

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Family Law Notes

Uniform Interstate Family Support Act Long Arm Statute Interpreted

Among the major changes to child support enforcement under the Uniform Interstate Family Support Act¹ (UIFSA), are the broad long-arm jurisdiction provisions.² A court must have *in personam* jurisdiction over the obligor before it can order a support obligation.³ If a state can meet one of the long-arm provisions under the UIFSA, it gains personal jurisdiction over a non-resident obligor and alleviates many of the cumbersome aspects of enforcing support interstate.

An interesting aspect of the UIFSA's long-arm provision is that it allows a state to assume personal jurisdiction based on the residence of the child in the state "as a result of the acts or directives of the non-resident obligor."⁴ Only two cases have interpreted this particular long-arm provision. Both cases agree that this provision would be sufficient to establish jurisdiction and meet the Constitutional requirements of due process. The question becomes, what conduct is going to fall within the language of "acts or directives?"

In *Windsor v. Windsor*,⁵ the Massachusetts Court of Appeals refused to find jurisdiction under this provision of the UIFSA. James Windsor and Beverly Windsor married at Otis Air Force Base in 1959.⁶ The couple lived in several military locations, eventually ending up in Florida in 1975. Mrs. Windsor left Florida in June 1977, returning to Massachusetts where she delivered their fourth child in September 1977.⁷ In 1995, she filed for divorce in Massachusetts based on cruel and abusive treatment by Mr. Windsor and requested child support for their youngest child.⁸ Mr. Windsor, who lived in Florida since 1975, filed a special appearance challenging the jurisdiction of Massachusetts to award child support.⁹

The trial court found jurisdiction based on the UIFSA provision that Mrs. Windsor and the child lived in Massachusetts due to the "acts and directives" of Mr. Windsor.¹⁰ On appeal, the court reversed the trial court's finding because the record did not allege sufficient facts to establish acts or directives by Mr. Windsor.¹¹ Specifically, the record did not set out any information that Mrs. Windsor and her children "fled" Florida for Massachusetts based on cruel treatment or the directives of Mr. Windsor.¹²

1. 9 U.L.A. 229 (1993) (amended 1996). In 1998 all states adopted the UIFSA. Each state has its own citation to their UIFSA depending into which state code the legislature passed the act. All references in this article are to the sections of the uniform act. Although the code citations will be different in each state, the provision will be the same as that in the Uniform Act as adopted by the National Conference of Commissioners on Uniform State Laws. You can obtain copies of the UIFSA and comments from the National Conference of Commissioners on Uniform State Laws, 676 North St. Clair Street, Suite 1700, Chicago, Illinois 60611, and telephone (312) 915-0195.

2. UNIF. INTERSTATE FAMILY SUPPORT ACT § 201, 2 U.L.A. 229 (amended 1996). The UIFSA provides eight circumstances where a court can exercise personal jurisdiction over a non-resident including if: (1) the individual is personally served within the State, (2) the individual submits to the jurisdiction of this State by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction, (3) the individual resided with the child in this State, (4) the individual resided in this State and provided prenatal expenses or support for the child, (5) the child resides in this State as a result of the acts or directives of the individual, (6) the individual engaged in sexual intercourse in this State and the child may have been conceived by that act of intercourse, (7) the individual asserted parentage in the putative father registry maintained in this State by the appropriate agency, or (8) there is any other basis consistent with the constitutions of this State and the United States for the exercise of personal jurisdiction.

3. *Windsor v. Windsor*, 700 N.E.2d 838, 840 (Mass. App. Ct. 1998) (citing *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957), *Kulko v. Superior Court of California*, 436 U.S. 84 (1978)).

4. UNIF. INTERSTATE FAMILY SUPPORT ACT § 201(5), 9 U.L.A. 229 (1993) (amended 1996).

5. 700 N.E.2d 838 (Mass. App. Ct. 1998).

6. *Id.* at 841.

7. *Id.*

8. *Id.* at 839-40.

9. *Id.*

10. *Id.*

11. *Id.* at 842.

In contrast, the Court of Appeals of Virginia affirmed a case based on the same long-arm jurisdiction provision in *Franklin v. Virginia*.¹³ Mr. and Mrs. Franklin married in 1981 and had two children. Mr. Franklin took a job with John Snow, Inc., a Boston-based company with a field office in Arlington, Virginia. Mr. Franklin's job sent the family to Africa where they lived from 1991 to 1994.¹⁴ Before leaving for Africa, the family resided for three brief months in Arlington, Virginia. While in Africa, the marriage deteriorated and, in January 1994, Mr. Franklin ordered his wife and children out of their home.¹⁵ His company paid to return the family to Virginia.¹⁶ Through several years of support and custody hearings, Mr. Franklin maintained that Virginia did not have personal jurisdiction over him.¹⁷

Mr. Franklin argued that the UIFSA's long-arm provision's plain meaning only confers jurisdiction if an individual takes an affirmative act, exerts power or influence, or gives instructions, orders or commands to his spouse or children to reside in a particular geographical location.¹⁸ The court found that this reading of the UIFSA was far too restrictive. The court found that after several physical altercations, Mr. Franklin told his family to leave Africa. Mrs. Franklin reasonably returned to Virginia, the family's home immediately prior to their departure for Africa. Additionally, Virginia was Mr. Franklin's employer's field office that distributed his mail. Accordingly, the court found that the family resided in Virginia as a result of Mr. Franklin's acts.¹⁹

By their nature, jurisdiction questions revolving around the issue of "acts and directives" of the nonresident are fact specific. Marshaling the facts and articulating whether they establish "acts and directives" is a true test of advocacy skills. The facts in *Franklin* easily fit into a military setting where families find themselves far from traditional support groups when marriages get into trouble. The military may help pay travel

expenses for the family, especially if they are living overseas. The court was not specific about whether any one fact was more persuasive than the others. Under a totality of the circumstances approach, *Franklin* indicates that very little is required to satisfy the UIFSA's "acts and directives" requirement.

The UIFSA significantly changes the "ground rules" for support awards. Consequently, legal assistance attorneys must understand its provisions. The long-arm provisions are particularly important because the old interstate support statutes did not contain such provisions. The long-arm provisions can enable a state that the client may never have set foot in to exercise jurisdiction over support issues. Military families may find themselves in this situation in a variety of ways given the mobility of our communities. Legal assistance attorneys need to consider all the options and facts before advising a client on the jurisdiction of a court to impose a support obligation. Major Fenton.

Washington Overrules Long-standing Law to Allow Innocent Spouse to Take Military Survivor Benefits

Washington's long standing law held that after the death of one of the parties the subject matter of a divorce proceeding abates, and the surviving spouse cannot move to challenge the dissolution.²⁰ This position is definitely the minority view. In *Himes v. Himes*,²¹ the Supreme Court of Washington overruled this harsh and restrictive view.

Victor and Frances Himes married in 1960 while Victor was on active duty with the Navy.²² Frances Himes, and the couple's two children, remained in the family home in Bethlehem, Pennsylvania in 1975 when Victor went to the state of Washington. For a brief time in 1982, Frances joined Victor in Washington.²³ In 1984, Victor retired after thirtyyears of service and

12. *Id.* at 842-43.

13. 497 S.E.2d 881 (Va. Ct. App. 1998). Virginia's Department of Social Services, Division of Child Support Enforcement is the party in the case because Mrs. Franklin received public assistance for herself and her children. In addition, she requested that this agency establish and enforce support. This agency was established under section IV-D of the Social Security Act. These agencies, known as IV-D agencies, are available to help clients in cases of child support regardless of whether the family receives public assistance.

14. *Id.* at 883.

15. *Id.*

16. *Id.*

17. *Id.* at 844.

18. *Id.* at 885.

19. *Id.* at 886.

20. *Dwyer v. Nolan*, 82 P. 746 (Wash. 1905).

21. 965 P.2d 1087 (Wash. 1998).

22. *Id.* at 1088.

remained in Washington.²⁴ Upon retiring, he elected for spousal coverage under the Survivor Benefit Plan (SBP).²⁵ In 1987, Victor filed for divorce in Washington alleging that he served Frances through publication because he could not locate her after reasonable and diligent attempts.²⁶ In reality, Frances lived in the same home that she and Victor had lived in together from 1960 until 1975. She lived next door to Victor's sister, who testified that Victor never contacted her to locate Frances. Victor remained in contact with his daughter and never mentioned the divorce action nor asked about Frances' whereabouts. Frances' address in 1994 was the same address that Victor put on his transfer papers in 1973.²⁷ Washington issued a divorce decree in December 1987 dissolving Frances' and Victor's marriage.²⁸ In 1993, Victor married Janana MacIntyre in Washington. He died thirteen months later and Janana began receiving SBP payments.²⁹ The Navy informed Frances that her medical coverage was terminated; this was her first notice that she and Victor were not married.³⁰

In 1984, Frances filed a motion to quash the 1987 divorce decree. She claimed that the decree was void for lack of jurisdiction because Mr. Franklin obtained it fraudulently. The trial court granted the motion. Janana appealed and the Court of Appeals reversed the trial court relying on *Dwyer v. Nolan* and its progeny.³¹ The Washington Supreme Court took advantage of the facts in this case to overrule *Dwyer*.³² Part of the rationale behind *Dwyer* was the idea that dissolution of marriage was merely a termination of status and "nothing is sought to be affected but the marital status of the husband and wife."³³ In *Himes* the Washington Supreme Court found that the dissolu-

tion decree affected the entitlement to substantial survivor benefits from the Navy. Applying the principles of equity, the Washington Supreme Court found Frances Himes was unquestionably married twenty-two years, ostensibly married for twenty-seven years, and arguably married for thirty-four years to Victor.³⁴ Thus, the award of SBP benefits to Janana who was "married" to him for thirteen months was not conscionable. Therefore, the court voided the divorce decree and affirmed the trial court's ruling.³⁵ Major Fenton.

Consumer Law Notes

Sixth Circuit Issues Additional Guidance on Attorney Use of Credit Reports

Information is power, as any good attorney knows. Those who hunger for information often need look no further than to a person's consumer report³⁶

No profession has a greater hunger for information than the legal profession. When preparing for a case, an attorney wants all the information she can get about her client and her opponent. Two cases concerning attorney access to credit reports under the Fair Credit Reporting Act (FCRA)³⁷ have recently reached the federal circuit court level. The Consumer Law Note in the December 1998 issue of *The Army Lawyer* discusses the first case, issued by the Eighth Circuit.³⁸ Another case concerning accessing consumer reports during litigation

23. *Id.*

24. *Id.*

25. *Id.* Only if the retiree enrolls in and pays a premium for the SBP can his beneficiary continue to receive retirement pay after he dies.

26. *Id.* at 1090.

27. *Id.* at 1097.

28. *Id.* at 1090.

29. *Id.*

30. *Id.*

31. *Id.* at 1091-92.

32. *Id.* at 1101.

33. *Id.* at 1100.

34. *Id.* at 1101.

35. *Id.*

36. *Duncan v. Handmaker*, 149 F.3d 424 (6th Cir. 1998).

37. 15 U.S.C.A. §§ 1681 - 1681u (West 1998).

38. See Consumer Law Note, *Litigation is Not a "Legitimate Business Need" Under the Fair Credit Reporting Act*, ARMY LAWYER, Dec. 1998, at 15.

reached the Sixth Circuit with a similar result—litigation is not a “legitimate business need” permitting access to credit reports.

In *Duncan v. Handmaker*,³⁹ the lawyer accessed the plaintiff’s credit report while preparing for a trial involving a property dispute between the plaintiff and the lawyer’s client.⁴⁰ The FCRA limits the purposes for which a party can access a consumer report.⁴¹ Among these legitimate purposes is when the user “otherwise has a legitimate business need for the information”⁴² Attorney Handmaker and his firm asserted that the litigation was a “legitimate business need” justifying their use of the credit report. The court took a dim view of this proposition by stating:

Unfortunately for Handmaker and his firm, we must reject their effort to shoehorn the use of the Duncans’ consumer reports into § 1681b[.]

. . . .

While a lawsuit occasionally may give rise to a “legitimate business need” for a consumer report . . . trial preparation generally does not fall within the scope of § 1681b.⁴³

This case, and others like it, remind legal assistance attorneys that there are real and enforceable limits on access to credit reports. We must educate and equip our soldiers to protect themselves against these types of abuses. Further, legal assistance attorneys must help our soldiers assert the FCRA’s protections. Particularly when the person misusing credit information is an attorney, legal assistance attorneys must interject

39. 149 F.3d 424 (6th Cir. 1998).

40. *Id.* at 425. The Duncans purchased residential real estate and, within a year after the closing, found that the well on the property “was contaminated with fecal coliform.” *Id.* They sued several people, including the mortgage company. “The Duncans alleged that Bankers Mortgage was negligent because it failed to ensure that the water supply had been inspected prior to extending the loan and closing the transaction.” *Id.* The mortgage company hired Mr. Handmaker to defend them in the litigation. After learning that Mr. Handmaker had accessed their credit report, the Duncans sued him and his firm for violating the Fair Credit Reporting Act (FCRA).

41. 15 U.S.C.A. § 1681b (West 1998). Generally speaking, these purposes are for credit, insurance, employment, licensing, or other legitimate business transactions.

42. The actions under dispute in *Duncan* case were evaluated under an older version of the statute. Congress recently modified the FCRA. See Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (to be codified at 15 U.S.C. § 1681). These changes took effect on 30 September 1997. See Consumer Law Note, *Fair Credit Reporting Act Changes Take Effect in September*, ARMY LAW., Aug. 1997, at 19. Among the changes were modifications to 15 U.S.C. § 1681b. Specifically, the “legitimate business need” purpose now allows release of a consumer report only when the user: “(F) otherwise has a legitimate business need for the information (i) in connection with a business transaction that is initiated by the consumer; or (ii) to review an account to determine whether the consumer continues to meet the terms of the account.” 15 U.S.C.A. § 1681b(a)(3)(F) (West 1998).

43. *Duncan*, 149 F.3d at 427.

44. 146 F.3d 1320 (11th Cir. 1998).

45. *Id.* at 1321.

46. *Id.*

47. *Id.*

48. *Id.*

themselves in the process to protect the client. The recent cases discussed here and in the December issue of *The Army Lawyer* provide good ammunition to help accomplish that task. Major Lescault.

Eleventh Circuit Clarifies What Constitutes a “Consumer Report” Under the Fair Credit Reporting Act

The Eleventh Circuit recently issued another Fair Credit Reporting Act decision. In *Yang v. Government Employees Insurance Co. (GEICO)*,⁴⁴ the court faced the fundamental issue of what constitutes a “consumer report” as that term is used in the FCRA.

Mr. Yang submitted a claim for bodily injury against GEICO based upon an automobile accident with one of GEICO’s insurance customers.⁴⁵ The GEICO claims examiner referred the case to the Special Investigations Unit (SIU) because she suspected fraud.⁴⁶ As part of its investigation, an SIU agent acquired an “Inquiry Activity Report” (IAR) on Mr. Yang from an affiliate of Equifax Credit Information Services, Inc.⁴⁷ According to the Eleventh Circuit:

IARs are preexisting, non-customized documents containing the subject’s name, recent addresses, social security number, date of birth, and recent employers. IARs also contain a partially encoded list of all the entities that have inquired about the subject’s credit history for the previous two years.⁴⁸

Mr. Yang sued Equifax and GEICO alleging a violation of the FCRA. The district court granted a motion for summary judgment, finding that the IAR was not a “consumer report” under the FCRA.

The FCRA defines a “consumer report” as:

[A]ny written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for—

- (A) credit or insurance to be used primarily for personal, family, or household purposes;
- (B) employment purposes; or
- (C) any other purpose authorized under section 1681b of this title.⁴⁹

From this statutory definition, the Eleventh Circuit stated that a consumer report for a credit-reporting agency (CRA) is a “consumer report” if it has three elements:

The . . . definition indicates that a consumer report is made up of three fundamental elements. First, a “consumer reporting agency” must “communicat[e] . . . information[.]

Second, the “communication of information” must “bear[] on” any one of a list of factors. Third, the “communication of information” must be “used or expected to be used or collected in whole or in part” for any one of several purposes.⁵⁰

The court referred to the third element as the “purpose clause” and found this element to be outcome-determinative in the *Yang* case.⁵¹

When determining whether a report is a “consumer report” under the so-called purpose clause, the court identified three components to consider. First, whether the user ultimately used the report for one of the FCRA’s listed purposes. Second, whether the CRA expects clients to use the reports for one of the purposes listed in the FCRA. Third, whether the CRA collects the information contained in the report for one of the purposes listed in the FCRA.⁵² According to the Eleventh Circuit, if any of these components are satisfied, the report is a “consumer report” under the FCRA.⁵³

In *Yang*, the court relied on the third component, Equifax’s purpose for collecting the information, to find that IARs were “consumer reports” subject to the FCRA.⁵⁴ Interestingly, it was Equifax’s own internal guide (which provided that IAR’s “contain information ‘placing [them] under the guidelines of the FCRA’”) and testimony from its representative (who testified “that the company would not knowingly allow a subscriber . . . to obtain IARs to evaluate insurance claims because that is not

49. 15 U.S.C.A. § 1681a (West 1998). The permissible purposes for release referenced in subparagraph (C) of the definition include:

[A]ny consumer reporting agency may furnish a consumer report under the following circumstances and no other:

- (1) In response to the order of a court having jurisdiction to issue such an order, or a subpoena issued in connection with proceedings before a Federal grand jury.
- (2) In accordance with the written instructions of the consumer to whom it relates.
- (3) To a person which it has reason to believe—
 - (A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or
 - (B) intends to use the information for employment purposes; or
 - (C) intends to use the information in connection with the underwriting of insurance involving the consumer; or
 - (D) intends to use the information in connection with a determination of the consumer’s eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant’s financial responsibility or status; or
 - (E) intends to use the information, as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation; or
 - (F) otherwise has a legitimate business need for the information—
 - (i) in connection with a business transaction that is initiated by the consumer; or
 - (ii) to review an account to determine whether the consumer continues to meet the terms of the account.

Id. § 1681b.

50. *Yang*, 146 F.3d at 1323.

51. *Id.*

52. *Id.* at 1324.

53. *Id.*

54. *Id.* at 1325.

one of the permissible uses of ‘consumer reports’ under the FCRA”) that were the critical facts.⁵⁵

The court’s systematic analysis of the definition of “consumer report” in *Yang* provides a logical framework for consumer advocates, like legal assistance attorneys, to better and more accurately counsel and negotiate on behalf of their clients in credit reporting cases. Additionally, the court’s refusal to allow GEICO’s actual use of the information to determine the report’s status as a “consumer report” is an important decision for consumers. To allow the user to avoid the provisions of the FCRA simply by misusing the information for a purpose not listed in the FCRA would leave a gaping hole in this important consumer protection statute. The Eleventh Circuit’s decision to avoid this outcome further demonstrates the trend in credit reporting cases and legislation to limit the use of credit information strictly to the purposes allowed by the FCRA. Major Lescault.

International and Operational Law Notes

United Nations Convention on the Safety of United Nations (UN) and Associated Personnel Enters into Force

Introduction

The United Nations Convention on the Safety of United Nations and United Nations Associated Personnel⁵⁶ entered into force on 15 January 1999. Presently, forty-nine states have signed the Convention.⁵⁷ The treaty will formally enter into force because twenty-two states have submitted instruments of ratification, acceptance, approval, or accession to the Secretary General.⁵⁸ This note outlines the need for this new multilateral Convention, briefly describes its substance, discusses the pri-

mary problem with applying the Convention, and predicts some of the likely near-term impacts of this Convention.

The Need for a Multilateral Convention

The UN has conducted forty-nine peacekeeping operations since 1948. Of these, thirty-six began from 1988 to 1998.⁵⁹ During the same period, untold numbers of civilians, police, military personnel, and UN employees worked throughout the world to help solve international economic, social, and humanitarian problems. The UN Charter mandates that UN representatives seek to enhance international peace and security and assist the settlement of international disputes “in conformity with the principles of justice and international law.”⁶⁰ In theory, UN personnel deploy to represent the interests of mankind and the entire international community. The Secretary-General praised UN efforts to “counter violence with tolerance, might with moderation, and war with peace” as being without precedent in human history.⁶¹

The fundamental goal of helping to maintain international peace and security requires personnel to deploy into situations that involve risks to their safety and security.⁶² United Nations representatives have delivered humanitarian aid, assisted refugees, rebuilt infrastructure, and monitored cease-fire lines throughout the world. United Nations personnel require legal protection because they serve in many areas where the lines between hostile factions are unclear. As representatives of the international community, persons deployed under the authority of the United Nations are often in the midst of conflict though not as a party to the conflict. Accordingly, the UN Charter provides that UN personnel must enjoy “such privileges and immunities as are necessary for the independent exercise of their duties.”⁶³

55. *Id.* at 1322, 1324-26.

56. Dec. 9, 1994, 34 I.L.M. 482 (1995), *reprinted in* INTERNATIONAL AND OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, JA-422, OPERATIONAL LAW HANDBOOK 8-20 (1998)[hereinafter Safety Convention].

57. Prior to the entering an international agreement into force, a state that has signed the agreement must refrain from acts that would defeat the object and purpose of the agreement. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 312(3) (1986). At the time of this writing, the 19 nations have signed the Convention and not completed the domestic process for expressing their consent to be legally bound by its provisions are: Australia, Bangladesh, Belarus, Belgium, Bolivia, Brazil, Canada, Fiji, Finland, France, Haiti, Honduras, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Pakistan, Poland, Russian Federation, Samoa, Senegal, Sierra Leone, Togo, Tunisia, United States of America, and Uruguay. <http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/xviiiiboov/xviii_8.html>.

58. Safety Convention, *supra* note 56, art. 27(1). The nations that have submitted instruments of acceptance to the Secretary General are: Argentina, Bulgaria, Chile, Czech Republic, Denmark, Germany, Japan, New Zealand, Norway, Panama, Philippines, Portugal, Republic of Korea, Romania, Singapore, Slovakia, Spain, Sweden, Turkmenistan, Ukraine, United Kingdom, and Uzbekistan. See <http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/xviiiiboov/xviii_8.html>.

59. Bernard Miyat, Under-Secretary-General for Peacekeeping Operations, Press Conference in Observance of 50 Years of United Nations Peacekeeping (May 29, 1998) available at <http://www.un.org/Depts/DPKO/pk50_p.htm>.

60. U.N. CHARTER, art. 1, para. 1.

61. Kofi Annan, Secretary General of the United Nations, Address by the United Nations Secretary-General Before the Special Commemorative Meeting of the General Assembly Honouring (sic) 50 Years of Peacekeeping, U.N. Doc. SG/SM/6732 (Oct. 6, 1998).

62. U.N. CHARTER art. 1.

International law shields UN personnel from attack while they are deployed in non-belligerent roles.⁶⁴ For example, combatants who feign protected status by the use of signs, emblems, or uniforms of the UN commit unlawful perfidy.⁶⁵ According to the International Committee of the Red Cross, the protected status of neutral personnel deployed or employed on behalf of the UN is “not contestable.”⁶⁶

The existing framework of international law does not adequately protect UN forces. To date, non-belligerent personnel who were deployed to support UN mandates have suffered 1581 casualties.⁶⁷ The Security Council recently passed a unanimous resolution condemning the loss of six UN chartered aircraft over territory controlled by rebels in Angola.⁶⁸ Since 1992, the Secretary-General has highlighted the “pressing need to afford adequate protection to UN personnel engaged in life-endangering circumstances.”⁶⁹ On 5 June 1993, Somalis killed twenty-four members of a UN operation and wounded another fifty-seven.⁷⁰ The General Assembly subsequently established an Ad Hoc Committee to determine responsibility for attacks on UN personnel and develop “measures to ensure that those responsible for such attacks are brought to justice.”⁷¹ During

the first week of April 1994, a Rwandan mob murdered ten Belgian peacekeepers assigned to protect the Prime Minister of Rwanda. The mob subsequently assassinated the Prime Minister.⁷² “Gravely concerned at the increasing number of attacks on United Nations and associated personnel,” the General Assembly adopted The United Nations Convention on the Safety of United Nations and Associated Personnel (The Safety Convention), and opened it for signature on 9 December 1994.⁷³

The Convention implements international law by making it a universal jurisdiction crime to attack neutral persons deployed on behalf of the UN. The Convention, however, does not change two underlying principles of international law. The law of war continues to apply to combatants in an international armed conflict regardless of the source of their mission, chain of command, or underlying legal authority. Forces that are deployed as combatants to enforce mandates of the UN Security Council become subject to the constraints of the existing law of war because they are lawful targets.⁷⁴ On the other hand, military or civilian personnel participating in international armed conflict benefit from the detailed protections codified in the law of war. The existing law of war framework, therefore,

63. U.N. CHARTER art. 105, para. 2.

64. Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15, *reprinted in* INTERNATIONAL AND OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA-422, OPERATIONAL LAW HANDBOOK 8-16 (1998). *See also* Rome Statute of the International Criminal Court, July 17, 1998, art. 8(2)(b)(iii) and art. 8(2)(e)(iii), U.N. Doc. No. A/CONF. 183/9 (1998), *reprinted in* 37 I.L.M. 999 (1998)(making attacks on United Nations personnel involved in humanitarian assistance or peacekeeping missions a war crime during both international and non-international armed conflicts).

65. Protocol I Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, art. 37(1), 16 I.L.M. 1391. The Protocol defines perfidy as acts “inviting the confidence of the adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence.” *Id.* Protocol I also prohibits misuse of the distinctive emblem of the United Nations, in essence equating the United Nations emblem with international protections accorded to the Red Cross. *Id.* art. 38(2).

66. CLAUDE PILLOUD, ET AL., INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, para. 1508 (Yves Sandoz et al. eds., 1987).

67. *See* <<http://www.un.org/Depts/dpko/fatalities/fatal2.htm>>.

68. S.C. Res. 1221, U.N. SCOR, 54th Sess., 3965th mtg., U.N. Doc. S/RES/1221 (1999). The Uniao Nacional para a Independencia Total de Angola (UNITA) has waged a war for control of Angola for 24 years. The United Nations Angola Verification Mission (UNAVEM) is in the country monitoring the implementation of the 1994 Lusaka Accords (S/PRST/1994/70). The crash killed the Secretary-General's Special Representative for Angola. Resolution 1221 affirms the Security Council's resolve to establish the truth about the downed aircraft, and to determine responsibility for the crashes.

69. *An Agenda For Peace: Preventative Diplomacy, Peacemaking, and Peacekeeping*. Report of the Secretary-General, Boutros Boutros-Ghali, U.N. Doc. A/47/277 S/2411, 68, June 17, 1992.

70. *Report of the Commission of Inquiry Established Pursuant to Resolution 885 (1993) to Investigate Armed Attacks on UNOSOM II Personnel Which Led to Casualties Among Them*, U.N. Doc. S/1994/653, para. 117 (1994). The United Nations Operation in Somalia (UNOSOM II) received its expanded mandate on 26 March 1993. *See* S.C. Res. 814, U.N. SCOR, 48th Sess., 3188th mtg, U.N. Doc. S/RES/814 (1993). The day after the murder of the UNOSOM II members, the Security Council passed another resolution which authorized United Nations forces to “take all necessary measures against all those responsible for the armed attacks including to secure the investigation of their actions and their arrest and detention for prosecution.” S.C. Res. 837, U.N. SCOR, 48th Sess., 3229th mtg., ¶ 5, U.N. Doc. S/RES/837 (1993).

71. G.A Res. 48/37, U.N. GAOR, 48th Sess., U.N. Doc. A/48/37 (1993).

72. GERARD PRUNIER, THE RWANDA CRISIS HISTORY OF A GENOCIDE 230 (1995).

73. *Question of Responsibility for Attacks on United Nations and Associated Personnel and Measures to Ensure That Those Responsible For Such Attacks Are Brought to Justice*, Report of the Sixth Committee, 49th Sess., Agenda Item 141, at 3, U.N. Doc. A/49/742 (1994).

continues to provide all of the protections needed by combatants in an international armed conflict. The implications of this legal distinction are discussed below.

At the same time, UN personnel who are deployed to internal armed conflicts under the legal authority of the UN retain their right of self-defense. Civilian and military personnel deployed in the vicinity of non-international armed conflicts are not participating in the hostilities. Combatants from any side of the dispute cannot lawfully target UN personnel, or interfere with their mission in any manner. International law recognizes that UN personnel have an inherent right to use force to defend themselves from threats. They do not become belligerents simply by using proportionate force in self-defense.⁷⁵

The Convention fills a void in the existing structure of international law because it establishes a clear legal norm that applies to forces conducting non-combat operations on behalf of the UN.⁷⁶ The Convention extends the principle of universal jurisdiction over offenses directed against UN and associated personnel, and creates a legal regime for prosecution or extradition of the perpetrators. Thus, the Convention will operate with the law of war to “provide seamless protection for all UN and associated personnel across the entire spectrum of risk or conflict.”⁷⁷

*Summary of the Main Convention Provisions*⁷⁸

This Convention is a significant development in the international legal regime because it codifies the principle that attacks directed against UN and associated personnel are criminal violations, punishable by all nations.⁷⁹ Article 9 is the core of the

Convention. Each party must implement domestic legislation to punish the list of offenses contained in Article 9. Parties “shall make the crimes punishable by appropriate penalties which shall take into account their grave nature.”⁸⁰ The Convention criminalizes the intentional commission of murder, kidnapping, or any other act against the person or liberty of any UN personnel. Article 9 includes threats to commit prohibited acts with the object of compelling UN personnel to do or to refrain from doing any act. The Convention also specifically addresses attempts to commit prohibited acts, participation as an accomplice, or organizing or ordering others to commit prohibited acts.

The Convention contains language requiring parties to “cooperate in the prevention of the crimes set out in Article 9.”⁸¹ Parties must enact provisions for establishing personal jurisdiction when the crime is committed on their territory, which includes on board a ship or aircraft registered in that state, or if the offender is a national of that state.⁸² Any state that has information regarding the victim or circumstances of an Article 9 violation must “fully and promptly” inform the UN Secretary-General.⁸³ Article 14 models the familiar language of the grave breach provisions of the Geneva Conventions by establishing a legal obligation for states to either prosecute or extradite offenders.⁸⁴ To reinforce the obligation to cooperate with other states, any bilateral extradition treaty that does not include the Article 9 crimes as extraditable offenses “shall be deemed to be included as such therein.”⁸⁵

Aside from the list of substantive crimes, the Convention protects a broad class of persons. The dual structure of the final text is significant. The prohibitions of Article 9 apply to

74. The principle of military necessity allows “those measure not forbidden by international law, which are indispensable for the complete submission of the enemy as soon as possible.” U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 3 (18 July 1956) (CI, 15 July 1976) [hereinafter FM 27-10].

75. Safety Convention, *supra* note 56, art. 21.

76. United States Mission to the United Nations, Press Release No. 217-94 (Dec. 9, 1994)(stating that the Convention represents an “important element” in protecting persons deployed on operations involving “exceptional risk.”).

77. *Id.*

78. Extensive detail of the process of negotiating this treaty is beyond the scope of this note. See Antoine Bouvier, *Convention on the Safety of United Nations and Associated Personnel: Presentation and Analysis*, INT’L REV. OF THE RED CROSS, No. 309, 638 (1995); Walter Gary Sharp, *Protecting the Avatars of International Peace and Security*, 7 DUKE J. COMP. & INT’L L. 93; Steven J. Lepper, *The Legal Status of Military Personnel in United Nations Peace Operations: One Delegate’s Analysis*, 18 HOUS. J. INT’L L. 359 (1996) (containing excellent insights into the diplomatic give and take, as well as exploration of the negotiating process).

79. In that sense, the Safety Convention follows the model set by other international conventions attempting to deter and regulate acts of terrorism. See Evan T. Bloom, *Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, 89 AM. J. INT’L L. 621, 625 (referring the interested reader to a few of the numerous universal jurisdiction multilateral treaties such as The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973., 28 U.S.T. 1975; The International Convention Against the Taking of Hostages, Dec. 14, 1979, T.I.A.S. No. 11081, 18 I.L.M. 1456 (1979); The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 10 I.L.M. 133 (1971)).

80. Safety Convention, *supra* note 56, art. 9(2).

81. *Id.* art. 11.

82. *Id.* art. 10(1). A state party may also establish its jurisdiction over any such crime when it is committed: (a) by a stateless person whose habitual residence is in that State; or (b) With respect to a national of that State; or (c) in an attempt to compel that State to do or to abstain from doing any act. *Id.* art. 10(2).

83. *Id.* art. 12(2).

“United Nations operations” and “United Nations and associated personnel.”⁸⁶ The Convention applies to UN operations established by the competent body of the United Nations to maintain or restore international peace and security. The “United Nations operation” must be conducted under “United Nations authority and control.”⁸⁷ Finally, either the UN Security Council or General Assembly must declare that the operation presents “an exceptional risk to the safety of the personnel participating in the operation.”⁸⁸

Therefore, the Convention protects UN civilian or military representatives who enter host nations to implement UN mandates; the consent of the host nation is not required. The Convention defines “United Nations personnel” as those “members of the military, police, or civilian components” whom the Secretary-General engages to deploy on UN operations.⁸⁹ Thus, the Convention does not protect every non-governmental agency in the operational area because it requires a tight contractual nexus with the UN. Non-governmental organizations may, however, be considered “associated personnel” if they deploy under an agreement with the Secretary-General.⁹⁰

Finally, the term “associated personnel” makes the Convention applicable to personnel who deploy on missions other than those strictly under UN command and control. This is an important point for practitioners because many United States forces deploy to support UN mandates as part of a unilateral or multinational operation that is not under direct UN command and control.⁹¹ The United States’ position is that the Convention protects United States forces that deploy to support a UN mandate.⁹² Aside from the negotiating history underlying the Convention, the dual categories of “United Nations” and “associated personnel” would arguably compel the same conclusion.

The Primary Underlying Legal Problem

Despite its broad coverage, the Convention contains an important limitation. Its focus fills the void where UN and associated personnel had no prior treaty-based protections. The convention, is consistent in that it “shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the UN Charter in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.”⁹³

The negotiated language of Article 2 serves as a legal device to switch the jurisprudential tracks from the law of peace to the law of war. As the operation becomes an international armed conflict, and the participants become lawful targets, the pre-existing criminal prohibitions against attacking them expire. When the United States delegation proposed the language quoted above, most delegations immediately recognized that it would help protect the established law of war from being undermined.⁹⁴

84. *Id.* art. 14 Article 14 of the Safety Convention states:

The State Party in whose territory the alleged offender is present shall, if it does not extradite that person, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the law of that State. Those authorities shall take their decision in the same manner as in the case of an ordinary offense of a grave nature under the law of that State.

See also FM 27-10, *supra* note 74, para. 506.

85. Safety Convention, *supra* note 56, art. 15(1).

86. *Id.* art. 2(1).

87. *Id.* art. 1(c).

88. *Id.*

89. *Id.* art. 1(a). The term “United Nations Personnel also includes ‘Other officials and experts on mission of the United Nations or its specialized agencies or the International Atomic Energy Agency who are present in an official capacity in the area where a United Nations operation is being conducted.’” *Id.* art. 1(a)(ii).

90. *Id.* note 56, art. 1(a)(iii).

91. U.S. DEP’T OF ARMY, FIELD MANUAL 100-23, PEACE OPERATIONS 20 (30 Dec. 1994).

92. Lepper, *supra* note 78, at 389.

93. Safety Convention, *supra* note 56, art. 2(2).

The drafters intended to create a “clear separation” between the UN Safety Convention and the laws of war to allow one or the other bodies of law to cover UN and associated personnel at all times. The drafters, did not intend for both bodies of law to apply at the same time.⁹⁵ The problem is that the Geneva Conventions set the threshold for applying the laws of war at a deliberately low, subjective threshold to maximize their application.⁹⁶ One observer called this provision the “fatal flaw” in the UN Safety Convention.⁹⁷

From one perspective, the Convention fails to maximize the protections afforded to UN and associated personnel because enemy forces can subjectively assess whether the operation has triggered the laws of war. For example, such a determination would have allowed the Somalis to invoke the Geneva Convention Relative to the Treatment of Prisoners of War as legal authority to detain Michael Durant. On the other hand, the American Bar Association (ABA) concluded “it is asking too much for a Somali clan warrior or Bosnian militiaman to know whether or not he is becoming an international criminal by firing at UN troops or aircraft.”⁹⁸ The ABA supported ratification of the Convention subject to the understanding that either a Chapter VI⁹⁹ (of the UN Charter) or Chapter VII (of the UN Charter) operation could rise to the level of an international armed conflict.¹⁰⁰

Regardless of your personal opinion about where your deployment is classified along the spectrum of conflict, this issue requires coordination through technical channels.

Whether the Convention protects the soldiers of your task force is a policy matter as well as a legal matter, and should be coordinated appropriately. Operational law attorneys should understand the Convention and explain its application to the soldiers who are affected by its provisions.

Foreseeable Impacts

As it becomes a binding treaty, the United Nations Convention on the Safety of United Nations and Associated Personnel will not immediately reshape United States operations. The Senate will probably debate the Convention during the 106th Congress prior to giving its advice and consent. Other than spawning debate over the wisdom of deploying in support of UN mandates, the Convention will likely gain broad bipartisan support in the Senate. Senate approval of the Convention will require implementing legislation that could, in turn, require some changes to the *Manual for Courts-Martial*. Judge advocates should monitor the debate and implement any necessary changes.

On a more immediate note, the Convention contains some language that affects current operations. Article 3 requires military and civilian components of a UN operation to “bear distinctive insignia.”¹⁰¹ It further requires associated personnel to “carry appropriate identification documents.”¹⁰² Judge Advocates may become involved in the obligation of states to “afford

94. Lepper, *supra* note 78, at 394. This line between protections of the Convention and those afforded by the law of war helps explain why the International Committee of the Red Cross (ICRC) is not included in the text. As a neutral humanitarian agency, the ICRC operates across the full spectrum of conflict, and thus is logically not linked to the United Nations operations by being included within the class of protected persons.

95. Bloom, *supra* note 79, at 625.

96. See FM 27-10, *supra* note 74, para. 8. See also U.S. v. Noriega, 808 F. Supp. 791, 795 (S.D. Fla. 1992)(stating that the law of war applies to “an incredibly broad spectrum of events” and citing the State Department policy that the international armed conflict threshold should be “construed liberally”).

97. Sharp, *supra* note 78, at 149. The Savings provisions of Article 20 do little to clarify the issue by stating:

Nothing in this Convention shall affect: The applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments in relation to the protection of United Nations operations and United Nations and associated personnel or the responsibility of such personnel to respect such law and standards.

Id. art. 20(a)

98. Michael D. Sandler, Chair, American Bar Association Section of International Law and Practice Standing Committee on World Order under Law Report to the House of Delegates, Safety of U.N. and Associated Personnel, 31 INT’L LAW. 195, 200 (1997).

99. General practice describes operations by reference to the sections of the United Nations Charter, which provides legal authority for the operation. Judge Advocates should be especially familiar with the provisions of Chapter VI, Pacific Settlement of Disputes (Articles 33-38) and Chapter VII, Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression (Articles 39-51). Chapter VI envisions a Security Council role in assisting parties to “any dispute likely to endanger the maintenance of international peace and security” as they strive to resolve conflicts through “peaceful means of their own choice.” U.N. CHARTER, chap. VI. Chapter VI does not specifically envision or authorize the deployment of military forces under UN authority to interpose themselves between hostile parties. The frequent use of military forces as peacekeepers, however, evolved as an extension of the UN’s desire to facilitate the “adjustment or settlement of international disputes or situations which might lead to a breach of the peace.” *Id.* Peacekeeping is an internationally accepted mode of managing conflicts and giving states a buffer to seek long term, peaceful resolutions. Because Peacekeeping was a compromise generated from the Security Council’s inability to use its Chapter VII enforcement powers, peacekeeping operations have become an inherent part of the UN’s strategy for resolving international disputes in the absence of more comprehensive and lethal collective security operations.

100. Sandler, *supra* note 98, at 203. The language of Article 2 rejected the ICRC contention that international armed conflicts by definition are waged between two states, and the United Nations can therefore never be involved in an international armed conflict because it is not a “state.” Lepper, *supra* note 78, at 402.

one another the greatest measure of assistance in connection with criminal proceedings set out in Article 9.”¹⁰³

Finally, Article 8 provides an additional legal basis for demanding the immediate release of any non-combatant personnel who are captured or detained by hostile parties. The Convention provides that “they shall not be subjected to interrogation and they shall be promptly released and returned to the UN or other appropriate authorities.”¹⁰⁴ During the hopefully brief period that United States personnel are unlawfully detained, they must be “treated in accordance with universally recognized standards of human rights and the principles and spirit of the Geneva Conventions of 1949.”¹⁰⁵ Importantly, unless they are deployed as combatants in an international armed conflict, United States personnel cannot lawfully be detained by any hostile forces.

Conclusion

The United Nations Convention on the Safety of United Nations and Associated Personnel is the latest multilateral effort to enforce international law through the punitive judicial systems of the nations of the world. Assuming that states fulfill their legal obligation to implement the Convention, the efforts of the UN on behalf of international peace and security should be enhanced. This is a win-win multilateral treaty that benefits individual soldiers as well as the entire international community. Major Newton.

Principle 5: Protecting the Force from Unlawful

101. Safety Convention, *supra* note 56, art. 3.

102. *Id.*

103. *Id.* art. 16.

104. *Id.* art. 8.

105. *Id.* Article 13 Convention Relative to the Treatment of Prisoners of War provides:

Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest. Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity. Measures of reprisal against prisoners of war are prohibited.

Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 13, 6 U.S.T. 3316, 75 U.N.T.S. 135.

106. See International and Operational Law Note, *When Does the Law of War Apply: Analysis of Department of Defense Policy on Application of the Law of War*, ARMY LAW., June 1998, at 17; International and Operational Law Note, *Principle 1: Military Necessity*, ARMY LAW., July 1998, at 72; International and Operational Law Note, *Principle 2: Distinction*, ARMY LAW., Aug. 1998, at 35; International and Operational Law Note, *Principle 3: Endeavor to Prevent or Minimize Harm to Civilians*, ARMY LAW., Oct. 1998, at 54 [hereinafter *Principle 3*]; International and Operational Law Note, *Principle 4: Preventing Unnecessary Suffering*, ARMY LAW., Nov. 1998, at 22.

107. See U.S. DEP’T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (10 July 1979). See also CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 5810.01, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (12 Aug. 1996).

108. See *infra* notes 117-21, and accompanying text.

Belligerents

The following note is the sixth in a series of practice notes¹⁰⁶ that discuss concepts of the law of war that might fall under the category of “principle” for purposes of the Department of Defense (DOD) Law of War Program.¹⁰⁷

The principle proposed in this note involves a law of war foundation for force protection measures used during Operations Other Than War. This principle is derived from various sources that grant a military force the right to defend itself against threats when in hostile areas. While the law of war is normally not associated with the “rights” of armed forces to defend themselves, this right is implied from virtually every explicit “limitation” in the law. This note deciphers the source of this implied right within the context of a force confronted with a hostile threat, not from an enemy armed force, but from some other hostile organization or individual.

This principle is derived from three primary sources. The first source is the law of war’s explicit recognition that a force may target civilians when they take part in hostilities against the force.¹⁰⁸ The second is the occupation prong of the law of war.¹⁰⁹ This source was intended to balance of the objective of protecting civilians under enemy occupation with the legitimate need of the occupying force to ensure its security against hostility from that population.¹¹⁰ The third source is the tradition of treating hostile acts by non-belligerents as a violation of the law of war.¹¹¹

All of these sources share the common theme of empowering an armed force to take measures necessary for its protection

in a hostile land. Today, these measures fall under the doctrinal umbrella of “force protection.”¹¹² This term, however, provides no source of the legal foundation for this conduct. One view suggests that the right of self-defense is inherent and implied in every military operation, regardless of the source of the threat.¹¹³ Assuming that this conclusion is accurate, or if there are other potential sources of authority for such measures,¹¹⁴ deriving a law of war foundation for such measures carries two potential benefits. First, it provides the commander, through his legal advisor, a familiar source of authority to rely upon when he is determining the appropriate means of force protection.¹¹⁵ Second, it provides some potentially valuable guidance for the commander on the level of necessity that is required to implement such measures.

Loss of Civilian Immunity

Perhaps the most fundamental issue related to force protection is when traditional non-combatants become the legitimate object of our lethality. Military practitioners should be familiar with current U.S. policy, in the form of the Standing Rules of Engagement,¹¹⁶ that obligates commanders to take defensive measures. These measures are based upon military necessity and tempered by proportionality. Practitioners may be unaware

that the law of war validates this approach. This validation comes in the form of Article 51 of Geneva Protocol I.¹¹⁷ Although entitled “Protection of the Civilian Population,”¹¹⁸ and considered by the Official Commentary to be “one of the most important articles in the Protocol,”¹¹⁹ Article 51 acknowledges the right of an armed force to treat “civilians” as legitimate targets *if, and for so long as*, “they take a direct part in hostilities.”¹²⁰ The Official Commentary further explains the legitimate nature of directing lethality against these individuals. While civilians are normally immune from attack, they forfeit this immunity whenever they take any action intended to cause actual harm to the personnel and equipment of an armed force.¹²¹ Thus, even during international armed conflict, the law of war acknowledges the absolute right of an armed force to use deadly force to protect itself from any threat. This right extends to a threat posed by persons who, but for their hostile act or intent, would be considered civilians.

Occupation Law

The Fourth Geneva Convention, which focuses on relations between armed forces and civilians, also acknowledges the right of a force to protect itself.¹²² This treaty, which is devoted exclusively to the protection of civilians during armed conflict

109. See Hague Convention No. IV Respecting the Laws and Customs of War on Land, 18 Oct. 1907, sec. III, 36 Stat. 2277, T.S. 539, *reprinted in* U.S. DEP’T OF ARMY PAM. 27-1, TREATIES GOVERNING LAND WARFARE (Dec. 1956) (discussing Military Authority Over the Territory of the Hostile State); Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, art. 2-3, 6 U.S.T. 3316, 75 U.N.T.S. 287, *reprinted in* U.S. DEP’T OF ARMY PAM. 27-1, TREATIES GOVERNING LAND WARFARE (Dec. 1956) [hereinafter GC]; 1977 Protocol I Additional to the Geneva Conventions, Dec. 12, 1977, art. 51(3), 16 I.L.M. 1391, [hereinafter GP I].

110. See A.P.V. Rogers, *LAW AND WAR SINCE 1945* (1996) (discussing the drafting history of the Fourth Geneva Convention).

111. See *infra* notes 130-38, and accompanying text.

112. See U.S. DEP’T OF DEFENSE JOINT PUBLICATION 1-02, DOD DICTIONARY (23 Mar. 1994) (Updated April 1997) (“Security program[s] designed to protect soldiers, civilian employees, family members, facilities, and equipment, in all locations and situations, accomplished through planned and integrated application of combating terrorism, physical security, operations security, personal protective services, and supported by intelligence, counterintelligence, and other security programs.”).

113. See INTERNATIONAL AND OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, JA-422, OPERATIONAL LAW HANDBOOK, ch. 9 (1998) [hereinafter OPERATIONAL LAW HANDBOOK] (discussing rules of engagement for United States forces); see also, CHAIRMAN, JOINT CHIEFS OF STAFF INSTRUCTION 3121.01, STANDING RULES OF ENGAGEMENT, app. A (1 Oct. 1994) [hereinafter STANDING RULES] (establishing the obligation of commanders of United States forces to use force to protect these forces from threats of hostilities when conducting military operations outside the territory of the United States).

114. For example, treating the right of force protection as derived from the national right of self-defense under Article 51 of the Charter of the United Nations.

115. See OPERATIONAL LAW HANDBOOK, *supra* note 113, at 11-16 (discussing the “law by analogy” method that is recommended for use during Military Operations Other Than War).

116. See STANDING RULES, *supra* note 113.

117. GPI, *supra* note 109.

118. *Id.* art. 51.

119. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 615 (YVES SANDOZ et al. eds., 1987) [hereinafter OFFICIAL COMMENTARY].

120. GPI, *supra* note 109, art 51(3). (providing a more extensive discussion of Article 51, including an analysis of the whether the United States is bound by it). See *Principle 3*, *supra* note 106.

121. See OFFICIAL COMMENTARY, *supra* note 119, at 618-19.

and occupation, contains 159 articles intended to implement such protections. As with Geneva Protocol I, in spite of this clear “civilian protection” focus, Article 5 of the Convention explicitly recognizes the right of an armed force to protect itself against hostile elements in the civilian community.¹²³ This Article ensures that enemy civilians cannot rely on the Convention’s extensive protection to shield themselves from the legitimate consequences of acts considered harmful to the friendly armed forces or state.¹²⁴ Thus, Article 5 permits derogation from the provisions of the Convention when state or occupying authorities definitely suspect that an individual, otherwise protected by the Convention, is engaged in activities hostile to the security of the state or occupying force.¹²⁵

According to Geoffrey Best, a distinguished law of war scholar, this was a major point of contention during the drafting of the Fourth Geneva Convention.¹²⁶ This contention arose between supporters of a “no derogation” position and the major Allied powers, who were administering occupied territories at the time the Convention was drafted. These powers, including the United States, rejected the “no derogation” position of the International Committee of the Red Cross.¹²⁷ The Allied powers were sympathetic to the concern that forces might use a derogation provision as a subterfuge to mistreat enemy civilians. They were, however, more focused on what they considered to be a critical need for an occupying force to retain the flexibility needed to deal with a hostile civilian population.¹²⁸ According to Geoffrey Best:

The other side of the coin from protection of civilians was protection of combatants. What powers did the Civilians Convention leave with or give to States to maintain their security and that of their armed forces against challenges from civilian, or seeming-civilian, sources? At first sight this may appear a contradiction in terms or a self-evident absurdity . . . By the time the Diplomatic Conference had finished dealing with it, however, the majority of the States

represented there had come to recognize that it really was a problem

The security-and order-maintaining parts of the Civilians Convention show how the Diplomatic Conference trod this tight-rope. They were the necessary counterpart to the civilian-protection parts, which otherwise and on their own must be considered pure fantasy

For the maintenance of security and of general order in occupied territory, the Civilians Convention prescribed, first, the continuance of the normal operations of the ordinary penal law of the land; and, second, to the extent that the functioning of that law should be undermined by its officials’ non-cooperation or should be in any case inadequate to meet the occupier’s security and military requirements, the enforcement of his own penal laws by his own military courts.¹²⁹

Concerns for the security of the force ultimately prevailed, with Article 5 as the most obvious manifestation of that result. Thus, the law of war explicitly acknowledged the right of an armed force to take measures necessary to protect itself from hostile civilian actors even when such civilians qualified as “protected persons” under enemy occupation.

Prohibition Against Unlawful Belligerents

The final source of support for the proposition that the law of war includes a “force protection” principle is derived from the traditional prohibition against “unlawful belligerents.” During past conflicts, states have used this prohibition as the basis to prosecute and punish enemy nationals, not qualifying as members of the enemy armed forces, who attempted to take or took hostile acts against the state or its armed forces.¹³⁰ The classic example of an “unlawful belligerent” is the enemy saboteur who, without qualifying for status as a combatant, infiltrates friendly areas with intent to cause harm to the force.

122. See GC, *supra* note 109.

123. See GC, *supra* note 109, art. 5. This acknowledgment is entitled “Derogations.”

124. COMMENTARY ON THE FOURTH GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, 52-53 (JEAN S. PICTET *et al.* eds., 1958).

125. See GC, *supra* note 109 art. 5.

126. GEOFFREY BEST, WAR AND LAW SINCE 1945, 123 (1994).

127. *Id.* at 123-24.

128. *Id.*

129. *Id.* at 123-25.

130. See 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 312 (2d ed. 1912).

International law has long recognized the right of a state to punish these individuals as unlawful belligerents. According to Oppenheim:

Since international law is a law between States only and exclusively, no rules of International Law can exist which prohibit private individuals from taking up arms and committing hostilities against the enemy. But private individuals committing such acts do not enjoy the privileges of members of the armed forces, and the enemy has according to a customary rule of International Law the right to consider and punish such individuals as war criminals.¹³¹

Oppenheim's statement is significant for several reasons. First, although the nature of warfare has changed significantly since Oppenheim made this statement in 1912, the basic premise seems to remain sound (that individuals who commit hostile acts without meeting the criteria necessary for gaining combatant status are not entitled to any combatant immunity upon capture.¹³² Second, the term "war crime" as used by Oppenheim, has a broader meaning than is normally associated with the term today. It encompasses any conduct that subjects the perpetrator to legitimate punishment by the enemy upon capture.¹³³ Third, and most significant for this analysis, is the fundamental premise contained in Oppenheim's quote (that the need for force security allows a state to punish civilians who commit acts hostile to the force.

One of the most dramatic historic examples of the legitimacy of this premise comes from our own Supreme Court. In 1942, the legality of trying and punishing individuals as "unlawful combatants" was "put to the test" when President Roosevelt convened a military commission to try seven Nazi operatives who had been captured in the U.S. with plans to commit acts of sabotage against our war industry.¹³⁴ These individuals, including one U.S. citizen, had been trained in Germany as saboteurs. They landed on Long Island and in Florida for their missions. Upon landing, they discarded any uniform items and attempted to blend into society as civilians. Federal

Bureau of Investigation agents captured these individuals and, at the direction of the President, turned them over to the Provost Marshall for the Military District of Washington for a trial before a military commission. Among the offenses military authorities charged them with was the crime of "unlawful belligerency."¹³⁵

In denying writs of *habeas corpus* for the prisoners, the Supreme Court concluded that unlawful belligerency was a valid charge under the law of war. According to the Court:

By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful population of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.¹³⁶

For the individuals involved in this case, the result of this decision was execution.¹³⁷

The purpose of this discussion of the offense of "unlawful belligerency" under the law of war is not to suggest that during future Operations Other Than War U.S. commanders should plan to convene military commissions to punish individuals hostile to the force. In fact, whether these commissions are viable options for use during such operations is unknown.¹³⁸ Assuming these commissions are viable options, the absence of armed conflict during Operations Other Than War likely deprives them of their jurisdiction to try specific offenses. Rather, the discussion of "unlawful belligerency" reinforces the notion that armed forces can take measures necessary to protect themselves from hostile civilians.

These three sources of authority all point to one undeniable conclusion: when justified by military necessity, the law of

131. *Id.*

132. In fact, this point seems validated by the existence in Geneva Protocol I of a rule intended to provide minimum humane treatment protections for individuals falling into this category and pending punishment by a belligerent. *See* GP I, *supra* note 109, art. 45(3).

133. *See* OPPENHEIM, *supra* note 130, at 309.

134. *Ex Parte Quirin*, 317 U.S. 1 (1942).

135. *Id.*

136. *Id.* at 30-31.

137. *See The Milligan Decision*, 11 THE Q. J. OF MIL. HIST., Winter 1999, at 44.

138. *See* Major Michael A. Newton, *Continuum Crimes: Military Jurisdiction over Foreign Nationals Who Commit International Crimes*, 153 MIL. L. REV. 1 (1996) (containing an in-depth analysis of the viability of using military commissions during Operations Other Than War).

war empowers military forces to do what is required to protect themselves from hostile civilians. Justifiable measures range from temporary detention to targeting these individuals, depending on the exact nature of the threat posed to the force. Treating this authority as a “principle” of the law of war provides a solid legal foundation for force protection measures

imposed by U.S. commanders during non-conflict operations. Additionally, it reinforces the Standing Rules of Engagement: that U.S. forces never have to wait until they take casualties before they do what is needed to defend themselves. Major Corn.