. *Id.* art. 13.

100. *Id.*

101. WINTHROP, *supra* note 74, at 838.

102. *See supra* notes 96-98 and accompanying text.

103. *See* WINTHROP, *supra* note 74, at 838.

laws of war”<sup>104</sup> will be explored in Parts III and IV. The last category is quite expansive. Winthrop explained that it included those “amenable to military commission because of criminal offences committed in places where, by reason of war and military occupation ... the ordinary criminal courts were closed.”<sup>105</sup> It also included those “who became [amenable to military commission jurisdiction] by reason of violations of the laws of war or offences of a military character, not included among the acts made punishable by the code of Articles of war.”<sup>106</sup> Such offenders included not only “officers and soldiers” in the U.S. military, but also “camp-followers and other civilians employed by the government in connection with the army in war.”<sup>107</sup> In other words, Winthrop clarified that during an armed conflict, a military commission could try any member of the U.S. military and any civilian accompanying the U.S. armed forces in the field for either common law crimes or offenses against the law of war.<sup>108</sup>

This background reveals the motivation for the merger of common law military tribunal jurisdiction into the military commission. Vesting one tribunal with jurisdiction to try common law crimes as well as offenses against the common law of war was simply more expedient. During war, any act of violence to persons or property might be a lawful act of war, a common crime, or a punishable act of illegitimate warfare. To determine in which of these categories an act of violence falls, a tribunal must clarify the context of an act of violence and the status of the person committing it. Doing so is necessary to determine whether an act of violence was criminal and, if so, the nature of the offense as common crime or offense against the law of war.

Merging the jurisdiction of common law military tribunals in a single forum prevented the context of an act from defeating the narrower jurisdiction of a more specific tribunal. For example, an individual engaging in an act of violence against a member of the U.S. military might be a lawful enemy belligerent, a civilian, or a guerilla fighter (also known as an unlawful enemy belligerent).<sup>109</sup> If

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104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *See id.* at 838-39.

109. *See Ex parte Quirin*, 317 U.S. 1, 30-36 (1942). For an analysis of this aspect of *Ex parte*

a lawful belligerent, he was a prisoner of war protected from punishment for all lawful acts of war.<sup>110</sup> If a civilian engaged in violence unrelated to the conflict, his violence was merely a common crime.<sup>111</sup> If an individual were an irregular fighter, his violence was punishable as illegitimate warfare.<sup>112</sup> But for the merger of military jurisdiction, the facts presented at a trial might change the nature of an offense from a common crime to an offense against the law of war. Any such change would potentially defeat the jurisdiction of a more specific common law tribunal.

The Supreme Court's decision in *Ex parte Milligan* also supports the view that military tribunals may constitutionally exercise broad criminal jurisdiction where civil courts are closed by conflict, even within U.S. territory.<sup>113</sup> In *Milligan*, a majority of the Court held that convening military commissions was unlawful where "the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances."<sup>114</sup> The majority clarified, "Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration."<sup>115</sup> The Court's conclusion is consistent with the description of martial law in Orders 100.<sup>116</sup> Thus, during the Civil War, all three branches of the federal government understood that military tribunals could constitutionally exercise jurisdiction over common law crimes and law of war offenses where local civil courts, whether in friendly or enemy territory, were closed by actual fighting or military occupation.

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*Quirin*, see John C. Dehn, *The Hamdan Case and the Application of a Municipal Offense: The Common Law Origins of 'Murder in Violation of the Law of War'*, 7 J. INT'L CRIM. JUST. 63, 73-81 (2009).

110. ORDERS 100, *supra* note 94, art. 56 ("A prisoner of war is subject to no punishment for being a public enemy."); see also *id.* art. 57 ("So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses.").

111. See *id.* art. 6 ("All civil and penal law shall continue to take its usual course in the enemy's places and territories under Martial Law.").

112. See *id.* arts. 83-85; see also WINTHROP, *supra* note 74, at 838.

113. 71 U.S. (4 Wall.) 2, 127 (1866).

114. *Id.* at 121.

115. *Id.* at 127.

116. See ORDERS 100, *supra* note 94, arts. 1-7.

*C. Toward the Uniform Code of Military Justice*

The personal and subject matter jurisdiction of military tribunals continued to evolve after the Civil War. In 1874, near the end of the Reconstruction Era,<sup>117</sup> Congress amended the Articles of War.<sup>118</sup> It added a new article that, in time of war, provided for the punishment of various common law capital crimes by courts-martial rather than military commission.<sup>119</sup> It appears Congress intended to transfer jurisdiction over capital crimes to courts-martial, which provided for greater procedural regularity and congressional control.<sup>120</sup>

This amendment began a trend toward expanding court-martial jurisdiction to include common criminal offenses. Congress substantially amended the Articles of War again in 1916.<sup>121</sup> This edition included the statutory antecedents of UCMJ Articles 18 and 21.<sup>122</sup>

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117. This Article will not address the Reconstruction Acts or American military practices in the former Confederate states during Reconstruction because those precedents are constitutionally suspect and, in any event, unnecessary for understanding the issues addressed in this Article. For a review and analysis, see WINTHROP, *supra* note 74, at 855-62. See generally Detlev F. Vagts, *Military Commissions: The Forgotten Reconstruction Chapter*, 23 AM. U. INT'L L. REV. 231 (2008).

118. American Articles of War of 1874, *reprinted in* WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 986-96 (2d ed. 1920).

119. *Id.* at 990 (“In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding, by shooting or stabbing, with an intent to commit murder, rape, or assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided, for the like offense, by the laws of the State, Territory, or district in which such offense may have been committed.”).

120. According to Winthrop, “In the absence of any statute or regulation governing the proceedings of military commissions, the same are commonly conducted according to the rules and forms governing courts-martial. These war-courts are indeed more summary in their action than are the courts held under the Articles of war, and ... their proceedings ... will not be rendered *illegal* by the omission of details required upon trials by courts-martial.” WINTHROP, *supra* note 74, at 841 (footnotes omitted); see also *In re Yamashita*, 327 U.S. 1, 17-20, 23 (1946) (holding procedural aspects of the Articles of War did not apply to military commissions and “that the commission’s rulings on evidence and on the mode of conducting these proceedings against petitioner are not reviewable by the courts, but only by the reviewing military authorities”).

121. Articles of War, Pub. L. No. 64-242, 39 Stat. 619 (1916), *amended by* Act of June 4, 1920, Pub. L. No. 66-242, 41 Stat. 759 (repealed 1950).

122. See NAT'L MILITARY ESTABLISHMENT, *UNIFORM CODE OF MILITARY JUSTICE* arts. 18 cmt., 21 cmt. (1949) [hereinafter UCMJ COMMENTARY].

Article 12, the antecedent of UCMJ Article 18, provided, “General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles and any other person who by the law of war is subject to trial by military tribunals.”<sup>123</sup> Article 15, the antecedent of UCMJ Article 21, clarified that “conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions ... of concurrent jurisdiction [over] offenders or offenses that by the law of war may be lawfully triable by such military commissions.”<sup>124</sup> From this language and in light of earlier events, it is clear that Congress expanded court-martial jurisdiction to encompass all offenders and offenses punishable by military commission for common law crimes or offenses against the law of war.

The executive branch clearly shared this expansive view of the jurisdiction of courts-martial under the 1916 Articles of War. The 1918 *Manual for Courts-Martial*, issued by authority of the President,<sup>125</sup> explained that these new articles made “[t]he jurisdiction of the general court-martial ... concurrent with that of the military commission and other war tribunals in the trial of offenses against the laws of war.”<sup>126</sup>

To ensure that courts-martial could exercise the full extent of personal jurisdiction exercised by military commissions, Congress also modified the personal jurisdiction of courts-martial. The 1874 Articles governed “[t]he armies of the United States,”<sup>127</sup> which were defined to include only appointed officers and enlisted men.<sup>128</sup> Article 63 then stated, “All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war.”<sup>129</sup> The military interpreted this provision to

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123. Art. 12, 39 Stat. at 652.

124. Art. 15, 39 Stat. at 653.

125. See, e.g., Gregory E. Maggs, *Judicial Review of the Manual for Courts-Martial*, 160 MIL. L. REV. 96, 100-01, 132-35 (1999) (articulating current statutory and probable constitutional bases for the President’s authority to promulgate Manuals for Courts-Martial).

126. MANUAL FOR COURTS-MARTIAL, UNITED STATES, intro., ¶ 6 (1918) [hereinafter 1918 MCM]. Interestingly, Article 16 provided that officers could only be tried by courts-martial, and thus, without this expansion of courts-martial jurisdiction, no jurisdiction to try officers for law of war violations would have existed. 39 Stat. at 653.

127. American Articles of War of 1874, *supra* note 118, pmb., at 986.

128. *Id.* arts. 1-2, at 986.

129. *Id.* art. 63, at 991.

apply only during war,<sup>130</sup> and found it to be ambiguous with respect to whether Congress intended to subject such persons to the jurisdiction of courts-martial.<sup>131</sup> To clarify these matters, Article 2(d) of the 1916 Articles extended courts-martial jurisdiction to:

All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles.<sup>132</sup>

Not only were all civilians accompanying the military abroad made statutorily subject to court-martial jurisdiction, so too were those accompanying the military in the field during war regardless of location.

These changes suggest that Congress considered different constitutional issues. The provision relating to general extraterritorial jurisdiction was likely due to the limited availability of Article III or other U.S. criminal courts abroad.<sup>133</sup> The latter provision, extending court-martial jurisdiction to civilians in time of war regardless of location, was clearly based in the federal war powers,<sup>134</sup> like the jurisdiction of military commissions preceding them.<sup>135</sup> Although Congress later amended the Articles of War in various respects, these aspects of the 1916 Articles remained substantially unchanged until incorporated into the UCMJ.<sup>136</sup>

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130. Edmund M. Morgan, *Court-Martial Jurisdiction over Non-Military Persons Under the Articles of War*, 4 MINN. L. REV. 79, 90 (1920) (noting application of this provision “was strictly limited to the time of war”).

131. *See id.* (noting that the military’s “settled construction of [Article 63] was that [it] subjected the civilians designated ... to the jurisdiction of courts-martial” but that Congress did not officially give “legislative sanction” to this practice until its passage of 1916 Articles).

132. Articles of War, Pub. L. No. 64-242, art. 2(d), 39 Stat. 619, 651, *amended by* Act of June 4, 1920, Pub. L. No. 66-242, 41 Stat. 759 (repealed 1950).

133. *See* Morgan, *supra* note 130, at 94-95, 95 n.68 (explaining the jurisdictional gap this provision was designed to cure).

134. *See generally id.* at 89-97 (analyzing wartime case law surrounding these provisions). For an analysis of Supreme Court cases supporting this characterization, see Dehn, *supra* note 17, at 2142-46, 2149-52.

135. *See supra* note 84 and accompanying text.

136. *See, e.g.*, Act of June 4, 1920, Pub. L. No. 66-242, arts. 2(d), 12, 15, 41 Stat. 759, 787,

*D. The Uniform Code of Military Justice*

When Congress enacted the UCMJ in 1950, it refined the scope of court-martial jurisdiction. The substance of Articles of War 2(d), 12, and 15 was placed in UCMJ Articles 2(10)-(12), 18, and 21, respectively.<sup>137</sup> Relevant to this analysis, Article 18 read,

[G]eneral courts-martial shall have jurisdiction to try persons subject to this code for any offense made punishable by this code .... General courts-martial shall 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.<sup>138</sup>

Article 21 of the UCMJ was identical to Article of War 15.<sup>139</sup> Article 2(10) preserved court-martial jurisdiction over “all persons serving with or accompanying an armed force in the field” “[i]n time of war.”<sup>140</sup> Article 2(11)-(12) refined the circumstances under which Congress sought to extend court-martial jurisdiction to areas outside U.S. territory in circumstances not involving war,<sup>141</sup> and were later deemed unconstitutional.<sup>142</sup>

The UCMJ also codified many common law crimes, including murder, rape, assault, burglary, and others, in addition to offenses against military discipline.<sup>143</sup> Congress also made the UCMJ, including the new punitive articles codifying common law crimes, “applicable in all places.”<sup>144</sup> For the first time, therefore, courts-martial had statutory jurisdiction over common criminal offenses by

789-90 (repealed 1950); Selective Service Act of 1948, Pub. L. No. 80-759, secs. 202, 209, 62 Stat. 604, 628-30 (amending unrelated aspects of Article 12 only).

137. Uniform Code of Military Justice, Pub. L. No. 81-506, arts. 2(10)-(12), 18, 21, 64 Stat. 107, 109, 114-15 (1950) (codified as amended at 10 U.S.C. §§ 802(a)(10)-(12), 821 (2012); 10 U.S.C. § 818 (Supp. IV 2017)).

138. *Id.* art. 18.

139. *Compare* art. 15, 41 Stat. at 790, *with* art. 21, 64 Stat. at 115.

140. Art. 2(10), 64 Stat. at 109.

141. *Id.* art. 2(11)-(12); *see also* UCMJ COMMENTARY, *supra* note 122, art. 2 cmt. (explaining sources and purposes of these articles).

142. *See Reid v. Covert*, 354 U.S. 1, 38-41 (1957) (holding trial and punishment by courts-martial of military spouses accompanying service members abroad in times of peace unconstitutional).

143. Arts. 77-134, 64 Stat. at 133-43.

144. *Id.* art. 5.

members of the military wherever and whenever committed, even when unrelated to a war or other contingency operation.<sup>145</sup>

The exact scope of courts-martial jurisdiction over law of war matters under the UCMJ was not initially made clear to Congress. During committee hearings on the UCMJ, court-martial jurisdiction over offenders and offenses punishable by military tribunal under the law of war was a point of confusion.<sup>146</sup> Committee members sought clarification concerning whether courts-martial trying such individuals would be subject to statutory limits on court-martial punishment.<sup>147</sup> Inconsistent answers were given. One witness stated that when courts-martial exercise jurisdiction as permitted by the laws of war, they act as “military tribunals” rather than courts-martial.<sup>148</sup> This may suggest that statutory constraints upon courts-martial, such as limitations on punishment, would not necessarily apply. Later, though, the same witness stated that such limits

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145. This development resulted in a significant expansion of court-martial jurisdiction when those crimes were committed within the United States in times of peace. *Solorio v. United States* explains the effect of this development on the jurisdiction of courts-martial in domestic territory not affected by an armed conflict. 483 U.S. 435, 440-42, 449-51 (1987) (explaining origins of development of “service connection” test once used to limit court-martial jurisdiction, which the Court abandoned).

146. The confusion is undoubtedly in part because the witnesses had helped prepare a report with text and commentary on the proposed Code that omitted any reference to the law of war element of Article 18. See UCMJ COMMENTARY, *supra* note 122, art. 18 cmt.

147. *Uniform Code of Military Justice: Hearings on H.R. 2498 Before the H. Subcomm. No. 1 of the H. Comm. on Armed Services*, 81st Cong. 958-62 (1949) (statement of Felix Larkin, Assistant Gen. Counsel, Office of the Secretary of Def.).

148. The relevant discussion follows:

Mr. BROOKS: ... Now I want to ask one more question before we finish the paragraph. I may be a little confused about it, but it seems to me that last sentence is a catch-all that will just about cover anything. Perhaps, historically, it was worded all right.

Mr. LARKIN: It is designed to enable the courts martial, when it is acting not as a courts martial but as a military tribunal, to follow the laws of war.

Mr. BROOKS: Does it not nullify what we just said above there?

Mr. LARKIN: No, because it is used as a military tribunal in only a very limited number of cases, usually a case like spying or treason.

Mr. BROOKS: But it says “any person who by the law of war is subject to trial.” Would that not include any man in any branch of the service?

Mr. LARKIN: Well, any man in any branch of service, I suppose who violated the law of war would be triable by a military tribunal or a courts martial which is not acting as a courts martial but a military tribunal.

*Id.* at 961.

would nevertheless apply.<sup>149</sup> Another witness suggested they would not.<sup>150</sup> One witness claimed that the category of cases encompassed by Article 18 would likely be limited to spies or treason.<sup>151</sup> And still another suggested that U.S. service members would never be tried under the laws of war rather than a punitive article of the UCMJ.<sup>152</sup> No clarification was given to explain why this would be the case. Given the diversity of views presented, the committee's understanding of Article 18 is unclear.

Despite this confusion, the 1951 *Manual for Courts-Martial* demonstrated that the executive branch understood Article 18 to be as broad as both its language and origins suggest. It stated:

[C]ourts-martial have power to try any person subject to the code for any offense made punishable by the code. In addition they have power to try any person who by the law of war is subject to trial by military tribunal for any crime or offense against the law of war and for any crime or offense against the law of territory occupied as an incident of war or belligerency whenever the local civil authority is superseded in whole or in

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149. The relevant discussion follows:

Mr. BROOKS: I will not make it a point, but it does just seem to me that that covers everybody and it renders null the preceding provision which limits the type of punishment. That is not true, is it?

Mr. LARKIN: I do not think so, Mr. Chairman.

*Id.*

150. The relevant discussion follows:

Mr. DEGRAFFENRIED: Mr. Larkin, I do not want to delay—I know we have to cover a lot of ground and everything—but I am not entirely familiar with the difference between military tribunal and a courts martial.

Would it take you too long to tell us just a little bit about that?

Mr. GAVIN. Who sits on the military tribunal?

Mr. LARKIN. Well, they vary. Perhaps Colonel Dinsmore can explain that difference.

Colonel DINSMORE: That ordinarily, Mr. deGraffenried, takes the form of a military commission. It is appointed in the same manner and perhaps by the same authority as the courts martial. It is not sitting as a courts martial, however. It is sitting as a military tribunal to administer the laws of war.

Now, I would like to say at the same time, in response to a suggestion that has been made, I conceive of no situation in which military personnel of our own forces would be tried under the laws of war as distinguished from the Articles of War we are writing.

*Id.*

151. *See id.*

152. *See id.*

part by the military authority of the occupying power. The law of occupied territory includes the local criminal law as adopted or modified by competent authority, and the proclamations, ordinances, regulations, or orders promulgated by competent authority of the occupying power.<sup>153</sup>

Thus, the executive branch understood UCMJ court-martial jurisdiction to be equivalent to the broad jurisdiction of common law military tribunals under the Articles of War. A court-martial could try any case that, under the law of war, may have been tried by a military commission or other military tribunal.<sup>154</sup> It is therefore essential to more carefully examine the text of Article 18 and determine its substantive scope and legal effect.

### III. THE SCOPE AND LEGAL EFFECT OF ARTICLE 18

Between the 1916 Articles of War, which contained the Article 18 antecedent, and 1950, when the UCMJ adopted Article 18, the United States participated in two world wars. Its participation in the Second World War included the trial and punishment of 142 Germans for offenses against the law of war by U.S. military tribunals in occupied Germany.<sup>155</sup> Military tribunals also prosecuted U.S. civilians for violations of German penal law in occupied Germany.<sup>156</sup> During this period the United States also participated in the development and adoption of several new law of war treaties. Relevant treaties included what is known as the 1925 Gas Protocol<sup>157</sup> and the

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153. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 14a (1951) [hereinafter 1951 MCM].

154. *See id.* pt. I, ¶ 2 (“Military jurisdiction is exercised by a belligerent occupying enemy territory (military government); by a government temporarily governing the civil population of a locality through its military forces, without the authority of written law, as necessity may require (martial law); by a government in the execution of that branch of the municipal law which regulates its military establishment (military law); and by a government with respect to offenses against the law of war.”).

155. *See* TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW No. 10, at 241 (1949). Although 185 individuals were indicted, only 177 were tried (with 142 convicted and 35 acquitted). *Id.* Eight either committed suicide or were “severed.” *Id.*

156. *See, e.g.,* Madsen v. Kinsella, 343 U.S. 341, 342-43 (1952).

157. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571.

1929 Geneva Conventions,<sup>158</sup> which were later replaced and expanded upon by the 1949 Geneva Conventions (ratified by the United States in 1955).<sup>159</sup> Despite these many developments, the law of war component of both court-martial and military tribunal jurisdiction remained fundamentally unchanged from the 1916 Articles of War until the Military Commissions Acts of 2006 and 2009.<sup>160</sup> From 1950 to the present, states including the United States have developed and adopted numerous additional law of war treaties,<sup>161</sup> and many customary law of war norms have either been modified or further clarified.<sup>162</sup>

These many developments raise at least three important issues of statutory interpretation with respect to UCMJ Article 18. The first is the precise legal effect of UCMJ Article 18. Is it merely jurisdictional or does it effectively create substantive criminal offenses? The second entails identifying precisely to what the term “law of war” refers. The third involves identifying the individuals and conduct punishable under the relevant “law of war.” This Part examines each of these issues in turn, and I first argue that Article 18 not only assigns jurisdiction over a general class of offenders and acts but also creates municipal crimes punishing all acts in the context of an armed conflict for which the law of war permits punishment by military tribunal. Second, it concludes the term “law of war” refers to all treaty and customary norms applicable to a specific armed conflict at the time an alleged punishable act occurred rather than only the law of war norms existing at the time the term “law of war” was adopted. Third, it shows that Article 18 authorizes punishment of: (1) acts denominated war crimes by international law; and (2) any acts by or on behalf of an enemy of the United States for which the law of war removes legal protection and permits punishment. The punishment of other law of war violations by

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158. Convention Relating to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021; Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, July 27, 1929, 47 Stat. 2074.

159. See GC I, *supra* note 5; GC II, *supra* note 50; GC III, *supra* note 50; GC IV, *supra* note 50.

160. See *supra* note 49.

161. The International Committee of the Red Cross identifies twenty-seven “main” law of war treaties. See INT’L COMM. OF THE RED CROSS, *supra* note 50, at 1.

162. An example is the clarification of war crimes in non-international armed conflict. See *infra* note 217 and accompanying text.

U.S. forces and any civilians accompanying them, as well as the relationship of such violations to the punitive articles of the UCMJ, are addressed in Part IV.

### *A. Parsing the Text and Its Effect*

#### *1. Article 18*

The precise legal effect of vesting courts-martial with “jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and [to] adjudge any punishment permitted by the law of war,”<sup>163</sup> has not been fully addressed by military courts,<sup>164</sup> commentators,<sup>165</sup> or the *Law of War Manual*.<sup>166</sup>

The text of Article 18 might be interpreted in at least two ways. First, it might be construed as purely jurisdictional, conferring authority only to adjudicate acts denominated as criminal by the law of war. Second, the text may be read not only to vest jurisdiction but also to effectively create substantive criminal offenses punishing any act for which the law of war permits punishment by military tribunal.

Determining which of these potential interpretations is correct has significant implications for subject matter jurisdiction. If Article

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163. 10 U.S.C. § 818(a) (Supp. IV 2017).

164. Cases discussing the scope of law of war jurisdiction deal almost exclusively with military commissions. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 566 (2006); *Madsen v. Kinsella*, 343 U.S. 341, 342-43 (1952); *In re Yamashita*, 327 U.S. 1, 5 (1946); *Ex parte Quirin*, 317 U.S. 1, 18-19 (1942); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 107 (1866). One exception is *United States v. Schultz*, in which the Court of Military Appeals only generally explains court-martial jurisdiction under 1916 Articles of War 12 in occupied Japan. 4 C.M.R. 104, 111-13 (C.M.A. 1952); see also *id.* at 111 (concluding courts-martial in occupied territory have jurisdiction over “persons subject to the military law and ... persons subject to the law of war” without explaining the full scope of the latter category); see also *United States v. Burney*, 21 C.M.R. 98, 115-17, 126-27 (C.M.A. 1956) (examining only when civilians are subject to jurisdiction of courts-martial in time of war, citing similar reported cases).

165. See, e.g., Major Jan E. Aldykiewicz & Major Geoffrey S. Corn, *Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts*, 167 MIL. L. REV. 74, 78-82 (2001) (concluding courts-martial may punish war crimes but not full scope of statutory language); Major Mynda G. Ohman, *Integrating Title 18 War Crimes into Title 10: A Proposal to Amend the Uniform Code of Military Justice*, 57 AIR FORCE L. REV. 1, 6 (2005) (discussing only jurisdiction over war crimes by U.S. service members).

166. See LAW OF WAR MANUAL, *supra* note 38, at 1120-21.

18 is only jurisdictional, then international law must clearly and affirmatively denominate an act as a crime before it may be punished by courts-martial.<sup>167</sup> Until states collectively and affirmatively denominate an act as criminal, it is not an international crime.<sup>168</sup> Generally speaking, states have an affirmative international legal obligation to investigate and prosecute international war crimes.<sup>169</sup> If Article 18 grants jurisdiction and also effectively creates substantive offenses when the law of war permits, then the subject matter jurisdiction of courts-martial is clearly much broader.<sup>170</sup> This is because the law of war permits the punishment of many acts without denominating those acts to be crimes,<sup>171</sup> which then allows states discretion to determine how to punish or otherwise suppress such acts.

It seems clear that Article 18 should be construed to permit military tribunals to punish any act for which punishment by military tribunal is permitted under the law of war. Its text requires reference to the law of war to identify offenders and acts punishable by military tribunal and also empowers courts-martial to “adjudge *any* punishment permitted by the law of war.”<sup>172</sup> Granting a criminal tribunal general power to punish when international law *permits* rather than *requires* it necessarily entails the creation of a municipal criminal offense for every such act. If international law does not provide a criminal sanction, any such sanction must come from domestic law. Vesting municipal courts with the power to punish international law violations therefore effectively creates municipal

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167. See, e.g., Jens David Ohlin, *The Common Law of War*, 58 WM. & MARY L. REV. 493, 502 (2016). International law is created by the express or implied consent of sovereign states. See Statute of the International Court of Justice, art. 38, ¶ 1, June 26, 1945, 59 Stat. 1031; Dehn, *supra* note 17, at 2116.

168. This is known as the legality principle, which prohibits the punishment of conduct not denominated as criminal at the time it occurred. See, e.g., ICC Statute, *supra* note 3, art. 22, ¶ 1. The absence of international norms clearly authorizing individual criminal punishment was a primary objection to post-World War II international military tribunals. See, e.g., TAYLOR, *supra* note 155, at 218.

169. See ICC Statute, *supra* note 3, pmb1.

170. I have elsewhere argued that Article 18 preserves an Anglo-American common-law approach to punishing acts for which the law of war removes or does not provide immunity or other protection. See generally Dehn, *supra* note 109.

171. See *infra* Part III.C.

172. 10 U.S.C. § 818(a) (Supp. IV 2017) (emphasis added).

crimes. This becomes clearer by considering other statutes that create domestic authority to punish law of war violations.

A prime example of a statute broadly creating not only personal and subject matter jurisdiction but also U.S. municipal criminal law of war offenses is the War Crimes Act. The War Crimes Act delimits personal jurisdiction: it applies to acts “whether inside or outside the United States”: but only when “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.”<sup>173</sup> The War Crimes Act vests Article III federal courts with jurisdiction to punish “war crimes,” including grave breaches of the 1949 Geneva Conventions and other serious law of war violations.<sup>174</sup> Although the 1949 Geneva Conventions require high contracting parties to impose a “penal sanction[.]” for grave breaches, they do not label those acts to be “international crimes.”<sup>175</sup> Although grave breaches are now frequently called “international war crimes,” states must logically implement treaty obligations to punish individuals in their *municipal* criminal law. The international legal norms incorporated by reference in the War Crimes Act become municipal crimes.<sup>176</sup> The War Crimes Act therefore establishes and delineates not only subject matter and personal jurisdiction but also municipal federal crimes enforcing the law of war.<sup>177</sup>

It is appropriate to construe Article 18 similarly. The text of Article 18 clearly grants both subject matter and personal jurisdiction over the “offenders” and “offenses” punishable by military tribunal.<sup>178</sup> Additionally, by vesting authority to punish any act when permitted by the law of war, it also effectively creates domestic crimes for each such act. Whenever the law of war permits punishment of an offender and act by military tribunal, Article 18

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173. 18 U.S.C. § 2441(a)-(b) (2012). This does not fully satisfy the treaty obligation to impose a penal sanction regardless of the nationality of the offender or victim. See GC I, *supra* note 5, art. 49; GC II, *supra* note 50, art. 50; GC III, *supra* note 50, art. 129; GC IV, *supra* note 50, art. 146.

174. 18 U.S.C. § 2441(a), (d).

175. GC I, *supra* note 5, art. 49; GC II, *supra* note 50, art. 50; GC III, *supra* note 50, art. 129; GC IV, *supra* note 50, art. 146.

176. See 18 U.S.C. § 2441(c).

177. See *id.*

178. See 10 U.S.C. § 818 (Supp. IV 2017).

empowers courts-martial to punish it.<sup>179</sup> It thereby incorporates all such acts by reference and establishes municipal crimes.

Commentary in the 1951 *Manual for Courts-Martial* supports this understanding of Article 18. It states, “In the case of a person subject to trial by general court-martial by the law of war (see Art. 18), the [criminal] Charge should be: ‘Violation of the Law of War.’”<sup>180</sup> Note that this provision does not refer only to war crimes defined by international law or grave breaches of the Geneva Conventions, but instead permits charging any law of war violation.<sup>181</sup> A similar comment appeared in later Manuals for Courts-Martial,<sup>182</sup> and was later included in the comments to Rule for Courts-Martial 307, where it remains today.<sup>183</sup> Thus, it appears that the executive branch has long understood that Article 18 not only vests personal and subject matter jurisdiction but also creates municipal offenses for law of war violations that may be charged by courts-martial.

One objection to this view might be that the Supreme Court has generally treated the “customary” or “common” law of war as entirely exogenous to, rather than part of, U.S. law.<sup>184</sup> This would suggest that Article 18 is only jurisdictional and does not create municipal crimes. The precise issue, however, is not how to characterize the law of war generally, but rather its implementation in the UCMJ and punishment by courts-martial. At least one Supreme Court Justice has noted that decisions by U.S. officials to implement the law of war in a specific way are domestic policy choices that create federal law.<sup>185</sup> The author of a seminal article on this topic, Professor

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179. *See id.*

180. 1951 MCM, *supra* note 153, app. 6b, ¶ 12.

181. *Id.*

182. MANUAL FOR COURTS-MARTIAL, UNITED STATES app. 6b, ¶ 12 (1968) [hereinafter 1968 MCM]; *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES app. 6b, ¶ 12 (rev. ed. 1969) [hereinafter 1969 MCM].

183. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 307(c)(2) cmt. (D) (2012) [hereinafter 2012 MCM]; *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 307(c)(2) cmt. (D) (1998) [hereinafter 1998 MCM]; MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 307(c)(2) cmt. (D) (1994) [hereinafter 1994 MCM]; MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 307(c)(2) cmt. (D) (1984) [hereinafter 1984 MCM].

184. *See generally* Dehn, *supra* note 17; Ohlin, *supra* note 167.

185. In his dissent in *New York Life Insurance Co. v. Hendren*, Justice Joseph Bradley stated, “[I]n many things that *prima facie* belong to international law, the government will adopt its own regulations: such as the extent to which intercourse shall be prohibited; how far property of enemies shall be confiscated; what shall be deemed contraband.” 92 U.S. 286, 288 (1875) (Bradley, J., dissenting). He continued:

Richard Baxter, also understood some law of war punishment necessarily occurs under a state's municipal law, including its "military common law."<sup>186</sup>

It seems clear, then, that vesting a domestic tribunal with the power to punish offenders and acts when "permitted" by the law of war incorporates all such circumstances as crimes in U.S. law. This conclusion also finds additional support in the case law related to the "concurrent jurisdiction" of Article 21.

## 2. *Instructive Article 21 Case Law*

The case law interpreting Article 21 (and its antecedent statute, Article of War 15) clarifies that while the sources of jurisdiction to punish law of war violations and other crimes by military tribunal are the Constitution and international law, the offenses for which it authorizes punishment are municipal in nature. Although the Supreme Court has expressed conflicting views about the legal underpinnings and effect of UCMJ Article 21, both the executive branch and the Supreme Court now appear to share this view.

The long-standing executive branch view has been that the law of war is one source of the jurisdiction for military tribunals other than courts-martial. This is reflected in Orders 100,<sup>187</sup> Winthrop's treatise,<sup>188</sup> almost a century of Manuals for Courts-Martial,<sup>189</sup> and

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All this only shows that the laws which the citizens of the United States are to obey in regard to intercourse with a nation or people with which they are at war are laws of the United States. These laws will be the unwritten international law, if nothing be adopted or announced to the contrary; or the express regulations of the government, when it sees fit to make them. But in both cases it is the law of the United States for the time being, whether written or unwritten.

*Id.* This view supports the notion that punishing an individual is properly considered domestic law, whether expressly defined in a statute or imposed by the executive when permitted by international law.

186. See Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323, 340 (1951); see also *infra* note 196 and accompanying text.

187. ORDERS 100, *supra* note 94, art. 13; see also *supra* notes 99-100 and accompanying text.

188. WINTHROP, *supra* note 74, 836-37.

189. See 2012 MCM, *supra* note 183, pt. I, pmb. ("The sources of military jurisdiction include the Constitution and international law."); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, pmb. (2008) [hereinafter 2008 MCM] (same); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, pmb. (2000) [hereinafter 2000 MCM] (same); 1998 MCM, *supra* note

other military manuals.<sup>190</sup> This view is also consistent with the historical origins of these tribunals and with post-Second World War events, discussed earlier.<sup>191</sup>

The executive branch also believed, however, that the war powers conferred by the Constitution are also a source of authority. As Winthrop stated, “[I]n general, it 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.”<sup>192</sup> Put differently, congressional authorization to engage in war confers constitutional authority to use all measures that are consistent with the law of war and any specifically applicable domestic law.<sup>193</sup> This authority has long included the power to create and use military tribunals when permitted by the law of war.

The Supreme Court has not been consistent in its view of either the international or the domestic legal authority for using military tribunals other than courts-martial. It initially suggested Article 15 of the 1916 Articles of War, the antecedent of Article 21, was an exercise of Congress’s power “[t]o *define* and punish ... Offenses against the Law of Nations” rather than the war powers.<sup>194</sup> This characterization is highly suspect. Recall that Article 15, and now UCMJ Article 21, merely clarifies that vesting identical jurisdiction

183, pt. I, pmbl. (same); 1994 MCM, *supra* note 183, pt. I, pmbl.(same); 1984 MCM, *supra* note 183, pt. I, pmbl. (same); 1969 MCM, *supra* note 182, ch. 1, ¶ 1 (same); 1968 MCM, *supra* note 182, ch. 1, ¶ 1 (same); 1951 MCM, *supra* note 153, ch. 1, ¶ 1 (same); *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES § 1(1)-(2)(a) (1921) (asserting source of military jurisdiction rests in Constitution’s assignment of war powers and includes punishment permitted by the law of war); 1918 MCM, *supra* note 126, ch. 1, § 1(1)-(2)(a) (similar language).

190. *See, e.g.*, WAR DEP’T, RULES OF LAND WARFARE 129-32 (1914) (differentiating punishment of individuals under law of war and domestic law); *see also, e.g.*, DEP’T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 176-83 (1956) (similar); WAR DEP’T, FIELD MANUAL 27-10, RULES OF LAND WARFARE 86-89 (1940) (similar).

191. *See supra* Parts II.A-B; *supra* note 155 and accompanying text.

192. WINTHROP, *supra* note 74, at 831 (emphasis added).

193. *See* John C. Dehn, *The Commander-in-Chief and the Necessities of War: A Conceptual Framework*, 83 TEMP. L. REV. 599, 626-38 (2011)

194. U.S. CONST. art. I, § 8, cl. 10 (emphasis added); *Ex parte Quirin*, 317 U.S. 1, 28 (1942) (“Congress ... has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals.”).

in courts-martial “shall not be construed as *depriving* military commissions, provost courts, or other military tribunals of *concurrent* jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by such” tribunals.<sup>195</sup> In other words, the text of Article 15 preserved previously existing jurisdiction, which the executive branch has consistently viewed as based in the war powers and law of war. The text of Article 21 cannot fairly be read to create the tribunals, to affirmatively grant jurisdiction, or to delegate *legislative* power to prescribe and punish offenses. As the Court later explained in *Ex parte Quirin*, Congress chose to recognize and employ “the system of common law applied by military tribunals.”<sup>196</sup>

The Supreme Court later clarified that international law and the nation’s war powers are the sources of legal authority for military tribunals. In the cases of *Madsen v. Kinsella* and *In re Yamashita*, the Court found Judge Advocate General of the Army Enoch Crowder’s congressional testimony regarding Article 15 to be authoritative.<sup>197</sup> General Crowder stated that Article 15 was intended to preserve preexisting legal authority rather than to create new tribunals in domestic law.<sup>198</sup> That legal authority was consistently understood to be the Constitution’s war powers and the law of war.

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195. See Articles of War, Pub. L. No. 64-242, 39 Stat. 619, 653 (1916) (emphasis added), amended by Act of June 4, 1920, Pub. L. No. 66-242, 41 Stat. 759 (repealed 1950); see also 10 U.S.C. § 821 (2012) (similar language).

196. *Ex parte Quirin*, 317 U.S. at 30.

197. See *Madsen v. Kinsella*, 343 U.S. 341, 353-54 (1952) (citing *In re Yamashita*, 327 U.S. 1, 67-71 (1946)).

198. Crowder’s relevant testimony was as follows:

Article 15 is new. We have included in article 2 as subject to military law a number of persons who are also subject to trial by military commission. A military commission is our common-law war court. It has no statutory existence, though it is recognized by statute law. As long as the articles embraced them in the designation “persons subject to military law,” and provided that they might be tried by court-martial, I was afraid that, having made a special provision for their trial by court-martial, it might be held that the provision operated to exclude trials by military commission and other war courts; so this new article was introduced

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It just saves to these war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient.

S. REP. NO. 64-130, at 40 (1916).

It thus seems clear that all branches of government once clearly understood that the power to impose punishment by military tribunals other than courts-martial was based in the law of war and war powers of the government rather than the Offenses Clause or other congressional powers.<sup>199</sup> Indeed, the Supreme Court has repeatedly held that military commissions are not Article III “courts” and do not exercise the judicial power of the United States.<sup>200</sup> It has also clearly held that Military Commissions are not subject to the requirements of the Fifth or Sixth Amendments.<sup>201</sup>

These dual sources of authority for the tribunals do not alter the domestic nature of the crimes charged and punishment imposed. Although the authority to impose individual punishment may stem from international law, it cannot be properly said that U.S. military tribunals impose a criminal sanction created by international law. The law of war did not affirmatively require criminal sanctions for some violations until the grave breach provisions of the 1949 Geneva Conventions. Military commissions punishing common law crimes, illegitimate acts of warfare, and law of war violations long predated this development and therefore could only have imposed punishment under municipal sovereign authority. When established by collective sovereign action, international tribunals impose punishment by directly applying international law; individual states

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199. See *Al-Bahlul v. United States*, 840 F.3d 757, 761 (D.C. Cir. 2016) (en banc) (Kavanaugh, J., concurring) (per curiam) (“[T]he war powers clauses in Article I, Section 8—including the Declare War Clause and the Captures Clause, together with the Necessary and Proper Clause—supply Congress with ample authority to establish military commissions and make offenses triable by military commission. And the Declare War Clause and the other war powers clauses in Article I do not refer to international law or otherwise impose international law as a constraint on Congress’s authority to make offenses triable by military commission.”), *rev’g* 792 F.3d 1 (D.C. Cir. 2015), *cert. denied*, No. 16-1307, 2017 WL 1550817 (U.S. 2017); Dehn, *supra* note 17, at 2143.

200. *Hirota v. MacArthur*, 338 U.S. 197, 198 (1948) (per curiam) (holding tribunal in occupied Japan convened on behalf of allies is “not a tribunal of the United States”); *In re Yamashita*, 327 U.S. 1, 8 (1946) (“[T]he military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court.”); *Ex parte Quirin*, 317 U.S. at 39 (“[M]ilitary tribunals ... are not courts in the sense of the Judiciary Article.”); *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 251 (1863) (“[A] military commission [is not] a court within the meaning of the 14th section of the Judiciary Act of 1789.”); *Jecker v. Montgomery*, 54 U.S. (13 How.) 498, 515 (1851) (“The courts, established or sanctioned in Mexico during the war by the commanders of the American forces, were nothing more than the agents of the military power.... They were not courts of the United States.”).

201. See *Ex parte Quirin*, 317 U.S. at 40.

typically do so by exercising domestic jurisdiction and applying municipal criminal law.<sup>202</sup> In the United States, the authority of military tribunals to impose punishments permitted or required by the law of war is therefore properly understood as imposing punishment under municipal U.S. law.<sup>203</sup>

The breadth and nature of acts punishable by military tribunal under the law of war also reveal the municipal nature of crimes charged and punishment imposed. For example, Articles 18 and 21 also authorize the trial and punishment of violations of the criminal laws of an occupied foreign territory as well as military-created security measures. This is because Article 64 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War provides that a military tribunal may enforce “[t]he penal laws of the occupied territory,” which “shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an

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202. See Rüdiger Wolfrum & Dieter Fleck, *Enforcement of International Humanitarian Law*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 675, 682-83 (Dieter Fleck ed., 2d ed. 2008) (“Despite a lack of practice it has to be assumed in the meantime that a broad *opinio juris* exists that individuals who commit war crimes ... can be held responsible for those acts under national or international criminal law.”). *But see* DEP’T OF THE ARMY, *supra* note 190, at 180-81 (“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.”). The premise of a 1956 military field manual (FM 27-10) on this point is unclear. To say punishment occurs directly under international law ignores the fact that a sovereign state has adopted and is independently enforcing that law. See Baxter, *supra* note 186, at 338. (“In Germany, guerrilla warfare against the Reich was defined as a crime by German law. In other countries a purported prosecution for acting in ‘violation of the laws and customs of war’ is probably to be construed as directed against an offence *in violation of the military common law of the state concerned*.” (emphasis added) (footnote omitted)).

203. This power may be based in the Offenses Clause when no armed conflict exists. For example, the War Crimes Act of 1996 remedied the fact that no U.S. court or military tribunal had jurisdiction to punish war crimes against U.S. nationals after an armed conflict has ended, or service members who were no longer subject to court-martial jurisdiction. See *War Crimes Act of 1995: Hearing on H.R. 2587 Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 104th Cong. 5-7 (1996) (statement of Rep. Walter B. Jones, Jr.); *id.* at 13-15 (statement of John H. McNeil, Senior Deputy Gen. Counsel, Dep’t of Def.); H.R. REP. NO. 104-698, at 7 (1996). During an armed conflict, military commissions have authority to punish war crimes by or against U.S. or foreign nationals. See, e.g., *In re Yamashita*, 327 U.S. at 13-14 (denying Japanese General’s habeas corpus petition after military commission convicted him of committing war crimes against U.S. and Filipino nationals).

obstacle to the application of the present Convention.”<sup>204</sup> An Occupying Power may also adopt necessary security measures,<sup>205</sup> publish and announce them in the language(s) of the population,<sup>206</sup> and if violated, “hand over the accused to its properly constituted, non-political military courts.”<sup>207</sup> Punishing such offenders and offenses is permitted by the law of war, and therefore within the scope of jurisdiction granted by Articles 18.<sup>208</sup> Punishing foreign crimes as altered or supplemented by an occupying force is clearly an exercise of a state’s sovereign authority that effectively creates municipal crimes.<sup>209</sup>

### *B. The Relevant “Law of War”*

It is next necessary to clarify the term “law of war” in UCMJ Article 18. A standard canon of statutory interpretation requires interpreting statutes that incorporate a legal concept or term in accordance with the particular definition or meaning the concept or term had at the time it was adopted.<sup>210</sup> With respect to the term “law of war” in Article 18, this could mean that a court should determine the content of the relevant “law of war” by reference to its content when Article 18 was adopted in 1950, or perhaps even in its antecedent statute in 1916. Such an approach would generate

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204. GC IV, *supra* note 50, art. 64.

205. *Id.*

206. *Id.* art. 65.

207. *Id.* art. 66.

208. Confirming this view, Rule for Courts-Martial 307(c)(2) expressly recognizes that courts-martial may exercise jurisdiction over these offenses. It provides, “A charge states the article of the code, law of war, or local penal law of an occupied territory which the accused is alleged to have violated.” 2012 MCM, *supra* note 183, R.C.M. 307(c)(2); *see also* Madsen v. Kinsella, 343 U.S. 341, 361-62 (1952) (upholding conviction by military commission in occupied Germany applying German penal law to acts of civilian U.S. citizen).

209. There is no other way to characterize the punishment of military security measures. With regard to foreign criminal law, the earlier cited 1951 MCM commentary, *supra* note 153, strongly suggests the view that foreign criminal law is incorporated into the municipal law of the occupying force, which may suspend such parts of it as it deems necessary to its security.

210. *See* Astoria Fed. Sav. & Loan Ass’n v. Solimino, 501 U.S. 104, 108 (1991) (“[W]here a common-law principle is well established, ... the courts may take it as a given that Congress has legislated with an expectation that the principle will apply except ‘when a statutory purpose to the contrary is evident.’” (citations omitted) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952))).

significant problems for U.S. compliance with its current law of war obligations and is likely mistaken.

It seems the better approach to interpreting “law of war” in Article 18 is to treat it as a term of art. Regarding terms of art incorporated by a statute, the Supreme Court has held:

[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.<sup>211</sup>

The Supreme Court has long viewed “law of war” as a term of art—a special body of knowledge with a traditional meaning in international law.<sup>212</sup> The term “law of war” in Article 18 must therefore be understood to refer to current international treaties and custom norms applicable to the armed conflict in which Article 18 authority is being invoked.

Confirming this understanding in *Hamdan* the Supreme Court implicitly took a term-of-art approach to interpreting the term “law of war” in UCMJ Article 21. The Court concluded that “law of war” in Article 21 incorporated what it determined to be an applicable provision of the 1949 Geneva Conventions.<sup>213</sup> The United States ratified those conventions in 1955,<sup>214</sup> five years *after* adoption of the

211. *Morissette v. United States*, 342 U.S. 246, 263 (1952).

212. *Ex parte Quirin*, 317 U.S. 1, 27-28 (1942) (“From the very beginning of its history, this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals.”). In support of this assertion, the Court cites *Juragua Iron Co. v. United States*, 212 U.S. 297 (1909); *United States v. Pacific Railroad*, 120 U.S. 227, 233 (1887); *Coleman v. Tennessee*, 97 U.S. 509, 517 (1878); *Miller v. United States*, 78 U.S. (11 Wall.) 268 (1870); *The William Bagaley*, 72 U.S. (5 Wall.) 377 (1866); *The Venice*, 69 U.S. (2 Wall.) 258, 274 (1864); *Prize Cases*, 67 U.S. (2 Black) 635, 666-67, 687 (1862); *United States v. Reading*, 59 U.S. (18 How.) 1, 10 (1855); *The Anne*, 16 U.S. (3 Wheat.) 435, 447-48 (1818); *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 197-98 (1815); *The St. Lawrence*, 13 U.S. (9 Cranch) 120, 122 (1815); *The Rapid*, 12 U.S. (8 Cranch) 155, 159-64 (1814); *Fitzsimmons v. Newport Insurance Co.*, 8 U.S. (4 Cranch) 185, 199 (1808); *Maley v. Shattuck*, 7 U.S. (3 Cranch) 458, 488 (1806); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 40-41 (1801); and *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 153, 159-61 (1795).

213. *Hamdan v. Rumsfeld*, 548 U.S. 557, 627-28 (2006).

214. GC I, *supra* note 5; GC II, *supra* note 50; GC III, *supra* note 50; GC IV, *supra* note 50.

UCMJ.<sup>215</sup> Without analysis or comment, the Court intuitively followed a “term-of-art” approach to determining the content of the “law of war.”<sup>216</sup> Thus, to identify the jurisdiction and punishable offenses created by Article 18, courts should look to the contemporary law of war.

### *C. Punishable Conduct Under the Contemporary Law of War*

The next necessary step is to determine the scope of the jurisdiction and offenses created by UCMJ Article 18; in other words, to identify the offenders and offenses punishable by military tribunal, and the punishments permitted, under the contemporary law of war.

Before doing so, however, it is important to review certain complexities about the body of international law known as the law of war. While many law of war norms are universal and apply to all armed conflicts, most treaty and some customary norms differ depending upon the nature of the conflict, meaning whether an armed conflict is classified as international or non-international.<sup>217</sup> Further complicating matters, not all states are party to the “main” law of war treaties.<sup>218</sup> A specific treaty provision applicable between some states may not apply between others.

It is therefore important to remember that many norms in law of war treaties, particularly those related to punishable persons and conduct, reflect or have become norms of universal customary

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215. Uniform Code of Military Justice, Pub. L. No. 81-506, arts. 2(10)-(12), 18, 21, 64 Stat. 107, 109, 114-15 (1950) (codified as amended at 10 U.S.C. §§ 802(a)(10)-(12), 821 (2012); 10 U.S.C. § 818 (Supp. IV 2017)).

216. See *Hamdan*, 548 U.S. at 627-28.

217. As of 2005, of the 161 rules identified by the International Committee of the Red Cross, only nine were determined to be specific to international armed conflict, two were specific to non-international armed conflict, seven were believed clearly applicable in international armed conflict and “arguably” applicable in non-international armed conflict, and three had slightly different rules for international versus non-international armed conflict. The remaining 140 rules were determined to be applicable in both international and non-international armed conflict. See Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT’L REV. RED CROSS 175, 187-90 (2005). For a helpful summary of the limited number of treaties applicable to non-international armed conflict, see *id.* at 178.

218. See INT’L COMM. OF THE RED CROSS, *supra* note 50, at 6, 11.

international law.<sup>219</sup> These universal customary norms exist independently from and concurrently with applicable treaties.<sup>220</sup> Nations not bound by a particular law of war treaty are still obligated to observe any applicable universal customary international norms that a treaty contains.<sup>221</sup>

The fundamental requirement to observe customary law in the absence of an applicable treaty was first reflected in a treaty provision known as the Martens Clause, adopted in the 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land. It states,

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.<sup>222</sup>

Adopted in different forms in major law of war treaties since,<sup>223</sup> some of which have been universally adopted by states, this clause “serves as a reminder that customary international law continues to apply after the adoption of a treaty norm.”<sup>224</sup>

For purposes of U.S. military law, the import of this fundamental principle is that applicable customary law of war norms relating to individual punishment are incorporated and enforced under Article 18 even if a relevant law of war treaty does not apply or is believed

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219. See Henckaerts, *supra* note 217, at 182-83.

220. *See id.*

221. *See id.*

222. Hague Convention (II) with Respect to the Laws and Customs of War on Land, pmbl., July 29, 1899, 32 Stat. 1803, 1805; *see also* Hague Convention (IV) Respecting the Laws and Customs of War on Land, pmbl., Oct. 18, 1907, 36 Stat. 2277, 2279-80 [hereinafter Hague IV].

223. *See, e.g.*, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 1(2), June 8, 1977, 1125 U.N.T.S. 3, 7 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), pmbl., June 8, 1977, 1125 U.N.T.S. 609, 611 [hereinafter Protocol II]; GC I, *supra* note 5, art. 63; GC II, *supra* note 50, art. 62; GC III, *supra* note 50, art. 142; GC IV, *supra* note 50, art. 158.

224. Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, 79 INT'L REV. RED CROSS 125, 126 (1997).

not to be inherently enforceable in U.S. law.<sup>225</sup> In other words, Article 18 effectively executes all customary law of war norms related to the punishment of individuals in U.S. military law.

It is not feasible to identify here every act that may be punished by a military tribunal in international or non-international armed conflict. This Section will therefore identify two principal categories of offenses and offenders punishable by military tribunal under the law of war, reserving a third category for the next Part. This is a complex topic with origins in customary international law.

### *1. Customary Law and Individual Punishment*

To identify the offenders and offenses subject to punishment by military tribunal under the law of war, a brief review of customary international law related to individual punishment is helpful. The law of war traditionally had two means of enforcement: retaliation, also known as reprisal, and individual punishment.<sup>226</sup> Retaliation refers to engaging in a breach of the law of war in response to an

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225. This point is important for two reasons. The first is that much of the law related to individual punishment is still customary. Law of war treaties do not extinguish that customary law but may modify it to the extent they apply. The second is that some U.S. Supreme Court Justices have expressed the mistaken belief that law of war treaties containing enforcement mechanisms provide the exclusive means for resolving treaty violations, and that this fact renders those treaty norms unenforceable by federal courts. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 717 (2006) (Thomas, J., dissenting) (“The judicial nonenforceability of the Geneva Conventions derives from the fact that those Conventions have exclusive enforcement mechanisms.” (citing *Johnson v. Eisentrager*, 339 U.S. 763, 784 & n.14 (1950))). This aspect of Justice Thomas’s opinion misunderstands the relevant international law and also misapplies precedent. In *Johnson v. Eisentrager*, which Justice Thomas cites, the Supreme Court held that German petitioners had no right to a writ of habeas corpus in U.S. federal courts. 339 U.S. 763, 781 (1950). In context, the section of the opinion cited by Justice Thomas concludes that alleged noncompliance with the 1929 Geneva Conventions did not give the federal courts an *independent* basis for jurisdiction to issue a writ of habeas corpus. *Id.* at 789 & n.14. The *Eisentrager* Court did not state a general proposition that rights or protections in a treaty with an international enforcement mechanism may never be made enforceable, including by incorporation in a federal statute. For example, Article 3 of Hague Convention (IV) of 1907 provides for enforcement, but only by reparations. Hague IV, *supra* note 222, art. 3. This surely does not prevent the enforcement of its annexed regulations pursuant to the War Crimes Act. *See* 18 U.S.C. § 2441(c)(2) (2012).

226. Reparations are also generally available. *See, e.g.*, Protocol I, *supra* note 223, art. 91; Hague IV, *supra* note 222, art. 3; *see also* Int’l Law Comm’n, Draft Articles on Responsibility for States of Internationally Wrongful Acts, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at arts. 34-37 (2001). Regarding retaliation, *see generally* FRITS KALSHOVEN, *BELLIGERENT REPRISALS* (1971).

enemy's violation.<sup>227</sup> To cite two common examples: if an army killed prisoners of war then its enemy might kill an equal number of prisoners in retaliation,<sup>228</sup> or, if civilians engaged in acts hostile to an approaching or occupying army, that army might kill a proportionate number of civilians in response.<sup>229</sup> Because retaliation was usually imposed against individuals innocent of wrongdoing,<sup>230</sup> and because it tended toward belligerents disregarding legal constraints on warfare,<sup>231</sup> a preference for punishing the individuals responsible for law of war violations developed.

The idea that an offending individual may or should be punished for violating the law of war has origins in influential legal treatises, including Hugo Grotius's 1625 seminal work,<sup>232</sup> and Emmerich de Vattel's 1759 treatise.<sup>233</sup> Winthrop, citing an Oxford Manual adopted in 1880, described the then-evolving view of the relationship between retaliation and individual punishment.<sup>234</sup> In the event of a law of war violation, the individual offender should be punished if possible.<sup>235</sup> However,

[w]here the offender cannot be reached, or where, being a member of the army or subject of the government of the enemy, the latter refuses or neglects to bring him to trial, the only remedy of the belligerent against which, or against a citizen or

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227. MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 407-08 (1959). It has origins in natural law according to the writings of eminent jurists. See, e.g., EMMERICH DE VATTEL, *THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* § 142 (Joseph Chitty trans., 6th Am. ed. 1844).

228. See, e.g., VATTEL, *supra* note 227, § 142; WINTHROP, *supra* note 74, at 796-97.

229. See, e.g., KALSHOVEN, *supra* note 226, at 200-02.

230. INST. OF INT'L LAW, *THE LAWS OF WAR ON LAND* art. 84 (1880), <https://ihl-databases.icrc.org/ihl/INTRO/140?OpenDocument> [<https://perma.cc/TC5G-6KN9>] ("Reprisals are an exception to the general rule of equity, that an innocent person ought not to suffer for the guilty. They are also at variance with the rule that each belligerent should conform to the rules of war, without reciprocity on the part of the enemy.").

231. See GREENSPAN, *supra* note 227, at 408.

232. HUGO GROTIUS, *ON THE LAW OF WAR AND PEACE* pt. III, ch. 4, para. XIII (A.C. Campbell trans., Batoche Books 2001) (1625) ("[T]he law of retaliation, strictly and properly so called, must be directly enforced upon the person of the delinquent himself. Whereas, in war, what is called retaliation frequently redounds to the ruin of those, who are no way implicated in the blame.").

233. VATTEL, *supra* note 227, § 141 (stating that an enemy may be denied quarter, meaning executed, for "enormous breach of ... the laws of war").

234. See WINTHROP, *supra* note 74, at 796 (citing INST. OF INT'L LAW, *supra* note 230).

235. See *id.*

citizens of which, the infraction of law has been injuriously committed, is by *retaliation* or *reprisal*.<sup>236</sup>

In other words, by the late nineteenth century, retaliation or reprisal had become a measure of last resort. Since then, retaliation has been largely prohibited by both law of war treaties,<sup>237</sup> and customary international law.<sup>238</sup>

As the use of reprisals declined, the law related to individual responsibility and punishment developed. Although disagreement existed at various points in time, particularly after the Second World War,<sup>239</sup> it has long been the case in U.S. military law, and is now generally accepted in law of war treaties and customary law, that individuals may (and in some cases must) be punished for serious law of war violations or other acts of illegitimate warfare in both international and non-international armed conflict.<sup>240</sup> Indeed, given the substantial prohibitions on retaliation, individual punishment is the primary means of enforcing the law of war.

It is also clear that the law of war generally permits the adjudication and imposition of individual punishment by military tribunal. Text in the 1949 Geneva Conventions, related commentary by the International Committee of the Red Cross (ICRC), and the ICRC's customary law of war study all clarify that states may use impartial military tribunals to punish individuals.<sup>241</sup> The key to understanding

236. *Id.*

237. *See, e.g.*, Protocol I, *supra* note 223, art. 20 (prohibiting reprisals against medical and religious personnel); *id.* art. 51(6) ("Attacks against the civilian population or civilians by way of reprisals are prohibited."); *id.* art. 53(c) (prohibiting reprisals against cultural objects); *id.* art. 55(2) ("Attacks against the natural environment by way of reprisals are prohibited."); GC I, *supra* note 5, art. 46 ("Reprisals against the wounded, sick, personnel, buildings or equipment protected by the Convention are prohibited."); GC II, *supra* note 50, art. 47 ("Reprisals against the wounded, sick and shipwrecked persons, the personnel, the vessels or the equipment protected by the Convention are prohibited."); GC III, *supra* note 50, art. 13 ("Measures of reprisal against prisoners of war are prohibited."); GC IV, *supra* note 50, art. 33 ("No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.")

238. *See* 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 513-29 (2009) (discussing the limited permissible and numerous prohibited reprisals under customary international law of war).

239. *See* TAYLOR, *supra* note 155, at 218-19.

240. *See* HENCKAERTS & DOSWALD-BECK, *supra* note 238, at 551-55.

241. *See, e.g.*, GC IV, *supra* note 50, art. 66 (allowing punishment by "non-political military courts"); Lindsey Cameron et al., *Article 3: Conflicts Not of an International Character, in*

the scope of Article 18, then, is to identify the offenders and acts for which the law of war permits punishment.

## 2. War Crimes

The offenses most clearly punishable by military tribunal under the law of war, and therefore within the scope of Article 18, are war crimes. The ICRC customary law of war study defines a “war crime[.]” as a “[s]erious violation[.] of international humanitarian law.”<sup>242</sup> Its analysis of state practice concludes “that violations are in practice treated as serious, and therefore as war crimes, if they endanger protected persons or objects or if they breach important values.”<sup>243</sup> The grave breach provisions of the 1949 Geneva Conventions and their Additional Protocols also identify conduct considered a war crime<sup>244</sup> and require states to impose criminal punishment.<sup>245</sup>

Individuals may be punished for a war crime not only when their acts directly violate the law of war but also for “attempting[,] ... assisting in, facilitating, aiding or abetting the commission of a war crime ... [, or] for planning or instigating the commission of a war crime.”<sup>246</sup> Some omissions may also be punished. For example, as found by the U.S. Supreme Court in *Yamashita*,<sup>247</sup> and now a well-accepted rule of customary international law, it is a war crime if military commanders knowingly fail to prevent and suppress violations of the law of war.<sup>248</sup>

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INT'L COMM. OF THE RED CROSS, COMMENTARY OF 2016, CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD para. 680 (2d ed. 2016), <https://ihl-catabases.icrc.org/ihl/full/GCI-commentary> [<https://perma.cc/4GZZ-L7HL>] (“The requirement of independence does not necessarily preclude the court from being composed of persons from ... members of the armed forces, so long as procedures are in place to ensure they perform their judicial functions independently and impartially.”); INT'L COMM. OF THE RED CROSS, *supra* note 50, at 356 (noting no court has “concluded that military tribunals inherently violate” requirements for a regularly constituted and impartial court).

242. See INT'L COMM. OF THE RED CROSS, *supra* note 50, at 568 (Rule 156).

243. See *id.* at 569.

244. Protocol I, *supra* note 223, arts. 11, 85; GC I, *supra* note 5, art. 50; GC II, *supra* note 50, art. 51; GC III, *supra* note 50, art. 130; GC IV, *supra* note 50, art. 147.

245. Protocol I, *supra* note 223, art. 86; GC I, *supra* note 5, art. 49; GC II, *supra* note 50, art. 50; GC III, *supra* note 50, art. 129; GC IV, *supra* note 50, art. 146.

246. See HENCKAERTS & DOSWALD-BECK, *supra* note 238, at 554; see also ICC Statute, *supra* note 3, art. 25(3) (listing six modes of participation in crimes).

247. *In re Yamashita*, 327 U.S. 1, 13-14 (1946).

248. See HENCKAERTS & DOSWALD-BECK, *supra* note 238, at 558-63; see also ICC Statute,

There is a particularly difficult issue with regard to what constitutes sufficient evidence that a given law of war violation is considered “serious” and therefore a war crime in customary international law. Treaties identify grave breaches, but no single source of international law clearly provides a universally accepted and exhaustive list of the law of war violations deemed war crimes by the customary law of war.<sup>249</sup> To identify war crimes in the customary law of war, the ICRC study examines treaties, municipal legislation, state military manuals, the jurisprudence of international tribunals empowered to adjudicate war crimes, as well as historical antecedents.<sup>250</sup> This is a rather tedious approach to say the least.

It seems relatively clear, however, that one important source of evidence of the acts deemed war crimes by customary international law is the Rome Statute of the International Criminal Court (ICC Statute). The ICC Statute defines numerous war crimes for both international and non-international armed conflict.<sup>251</sup> Although a treaty, at least one commentator has opined that the war crimes listed in the ICC Statute codify years of development in the customary law of war crimes, particularly in the area of non-international armed conflict.<sup>252</sup> This suggests that the Rome Statute may contain a complete or near complete list of the war crimes existing in customary international law at the time of its adoption. Another author, however, has suggested that the Rome Statute may have attempted to develop at least some war crimes law and may therefore not reflect customary international law.<sup>253</sup> Nevertheless, both the ICRC study and ICC Statute are helpful resources for identifying the law of war violations deemed war crimes by customary international law.

Because states may impose individual punishment by military tribunal for any serious violation of the law of war, war crimes are within the scope of acts made punishable by the law of war component of UCMJ Article 18. This clearly includes war crimes

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*supra* note 3, art. 28(a) (noting that knowledge may be actual or implied).

249. See, e.g., HENCKAERTS & DOSWALD-BECK, *supra* note 238, at 568-74.

250. See *id.* at 574-603.

251. ICC Statute, *supra* note 3, art. 8.

252. Edoardo Greppi, *The Evolution of International Criminal Responsibility Under International Law*, 81 INT'L REV. RED CROSS 531, 544 (1999).

253. Marko Milanović, *Is the Rome Statute Binding on Individuals? (And Why We Should Care)*, 9 J. INT'L CRIM. JUST. 25, 33-34 (2011).

committed by members of the U.S. military as well as enemy and friendly forces.

### 3. *Other Punishable Conduct by an Enemy*

There is another, less-understood category of individuals and acts punishable by military tribunal under the law of war. This category includes those who engage in acts for which the law of war removes or does not provide protection from punishment without affirmatively prohibiting the relevant conduct. Included in this category are so-called unprivileged belligerents, such as spies, saboteurs, and others who participate in the hostilities of an armed conflict without meeting the requirements for prisoner of war status.<sup>254</sup> The last category has had many names, including: “guerillas, partisans, ... war-traitors, [and] *francs-tireurs*.”<sup>255</sup> In an influential article, Professor Richard Baxter described their common characteristic as involving persons who “have committed hostile acts without meeting the qualifications prescribed for lawful belligerents.”<sup>256</sup>

There is confusion regarding the legal basis and proper forum for punishing these individuals. Some commentary might be read to suggest that those who participate in the violence of a conflict without protection from the law of war are common criminals punishable only by municipal courts of the state in which their acts occurred.<sup>257</sup> According to Professor Baxter, however, “armed and unarmed hostilities, wherever occurring, committed by persons other than those entitled to be treated as prisoners of war or peaceful civilians merely deprive such individuals of a protection they might otherwise enjoy ... and place them ... at the power of the[ir] enemy.”<sup>258</sup> Baxter further explained that the tendency to label these acts “war crimes” stemmed from confusion between punishable law of war violations “and acts with respect to which [the law of war] affords no

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254. See Baxter, *supra* note 186, at 326-27.

255. See *id.* at 327.

256. *Id.*

257. See, e.g., YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 46 (3d ed. 2016) (arguing that engaging in such acts “merely strips the mantle of immunity off the defendant who is therefore exposed to penal charges for any offence committed in breach of the enemy’s domestic legal system”). *But see infra* note 287 and accompanying text.

258. Baxter, *supra* note 186, at 343.

protection.”<sup>259</sup> Baxter clarified, though, the punishment of such acts occurs under the municipal law of the capturing force,<sup>260</sup> and might include “the military common law of the state concerned.”<sup>261</sup> Contemporary commentary and ICRC guidance confirm this view.<sup>262</sup>

One example of this category of punishable acts is spying. Grotius, citing biblical sources, stated that although all spies may be harshly punished when captured, it is not a violation of the law of nations to send spies.<sup>263</sup> According to Article 20 of the 1874 Brussels Declaration, “A spy taken in the act shall be tried and treated according to the laws in force in the army which captures him.”<sup>264</sup> Spies may be members of a military not wearing their country’s uniform or civilians.<sup>265</sup> The ICRC customary law of war study notes that punishment of those captured while spying is permissible (after a fair trial) under the 1899 and 1907 Hague Regulations, Geneva Convention IV of 1949, and Additional Protocol I to the 1949 Geneva Conventions, adopted in 1977.<sup>266</sup> The authority to punish spies is therefore firmly established in both the treaty and customary law of war.

The punishment of spies also has deep roots in U.S. law and practice. Both British and American commanders executed suspected

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259. *Id.* at 340.

260. *Id.* at 338; *see also id.* at 344 (“[The capturing] may require the application of domestic law to determine something denominated in that municipal law as ‘guilt’—but a guilt only in the sense of municipal law.”).

261. *Id.* at 338.

262. *See, e.g.*, Knut Dörmann, *The Legal Situation of “Unlawful/Unprivileged Combatants,”* 85 INT’L REV. RED CROSS 45, 70-71 (2003); *Direct Participation in Hostilities: Questions & Answers*, INT’L COMM. RED CROSS (2009), <https://www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm> [<https://perma.cc/X684-V2RJ>] (“[C]ivilians having directly participated in hostilities can be prosecuted for any offence that they may have committed under domestic law even if, in doing so, they did not violate IHL.”). For ICRC guidance, *see infra* note 279 and accompanying text.

263. GROTIUS, *supra* note 232, pt. III, ch. 4, para. XV (“[S]pies, if discovered and taken, are usually treated with the utmost severity. Yet there is no doubt, but the law of nations allows any one to send spies, as Moses did to the land of promise, of whom Joshua was one.”).

264. Project of an International Declaration Concerning the Laws and Customs of War, art. 20, Aug. 27, 1874, <https://ihl-databases.icrc.org/ihl/INTRO/135> [<https://perma.cc/2W3X-9Q2E>] [hereinafter Brussels Declaration].

265. *See* Baxter, *supra* note 186, at 329-33; *see also* Brussels Declaration, *supra* note 264, arts. 19-23 (defining spying and circumstances under which punishment may be imposed).

266. *See* HENCKAERTS & DOSWALD-BECK, *supra* note 238, at 390-91. The study also cites the 1899 and 1907 Hague Regulations and Additional Protocol I for evidence of the definition of spying. *See id.* at 390.

spies during the Revolutionary War.<sup>267</sup> Congress vested courts-martial with jurisdiction to punish spies in 1806,<sup>268</sup> which it amended in 1862 for the Civil War.<sup>269</sup> Orders 100 declared that a “spy is punishable with death by hanging by the neck.”<sup>270</sup> Winthrop gives extensive attention to U.S. practice surrounding the definition, conviction, and punishment of spies in his treatise.<sup>271</sup> In current U.S. military law, Article 106 of the UCMJ defines spying for purposes of courts-martial or military commissions other than those convened pursuant to the Military Commissions Act.<sup>272</sup> Spies are therefore clearly punishable under U.S. military criminal law.

The contemporary law of war also permits the punishment of others who participate in the hostilities of a conflict without being entitled to prisoner of war status. The ICRC customary law of war study identifies three categories of individuals and acts that do not qualify for a protected status in international armed conflict. These include: combatants who fail to distinguish themselves from civilians during or preparatory to an attack,<sup>273</sup> combatants who engage in espionage if captured while doing so,<sup>274</sup> and mercenaries.<sup>275</sup> The study further notes that none of these individuals can be punished without a fair trial.<sup>276</sup>

The law of war authority to punish civilians who engage in acts of belligerency or otherwise participate in the hostilities of an armed conflict is even less clear. Baxter noted that the 1949 Conventions

267. See, e.g., LOUIS FISHER, *MILITARY TRIBUNALS AND PRESIDENTIAL POWER* 9-13 (2005) (recounting Revolutionary War executions of Major John André by Continental Army, and Captain Nathan Hale by British Army, both for spying).

268. An Act for Establishing Rules and Articles for the Government of the Armies of the United States, ch. 20, § 2, 2 Stat. 359, 371 (Apr. 10, 1806).

269. An Act Making an Appropriation for Completing the Defences of Washington, and for Other Purposes, ch. 25, sec. 4, § 2, 12 Stat. 339, 339-40 (Feb. 13, 1862).

270. ORDERS 100, *supra* note 94, art. 88. More fully, Article 88 stated,

A spy is a person who secretly, in disguise or under false pretense, seeks information with the intention of communicating it to the enemy.

The spy is punishable with death by hanging by the neck, whether or not he succeed in obtaining the information or in conveying it to the enemy.

*Id.*

271. WINTHROP, *supra* note 74, at 765-71.

272. 10 U.S.C. § 906 (2012), *amended by* 10 U.S.C. § 903 (Supp. IV 2017).

273. HENCKERTS & DOSWALD-BECK, *supra* note 238, at 384 (Rule 106).

274. *Id.* at 389 (Rule 107).

275. *Id.* at 391 (Rule 108).

276. *Id.* at 352 (Rule 100).

do not squarely address this topic and that it remains an issue of customary international law.<sup>277</sup> Additional Protocol I is similarly unhelpful, seeking to expand the category of individuals eligible for prisoner of war status without clearly explaining whether or which civilians may be prosecuted and punished for participating in hostilities.<sup>278</sup> It is clear that civilians who commit or are complicit in a war crime may be punished.<sup>279</sup> Some civilians qualify for prisoner of war status.<sup>280</sup> The category at issue here, though, involves civilians participating in the hostilities of an armed conflict without being entitled to prisoner of war status. There is a broad range of conduct that may qualify, from directly attacking an armed force to various types of support to such hostilities.<sup>281</sup> The exact relationship between civilians who lose protection from attack for such time as they take a direct part in hostilities and those who may be punished for such acts is unclear.<sup>282</sup>

Additional Protocol I clarifies, however, that for the purpose of international armed conflict, those “who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely” and lists the protections to be afforded them.<sup>283</sup> These protections include not being sentenced and punished for “a penal offence *related to the armed conflict* except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure.”<sup>284</sup> Applicable principles include punishment solely on the basis of individual responsibility, punishing only acts that were crimes when committed, a presumption of innocence, a right against self-incrimination, and others.<sup>285</sup> So long as these conditions are

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277. Baxter, *supra* note 186, at 327-28.

278. Protocol I, *supra* note 223, arts. 43-47.

279. See HENCKAERTS & DOSWALD-BECK, *supra* note 238, at 607-08 (Rule 158); Baxter, *supra* note 186, at 338. Although not formally a part of a state's armed forces, civilians who are part of a *levée en masse* are entitled to prisoners of war status and are protected from punishment for their participation in the hostilities of a conflict. See GC III, *supra* note 50, art. 4(A)(6).

280. See GC III, *supra* note 50, art. 4(B)(1)-(2).

281. See Baxter, *supra* note 186, at 333-42.

282. See Protocol I, *supra* note 223, art. 51(3).

283. *Id.* art. 75.

284. *Id.* art. 75(4) (emphasis added).

285. *Id.*

met, Additional Protocol I appears to implicitly recognize that some individuals who have participated in the hostilities of an armed conflict without being entitled to a protected status may be punished, as recent ICRC guidance acknowledges.<sup>286</sup>

In non-international armed conflict, the existence of this category of punishable individuals is less clear. Because the concepts of combatant status, prisoner of war, and combatant immunity do not formally exist in the law of war applicable to non-international armed conflict, what constitutes a loss of protected status for purposes of punishment is less certain.<sup>287</sup> This law of war does, however, distinguish those involved in fighting from those no longer fighting and civilians.<sup>288</sup> It also provides for the general protection of civilians from violence. For example, Common Article 3 requires that “[p]ersons taking no active part in the hostilities ... be treated humanely.”<sup>289</sup> Attacking the civilian population and attacking individual civilians who are not taking an active part in hostilities are war crimes in non-international armed conflict.<sup>290</sup> The law of war applicable to non-international armed conflict therefore also appears to implicitly recognize that states may punish those who engage in violence on behalf of a party to the conflict without domestic legal authority, such as members of a non-state armed group.<sup>291</sup> The limitations on imposing such punishment are that the

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286. See NILS MELZER, INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 84 (2009) (“Consequently, civilians who have directly participated in hostilities and members of organized armed groups belonging to a non-State party to a conflict may be prosecuted and punished to the extent that their activities, their membership, or the harm caused by them is penalized under national law (as treason, arson, murder, etc.)” (footnote omitted)). Punishing acts of unprivileged belligerency under domestic law incorporating this general category of individuals and acts, as Article 18 does, certainly seems consistent with this guidance. See 10 U.S.C. § 818(a) (Supp. IV 2017).

287. MELZER, *supra* note 286, at 83 (“[The law of war] provides an express ‘right’ to directly participate in hostilities only for members of the armed forces of parties to international armed conflicts and participants in a *levée en masse*.”).

288. See, e.g., LAW OF WAR MANUAL, *supra* note 38, at 1048-49.

289. See, e.g., GC III, *supra* note 50, art. 3(I).

290. ICC Statute, *supra* note 3, art. 8(2)(e)(I), (f).

291. See MELZER, *supra* note 286, at 84 (“[M]embers of organized armed groups belonging to a non-State party to a conflict may be ... punished.” (footnote omitted)).

crimes prosecuted exist in domestic law,<sup>292</sup> and that individuals are afforded fair trial and other rights required by the law of war.<sup>293</sup>

In U.S. military law, the power to punish individuals engaging in hostilities without either state authority or other entitlement to a protected status has long existed in both non-international and international armed conflict, as Orders 100<sup>294</sup> and U.S. practice during the Mexican and Civil Wars indicate.<sup>295</sup> Article 18 should therefore be read to effectively create not only jurisdiction to punish such individuals but also domestic offenses punishing all qualifying acts.<sup>296</sup>

The question then becomes whether Article 18 prohibits members of the U.S. military from being spies or saboteurs, or from being complicit in employing irregular forces or others unqualified for prisoner of war or civilian status in the hostilities of a conflict. The answer is clearly no. As Professor Baxter explained, the law of war permits punishment of those who engage in such forms of belligerency, but does not directly prohibit a belligerent from using such forces or methods.<sup>297</sup> He clarified that “the law of nations has not ventured to require of states that they prevent the belligerent activities of their citizenry or that they refrain from the use of secret agents or that these activities upon the part of their military forces or civilian population be punished.”<sup>298</sup> Recent guidance from the

292. See Protocol I, *supra* note 223, art. 75(4)(c). See generally HENCKAERTS & DOSWALD-BECK, *supra* note 238.

293. See, e.g., Protocol II, *supra* note 223, art. 6.

294. ORDERS 100, *supra* note 94, arts. 82-85 (defining, in order, punishable irregular fighters, spies, “[a]rmed prowlers” (also known as saboteurs), and “[w]ar-rebels”).

295. WINTHROP, *supra* note 74, at 783-84; Dehn, *supra* note 17, at 76-78.

296. See 10 U.S.C. § 818(a) (Supp. IV 2017). The nature of the acts fitting within the offense would be determined first by the commander referring the charges to courts-martial and then by the finder of fact. An important caveat here is that the United States is not party to Additional Protocol I, see INT’L COMM. OF THE RED CROSS, *supra* note 50, at 6, which broadens the range of individuals entitled to prisoner of war status and combatant immunity, Protocol I, *supra* note 223, arts. 43-44. The U.S. does not accept that expansion of the category and resists the notion that these treaty provisions reflect or have become universal customary international law to which it is bound. See HENCKAERTS & DOSWALD-BECK, *supra* note 238, at 389 (“[T]he United States has changed its position and voiced its opposition to this rule.”). This means that the United States would consider a broader category of individuals to be subject to punishment.

297. Baxter, *supra* note 186, at 342.

298. *Id.*

ICRC confirms this view.<sup>299</sup> In other words, for purposes of Article 18, only individuals who engage in these activities on behalf of an enemy force in armed conflict with the United States are “tria[ble] by a military tribunal,” whose punishment is “permitted by the law of war.”<sup>300</sup> While this result may seem anomalous, the anomaly exists in the law of war rather than in U.S. law.

In sum, Article 18 not only vests courts-martial with jurisdiction over certain persons and acts, but also creates municipal offenses punishing international war crimes and other acts *by adversaries* for which the law of war removes protection and permits punishment. It therefore authorizes punishment of members of the U.S. military and others—including civilians accompanying the military in an armed conflict—who commit war crimes.<sup>301</sup> This does not fully explain whether other law of war violations may be punished, or the general relationship of law of war violations to the punitive articles of the UCMJ. I next turn to these topics.

#### IV. LAW OF WAR VIOLATIONS AND THE PUNITIVE ARTICLES OF THE UCMJ

While it is clear that service members may be tried by courts-martial for war crimes, it is not clear whether they may be punished for other law of war violations. As earlier mentioned, the *Rules for Courts-Martial*, promulgated by rulemaking authority delegated to the President,<sup>302</sup> state that court-martial charges may include law of war violations without qualification.<sup>303</sup> The *Law of War Manual* also indicates that law of war violations may be prosecuted, as such,

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299. MELZER, *supra* note 286, at 83-84 (“[C]ivilian direct participation in hostilities is neither prohibited by [the law of war] nor criminalized under the statutes of any prior or current international criminal tribunal or court.” (footnote omitted)).

300. *See* 10 U.S.C. § 818.

301. 10 U.S.C. § 802 (2012).

302. *Id.* § 836(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.”).

303. R.C.M. 307(c)(2) states, “A charge states the article of the code, law of war, or local penal law of an occupied territory which the accused is alleged to have violated.” 2012 MCM, *supra* note 183, R.C.M. 307(c)(2).

by courts-martial.<sup>304</sup> Neither of these sources, however, limit chargeable law of war violations to those defined as war crimes by international law. This raises the obvious question of whether other law of war violations are subject to criminal prosecution under Article 18, and if so, why and against whom.

Complicating matters further, a comment in the *Rules for Courts-Martial* provides that, for those subject to the UCMJ, a UCMJ offense rather than a law of war violation should “[o]rdinarily” be charged.<sup>305</sup> The *Law of War Manual* parrots this guidance.<sup>306</sup> Both are consistent with prior Manuals for Courts-Martial.<sup>307</sup> None of these manuals explain the relationship between violations of the law of war and the punitive articles of the UCMJ.<sup>308</sup> This raises the obvious question of precisely why a law of war violation may be punished as a UCMJ offense.

This Part explains that the view both preceding and underlying Article 18 is that law of war compliance is required to claim public authority to engage in otherwise criminal conduct. This explains why all law of war violations resulting in a common crime may be punished, and why reasonable compliance with the law of war is necessary to a U.S. service member’s justification for engaging in acts during war that are otherwise UCMJ offenses.

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304. LAW OF WAR MANUAL, *supra* note 38, at 1120-21.

305. 2012 MCM, *supra* note 183, R.C.M. 307(c)(2) cmt. (D) (“Ordinarily persons subject to the code should be charged with a specific violation of the code rather than a violation of the law of war.”).

306. *See* LAW OF WAR MANUAL, *supra* note 38, at 1119-20 (“The principal way for the United States to punish members of the U.S. armed forces for violations of the law of war is through the Uniform Code of Military Justice.... Offenses under the Uniform Code of Military Justice that may be used to punish conduct that constitutes a violation of the law of war include, among others: cruelty and maltreatment; murder; rape and sexual assault; failure to obey order or regulation; and conduct prejudicial to good order and discipline.” (footnotes omitted)).

307. *See, e.g.*, 2008 MCM, *supra* note 189, R.C.M. 307(c)(2) cmt. (D); 2000 MCM, *supra* note 189, R.C.M. 307(c)(2) cmt. (D).

308. *See, e.g.*, LAW OF WAR MANUAL, *supra* note 38, at 1118-20.

### A. Law of War Compliance as a Justification of Violence

Replacing the common law of earlier military tribunals and codes, the punitive articles of the UCMJ proscribe most common crimes, such as murder, assault, maiming, arson, and many others,<sup>309</sup> and makes them applicable “in all places.”<sup>310</sup> These crimes therefore apply to service members in foreign territory and on the high seas during both peace and war. Without an applicable affirmative defense, service members engaged in common wartime activities could technically be prosecuted for these UCMJ crimes. It is therefore necessary to understand the source and substance of defenses to crimes under the UCMJ in order to determine how they relate to the law of war.

#### 1. The Source of UCMJ Defenses

It is not initially clear how law of war compliance would inform an affirmative criminal defense under the UCMJ. This is in part because the *source* of affirmative defenses to crimes under the UCMJ is not often discussed or litigated. Other than the defense of lack of mental responsibility, the UCMJ has never affirmatively prescribed general defenses to crimes.<sup>311</sup>

Although Rule for Courts-Martial 916 lists several potential defenses,<sup>312</sup> Congress has not delegated any authority to prescribe substantive criminal law to the President.<sup>313</sup> Rule 916 cannot be the source of law for the affirmative defenses that it lists. The Rule can only be declaratory of existing law.<sup>314</sup> The *source* of affirmative defenses to crimes in U.S. military law is nowhere expressly identified. In fact, the Manuals for Courts-Martial did not even include a list

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309. See 10 U.S.C. §§ 877-934 (2012) (UCMJ punitive articles), amended by 10 U.S.C. §§ 877-934 (Supp. IV 2017).

310. See 10 U.S.C. § 805 (2012).

311. See 10 U.S.C. § 850a (2012 & Supp. IV 2017).

312. 2012 MCM, *supra* note 183, R.C.M. 916(c)-(k).

313. See 10 U.S.C. § 836(a) (2012). The President’s authority is limited to prescribing “[p]retrial, 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.” *Id.* (emphasis added).

314. See *id.*

of potential generally applicable affirmative defenses until 1968, and then did so without discussing or explaining their origins.<sup>315</sup>

Relevant to a service member's actions in war, the general defenses to crimes in Rule for Courts-Martial 916(c) lists a justification defense: "A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful."<sup>316</sup> The comments to Rule 916(c) state that law enforcement apprehension is one example of this defense, and that "killing an enemy combatant in battle is justified."<sup>317</sup> The comments do not clarify whether only reasonable force may be used to apprehend a suspect or whether an enemy may be killed only in a manner consistent with the law of war.<sup>318</sup> The exact source of this defense, its precise content, and its relationship to the law of war, if any, is nowhere identified or explained.

To identify the source of defenses under the UCMJ and their relationship to the law of war, it is helpful to briefly retrace their articulation and use. Common law defenses to specific crimes were mentioned in the first *Manual for Courts-Martial* published after adoption of the UCMJ. In relation to the crime of murder, for example, the 1951 Manual included the following commentary:

A homicide committed in the proper performance of a legal duty is justifiable. Thus executing a person pursuant to a legal sentence of death, killing in suppression of a mutiny or riot, killing to prevent the escape of a prisoner if no other reasonably apparent means are adequate, killing an enemy in battle, and killing to prevent the commission of an offense attempted by force or surprise such as burglary, robbery, or aggravated arson, are cases of justifiable homicide.

The general rule is that the acts of a subordinate, done in good faith in compliance with his supposed duty or orders, are justifiable. This justification does not exist, however, when those acts are manifestly beyond the scope of his authority, or the order is such that a man of ordinary sense and understanding would know it to be illegal.<sup>319</sup>

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315. 1968 MCM, *supra* note 182, ch. 29, ¶ 216.

316. 2012 MCM, *supra* note 183, R.C.M. 916(c).

317. *Id.* R.C.M. 916(c) cmt.

318. *See id.*

319. 1951 MCM, *supra* note 153, ch. 38, ¶ 197b.

No authority is cited for this commentary, which clearly adopts what is generally referred to as a “public authority” defense.<sup>320</sup> There is scant evidence of the precise source of this or other defenses in U.S. military law.

The case law and commentary related to the defense of self-defense is instructive. The commentary in the 1951 Manual also included self-defense as a defense to murder.<sup>321</sup> When examining an early claim of self-defense under the UCMJ, the Court of Military Appeals noted that the substance of the defense was not within the President’s congressionally delegated rulemaking authority.<sup>322</sup> It then held that a trial judge’s instruction, which was based upon the 1951 Manual’s self-defense commentary, was incorrect.<sup>323</sup> The court stated that the instruction must be changed to accurately reflect the defense and recommended changing the manual’s commentary to prevent future errors.<sup>324</sup> This strongly suggests that the reviewing court viewed the law of self-defense as entirely independent from UCMJ and *Manual for Courts-Martial*.

Absent legislative definition, the only possible source of affirmative defenses under the UCMJ is Anglo-American common law. Recall that prior to the 1916 Articles of War, military commissions, rather than courts-martial, exercised jurisdiction over common law crimes.<sup>325</sup> The only exceptions were in the aforementioned statutes extending court-martial jurisdiction to certain common law crimes during war.<sup>326</sup> Regardless of the source of a tribunal’s jurisdiction over a common law offense, whether by common law or statute, Winthrop observed that military tribunals must look to the common law for the definition of those crimes.<sup>327</sup> He also noted that

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320. See *infra* Part IV.B.

321. 1951 MCM, *supra* note 153, ch. 38, ¶ 197c.

322. See *United States v. Acosta-Vargas*, 32 C.M.R. 388, 392 (C.M.A. 1962) (“The portion of [the] Manual for Courts-Martial, United States, 1951, upon which the questioned instruction is evidently grounded, relates to a question of substantive law and not to a matter of procedure or mode of proof.” (footnote omitted) (citing *United States v. Smith*, 32 C.M.R. 105 (C.M.A. 1962))).

323. *Id.* at 392-93.

324. *Id.*

325. See *supra* Part II.

326. See *supra* notes 92, 119 and accompanying text.

327. WINTHROP, *supra* note 74, at 671 (“It is to be observed that as these crimes are not specifically defined in the Article, or elsewhere in the written military law, they are to be interpreted by the doctrines of the *common law*, each being viewed as the common-law offence

placing common law crimes within the jurisdiction of military tribunals necessarily allowed the invocation of relevant common law defenses.<sup>328</sup>

The text of some UCMJ punitive articles provides additional support for the conclusion that Anglo-American common law is the source of affirmative defenses under the UCMJ. For example, the 1950 UCMJ defined murder, as it does today, as “[a]ny person subject to this code who, without justification or excuse, unlawfully kills a human being.”<sup>329</sup> The UCMJ nowhere defines the terms “justification” or “excuse.” Other punitive articles also use general, undefined terms, such as “unlawful.”<sup>330</sup> Even though the UCMJ did not define these terms, it is common practice in the American legal system to look to the common law,<sup>331</sup> including that of defenses,<sup>332</sup> to do so, unless the nature or definition of a crime clearly excludes a common law defense.<sup>333</sup> Thus, just as Winthrop concluded, albeit for slightly different legal reasons, prescribing common crimes in the UCMJ allows individuals to invoke common law defenses to those crimes, even if those defenses were not affirmatively prescribed.

## 2. *Defenses and the Law of War*

Clarifying that the common law is the source of defenses to crimes under the UCMJ does not explain how the law of war is relevant.

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of the same name.”).

328. *Id.* at 674 (accepting applicability of and explaining defenses of justification and self-defense in relation to the crime of murder).

329. Uniform Code of Military Justice, Pub. L. No. 81-506, art. 118, 64 Stat. 107, 140 (1950); *see also* 10 U.S.C. § 918 (Supp. II 2015), *amended by* 10 U.S.C. § 918 (Supp. IV 2017).

330. *See, e.g.*, art. 128(a), 64 Stat. at 141 (defining assault to include “unlawful force or violence”).

331. *See* *United States v. Turley*, 352 U.S. 407, 411 (1957) (“[W]here a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning.”); *supra* note 211 and accompanying text.

332. *See, e.g.*, *United States v. Peterson*, 483 F.2d 1222, 1228-31 (D.C. Cir. 1973).

333. For an example in military case law, *see United States v. Washington*, 57 M.J. 394, 397-98 (C.A.A.F. 2002) (holding duress not a defense to disobedience of a lawful order because military orders sometimes require soldiers to risk their lives). This is a specific instance of a general rule of statutory construction that common law terms will not retain their generally accepted common law meaning if doing so would frustrate “Congress’ general purpose in enacting a law.” *Moskal v. United States*, 498 U.S. 103, 117 (1990).

The clearest statement of the traditional U.S. view of the relationship between law of war and domestic criminal law was in a 1956 military field manual (FM 27-10). It states:

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.<sup>334</sup>

The *Law of War Manual* articulates a similar view without explaining how or why an international law violation results in a domestic crime.<sup>335</sup>

Nevertheless, the premise underlying this view seems clear: compliance with the law of war is necessary to justify acts of violence to or interference with persons or property otherwise prohibited by general criminal law. Those who violate the law of war may therefore be punished for any criminal act that is entailed in or results from a law of war violation. In other words, all violations of the law of war remove one's public authority to engage in violence. In the law of war, the protection afforded to lawful acts of war is known as combatant immunity or the combatant's privilege, which is merely a form of international law immunity from punishment, like diplomatic immunity.<sup>336</sup> This theoretical approach is consistent with the practice of military tribunals described earlier in this Article.<sup>337</sup>

Relevant military case law under the UCMJ follows this approach. For example, in his petition for a new trial related to the My Lai Massacre in Vietnam, Lieutenant Calley claimed that his unit's execution of villagers was justified because they had assisted the Viet Cong and therefore lost their status as protected civilians

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334. DEP'T OF THE ARMY, *supra* note 190, at 182.

335. LAW OF WAR MANUAL, *supra* note 38, at 1118-19.

336. *See* Dehn, *supra* note 17, at 66.

337. *See supra* Parts II.A-C.

without meeting the requirements for protection as prisoners of war.<sup>338</sup> The Army Appellate Court rejected the defense because, regardless of the truth of Calley's factual assertions, the law of war forbids the mass execution of irregular fighters without trial.<sup>339</sup> Calley's attempted public authority justification defense therefore failed.<sup>340</sup> In another case, a military review board upheld a trial judge's refusal to allow an obedience-to-orders defense when the alleged order would have been a manifest violation of the law of war and not a justification for killing a prisoner of war.<sup>341</sup> This case law is consistent with the view offered in FM 27-10, but does not fully explain how compliance with the law of war provides a justification for otherwise applicable crimes defined in the UCMJ.

Traditionally, the law of war was understood to be a form of common law inherently enforceable at courts-martial as well as U.S. common law military tribunals.<sup>342</sup> Not only did the common law inform justification defenses, so did the common law of war if an alleged offense occurred in war.<sup>343</sup> These conclusions are further supported by the fact that, well before the UCMJ, Winthrop noted that the law of war could be relevant to any charge being prosecuted at court-martial. He stated:

[T]he unwritten laws and customs of war, as generally understood in our armies or as defined by writers of authority, will often properly be consulted as indicating whether certain acts are to be regarded as constituting the offences charged, or what measure of punishment will be just and adequate in the event of conviction.<sup>344</sup>

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338. See *United States v. Calley*, 46 C.M.R. 1131, 1174 (A.C.M.R. 1973), *aff'd*, 48 C.M.R. 19 (C.M.A. 1973); see also *United States v. Calley*, 48 C.M.R. 19, 26 (C.M.A. 1973) (citing with approval the trial judge's instruction that "[t]he killing of resisting or fleeing enemy forces is generally recognized as a justifiable act of war, and you may consider any such killings justifiable in this case").

339. See *Calley*, 46 C.M.R. at 1174.

340. See *id.*

341. See *United States v. Griffen*, 39 C.M.R. 586, 590 (A.B.R. 1968).

342. See WINTHROP, *supra* note 74, at 42.

343. See *id.*

344. *Id.*

Winthrop clearly concludes that the customary (or common) law of war is inherently applicable and enforceable at courts-martial.<sup>345</sup> That view is consistent with the Supreme Court's long-standing treatment of the law of war in federal courts, at least in cases involving war with foreign entities.<sup>346</sup> It is also consistent with the American practice of considering potentially applicable common law defenses in criminal trials even when those defenses are not prescribed by statute.

If a court were reluctant to conclude that the law of war is inherently applicable to military operations and enforceable at courts-martial, there are at least two arguments that Article 18 incorporates the law of war not only to create municipal criminal offenses but also as a defense. The first is based on the purpose and schema of the UCMJ. The clear intent of Article 18 is to vest courts-martial with jurisdiction to punish all conduct punishable by military tribunals under the law of war, as had existed under the 1916 Articles of War.<sup>347</sup> Just as domestic crimes incorporating the law of war by reference were created by Article 18, the law of war is necessarily incorporated as a defense to the crimes defined in the punitive articles, as was the case prior to the UCMJ. Although the text vesting jurisdiction to punish violations of the UCMJ punitive articles is distinct from the text vesting law of war jurisdiction, the two provisions must be read together and in light of the history leading to their adoption.<sup>348</sup> The punitive articles replaced common law offenses to which the law of war had always been a potential defense at military tribunals.<sup>349</sup> Article 18's affirmative authority to adjudge "punishment[s] permitted by the law of war" should therefore be understood to prevent the punishment of UCMJ punitive articles in cases to which the law of war applies and has been followed.<sup>350</sup>

A narrower potential textual anchor for a law of war justification defense might simply be Article 18's reference to "punishment per-

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345. Winthrop also stated a court-martial could take judicial notice of the law of war. *See id.* at 318-19.

346. *See generally* Dehn, *supra* note 17.

347. *See supra* Part III.

348. *See* 10 U.S.C. § 818(a) (Supp. IV 2017).

349. *See supra* notes 344-46 and accompanying text.

350. *See* 10 U.S.C. § 818(a).

mitted by the law of war.”<sup>351</sup> If a law of war violation is charged as such, an accused’s claim that he complied with the law of war is a direct challenge to the charged offense. If the violation of a UCMJ punitive article is charged instead of a law of war violation, a defense that one’s conduct occurred in the context of an armed conflict and was consistent with the law of war should similarly still apply.<sup>352</sup> Punishment in such circumstances is not “permitted by the law of war.” A prosecutor’s decision to charge a UCMJ offense rather than a law of war violation should not eliminate an otherwise available defense.

Customary and conventional law of war norms also reveal why all U.S. nationals subject to the UCMJ may be punished for any law of war violation. The customary law of war requires states to suppress all law of war violations, not merely war crimes or violations by members of their armed forces.<sup>353</sup> Law of war treaties impose like obligations. For example, in addition to requiring states to punish grave breaches, the 1949 Geneva Conventions require states to “take measures necessary for the suppression of all acts contrary to the provisions of the [1949 Geneva Conventions] other than the grave breaches.”<sup>354</sup> The additional protocols to the 1949 Geneva Conventions impose similar requirements.<sup>355</sup> Thus, both the customary and treaty law of war “permit” a state to punish its nationals by military tribunal for any law of war violation. Whether a state does so, or whether it may do so by military tribunal, depends solely upon its domestic law. Article 18 of the UCMJ vests courts-martial with jurisdiction to punish both members of the military and, when coupled with UCMJ Article 2(10), civilians accompanying the military in the field during an armed conflict.<sup>356</sup>

Because the punitive articles of the UCMJ apply everywhere, attacking or capturing enemy persons or property may be prosecuted

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351. *See id.*

352. *See supra* Part IV.A.1.

353. HENCKAERTS & DOSWALD-BECK, *supra* note 238, at 495.

354. GC I, *supra* note 5, art. 49; *see also* GC II, *supra* note 50, art. 50 (same); GC III, *supra* note 50, art. 129 (same); GC IV, *supra* note 50, art. 146 (same).

355. *See* Protocol I, *supra* note 223, art. 87 ([T]he [p]arties to the conflict shall require military commanders ... to suppress and to report to competent authorities breaches of the Conventions and of this Protocol ... and, where appropriate, to initiate disciplinary or penal action against violators thereof.); Protocol II, *supra* note 223, pmb1.

356. *See* 10 U.S.C. §§ 802(a)(10), 818 (2012 & Supp. IV 2017).

and punished unless there is legal authority justifying those (typically criminal) acts. Pursuant to Article 18, law of war compliance is necessary to any such justification.<sup>357</sup> Just as common law defenses are not limited to crimes, such as UCMJ murder, that expressly (albeit generally) incorporate them in their text, any potentially criminal act in an armed conflict is lawful if consistent with the applicable law of war.<sup>358</sup>

Consider several examples. Killing an enemy combatant in battle is justified, just as the *Manual for Courts-Martial* states, but only if the acts leading to the death complied with the law of war. Similarly, a soldier who uses physical force to detain an individual on the battlefield does not commit unlawful assault if the force used is reasonable under the circumstances and the detention is consistent with the applicable law of war. Destroying an enemy barracks or headquarters building is not arson if the attack is consistent with the law of war. A soldier who breaks and enters the home of an insurgent, at night, to seize a large weapons cache does not commit burglary if his actions do not violate the applicable law of war. Service members responsible for guarding individuals properly detained under the law of war may use necessary and reasonable force to prevent their escape. All of these acts are with one's public authority to participate in an armed conflict, and are therefore justified.

Conversely, any law of war violation—even one that is not an international war crime—falls within the scope of Article 18 and may be charged under an applicable UCMJ punitive article. An infantryman who uses clearly excessive force during the capture of an enemy, or a guard or interrogator who physically assaults or otherwise abuses a prisoner of war or other detainee, may be charged with assault,<sup>359</sup> or cruelty and maltreatment.<sup>360</sup> If any such acts were to result in permanent disability or disfigurement, he or she may be charged as maiming.<sup>361</sup> If an unintentional death

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357. See *id.* § 818(a).

358. For example, federal courts have interpreted the term “unlawful” to be “equivalent” to “without excuse or justification.” See, e.g., *Territory v. Gonzales*, 89 P. 250, 252 (Terr. N.M. 1907).

359. See 10 U.S.C. § 928 (2012), amended by 10 U.S.C. § 928 (Supp. IV 2017).

360. See 10 U.S.C. § 893 (Supp. IV 2017).

361. See 10 U.S.C. § 924 (2012), amended by 10 U.S.C. § 928(a) (Supp. IV 2017).

results, a prosecutor could charge involuntary manslaughter,<sup>362</sup> or potentially negligent homicide.<sup>363</sup>

### *B. Contours of the Public Authority Justification Defense*

Given its evident relationship to the law of war, it is essential to clarify the contours of the public authority justification defense. The idea that law of war compliance is necessary to justify an individual's actions in armed conflict that are otherwise crimes under the UCMJ might be troubling to the average soldier, sailor, airman, or marine. The correct application of the law of war can be unclear in the chaos and fog of war. Additionally, service members often carry out missions based upon information provided by others, such as superior commanders or military and civilian intelligence analysts. If perfect compliance with the law of war were required to justify all acts of violence, service members might justifiably become paralyzed by fear of criminal prosecution. This Section provides two reasons why such concerns are not as significant as they may at first appear. First, not all law of war violations are inherently criminal or necessarily result in the violation of a UCMJ punitive article. Second, the public authority justification defense requires only reasonable rather than perfect compliance with the law of war.

