

# AN UNNECESSARY CONVENIENCE: THE ASSERTION OF THE UNIFORM CODE OF MILITARY JUSTICE (“UCMJ”) OVER CIVILIANS AND THE IMPLICATIONS OF INTERNATIONAL HUMAN RIGHTS LAW

*Dan E. Stigall\**

## TABLE OF CONTENTS

I. INTRODUCTION .....	60	R
II. A BRIEF OVERVIEW OF THE MILITARY JUSTICE SYSTEM .....	61	R
III. CIVILIANS AND MILITARY JURISDICTION .....	68	R
IV. APPLICABLE INTERNATIONAL HUMAN RIGHTS LAW ..	73	R
A. The International Covenant on Civil and Political Rights .....	75	R
B. The ICCPR and Due Process .....	77	R
C. International Human Rights Law and Military Jurisdiction Over Civilians .....	77	R
V. DOES THE TRIAL OF CIVILIANS UNDER THE UCMJ COMPORT WITH INTERNATIONAL LAW? .....	82	R
A. The Capacity of Regular Civilian Courts in the United States .....	82	R
B. The Availability of Other Alternative Forms of Special or High-Security Courts .....	83	R
C. The Necessity of Recourse to Military Courts ....	83	R
D. The Protections Afforded the Accused in Military Courts .....	84	R
E. The Principle of Equality.....	87	R
VI. DIFFERENT APPROACHES, INTERPRETATIONS, AND EXPERIENCES .....	88	R
A. The Experience of the United Kingdom before the ECtHR .....	90	R

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\* U.S. Army Judge Advocate (JAG). J.D., 2000, Louisiana State University Paul M. Hebert Law Center; B.A., 1996, Louisiana State University. Any opinion expressed in this Article is solely that of the author and not necessarily the Department of Defense. The author wishes to express his thanks to Professor Edward T. Swaine for his patience, guidance, and advice. In addition, the author wishes to thank Colonel Dom McAlea, Office of the Judge Advocate General, Canadian Armed Forces, and LTC Chris Jenks, U.S. Army JAG Corps, for their spirited and insightful discussions of this matter.

B. The ECtHR, the Human Rights Committee, and an Emerging Norm .....	92	R
VII. THE ISSUE OF EXTRATERRITORIALITY .....	94	R
VIII. CONCLUSION .....	96	R

“Something radical has begun in Iraq . . .”<sup>1</sup>

I. INTRODUCTION

Section 552 of Public Law 109-364 is merely a single sentence buried in over 400 pages of complex legislation.<sup>2</sup> Amidst the legislation’s multitudinous provisions, under the title “CLARIFICATION OF APPLICATION OF UNIFORM CODE OF MILITARY JUSTICE DURING A TIME OF WAR,” it provides that “[p]aragraph (10) of *section 802(a) of title 10, United States Code* (article 2(a) of the Uniform Code of Military Justice), is amended by striking ‘war’ and inserting ‘declared war or a contingency operation.’”<sup>3</sup> The language, both terse and seemingly insignificant, is unaccompanied by legislative history or background information.<sup>4</sup> Nonetheless, it marks both a dramatic increase in the authority given to military commanders to prosecute civilians and a marked shift in U.S. criminal law.

Recently, a civilian contractor and Canadian citizen named Alaa (“Alex”) Mohammad Ali pleaded guilty before a military court to wrongfully taking a U.S. soldier’s knife, obstruction of justice, and lying to investigators. Though convicted of relatively minor offenses, he had originally been charged with aggravated assault—a more serious charge that was dropped in accordance with his guilty plea.<sup>5</sup> Without an indictment by a grand jury, this civilian

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<sup>1</sup> Geoffrey S. Corn, *Battlefield Accountability for Contractors: At What Cost?*, WORLD POLITICS REV., Apr. 4, 2008, <http://www.worldpoliticsreview.com/article.aspx?id=1893>.

<sup>2</sup> See Peter W. Singer, *Frequently Asked Questions on the UCMJ Changes and Its Applicability to Private Military Contractors*, BROOKINGS INSTITUTION, Jan. 12, 2007, <http://brookings.edu/views/op-ed/psinger/20070112.htm> (“The law was a very small change inside a big bill, that was on another issue. That is, the wording was section 552 in a bill that had over 3000 sections and only contained an addition of 5 new words to the law. It also didn’t scream out its implications for contractors in the title of the section.”).

<sup>3</sup> See Pub. L. No. 109-364; 120 Stat. 2083, 2217; 109 Enacted H.R. 5122, 109th Cong. (2007).

<sup>4</sup> See Geoffrey S. Corn, *Bringing Discipline to the Civilianization of the Battlefield: A Proposal for a More Legitimate Approach to Resurrecting Military-Criminal Jurisdiction over Civilian Augmentees*, 62 U. MIAMI L. REV. 491, 496 (2008).

<sup>5</sup> See *Iraqi-Canadian Contractor Convicted in U.S. