

Notes from the Field

International Law and Terrorism: Some “Qs and As” for Operators

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The events of 11 September 2001 present military lawyers—like the rest of the U.S. armed forces—with a variety of new challenges. The war on terrorism raises complex legal issues, not the least of which is whether it is a “war” at all. As difficult as it may be to determine what law applies to a particular question, it may be even more challenging to translate one’s legal analysis into something that commanders and their troops can understand.

This note presents a series of common questions raised by recent events and a suggested answer for each question. These answers are not intended to be comprehensive dissertations on every aspect of each question; they are designed to guide practitioners through the key points of law and help them give clear, understandable responses to non-lawyers. For questions that require further research, this note’s format and citations are intended to provide the reader with a useful starting point. It is important to remember, however, that the international and domestic laws that apply to terrorism are changing rapidly. Practitioners, therefore, must stay current with these laws to

ensure that their answers follow the most recent authorities and national policy.¹

1. What Is Terrorism?

The United States Code defines terrorism as “premeditated, politically motivated violence perpetrated against noncombattant targets by sub-national groups or clandestine agents.”² The Department of Defense (DOD) defines terrorism more broadly, calling it “the calculated use of unlawful violence or the threat of unlawful violence to inculcate fear; intended to coerce or intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological.”³

2. Does the United States Consider Terrorism a Crime or An “Act of War”?

Historically, the United States has treated terrorist acts committed by non-state actors—persons not acting for a nation-state—as crimes to be addressed by domestic law enforcement authorities.⁴ The United States is a party to several international treaties that apply to particular forms of terrorism; most of these conventions require the parties to establish criminal jurisdiction over offenders.⁵ State-sponsored terrorism is ordinarily considered to be a national security issue to be addressed by the armed forces.⁶

1. FindLaw maintains a comprehensive listing of U.S. laws related to terrorism. See generally FindLaw, *Special Coverage: War on Terrorism*, at <http://news.findlaw.com/legalnews/us/terrorism/laws.html> (last visited Nov. 13, 2001).

2. 22 U.S.C. § 2656(d)(1) (2000).

3. JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 443 (12 Aug. 2002), available at http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf.

4. INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 315 (2003) [hereinafter OPERATIONAL LAW HANDBOOK].

5. See, e.g., Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570; Convention of the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167. The United States has enacted criminal statutes prohibiting specific terrorist acts as required by the respective treaties. See, e.g., 18 U.S.C. § 1203 (2000) (prohibiting the taking of hostages); 49 U.S.C. § 46502 (2000) (prohibiting air piracy).

6. THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 10-12 (2002) [hereinafter NATIONAL SECURITY STRATEGY], available at <http://www.whitehouse.gov/nsc/nssall.html>. Neutral nations have an obligation to prevent belligerents from using their territory for warlike purposes. Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, art. 5, 36 Stat. 2310, 2323, 1 Bevans 654, 662. If the “neutral” nation permits belligerents to organize, recruit, or communicate on its territory in violation of these obligations, the aggrieved state has a right to defend itself. U.N. CHARTER art. 51; see also OPERATIONAL LAW HANDBOOK, *supra* note 4, at 4-5.

3. *In Terms of International Law, What Does “Act of War” Really Mean?*

In the modern era, the phrase “act of war” is more a political term than a legal one.⁷ Article 2 of the U.N. Charter has since supplanted the concept of “act of war” by requiring members to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”⁸

4. *Does the U.N. Charter Outlaw All Uses of Force?*

No. The U.N. Charter provides two principal exceptions to its prohibition against the use of force: (1) The U.N. Security Council can authorize member nations to “take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security”;⁹ and (2) member states may use force in self-defense under Article 51 of the U.N. Charter. Specifically, Article 51 states, “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security”¹⁰

5. *The Security Council Passed a Resolution Condemning the 11 September 2001 Attacks; Does This Resolution Provide Legal Authority to Use Force?*

On 12 September 2001, the Security Council adopted a resolution that condemned the attacks, expressed its determination

to combat terrorist acts by “all means,”¹¹ reaffirmed member states’ inherent rights of individual and collective self-defense, and expressed its readiness “to take all necessary steps” to respond to the terrorist attacks. It does not, however, explicitly authorize the use of force except in self-defense.¹²

6. *On What Legal Theory Is the United States Relying to Justify the Use of Force Against Terrorists?*

The United States is relying on its inherent right of self-defense. In its joint resolution authorizing the use of force, Congress noted that the attacks of 11 September 2001 “render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens, both at home and abroad, . . . to deter and prevent acts of international terrorism against the United States.”¹³

7. *Does the Law of Armed Conflict (LOAC) Apply to Counter-Terrorism Operations?*

Generally, the LOAC only applies to international armed conflicts between nation-states, and under certain circumstances, organized resistance movements.¹⁴ The LOAC usually does not govern the conduct of military or police personnel in law enforcement operations against non-state actors. If a state sponsors the terrorist group, the LOAC may govern counter-terrorism operations.¹⁵ As a matter of U.S. government policy, however, the U.S. armed forces must “comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations.”¹⁶

7. The phrase “act of war” appears in the U.S. Code, but not in the context of a rationale to engage in armed conflict. Specifically, Title 18 defines “act of war” as:

[A]ny act occurring in the course of—
(a) declared war;
(b) armed conflict, whether or not war has been declared, between two or more nations; or
(c) armed conflict between military forces of any origin.

18 U.S.C. § 2231.

8. U.N. CHARTER art. 2, para. 4.

9. *Id.* art. 42.

10. *Id.* art. 51.

11. S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001), available at <http://daccess-ods.un.org/doc/undoc/gen/n01/533/82/pdf/n0153382.pdf>.

12. *Id.*

13. Pub. L. No. 107-40, 115 Stat. 224 (2001). See also U.N. CHARTER art. 51; NATIONAL SECURITY STRATEGY, *supra* note 6, at 10-12.

14. See Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 2, 6 U.S.T. 3114, 3118, 75 U.N.T.S. 31, 33; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 2, 6 U.S.T. 3217, 3220, 75 U.N.T.S. 85, 88; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3316, 3318, 75 U.N.T.S. 135, 137 [hereinafter Geneva Convention III]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3516, 3518, 75 U.N.T.S. 287, 289 [hereinafter Geneva Convention IV].