#### *1. Noncriminal Law of War Violations*

Not every law of war violation is inherently criminal or results in the violation of a punitive article of the UCMJ. Following the FM 27-10 view that “[e]very violation of the law of war is a war crime,”<sup>364</sup> at least one commentator has used the term “administrative war crime” to describe law of war violations that do not entail harm to or criminal interference with persons or property.<sup>365</sup> That label is misleading. Such violations constitute violations of an international obligation and create international legal responsibility, but

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362. See 10 U.S.C. § 919(b) (Supp. IV 2017).

363. See 10 U.S.C. § 934 (2012), amended by 10 U.S.C. § 934 (Supp. IV 2017); 2012 MCM, *supra* note 183, pt. IV, ¶ 85.

364. DEP'T OF THE ARMY, *supra* note 190, at 178.

365. See GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 331-32 (2d ed. 2016).

they do not necessarily create individual criminal responsibility.<sup>366</sup> For example, the third 1949 Geneva Convention requires states to provide prisoners of war with opportunities for physical activities including sports,<sup>367</sup> and a “canteen” “where prisoners of war may procure foodstuffs, soap and tobacco and ordinary articles in daily use.”<sup>368</sup> The failure to do these things, standing alone, does not result in unlawful harm to any individuals or otherwise render their continued detention unlawful. While there are several potential examples of such violations, it is only here necessary to note that not all law of war violations will necessarily entail or result in the violation of a UCMJ punitive article. With that said, the violations of an order to perform such acts could be punished as a violation of any such order.<sup>369</sup>

## 2. *Public Authority: Necessity and Reasonableness*

The idea that a public official may lawfully use force in the proper performance of her duties is an old one.<sup>370</sup> The idea that public authority is required to engage in war has even deeper roots.<sup>371</sup> It should be no surprise, then, that Anglo-American criminal law commentators have long recognized that using necessary and reasonable violence in the performance of one’s public duties renders otherwise criminal conduct lawful,<sup>372</sup> and that exceeding one’s

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366. See, e.g., Int’l Law Comm’n, *supra* note 226, art. 12.

367. See GC III, *supra* note 50, art. 38.

368. *Id.* art. 28.

369. See 10 U.S.C. § 890(2) (2012) (proscribing willful disobedience of a lawful order of a commissioned officer), *amended by* 10 U.S.C. § 890 (Supp. IV 2017); 10 U.S.C. § 891(2) (Supp. IV 2017) (proscribing willful disobedience of lawful order of warrant or noncommissioned officer); *id.* § 892(1) (proscribing violation of or failure to obey a lawful general order or regulation); see also LAW OF WAR MANUAL, *supra* note 38, at 1087.

370. See, e.g., GROTIUS, *supra* note 232, pt. I, ch. 3, no. IV (“[E]very magistrate, in case of resistance, seems to have a right to take up arms, to maintain his authority in the execution of his offices; as well as to defend people committed to his protection.”).

371. Grotius cites Plato, Roman law, and other ancient sources for the proposition that “no war can be made but by the authority of the sovereign in each state.” *Id.* This principle was recognized and implemented in the United States in the Neutrality Act of 1794, which prohibits private citizens from waging wars against foreign sovereigns or persons without public authority. Neutrality Act of 1794, ch. 50, § 5, 1 Stat. 381, 384.

372. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 179-80 (1769) (photo. reprint. 1966) (outlining justifiable homicides by officers enforcing the law).

authority in the use of such violence is criminal.<sup>373</sup> With respect to justifiable homicides, for example, Blackstone noted that they must be “for the *advancement* of public *justice*,”<sup>374</sup> and that “there must be an apparent necessity on the officer’s side [meaning] that the party could not be arrested or apprehended.”<sup>375</sup> Blackstone therefore implicitly recognized that principles of necessity and reasonableness limited the permissible scope of one’s public functions, and therefore the public authority to use force.

Blackstone’s view is reflected in a recent American legal treatise, which states that “[d]eeds which otherwise would be criminal, such as taking or destroying property, taking hold of a person by force and against his will, placing him in confinement, or even taking his life, are not crimes if done with proper public authority.”<sup>376</sup> However, “[t]he public authority justification does not excuse all conduct of public officials from all criminal prohibitions. The legislature may design some criminal prohibitions to place bounds on the kinds of governmental conduct that can be authorized by the Executive.”<sup>377</sup> Logically, then, the law of war as implemented in Article 18 limits one’s ability to claim public authority in an armed conflict. Because Congress has authorized the punishment of any law of war violation by courts-martial, the law of war is a limit upon a service member’s public authority in armed conflict.

There are two essential elements of a valid claim of public authority. First, the act must be necessary to further a public interest within an official’s sphere of authority; second, the act must be both necessary to advancing that interest and reasonable under the circumstances.<sup>378</sup> Related to law enforcement, for example, the

373. See, e.g., *id.* at 178-79.

374. *Id.* at 179.

375. *Id.* at 180.

376. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 1093 (3d ed. 1982).

377. Memorandum for the Attorney General Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi from David J. Barron, Acting Assistant Attorney Gen., Office of Legal Counsel, Dep’t of Justice 16 (July 16, 2010).

378. As Professor Paul Robinson’s treatise puts it:

The general form of all public authority justification principles may be stated as follows:

Public Authority. *Conduct constituting an offense is justified if*

(1)(a) *the actor has a public authority; and*

(b) *there arises the need for action protecting or furthering the particular*

Supreme Court has stated that general “[c]riminal prohibitions do not generally apply to *reasonable* enforcement actions by officers of the law.”<sup>379</sup> Law enforcement officers may use reasonable force in carrying out enforcement activities, such as apprehending a suspect.<sup>380</sup> This might include lethal force when officers reasonably conclude that a fleeing subject poses a threat of death or great bodily injury to the officers or others.<sup>381</sup>

A public authority justification defense has long been understood to exist in U.S. military law. Winthrop stated, “Homicide is said to be ‘*justifiable*’ when committed by a public officer in the due execution of the laws or administration of public justice.”<sup>382</sup> As the earlier-referenced 1951 Manual put it, “The general rule is that the acts of a subordinate, done in good faith in compliance with his supposed duty or orders, are justifiable.”<sup>383</sup> Such “justification does not exist, however, when those acts are manifestly beyond the scope of his authority, or the order is such that a man of ordinary sense and understanding would know it to be illegal.”<sup>384</sup> Clearly then, the principles of necessity and reasonableness, as well as any applicable international or domestic law delineate the measures one may lawfully take in the performance of their duties, even when those duties involve fighting a war.

The public authority principle and its necessity and reasonableness elements are also reflected in the long-standing law of war principle of military necessity. As articulated in Orders 100: “Military necessity ... consists in the necessity of those measures

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*interest at stake; and*

*(2) consistent with his authority, the actor engages in conduct, constituting the offense,*

*(a) when and to the extent necessary to protect or further the interests at stake,*

*(b) that is reasonable in relation to the gravity of the harm threatened or the importance of the interest to be furthered.*

2 PAUL H. ROBINSON ET AL., CRIMINAL LAW DEFENSES § 141 (2017).

379. *Brogan v. United States*, 522 U.S. 398, 406 (1998) (citing ROBINSON ET AL., *supra* note 378, § 142(a)) (emphasis added).

380. See ROBINSON ET AL., *supra* note 378, § 142.

381. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (“Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.”).

382. WINTHROP, *supra* note 74, at 674.

383. See 1951 MCM, *supra* note 153, ch. 28, ¶ 197b.

384. *Id.*

which are indispensable (or necessary) for securing the ends of the war, and which are lawful according to the modern law and usages of war.”<sup>385</sup> Modern legal treatises adopt this definition in substance.<sup>386</sup> This doctrine of military necessity clarifies that reasonable and necessary wartime actions may never include actions that violate the law of war. The *Law of War Manual* likewise notes that while military necessity authorizes a wide array of violent and nonviolent military measures, it can never justify violations of the law of war.<sup>387</sup> In forming the law of war, nations have already considered the exigencies of war and balanced the competing interests.<sup>388</sup> Not even extreme necessity will justify violating clearly established law of war norms.<sup>389</sup> By vesting courts-martial with jurisdiction to impose “punishment[s] permitted by the law of war,” Congress has implemented these principles in U.S. military law.<sup>390</sup>

All of this means that warfighters need not be perfect; their actions must only be within their scope of authority and reasonable under the circumstances. Evaluating the reasonableness of actions undertaken in war does not occur in a vacuum. It involves examining the precise actions taken and the surrounding circumstances in light of applicable legal obligations and prohibitions. Reasonableness must be judged not only based upon the actual circumstances existing at the time, but also upon a person’s reasonable perception(s) of them in a complex and chaotic combat environment. This would include reasonable reliance upon information provided by others, such as strategic or battlefield intelligence.

Superior orders are also relevant to determining the scope of a subordinate’s public authority.<sup>391</sup> Thus, determining the reasonableness of a given act may also require an evaluation of what a subordinate reasonably believed a superior had authorized under the circumstances.<sup>392</sup> Commanders may not always be perfectly clear or

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385. ORDERS 100, *supra* note 94, art. 14.

386. *See* LAW OF WAR MANUAL, *supra* note 38, at 52-53 (articulating the principle of military necessity and citing numerous treatises).

387. *See id.* at 53.

388. *See id.* at 54 (citing sources).

389. *See, e.g., id.* at 54 n.27.

390. *See* 10 U.S.C. § 818 (a) (2012 & Supp. IV 2017).

391. Recall that Winthrop noted destruction of public or private property was a crime unless pursuant to superior orders. *See supra* note 76 and accompanying text.

392. *See* LAW OF WAR MANUAL, *supra* note 38, at 1076-77.

precise when articulating a subordinate's duties or permissible discretion.<sup>393</sup> With that said, especially in light of Article 18, it would never be reasonable for a subordinate to imply that a commander has authorized an obvious law of war violation.<sup>394</sup>

### C. Obedience to Orders

The preceding analysis clarifies the origin, scope, and substance of the obedience to orders defense. As was articulated in the 1951 Manual and just alluded to, obedience to orders is part of the public authority justification defense.<sup>395</sup> Members of the armed forces have a legal obligation to follow the lawful orders of their military superiors.<sup>396</sup> Such orders not only confer public authority but also impose a public duty, which must be performed reasonably and in good faith.<sup>397</sup> They therefore inform the scope of one's public authority.

Unlawful orders are *ultra vires* and cannot confer public authority or create a public duty to act. As stated in the *Law of War Manual*, "Each member of the armed services has a *duty* to ... refuse to comply with clearly illegal orders to commit violations of the law of war."<sup>398</sup> Hence, as with public authority generally, the reasonableness of one's actions is critical. The duty to disobey only "clearly illegal" orders flows logically from the reasonableness requirement. Plausibly lawful orders may reasonably be followed. It is only unreasonable to follow clearly or manifestly unlawful orders.

Because all members of the U.S. military must comply with the law of war, "[s]ubordinates are not required to screen the orders of superiors for questionable points of legality, and may, absent specific knowledge to the contrary, presume that orders have been lawfully issued."<sup>399</sup> Additionally, the law of war sometimes imposes

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393. See generally *id.* at 1076-77, 1076 n.31.

394. See LAW OF WAR MANUAL, *supra* note 38, at 1076 ("Commands and orders should not be understood as implicitly authorizing violations of the law of war where other interpretations are reasonably available.").

395. See 1951 MCM, *supra* note 153, ch. 28, ¶ 197.

396. See 10 U.S.C. § 890 (2012), amended by 10 U.S.C. § 890 (Supp. IV 2017); 10 U.S.C. § 891(2) (Supp. IV 2017); *id.* § 892(1); see also LAW OF WAR MANUAL, *supra* note 38, at 1087.

397. See 10 U.S.C. § 892(3) (punishing willful and negligent dereliction in the performance of duties).

398. See LAW OF WAR MANUAL, *supra* note 38, at 1074 (emphasis added).

399. *Id.* at 1076 & n.30 (citing sources).

requirements upon a specific individual, such as the commander ordering an attack.<sup>400</sup> Service members may rely on a commander's determination of the legality of such action unless or until they possess sufficient information to determine that an action is clearly or manifestly illegal.<sup>401</sup> To the extent UCMJ Article 18 implements the law of war, no authorization or order issued by any military authority may contravene that legislative choice. The question then becomes whether a President possesses constitutional authority to order or authorize war crimes or other law of war violations even though his subordinate commanders do not.

## V. ARTICLE 18 AND PRESIDENTIAL AUTHORITY

With this more complete understanding of the UCMJ's implementation of the law of war, let us now consider its effect on the president's authority to direct military operations in an armed conflict. This Part first analyzes whether the law of war component of Article 18 limits the President's constitutional authority over the military as Commander-in-Chief in an armed conflict. Concluding that it does, it then explains the practical effect of this limitation on a President's authority to authorize or order law of war violations by examining potential presidential authorizations (or orders) to torture, or to kill the family members of terrorists.

### *A. Congress, the Armed Forces, and the Commander-in-Chief*

Presidents and the Office of Legal Counsel have sometimes claimed that congressional wartime regulation of the President or military violates the separation of powers.<sup>402</sup> Such claims are clearly

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400. For example, the commander ordering an attack necessarily determines whether the attack complies with the proportionality requirement. *See infra* notes 434-35 and accompanying text.

401. *See* LAW OF WAR MANUAL, *supra* note 38, at 1076.

402. *See, e.g.,* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1193-94 (2006) ("Indeed, [constitutional] avoidance [doctrine] has taken center stage in many of the most controversial episodes of executive branch legal interpretation relating to the 'war on terror.' It appeared prominently, for example, in the leaked (and later withdrawn) 'torture memorandum' issued by the Justice Department's Office of Legal Counsel, in the Justice Department's defense of the National Security Agency's warrantless wiretapping program, and in President George W. Bush's narrow construction of a statute banning the cruel, inhuman, or degrading treatment of detainees." (footnotes

dubious when Congress regulates the military. The Supreme Court has consistently held that Congress has plenary authority to regulate the armed forces, particularly with regard to matters of discipline.<sup>403</sup> This authority is based in Congress's powers to "raise," "maintain," and "support" the military,<sup>404</sup> and particularly "[t]o make rules for the Government and Regulation of the land and naval Forces."<sup>405</sup> The Framers of our Constitution deemed the power to regulate the military essential to the national defense,<sup>406</sup> and specifically vested that power in Congress rather than the President.<sup>407</sup> In the words of the Court, Congress's "control over the whole subject of the formation, organization, and government of the national armies, including therein the punishment of offenses committed by persons in the military service, would seem to be plenary."<sup>408</sup> At a minimum, a President's obligation to "take Care that the Laws be faithfully executed" obligates him or her to abide by statutes regulating military discipline.<sup>409</sup>

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omitted)).

403. See *Weiss v. United States*, 510 U.S. 163, 177 (1994) ("[T]he Constitution contemplates that Congress has 'plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.'" (quoting *Chappell v. Wallace*, 462 U.S. 296, 301 (1983))); *Solorio v. United States*, 483 U.S. 435, 446 (1987) ("The unqualified language of Clause 14 suggests that whatever these concerns, they were met by vesting in Congress, rather than the Executive, authority to make rules for the government of the military."); *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion) ("[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty .... The Framers expressly entrusted that task to Congress.").

404. U.S. CONST. art. 1, § 8, cls. 12-13.

405. *Id.* art. 1, § 8, cl. 14.

406. THE FEDERALIST NO. 41, at 226 (James Madison) (Glazier & Co. 1826) (emphasizing, among other things, the necessity of powers to regulate militia and armed forces because "[s]ecurity against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American union. The powers requisite for attaining it, must be effectually confided to the federal councils.").

407. THE FEDERALIST NO. 69, *supra* note 406, at 234 (Alexander Hamilton) ("The president is to be commander in chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy: while that of the British king extends to the *declaring* of war, and to the *raising* and *regulating* of fleets and armies; all which, by the constitution under consideration, would appertain to the legislature.").

408. *Coleman v. Tennessee*, 97 U.S. 509, 514 (1878).

409. U.S. CONST. art. 2, § 3.

Congress's broad powers over both war and the military are undoubtedly why an extensive study of the commander-in-chief power yielded "surprisingly little Founding-era evidence supporting the notion that the conduct of military campaigns is beyond legislative control and a fair amount of evidence that affirmatively undermines it."<sup>410</sup> Additionally, "the Supreme Court has never held that any statutory limitations on substantive executive war powers have unconstitutionally infringed the core prerogatives of the Commander in Chief."<sup>411</sup> These conclusions find support in the words of Justice Robert Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*:

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.<sup>412</sup>

All of this severely undermines any notion that the President may ignore congressional regulation of the armed forces, even when such regulation applies to battlefield conduct in an armed conflict. It is hard to conceive of how a court could disable Congress from acting pursuant to an express grant of constitutional authority, particularly when coupled with the Necessary and Proper Clause.