8. *You Said LOAC Only Applies to International Armed Conflicts Between States. Will Our Response Be Considered Part of an “International Armed Conflict”?*

It depends. By definition, the Geneva Conventions apply in cases of “armed conflict which may arise between two or more of the High Contracting Parties.”¹⁷ This means that the Conventions, which form a large part of the LOAC, apply mainly when *nations* fight. Whether a specific response to a specific terrorist attack rises to the level of nations fighting depends on the factual circumstances surrounding the attackers, the attack, and the response. It may also depend upon the level of involvement of any harboring or protecting state.¹⁸ If the conflict does not rise to the level of an “international armed conflict,” then only a small portion of the Geneva Conventions would legally apply.¹⁹ In such a case, the United States could not, for example, *legally* demand that any of its soldiers captured during counter-terrorist operations have prisoner of war (POW) status.²⁰

9. *Is It Legal for the United States to Use Military Force Against Non-State Terrorists in Another State in Self-Defense?*

Yes. As a general rule, states should only employ military force as a last resort, when law enforcement efforts are ineffective.²¹ Ordinarily, U.S. law enforcement and judicial authorities will respond to terrorist acts in the United States first.²² Most experts agree, however, that all states “must be able to exercise their inherent rights to defend themselves against all actors—non-state and state alike.”²³

10. *Is It Legal to Use Military Force Against a State That Harbors Non-State Terrorists?*

Yes, under certain circumstances. When non-state actor terrorists merely use a state’s territory as a “safe haven,” and the host state is unable to prevent the terrorists from operating there, a victim state is entitled to use force against the *non-state actors* in self-defense, although this will violate the sovereignty of the host nation.²⁴ When the host nation does more than merely acquiesce to the terrorists’ presence and conspires with them, or aids or abets them, the actions of the terrorists become imputed to the state itself.²⁵ In such “state sponsorship” situations, the victim state may use such force as is necessary against the host nation itself to ensure that the host nation no longer presents a threat of continued facilitation or support of terrorist operations.²⁶

11. *Is It Legal to Use Force Against Countries That Help, But Do Not Harbor, Terrorists?*

Possibly. A state’s right to act in anticipatory self-defense may warrant the use of force when necessary to stop future attacks.²⁷ The lawfulness of the state’s action depends largely upon the nature and magnitude of the state support given to the terrorists.²⁸

12. *What Exactly Is Permitted Under the Concept of Self-Defense?*

The U.S. military’s Standing Rules of Engagement (SROE)²⁹ say that the use of force in self-defense “must be reasonable in intensity, duration, and magnitude to the perceived

15. Although the U.S. military position is to apply the principles of the law of war in international armed conflicts and military operations other than war, CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 5810.01, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM para. 4(a) (12 Aug. 1996) [hereinafter CJCSI 5810.01], the United States objects to certain provisions of the 1977 Geneva Protocols that appear to give additional protections to non-state actors who do not carry arms openly or wear a fixed and distinctive insignia. OPERATIONAL LAW HANDBOOK, *supra* note 4, at 11; see Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, arts. 43, 44, 16 I.L.M. 1391, 1413, 1125 U.N.T.S. 3, 23 [hereinafter Protocol I].

16. U.S. DEP’T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM para. 5.3.1. (9 Dec. 1998).

17. See Geneva Convention III, *supra* note 14, art. 2.

18. See *id.*; OPERATIONAL LAW HANDBOOK, *supra* note 4, at 315.

19. See Geneva Convention III, *supra* note 14, art. 3.

20. In such an event, the U.S. government would likely call for the immediate repatriation of the service members and demand that their captors afford them all of the protections to which lawful combatants are entitled. E-mail from Colonel Thomas Tudor, Chief, International and Operations Law Division, U.S. Air Force, to Colonel Charles J. Dunlap, Jr., Staff Judge Advocate, Air Education and Training Command (Oct. 9, 2001) (on file with author).

21. See RICHARD J. ERICKSON, LEGITIMATE USE OF MILITARY FORCE AGAINST STATE-SPONSORED TERRORISM 212 (1989).

22. OPERATIONAL LAW HANDBOOK, *supra* note 4, at 315, 317-18.

23. Walter Gary Sharp, Sr., *The Use of Armed Force Against Terrorism: American Hegemony or Impotence?*, 1 CHI. J. INT’L L. 37, 39 (2000).

24. See *generally* U.N. CHARTER art. 51. One expert concludes that “[m]erely providing safe haven for international terrorists after they have committed their acts” is not an “armed attack” as that term is used in the U.N. Charter. John F. Murphy, *The Control of International Terrorism*, in NATIONAL SECURITY LAW 465 (John Norton Moore, Fredrick S. Tipton, & Robert F. Turner, eds., 1990).

or demonstrated threat based on all the facts known to the commander at the time.”³⁰ Self-defense also includes the “authority to pursue and engage hostile forces that continue to commit hostile acts or exhibit hostile intent.”³¹ International law does not limit actions in self-defense to only those necessary to counter immediate, tactical dangers; rather, it is permissible to continue the use of force on a wider basis until the aggressor no longer constitutes a threat.³²

13. *Do We Have to Wait Until We Are Under Attack Again Before We Act in Self-Defense?*

No. The United States and other (but not all) countries believe that *anticipatory* self-defense is inherent in the basic right of self-defense.³³ When a potential adversary exhibits hostile intent, the SROE permits U.S. forces to act in anticipatory self-defense.³⁴ The White House has made it clear that anticipatory self-defense is part of the U.S. national security strategy:

We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction

25. Richard J. Erickson explained the limits of a state’s imputed responsibility when he wrote:

As an abstract entity, the state becomes liable under international law through the acts or omissions of its officials and agents. These acts or omissions are imputed to the state. The acts of the head of government are always imputable to the state, as are the acts of ministers within the scope of their ministries. The same is true of all other officials and agents, irrespective of governmental level. This includes military and police authorities. Additionally, acts or omissions are imputed to the state even if beyond the scope of the legal power of the official and even if opposite to that directed so long as they are not repudiated by governmental authority and the wrongdoer is not appropriately disciplined or punished.

ERICKSON, *supra* note 21, at 99. There is precedent in international law—for example, the Nuremberg trials—for applying the criminal law concepts of principals and conspiracy to war crimes. The Charter of the International Military Tribunal provided that:

Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Charter of the International Military Tribunal, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, art. 6, 59 Stat. 1544, 1547, 82 U.N.T.S. 280, 286-88 [hereinafter Charter of the International Tribunal].

26. See U.N. CHARTER art. 51; L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 9 (Manchester Univ. Press 1993).

27. OPERATIONAL LAW HANDBOOK, *supra* note 4, at 4-5; NATIONAL SECURITY STRATEGY, *supra* note 6, at 10-12.

28. See Michael J. Glennon, *Military Action Against Terrorists Under International Law: The Fog Of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL’Y 539, 541-49 (2002) (arguing that the term “armed attack,” as used in Article 51, should include the provision of arms, supplies, or safe haven to terrorists).

29. CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3121.01A, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES (15 Jan. 2000) [hereinafter CJCSI 3121.01A].

30. *Id.* para. 5f.

31. *Id.* para. 8b.

32. GREEN, *supra* note 26, at 9. As the author explained:

While the charter restricts the right to resort to measures of a warlike character to those required by self-defense, its provisions only relate to the *ius ad bellum*. Once a conflict has begun, the limitations of Article 51 become irrelevant. This means there is no obligation upon a party resorting to war in self-defense to limit his activities to those essential to his self-defense. Thus, if an aggressor has invaded his territory and been expelled, it does not mean that the victim of the aggression has to cease his operations once his own territory has been liberated. He may continue to take advantage of the *ius in bello*, including the principle of proportionality, until he is satisfied that the aggressor is defeated and no longer constitutes a threat.

Id.

33. OPERATIONAL LAW HANDBOOK, *supra* note 4, at 4-5. The accepted customary law rule of anticipatory self-defense has its origin in an 1842 incident in which the British Navy caught the American steamship *The Caroline* ferrying rebel forces and supplies into Canada. The British Navy attacked the ship, burned it, and sent it over Niagara Falls. After the incident, Secretary of State Daniel Webster exchanged notes with the British diplomat Lord Ashburton. They ultimately agreed that customary international law allows for the use of force against an imminent threat if such use constitutes “a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation.” This restrictive definition of anticipatory self-defense is still widely accepted as customary international law, despite its obvious limitations in a modern era of intercontinental missiles, long-range supersonic aircraft, nuclear submarines, cruise missiles, and biological weapons. TIMOTHY L.H. MCCORMACK, *SELF-DEFENSE IN INTERNATIONAL LAW* 139-44 (1996).

against the United States and our allies and friends. . . . It has taken almost a decade for us to comprehend the true nature of this new threat. Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first.³⁵

14. Is "Retaliation" Considered Self-Defense?

No. Retaliation, as that word is used in the law, is not permitted under international or domestic law.³⁶ Retaliation is *lex taliones*, that is, the "infliction upon a wrongdoer of the same injury which he has caused another."³⁷ An aggrieved state cannot legitimately use force to inflict punishment or retribution for its own sake; force is only lawful to the extent needed to restore peace, and where possible, bring criminals to justice.³⁸ It is the responsibility of the appropriate courts and tribunals to

determine the appropriate punishment for criminals, including war criminals. Military forces may not inflict summary punishment.³⁹

The Secretary of Defense recognized the important distinction between retaliation and self-defense in a 13 September 2001 television interview. When asked about the possible use of force to retaliate against terrorists, he corrected the interviewer and stated, "I don't think of it as retaliation. I don't think of it as punishment. I think of it as self-defense."⁴⁰ Likewise, in an interview on 20 October 2001, the Chairman of the Joint Chiefs of Staff stated that "[t]he United States isn't into retribution."⁴¹

15. What Is a "Reprisal"?

In legal terms, a "reprisal" is the legal use of an otherwise unlawful act in response to an illegal act by the enemy.⁴² For example, if an enemy uses an illegal weapon, the doctrine of reprisal would permit the use of weapons that would "otherwise be unlawful in order to compel the enemy to cease its prior violation."⁴³ Nations may only carry out reprisals during international armed conflicts; there is no such thing as a legitimate

34. CJCSI 3121.01A, *supra* note 29, para. 5(h). The SROE defines "hostile intent" as follows:

The threat of imminent use of force against the United States, U.S. forces, and in certain circumstances, U.S. nationals, their property, U.S. commercial assets, and/or other designated non-U.S. forces, foreign nationals and their property. Also, the threat of force to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital [U.S. government] property.

Id.

35. NATIONAL SECURITY STRATEGY, *supra* note 6, at 12.

36. See U.N. CHARTER arts. 2, 51. See generally CJCSI 3121.01A, *supra* note 29; Andrew D. Mitchell, *Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law*, 170 MIL. L. REV. 155 (2001).

37. BLACK'S LAW DICTIONARY 1058 (4th ed. 1968).

38. See OPERATIONAL LAW HANDBOOK, *supra* note 4, at 8-10; ERICKSON, *supra* note 21, at 211 ("If [force is used] in self-defense, then the action must be protective, not punitive.").

39. Protocol I, *supra* note 15, art. 85.4(e). The United States is not a party to Protocol I; however, it considers this rule to be a binding part of customary international law. OPERATIONAL LAW HANDBOOK, *supra* note 4, at 11.

40. *Larry King Live* (CNN television broadcast, Sept. 13, 2001). The full transcript of that portion of the interview is as follows:

KING: And how—just a couple more moments—how do we define retaliation? Do we retaliate through legal means? Do we retaliate through an armed force? What is the definition in your head of retaliation?

RUMSFELD: Larry, I don't think of it as retaliation. I don't think of it as punishment. I think of it as self-defense. The United States of America has every right to defend itself, and that is what it is about. It is consciously saying that countries and entities and people who actively oppose the United States and damage our interests by acts of violence, acts of war, are our enemies, and they are people and organizations and entities and states that we have every right to defend ourselves against.

Id.

41. General Richard B. Meyers, Pentagon Briefing on the Use of U.S. Army Special Forces in Afghanistan (Oct. 20, 2001), at http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/myers_102001.html.

42. U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF ARMED CONFLICT para. 497 (18 July 1956).

43. U.S. DEP'T OF AIR FORCE, PAM. 110-31, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS para. 10-7 (19 Nov. 1976).

reprisal against a non-state actor criminal.⁴⁴ Protocol I to the Geneva Conventions forbids reprisals against civilians and civilian property.⁴⁵

The United States is *not* a party to Protocol I and does not consider its proscriptions against reprisals directed at civilians to be part of customary international law. The United States is a party to the Geneva Convention on Civilians,⁴⁶ and follows its provisions prohibiting reprisals against *protected* persons and their property.⁴⁷ In general, “protected persons” are those “in the hands” of the opposing nation’s forces.⁴⁸ According to this view, if a nation attacks civilian targets *in another nation* while acting according to the law of reprisals, the reprisal would be lawful; it would violate Protocol I (which the United States does not recognize) but not the Geneva Convention itself. Civilians in the targeted areas would not be considered “protection persons” because they are not “in the hands” of the nation carrying out the reprisal.

16. May a State Use a Disproportionate Response in a Counter-Terrorism Operation?

No. To understand the legality of a disproportionate response, one must first define the precise context in which this term is used. There is no prohibition against the use of overwhelming force to achieve a legitimate military objective or a bona fide law enforcement purpose. The concept of proportionality, however, which is part of the LOAC, prohibits attacks where the incidental loss of civilian life or property “would be excessive in relation to the concrete and direct military advantage anticipated.”⁴⁹ The concept of proportionality is applied differently in cases of self-defense.⁵⁰ The responding government’s forces must carry out their attacks in a manner that dis-

criminate between legitimate targets and civilians or protected property.⁵¹

17. Can a Government Assassinate Terrorists As Part of a Military Operation?

No, but not every killing of an individual is an “assassination” under international or domestic law. Under Executive Order 12,333, no U.S. government employee or service member may “engage in, or conspire to engage in, assassination.”⁵² “Assassination,” however, ordinarily contemplates some measure of treachery or perfidy. For example, killing someone protected by a flag of truce is unlawful assassination. Absent treachery or perfidy, the prohibition against assassination does not prohibit the killing of individuals when necessary in self-defense; it also permits the killing of individual leaders who are directing or controlling armed forces in armed combat.⁵³

18. If U.S. Military Forces Capture a Terrorist, Is He a POW?

Probably not. The Geneva Convention protections for prisoners of war only apply to “armed conflict which may arise between two or more of the High Contracting Parties.”⁵⁴ Even if one assumes that such circumstances exist, the captive must usually be a member of the armed forces of a party to the Convention.⁵⁵ Even a member of the armed forces of a party to the Convention—who is entitled to POW status if captured—may be tried for crimes, including war crimes, if he commits an unlawful act.⁵⁶ A non-state actor will almost never qualify for POW status, however, except in very rare circumstances. A member of an “organized resistance movement,” for example, may be entitled to POW status if the resistance movement’s

44. See generally GEOFFREY BEST, WAR AND LAW SINCE 1945, at 311-18 (1994).

45. Protocol I, *supra* note 15, arts. 51.1 - 52.1.

46. Geneva Convention IV, *supra* note 14.

47. *Id.* art. 33.

48. *Id.* art. 4.

49. Protocol I, *supra* note 15, art. 51.5(b).

50. During an armed conflict, the rule of proportionality only applies in the context of collateral damage analysis, the balancing of an attack’s expected military advantage against the foreseeable non-combatant injury or death it could cause. Protocol I, *supra* note 15, art. 51(5)(b). When a nation acts strictly in self-defense, however, outside of any ongoing conflict, proportionality restricts the use of force to the amount, type, and duration “necessary to decisively counter a hostile act or demonstrated hostile intent and ensure the continued safety of US forces.” CJCSI 3121.01A, *supra* note 29, enclosure A, para. 7(c). In the War on Terror, therefore, the proportionality of a particular strike may depend on whether U.S. forces take the action in self-defense, or as part of the ongoing campaign against al Qaeda.

51. Protocol I, *supra* note 15, art. 51.5(b).

52. Exec. Order No. 12,333, 3 C.F.R. 200, 213 (1982), *reprinted in* 50 U.S.C. § 401 (2000).

53. *Id.*; see generally Hon. Caspar W. Weinberger, *When Can We Target the Leaders?*, 29 STRATEGIC REV. 21 (2001).

54. Geneva Convention III, *supra* note 14, art 2.

55. *Id.* art. 4(A)(1).

members: (1) are commanded by a person responsible for his subordinates; (2) wear a fixed distinctive sign recognizable at a distance; (3) carry arms openly; and (4) conduct their operations in accordance with the laws and customs of war.⁵⁷ In an international armed conflict, persons whose status is unknown are entitled to be treated as POWs until the question of their status is resolved.⁵⁸

19. *If a Terrorist Captures a U.S. Military Member, Is He a POW?*

It depends. If captured by a *state* actor—such as a member of the armed forces of a hostile country—during an international armed conflict, the military member is entitled to POW status.⁵⁹ There are exceptions to this rule; for example, if the individual was acting as a spy or a saboteur in hostile territory, he could not claim POW status.⁶⁰ If a U.S. service member is captured by a *non-state* actor, such as a terrorist or other criminal, the U.S. military member is technically not a POW but simply a crime victim—a hostage.⁶¹ International law permits an enemy power to hold POWs until the end of hostilities, but the criminal captors of a U.S. soldier are required to immediately release him.⁶²

20. *Does the Code of Conduct Apply in Situations Involving Terrorist Captors?*

Yes, but special considerations apply. *Department of Defense Directive 1300.7, Training and Education Measures Necessary to Support the Code of Conduct*, contains explicit guidance on how the Code of Conduct applies during captivity by terrorists.⁶³

21. *What Is the Scope of the President's Authority to Counter Terrorism?*

As Commander-in-Chief, the President has extensive power to act in the interest of national defense in emergency situations.⁶⁴ This power is not unlimited, however. For example, during the Korean War, President Truman ordered the government to take control of the steel industry in anticipation of a strike that he feared would impede national security. The Supreme Court set aside the order, holding that the President's emergency powers are limited to those set forth in the Constitution or provided by statute.⁶⁵ After the terrorist attacks of 11 September 2001, Congress granted the President broad war powers to act against terrorists, stating

[t]hat the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁶⁶

22. *Must Congress Declare War Before the United States May Take Action Against Terrorists?*

No. The President, as Commander-in-Chief, has the constitutional authority⁶⁷ and specific congressional authorization to act in the nation's defense,⁶⁸ even without a formal declaration of war. In 1973, Congress passed the War Powers Resolution,⁶⁹ which requires the President to report to Congress immediately

56. *Id.* art. 82.

57. *Id.* art. 4(A)(2).

58. *Id.* art. 5.

59. *Id.* arts. 2, 4.

60. Protocol I, *supra* note 15, art. 46.

61. See H. Wayne Elliott, *Hostages or Prisoners of War: War Crimes at Dinner*, 149 MIL. L. REV. 241 (1995).

62. Geneva Convention III, *supra* note 14, art. 4.

63. U.S. DEP'T OF DEFENSE, DIR. 1300.7, TRAINING AND EDUCATION MEASURES NECESSARY TO SUPPORT THE CODE OF CONDUCT encl. 3, para. K (23 Dec. 1988).

64. See Donald L. Robinson, *Presidential Emergency Powers*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 665 (Kermit L. Hall ed., 1992).

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

66. Pub. L. No. 107-40, 115 Stat. 224 (2001).

67. U.S. CONST. art. II, § 2, cl. 1.

68. 115 Stat. at 224.

when U.S. forces become involved in hostilities or are deployed overseas equipped for combat. Within sixty days of reporting to Congress, the President must either (1) remove the forces; (2) extend the deadline by a single period of thirty days; or (3) obtain congressional approval for continuing the operation, such as through a declaration of war or congressional resolution.⁷⁰ Although presidents have generally complied with the War Powers Resolution, some academics question its constitutionality.⁷¹

23. What Are a Commander's Obligations Under the LOAC?

Commanders must know the LOAC, ensure that their forces are properly trained in it, observe it in practice, and promptly report LOAC violations. Commanders who order war crimes, or who fail to prevent war crimes they know or *should have* known would occur, may be criminally liable for them.⁷²

The case of General Tomoyuki Yamashita illustrates the responsibilities of commanders for the actions of their subordinates. Yamashita commanded Japanese forces in the Philippines during the Second World War. Shortly before the end of the war, soldiers and sailors under his command killed thousands of Filipino civilians. Despite the absence of any evidence that General Yamashita had ordered or committed any atrocities, a military tribunal tried and convicted him for these killings after the war.⁷³ The Supreme Court affirmed the findings and death sentence, concluding that

[t]he law of war imposes on any . . . commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of acts which are violations of the law of war [H]e may be charged with personal

responsibility for his failure to take such measures when violations result.⁷⁴

24. How Can Military Members Be Certain That Their Orders in Counter-Terrorism Operations Are Lawful?

Military members are only obligated to obey *lawful* orders. Blind obedience of a superior's orders is not a defense.⁷⁵ Members of the U.S. armed forces, however, may *infer* that all orders are lawful, however, unless they are patently illegal.⁷⁶ The U.S. military rarely, if ever, executes an operation plan without first obtaining a legal review of that plan by a trained legal advisor. DOD policy requires that "all operation plans . . . concept plans, rules of engagement, execute orders, deployment orders, policies, and directives [be] reviewed by the command legal advisor to ensure compliance with domestic and international law."⁷⁷ Furthermore, Protocol I of the Geneva Conventions requires legal advisors to be available at all levels of command.⁷⁸ Department of Defense policy also incorporates this requirement.⁷⁹

Conclusion

The War on Terrorism is unlike any other war in American history. Terrorists do not wear uniforms, carry weapons openly, fight as organized units, or obey the most fundamental principles of the LOAC. This new war combines the elements of an international armed conflict, a global guerrilla war, and an international criminal investigation. Fortunately, the U.S. government and the international community have created legal frameworks for each of these levels of hostilities. Practitioners who can understand the fundamental principles of the LOAC that apply to a particular conflict—and who can interpret them for commanders—will become vital assets in the War on Terrorism.

69. War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555.

70. *Id.* at 555.

71. See, e.g., Charles Tiefer, *War Decisions in the Late 1990s by Partial Congressional Declaration*, 36 SAN DIEGO L. REV. 1 (1999).

72. CJCSI 5810.01, *supra* note 15, para. 5(c).

73. *In re Yamashita*, 327 U.S. 1 (1946).

74. *Id.* at 14. See also W. Hays Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1973).

75. "The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determine that justice so requires." Charter of the International Tribunal, *supra* note 25, art. 8; see also OPERATIONAL LAW HANDBOOK, *supra* note 4, at 30.

76. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 14c(2)(a)(i) (2002). But see MARK J. OSIEL, OBEYING ORDERS (1999) (arguing for a new norm that would require deliberative judgment in lieu of a presumption of lawfulness).

77. CJCSI 5810.01, *supra* note 15, para. 6(c)(5).

78. Protocol I, *supra* note 15, art. 82.

79. CJCSI 5810.01, *supra* note 15, para. 5(b).

**The Case for Court-Martial Jurisdiction Over Civilians
Under Article 2(a)(10) of the Uniform Code of
Military Justice**

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Introduction

Article 2(a)(10) of the Uniform Code of Military Justice (UCMJ) provides for court-martial jurisdiction “[i]n time of war, [over] persons serving with or accompanying [a U.S.] armed force in the field.”⁸⁰ For centuries, armies have exercised court-martial jurisdiction over civilians accompanying them in the field.⁸¹ During the nineteenth century, Article 63 of The Articles of War claimed military jurisdiction over “[all] retainers to the camp,⁸² and all persons serving with the armies of the United States in the field.”⁸³ This provision, “with some slight modifications, [came] down from our original code of 1775, which derived it from a corresponding British article.”⁸⁴ In 1916, Congress revised The Articles of War, extending jurisdiction to include persons “accompanying” the armies of the United States, “both within and without the territorial jurisdic-

tion of the United States, though not otherwise subject to these articles.”⁸⁵ The revised statute allowed court-martial jurisdiction over “retainers” and “persons accompanying or serving with the armed forces in the field.”⁸⁶

In November 2000, President Clinton signed the Military Extraterritorial Jurisdiction Act (MEJA),⁸⁷ which asserts the jurisdiction of federal civilian courts over civilians accompanying the armed forces overseas. The new statutes, which borrow the relevant language of Article 2(a)(10), UCMJ,⁸⁸ specifically disclaim any intent to deprive courts-martial of concurrent jurisdiction.⁸⁹ Congress and the President’s care to avoid eviscerating Article 2(a)(10) suggests that they intended to preserve its validity. The question remains, however, whether the judicial branch would view an exercise of Article 2(a)(10) jurisdiction today with equal favor.

Article 2(a)(10) clearly has deep roots. The more pertinent question is whether it would survive scrutiny by the Supreme Court if courts-martial attempted to exercise jurisdiction over civilians today, particularly U.S. citizens on U.S. soil. Is Article 2(a)(10) merely a defunct relic of a bygone era, or one that applies only during a declared war? This note will argue that Supreme Court precedent limits—but does not prohibit—the exercise of court-martial jurisdiction over civilians under Arti-

80. UCMJ art. 2(a)(10) (2000) (codified at 10 U.S.C. § 802(a)(10) (2000)). Article 2(a)(11) provides for court-martial jurisdiction over “persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands,” even during peacetime, except as limited by international law or treaties. *Id.* rt. 2(a)(11). Because of the mutual applicability of court decisions addressing Article 2(a)(10) and Article 2(a)(11), this article cites several decisions addressing Article 2(a)(11) jurisdiction.

81. WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 98 (2d ed., 1920 reprint).

82. The term “retainers to the camp” encompassed “[o]fficers’ servants” and “[c]amp-followers attending the army but not in the public service.” *Id.*

83. *Id.* at 99-100.

84. *Id.* at 98.

85. Act of August 29, 1916, ch. 418, § 3, 39 Stat. 650, 651.

86. *Id.*; *Hines v. Mikell*, 259 F. 28, 34 (4th Cir. 1919).

87. 18 U.S.C. §§ 3261-3267 (2000).

88. *Id.* § 3261(a). This provision states as follows:

(a) Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States—

- (1) while employed by or accompanying the Armed Forces outside the United States; or
- (2) while a member of the Armed Forces subject to . . . the Uniform Code of Military Justice, shall be punished as provided for that offense.

Id.

89. *Id.* § 3261(c). This subsection states:

(c) Nothing in this chapter . . . may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal.

Id. The act also prohibits federal civilian courts from trying service members unless and until they are no longer subject to the UCMJ, or when they are charged with committing offenses with civilians. *Id.* § 3261(d).

cle 2(a)(10). It also argues that courts-martial should have Article 2(a)(10) jurisdiction over civilians, even on U.S. soil and in the absence of a declared war.

The Constitutionality of Article 2(a)(10)

Supreme Court precedent strictly limits the exercise of military jurisdiction over civilians when civilian courts are available as an alternative forum.⁹⁰ In *Ex parte Milligan*,⁹¹ the Court held that a military commission lacked jurisdiction to try a U.S. citizen on U.S. soil when a civilian court could have tried the defendant, even though the defendant had conspired to assist the Confederate Army. In *Duncan v. Kahanamoku*,⁹² the Court refused to permit the wartime military trial of civilians under martial law in Hawaii. In the face of the government's assertion that martial law justified trial by military tribunal, the Court responded that the civilian courts could have functioned and that they were unjustifiably closed.⁹³ In *United States ex rel. Toth v. Quarles*,⁹⁴ the Court held that courts-martial could not exercise jurisdiction over civilians after their discharge for crimes committed during their military service. The major

exception to the Court's strong preference for trying civilians in civilian courts applies to civilians who act as enemy belligerents.⁹⁵

Following the limitations of this precedent, the first versions of the UCMJ incorporated a more limited application of military jurisdiction to civilians in Article 2(10), now known as Article 2(a)(10). Article 2(10) applied only to "persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States."⁹⁶ The Supreme Court, however, continued to limit the jurisdiction of courts-martial over civilians, even under these limited circumstances. In *Reid v. Covert*,⁹⁷ the Court held that the court-martial of the wife of a service member stationed overseas in peacetime was unconstitutional, because a court-martial could not guarantee fundamental rights, including "indictment by grand jury, jury trial, and the other protections contained in . . . the Fifth, Sixth, and Eighth Amendments."⁹⁸ The Court reasoned that American civilians do not give up these fundamental rights simply because they accompany their military family members overseas.⁹⁹ Other Supreme Court holdings apply these same constitutional protections to non-U.S. citizens on U.S. soil.¹⁰⁰

90. Courts have cited the absence of operating civilian courts to justify the exercise of military jurisdiction over U.S. citizens. See, e.g., *Madsen v. Kinsella*, 343 U.S. 341 (1952) (upholding the jurisdiction of a military commission, convened in the American Zone of Occupied Germany, to prosecute a U.S. citizen who murdered her husband, a member of the U.S. military, in their government quarters in Germany).

91. 71 U.S. (4 Wall.) 2 (1866).

92. 327 U.S. 304 (1946).

93. *Id.* at 313-14.

94. 350 U.S. 11 (1955).

95. See *Ex parte Quirin*, 317 U.S. 1 (1942). In *Quirin*, the defendant was a Nazi saboteur and U.S. citizen who was caught and convicted by a military tribunal. The Court held that the tribunal had jurisdiction to try the defendant, stating:

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention.

Id. at 37.

96. UCMJ art. 2(11) (1951). Article 2(11) was later redesignated Article 2(a)(11). See UCMJ art. 2(a)(11) (2000).

97. 354 U.S. 1 (1957).

98. *Id.* at 32. See also *McElroy v. Guagliardo*, 361 U.S. 281 (1960) (holding that Article 2(11) jurisdiction over civilian employees of the armed forces stationed overseas during peacetime was unconstitutional); *Grisham v. Hagan*, 361 U.S. 278 (1960) (holding that court-martial of government employee stationed overseas during peacetime was unconstitutional); *Kinsella v. Singleton*, 361 U.S. 234 (1960) (holding that court-martial of civilian family member overseas during peacetime was unconstitutional).

99. *Reid*, 354 U.S. at 5.

100. See *Zadvydas v. Davis*, 533 U.S. 678, 694 (2001) ("All persons [U.S. citizens or aliens] within the territory of the United States are entitled to the protection of the Constitution." (quoting *Wong Wing v. United States*, 163 U.S. 228, 238 (1896))); *accord* *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953) ("The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within its borders." (quoting *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring))).

Nevertheless, the Court left room for court-martial jurisdiction over civilians accompanying the armed forces, within certain strict limits. In *Reid*, the Supreme Court was careful to distinguish between its preclusion of court-martial jurisdiction over citizens during peacetime and court-martial jurisdiction under Article 2(10), the predecessor of Article 2(a)(10), during wartime. The Court opined, “We believe that Art. 2(10) sets forth the maximum historically recognized extent of military jurisdiction over civilians under the concept of ‘in the field.’”¹⁰¹ In *McElroy v. Guagliardo*,¹⁰² which concerned two overseas peacetime courts-martial of civilians under Article 2(11), the Supreme Court was also careful not to tread on Article 2(10). The Court commented that cases “based on the legal concept of the troops being ‘in the field,’ [were] inapposite” to evaluating the propriety of court-martial jurisdiction under Article 2(11).¹⁰³

Military courts have further limited court-martial jurisdiction over civilians in the field, though they have not held that Article 2(a)(10) would be invalid during a declared war. In *United States v. Averette*,¹⁰⁴ the appellant, a civilian contractor stationed at Long Binh, Vietnam, was convicted of larceny before a court-martial. He appealed the conviction, challenging the constitutionality of the Army’s exercise of Article 2(a)(10) jurisdiction over him.¹⁰⁵ The Court of Military Appeals (COMA) strictly construed the definition of “in time of war” and held that the court-martial lacked jurisdiction because Congress never formally declared war in Vietnam. The court, however, was careful to state that the Constitution did not necessarily preclude the trial of civilians under Article 2(a)(10).¹⁰⁶ Nearly twenty years later, in *Willenbring v. Neurauter*,¹⁰⁷ the Court of Appeals of the Armed Forces (CAAF) discussed the impact of cases holding that the Constitution forbade the exercise of Article 2(a)(11) jurisdiction over civilians. The CAAF reasoned that, in those cases, “the Supreme Court indi-

cated that the same considerations would not necessarily preclude exercise of court-martial jurisdiction over civilians accompanying the armed forces in time of war.”¹⁰⁸

Even as courts have strictly limited the reach of courts-martial over civilians, they have refused to contest Congress’s decision to authorize court-martial jurisdiction over civilians serving with the armed forces in the field during wartime. This suggests that, despite the courts’ strict interpretations, jurisdiction under Article 2(a)(10) remains viable during a declared war.

Prerequisites to the Exercise of Article 2(a)(10) Jurisdiction

There are three prerequisites to the exercise of court-martial jurisdiction under Article 2(a)(10): (1) the trial must occur in time of war; (2) the accused must be serving with or accompanying an armed force; and (3) the accused must be in the field.¹⁰⁹

1. “In Time of War” Requirement

Courts-martial may only try civilians under Article 2(a)(10) in time of war.¹¹⁰ The 1970 *Averette* case held that “in time of war” means a war formally declared by Congress,¹¹¹ although the court recognized “that the fighting in Vietnam qualifies as a war as that word is generally used and understood.”¹¹² Indeed, the court recognized that it had previously interpreted the term “in time of war” to include the fighting in Vietnam when applied to the question of tolling the statute of limitations under Article 43(a) of the UCMJ.¹¹³ The court concluded, however, that its recognition that a war was taking place in Vietnam

101. *Reid*, 354 U.S. at 34 n.61.

102. 361 U.S. 281 (1960).

103. *Id.* at 284-85.

104. 41 C.M.R. 363 (C.M.A. 1970).

105. *Id.* at 363.

106. *Id.* at 364-66.

107. 48 M.J. 152 (1998).

108. *Id.* at 157 n.4.

109. UCMJ art. 2(a)(10) (2000).

110. *Id.*

111. *Averette*, 41 C.M.R. at 365-66.

112. *Id.* at 365.

113. *Id.* (citing *United States v. Anderson*, 38 C.M.R. 386 (C.M.A. 1968)).

“should not serve as a shortcut for a formal declaration of war, at least in the sensitive area of subjecting civilians to military jurisdiction.”¹¹⁴

One month after *Averette*, the COMA decided *Zamora v. Woodson*,¹¹⁵ which overturned the conviction of a civilian tried pursuant to Article 2(10). *Zamora* is the most recent case of a civilian appealing the exercise of court-martial jurisdiction based on the civilian’s status as a person serving with or accompanying the armed forces during war.¹¹⁶ Thus, *Averette*’s definition of “in time of war”—that is, during a congressionally declared war—stands as the threshold requirement for the assertion of Article 2(a)(10) jurisdiction. There are good arguments for challenging this definition today, however.

First, *Averette* is the view of a narrow majority, written when memories of declared wars were still fresh, and with a strong dissent by Chief Justice Quinn.¹¹⁷ Today, congressionally declared wars are a distant memory from another era. The impracticality of this strict definition of “in time of war” alone could support a decision by the CAAF to hold that Article 2(a)(10) also applies to undeclared wars that fit the term’s plain meaning.

Second, *Averette* was poorly reasoned. Contrast *Averette*, interpreting “in time of war” under Article 2(a)(10) of the UCMJ, with *United States v. Anderson*,¹¹⁸ interpreting Article 43 of the UCMJ. In *Anderson*, decided by the same court just two years before *Averette*, the COMA held that “in time of war” *did* include the Vietnam War for purposes of tolling of the statute of limitations.¹¹⁹ *Averette* rested its holding on the concern

that it should strictly limit the exercise of court-martial jurisdiction over non-combatant U.S. citizens.¹²⁰ Although the court could simply have reasoned that constitutional concerns limited Article 2(a)(10) jurisdiction in cases such as the one presented, the court instead based its decision on a definition of “in time of war” inconsistent with its own precedent. As a result, the reasoning in *Averette* seems disingenuous.

Third, the court’s decision ignored long-standing legal precedent for a broad definition of “in time of war” to reach its desired result. During the nineteenth century, hostilities against Indian tribes were considered a “time of war” justifying court-martial jurisdiction over civilians serving with the army in the field.¹²¹ In *United States v. Grossman*,¹²² the Army Court of Military Review, citing *Averette*, overturned the murder conviction of a civilian who shot three American soldiers in Vietnam. The court expressed its clear regret in doing so, noting that “[a]s far back as the Indian Wars, court-martial jurisdiction has been exercised over civilians serving with the armies in the field during hostilities which were not formally declared wars.”¹²³ Government counsel in *Averette* had also cited numerous cases where courts had held that “in time of war” included undeclared hostilities. The court, however, distinguished those cases because they interpreted “in time of war” as written in other articles of the UCMJ, and because the accused in those cases were military personnel. The court’s analysis suggests that it would have ruled differently if it had been aware of authority for the exercise of court-martial jurisdiction over civilians during undeclared hostilities.¹²⁴

114. *Id.* at 365-66; accord *Robb v. United States*, 456 F.2d 768 (Ct. Cl. 1972) (agreeing with the *Averette* definition of “in time of war” in an action by the estate of a former civilian employee in Vietnam to recover a fine he paid pursuant to a court-martial sentence). *But see* *Latney v. Ignatius*, 416 F.2d 821 (D.C. Cir. 1969) (holding that a civilian court-martialed under Article 2(10) for murder in Vietnam was not “serving with or accompanying” the armed forces, after assuming arguendo that Vietnam qualified as a “war”).

115. 42 C.M.R. 5 (C.M.A. 1970).

116. The CAAF last discussed *Averette* in *Willenbring v. Neurauter*, 48 M.J. 152, 157 n.4 (1998). *Willenbring* upheld the exercise of court-martial jurisdiction over a reservist ordered to active duty for trial by court-martial on rape charges. In a footnote, the CAAF cited *Averette* for the proposition that the phrase “in time of war” is limited to “a war formally declared by Congress.” *Id.*

117. *Averette*, 41 C.M.R. at 366.

118. 38 C.M.R. 386 (C.M.A. 1968).

119. *Id.* at 388.

120. *See Averette*, 41 C.M.R. at 365.

121. WINTHROP, *supra* note 81, at 101.

122. 42 C.M.R. 529 (A.C.M.R. 1970).

123. *Id.* at 530.

124. *Averette*, 41 C.M.R. at 366.

Fourth, *Averette* was based on a Supreme Court case, *O'Callahan v. Parker*,¹²⁵ that has since been overruled by *Solorio v. United States*.¹²⁶ Referring to *O'Callahan*, *Averette* stated that “[a]s a result of the most recent guidance in this area from the Supreme Court we believe that a strict and literal construction of the phrase ‘in time of war’ should be applied.”¹²⁷ If *Solorio* is “the most recent guidance in this area,” and the CAAF reconsidered the same question today, it would likely overrule *Averette*.

2. “Serving with or Accompanying an Armed Force” Requirement

The second prerequisite to Article 2(a)(10) jurisdiction is that the accused must be serving with or accompanying an armed force.¹²⁸ Specifically, the civilian’s “presence [must be] not merely incidental to, but directly connected with or dependent upon, the activities of the armed forces or their personnel.”¹²⁹

In *United States v. Rubenstein*,¹³⁰ the accused was the civilian manager of a club located on an American air base near Tokyo, Japan. As a non-appropriated fund activity, the club was a government instrumentality “operated for the benefit of civilian employees of the Air Force on duty at the base.”¹³¹ The accused had signed a contract acknowledging that the club “operated under Army regulations.”¹³² He was “furnished living quarters and subsistence at the air base in accordance with

army regulations; and he was guaranteed transportation to his home in the United States upon termination of employment.”¹³³ Given these circumstances, the COMA held that the accused qualified as a person “accompanying the armed forces” in Japan and was subject to court-martial jurisdiction.¹³⁴

In *United States v. Burney*,¹³⁵ the accused was a civilian employee of Philco Television and Radio Corporation. He was stationed at an Air Force base in Japan, where he maintained Air Force technical equipment. He was supervised by and worked alongside Air Force personnel, slept in an Air Force billet, ate in Air Force dining facilities, and shopped in an Air Force exchange. Moreover, the “manner in which he performed his work and conducted his personal activities had a direct bearing on the efficiency, discipline, and reputation of the Air Force in that area.”¹³⁶ Under these circumstances, the COMA held that the accused was a person “serving with or accompanying” an armed force, despite the fact that he worked for a private contractor rather than the U.S. Government.¹³⁷

In *Ex parte Gerlach*,¹³⁸ the accused was a civilian sailor employed by the U.S. Shipping Board to serve aboard a military transport during the First World War. He had volunteered to stand watch for German submarines for several days, but later refused an order to continue to do so. The commanding officer of the ship convened a court-martial, which convicted the accused of disobeying the order. The *Gerlach* Court held that the accused was a person “accompanying” or “serving with the armies of the United States” under these circumstances.¹³⁹

125. 395 U.S. 258 (1969). In *O'Callahan*, the Court held that a court-martial had no jurisdiction to try a soldier for an off-post assault and attempted rape because the offenses were not “service connected.” *Id.* at 273-74.

126. 483 U.S. 435 (1987).

127. *Averette*, 41 C.M.R. 363, 365. In *Solorio*, the Supreme Court abandoned the *O'Callahan* “service connection” test for court-martial jurisdiction. The Court concluded that the accused’s status as a member of the armed forces justified his trial by court-martial for the sexual abuse of a minor in a private home in Alaska. *Solorio*, 483 U.S. at 451.

128. UCMJ art. 2(a)(10) (2000).

129. *United States v. Rubenstein*, 22 C.M.R. 313, 317 (1957).

130. *Id.* Although *Rubenstein* was a question of Article 2(11) jurisdiction, *id.*, its reasoning applies to language virtually identical to that found in Article 2(10). Compare UCMJ art. 2(a)(10) (2000) (“persons serving with or accompanying an armed force in the field”) with *id.* art. 2(a)(11) (“persons serving with, employed by, or accompanying the armed forces outside the United States”).

131. *Rubenstein*, 22 C.M.R. at 316.

132. *Id.*

133. *Id.* at 318.

134. *Id.* at 317.

135. 21 C.M.R. 98 (1956).

136. *Id.* at 110.

137. *Id.*

138. 247 F. 616 (S.D.N.Y. 1917).

3. “In the Field” Requirement

Article 2(a)(10) applies only to civilians serving “in the field.” Historically, this term has meant that the accused must serve in “an area of actual fighting.”¹⁴⁰ As the Supreme Court stated in *United States v. Reid*,¹⁴¹ “From a time prior to the adoption of the Constitution, the extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules.”¹⁴² The Court of Military Appeals has stated that “the question of whether an armed force is ‘in the field’ is determined by the activity in which it may be engaged at any particular time, not by the locality where it is found.”¹⁴³

In *McCune v. Kilpatrick*,¹⁴⁴ the U.S. District Court for the Eastern District of Virginia held that “in the field” included a ship transporting troops during wartime.¹⁴⁵ In doing so, the court relied on the reasoning in *Ex parte Gerlach*,¹⁴⁶ that “the words ‘in the field’ do not refer to land only, but to any place, whether on land or water, apart from permanent cantonments or fortifications where military operations are being conducted.”¹⁴⁷ Likewise, in *Ex parte Falls*,¹⁴⁸ the U.S. District Court for the District of New Jersey held that a civilian cook on

a ship carrying military supplies during the First World War was also “in the field.”¹⁴⁹

Courts have also held that “in the field” may include locations in the United States. In *Ex parte Jochen*,¹⁵⁰ the United States District Court for the Southern District of Texas held “in the field” encompassed “service in mobilization, concentration, instruction or maneuver camps as well as service in [a] campaign, simulated campaign or on the march.”¹⁵¹ Applying this definition, the court held that a civilian quartermaster stationed with an Army unit just inside the U.S.-Mexican border during the First World War was “in the field.”¹⁵² Finally, in *Hines v. Mikell*,¹⁵³ the Fourth Circuit Court of Appeals upheld the exercise of court-martial jurisdiction over a civilian auditor and stenographer at Camp Jackson, South Carolina, during the First World War.¹⁵⁴ Soldiers then converged on what is now Fort Jackson for basic training before deploying to the theater of operations.¹⁵⁵ The court held that “any portion of the army confined to field training in the United States should be treated as ‘in the field’” and that “troops in cantonments in [the United States] are ‘in the field.’”¹⁵⁶ The court concluded that “all persons serving there [Camp Jackson] are strictly ‘in the field’ and subject to military regulations.”¹⁵⁷

139. *Id.* at 617.

140. *United States v. Reid*, 354 U.S. 1, 34 n.61 (1957).

141. 354 U.S. at 1.

142. *Id.* at 33.

143. 21 C.M.R. 98 (1956) (citing *Hines v. Mikell*, 259 F. 28, 34 (4th Cir. 1919)).

144. 53 F. Supp. 80 (E.D. Va. 1943).

145. *Id.* at 84.

146. 247 F. 616 (S.D.N.Y. 1917).

147. *Id.* at 617.

148. 251 F. 415 (D.N.J. 1918).

149. *Id.* at 416.

150. 257 F. 200 (S.D. Tex. 1919).

151. *Id.* at 208-09.

152. *Id.* at 205, 209.

153. 259 F. 28 (4th Cir. 1919), *cert. denied*, 250 U.S. 645 (1919).

154. *Id.* at 28.

155. *Id.*

156. *Id.* at 34.

157. *Id.* at 35.

Conclusion

Congress granted court-martial jurisdiction over civilians accompanying the armed forces during wartime when it enacted Article 2(a)(10) of the UCMJ. Although the Supreme Court has stated that Article 2(a)(10) jurisdiction is constitutional when limited to the circumstances where it was intended to be used, military courts have eviscerated its applicability by limiting its reach to declared wars. Courts and practitioners

should reconsider this excessively strict construction of Article 2(a)(10) in light of today's circumstances and more recent changes in case law. During wars, whether declared or undeclared, judge advocates should be able to use Article 2(a)(10) as a means to exercise court-martial jurisdiction over civilians—whether aliens or U.S. citizens—who serve with or accompany the armed forces in the field.