If a President were to nevertheless assert a separation of powers concern, the Necessary and Proper Clause provides additional support for Congress's power to limit a President's discretion to direct the military as he or she sees fit. In addition to its express powers over both war and the military, Congress may also "make all Laws which shall be necessary and proper for carrying into Execution [its express] Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."<sup>413</sup> Even assuming Congress's plenary power to

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410. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 696 (2008).

411. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 1106 (2008).

412. 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring).

413. U.S. CONST. art. I, § 8, cl. 18.

regulate the armed forces does not inherently include the President in his capacity as Commander-in-Chief, its rules at the very least limit a President's permissible discretion in that role as a necessary incident to its plenary regulatory authority.<sup>414</sup> A President may no more ignore the UCMJ's execution of the law of war than he may ignore the UCMJ's procedural requirements for convening military tribunals or imposing punishment upon a member of the military.

Additionally, there is no obvious reason to believe that Congress's power to make necessary and proper laws with respect to "all other Powers vested by th[e] Constitution in the Government ... or in any Department or Officer thereof"<sup>415</sup> does not include the commander-in-chief power vested in the President. Indeed, Congress's superior regulatory authority over the military is apparent in the language of the early Articles of War and is recognized in other historical practice and commentary.<sup>416</sup> It therefore seems quite clear that Congress possesses constitutional power to require the military to comply with the law of war and that its decision to do so cannot be superseded by the President.<sup>417</sup> Under fundamental principles of statutory interpretation, neither courts nor Presidents should interpret a congressional declaration of war or an authorization to use military force to repeal existing laws regulating the military's war-related activities.<sup>418</sup> This includes the law of war compliance required by UCMJ Article 18.

The constitutional issues clearly differ when it comes to civilians accompanying the military during an armed conflict. Relying on Congress's war powers, the Supreme Court has upheld the use of

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414. See Barron & Lederman, *supra* note 411, at 1013-16.

415. U.S. CONST. art. I, § 8, cl. 18.

416. For citation and discussion of relevant authority, see Dehn, *supra* note 193, at 612-16.

417. *Cf.* Barron & Lederman, *supra* note 410, at 696-97 (arguing that the President must retain "a prerogative of *superintendence*," meaning, "the President must to some considerable extent retain control over the vast reservoirs of military discretion that exist in every armed conflict, even when bounded by important statutory limitations; and thus Congress may not assign such ultimate decisionmaking discretion to anyone else (including subordinate military officers)").

418. See *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 468 (1982) ("[W]henver possible, statutes should be read consistently."); see also *United States v. United Cont'l Tuna Corp.*, 425 U.S. 164, 168 (1976) ("It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored." (citations omitted)); *id.* at 169 ("The principle [disfavoring implied repeal] carries special weight when we are urged to find that a specific statute has been repealed by a more general one." (citations omitted)).

military tribunals to punish a civilian U.S. citizen who violated German penal laws during post-war military occupation.<sup>419</sup> Other than the earlier-cited dicta,<sup>420</sup> however, the Supreme Court has not addressed constitutional authority to punish war crimes or other law of war violations by civilians *acting on behalf of* rather than against the security interests of the United States.<sup>421</sup>

Although Congress has plenary constitutional authority to regulate the military, its use of the UCMJ to regulate civilians accompanying the military in an armed conflict, if constitutionally proper at all, likely depends upon the aggregate of its war powers, its powers over the military, and the Necessary and Proper Clause.<sup>422</sup> Although deserving of more thorough analysis in the future, placing civilians under the UCMJ and jurisdiction of courts-martial may be justified on several grounds. First, Congress may believe it an appropriate measure to meet international treaty and customary obligations to prevent or punish war crimes and other law of war violations by those, including civilians, acting on behalf of the United States.<sup>423</sup> Second, Congress may deem it necessary and proper to meet international treaty and customary obligations to maintain order in American-occupied territory.<sup>424</sup> And finally, Congress may deem it necessary to preserving good order and discipline in the armed forces by ensuring civilians accompanying the military may be punished for any act that could be punished if committed by a military member.<sup>425</sup> Congress's desire to require law of war compliance by civilians accompanying the armed forces "[i]n time of

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419. See *Madsen v. Kinsella*, 343 U.S. 341, 348-62 (1952).

420. See *supra* note 83 and accompanying text.

421. In both *Milligan* and *Quirin*, the citizen defendants tried by military tribunal were accused of acting against the security interests of the United States. See *Ex parte Quirin*, 317 U.S. 1, 21 (1942); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 6 (1866).

422. Its powers under the Necessary and Proper Clause include the power to implement treaties binding upon the government in war. See *Missouri v. Holland*, 252 U.S. 416, 432 (1920) ("If the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government."). The analysis here addresses only the separation of powers and not other constitutional issues raised by placing civilians within the jurisdiction of courts-martial, such as the right to jury trial.

423. See *supra* notes 354-56 and accompanying text.

424. See, e.g., GC IV, *supra* note 50, arts. 64-67.

425. LAW OF WAR MANUAL, *supra* note 38, at 1119-20.

declared war or a contingency operation”<sup>426</sup> should therefore be understood to limit a President’s authority to authorize the law of war violations made punishable by Article 18,<sup>427</sup> at least until a court reviews Congress’s constitutional authority in this area.

### *B. Presidential Discretion and Practical Limits*

Accepting these arguments for the sake of analysis, we can briefly evaluate a President’s practical ability to authorize torture or other ill treatment, or to “take out” the family members of terrorists. As discussed in the introduction, torture and cruel treatment are war crimes and also generally applicable federal crimes in both international and non-international armed conflict.<sup>428</sup> Under the law of war, no circumstances justify the use of torture. Because most reprisals are prohibited and must have the goal of inducing law of war compliance rather than imposing punishment, the use of torture because terrorists “deserve it” is unlawful and prohibited by Article 18.<sup>429</sup> Furthermore, anyone detained in an armed conflict must be treated humanely.<sup>430</sup> At a minimum, this prohibits cruel,

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426. 10 U.S.C. § 802(a)(10) (2012).

427. See Dehn, *supra* note 193, at 637-38. The analysis would differ with regard to civilian members of other government agencies to any extent Congress may provide those agencies with authority to violate international law generally or the law of war specifically. See Barron & Lederman, *supra* note 410, at 715. In any such cases, the general UCMJ requirements made applicable to civilians accompanying the military should not be interpreted to curtail other authority specifically granted to an agency by Congress. Of course, that does not mean other federal law, such as the War Crimes Act, would not limit any such agencies.

428. See *supra* notes 3-5 and accompanying text.

429. See *supra* Part III.C.1; see also HENCKAERTS & DOSWALD-BECK, *supra* note 238, at 519-29 (listing prohibited reprisals against persons and property protected by the Geneva Conventions and their protocols). The study states that some reprisals are still permitted but tightly controlled. *Id.* at 513-18. The *Law of War Manual* also asserts that a narrow and tightly circumscribed power to engage in reprisals still exists in the law of war. LAW OF WAR MANUAL, *supra* note 38, at 1110-17.

430. HENCKAERTS & DOSWALD-BECK, *supra* note 238, at 306-07. The Detainee Treatment Act of 2005 provides, “no individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.” Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003(a), 119 Stat. 2739 (codified at 42 U.S.C. § 2000dd-0(1) (2012)). Additionally, the 2016 National Defense Authorization Act enacted additional restrictions, including that an individual “in the custody or under the effective control of an officer, employee, or other agent of the United States Government; or ... detained within a facility owned, operated, or controlled by a department or agency of the United States, in any armed conflict,” may not be “subjected to any interrogation technique or approach,” or any interrogation-

inhuman, or degrading treatment, such as corporal punishment and other uses of force unrelated to the purpose of preventing escape or maintaining physical security.<sup>431</sup> Article 18 of the UCMJ therefore unconditionally prohibits all torture and ill treatment of those detained by the U.S. military or by any civilians assisting in that detention.<sup>432</sup> Thus, a President may not order or authorize the members of the military or any civilians accompanying it in armed conflict to engage in the torture or ill treatment of any detained individual.

The legal issues raised by a hypothetical order to kill the family members of terrorists are more nuanced. As earlier noted, intentionally attacking innocent civilians is a war crime in both international and non-international armed conflict.<sup>433</sup> However, harm to innocent civilians incident to an otherwise lawful attack, even if known or anticipated in advance, is permitted if not “clearly excessive” in relation to the direct and concrete military advantage anticipated from the attack.<sup>434</sup> This is known as the proportionality principle, the violation of which is also a war crime.<sup>435</sup> Although this principle is objective in theory, determining the military advantage of a given attack, or whether anticipated collateral harm is “clearly excessive” in relation to that advantage, is a fact-intensive assessment that entails the exercise of judgment and is therefore necessarily somewhat subjective.

For example, former government officials stated that there was significant uncertainty regarding whether Osama bin Laden was in the Abbottabad, Pakistan compound where he was killed.<sup>436</sup> The United States had surveilled the compound and knew there were men, women, and children resembling bin Laden’s family and other associates there.<sup>437</sup> President Obama reportedly rejected the idea of

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related treatment, “that is not [expressly] authorized by ... Army Field Manual 2-22.3.” National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1045(a)(2), 129 Stat. 726, 977 (2015) (codified at 42 U.S.C. § 2000dd-2 (Supp. III 2015)).

431. See *supra* Part IV.A.

432. See 10 U.S.C. § 818(a) (Supp. IV 2017).

433. See *supra* notes 8-9 and accompanying text.

434. See, e.g., HENCKAERTS & DOSWALD-BECK, *supra* note 238, at 46-50.

435. See, e.g., ICC Statute, *supra* note 3, art. 8(2)(b)(iv).

436. See, e.g., *CIA Chief Panetta: Obama Made ‘Gutsy’ Decision on Bin Laden Raid*, PBS (May 3, 2011, 12:00 AM), [http://www.pbs.org/newshour/bb/terrorism-jan-june11-panetta\\_05-03/](http://www.pbs.org/newshour/bb/terrorism-jan-june11-panetta_05-03/) [<https://perma.cc/629P-MFEE>].

437. *Id.*

“a B-2 bombing attack” due to concerns about collateral harm.<sup>438</sup> There is no doubt those concerns were heightened by the lack of certainty regarding bin Laden’s presence. What is the anticipated military advantage of an attack when one is only 60 to 80 percent certain that the intended target is present?<sup>439</sup> How much collateral harm might be justified by eliminating the leader of an enemy armed group like al Qaeda? These are difficult questions with no clear answers. Thus, the bin Laden operation demonstrates that the proportionality principle is more easily stated than applied.

Note also that, practically speaking, it is principally the person ordering or authorizing an attack who applies the proportionality principle and resolves these difficult issues. If President Obama had ordered a bombing attack of the Abbottabad compound, few in the military chain of command between the President and the pilots would be fully aware of the (likely highly classified) information upon which he relied. Even though the target was a civilian structure far away from any battlefield, members of the military executing that attack may reasonably presume that any such order was based upon adequate information and consistent with the law of war. A member of the military would only need to clarify the order if he or she acquired additional information that called its legality into serious question.<sup>440</sup>

Complicating matters further, in some cases, family members may themselves be directly and lawfully targeted. First, although civilians are generally protected from direct attack, they lose this protection “for such time as they take a direct part in hostilities.”<sup>441</sup> Determining whether an individual is taking a direct part in hostilities can be a fact-intensive inquiry and difficult to assess. According to recent guidance from the ICRC:

Acts amounting to direct participation in hostilities must meet three cumulative requirements: (1) a threshold regarding the harm likely to result from the act, (2) a relationship of direct

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438. *Id.*

439. Massimo Calabresi, *CIA Chief: Pakistan Would Have Jeopardized bin Laden Operation*, TIME (May 3, 2011), <http://swampland.time.com/2011/05/03/cia-chief-breaks-silence-u-s-ruled-out-involving-pakistan-in-bin-laden-raid-early-on/> [<https://perma.cc/579W-A5B2>].

440. *See supra* Part IV.C.

441. *See, e.g.*, HENCKAERTS & DOSWALD-BECK, *supra* note 238, at 19-20 (Rule 6).

causation between the act and the expected harm, and (3) a belligerent nexus between the act and the hostilities conducted between the parties to an armed conflict.<sup>442</sup>

Although logical, these criteria require evaluating the conduct of an individual in relation to the activities of others in what are often complex battlefield environments.<sup>443</sup> This may be why the ICRC's guidance has been criticized for "demonstrat[ing] a general failure to fully appreciate the operational complexity of modern warfare."<sup>444</sup> However, it is certainly possible that a family member might engage in acts that clearly constitute taking a direct part in the hostilities of an armed conflict. If so, he or she would become targetable while doing so.

Family members may also be lawfully targeted if they are members of a non-state armed group that is party to an armed conflict. In physical appearance and manner of dress, such individuals may be indistinguishable from civilian family members or other civilians. Therefore, their status as members of an armed group must be determined based upon their actions. Recent ICRC guidance suggests that such individuals must have a "continuous combat function," which is also a complex, fact-based inquiry.<sup>445</sup> The ICRC guidance provides:

For ... practical purposes ... membership in such groups cannot depend on abstract affiliation, family ties, or other criteria prone to error, arbitrariness or abuse. Instead, membership must depend on whether the continuous function assumed by an individual corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-State party to the conflict.<sup>446</sup>

Although this too is an entirely logical approach, its practical application is clearly difficult. It requires detailed knowledge of an individual's activities, as well as the relationship of those activities

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442. MELZER, *supra* note 286, at 46.

443. *See id.* at 70-71; *see also* Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT'L L. POL. 697, 699-704 (2010).

444. Schmitt, *supra* note 443, at 699.

445. MELZER, *supra* note 286, at 27.

446. *Id.* at 33.

to a larger group, which is composed of members to whom the same analysis must be applied. It can obviously be quite difficult to observe or collect and assess this information on a complex or remote battlefield, or when members of a group hide among civilians in villages or cities.

The onus is upon the individual ordering an attack to act reasonably and in good faith when assessing available information to decide whether an individual may be targeted under the law of war.<sup>447</sup> The quantity and quality of information regarding whether an individual is a member of a non-state armed group or is taking direct part in hostilities might vary widely. Other than in the clearest cases of error, however, or when new circumstances or information calls into question an earlier decision, the person making the targeting decision is responsible for its accuracy.<sup>448</sup> Furthermore, although the military may not violate the law of war, under domestic law the individual authorizing or ordering an attack need only act “reasonably” when making these assessments, whether that person is a sergeant, a colonel, a general, or a President.<sup>449</sup>

In spite of these difficulties, there are certainly cases when individuals ordered or authorized to engage in actions that would violate the law of war will know an order or authorization is manifestly unlawful. The My Lai massacre was clearly unlawful. Any order to kill “all military age males,” for example, is also manifestly unlawful because it does not require a good faith effort to distinguish between innocent civilians protected from attack and those who may be targeted based upon any of the above criteria. In situations when the law of war requires the collection and evaluation of information and the exercise of judgment, however, it is possible for a President to order or authorize the military to engage in acts that may technically violate the law of war without that fact being manifestly obvious to the individuals executing his or her order.

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447. See HENCKAERTS & DOSWALD-BECK, *supra* note 238, at 51-67; see also MELZER, *supra* note 286, at 72-73.

448. See HENCKAERTS & DOSWALD-BECK, *supra* note 238, at 55-56.

449. See MELZER, *supra* note 286, at 35.

## CONCLUSION

There are certainly many pragmatic reasons for the President and military to comply with the law of war.<sup>450</sup> Recent history demonstrates that these pragmatic considerations do not always carry the day.<sup>451</sup> Public statements by the current President suggest that they may not do so in the future. Although the Department of Defense states that soldiers must “comply with the law of war in good faith” and refuse to follow “illegal orders to commit violations of the law of war,”<sup>452</sup> it has not been clear whether this includes all law of war violations, or whether a President possesses constitutional authority to issue a “controlling executive act” ordering or authorizing the military to violate the law of war.

This Article clarified how the UCMJ broadly implements the law of war and authorizes criminal punishment for most violations of it. A President may only authorize law of war violations that do not entail or result in a UCMJ offense, or potentially those that fall within the extraordinarily narrow scope of reprisals still permitted by the law of war. Unless Congress is persuaded to change the law of war component of Article 18, it seems clear that a President lacks constitutional authority to authorize the military to violate (most of) the law of war.

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450. See, e.g., LAW OF WAR MANUAL, *supra* note 38, at 1072-74.

451. A prime example is the Bush Administration’s legal arguments to engage in abusive interrogation practices that some called “enhanced interrogation” and others called torture. See generally THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005); PHILLIPE SANDS, TORTURE TEAM: RUMSFELD’S MEMO AND THE BETRAYAL OF AMERICAN VALUES (2008).

452. LAW OF WAR MANUAL, *supra* note 38, at 1074.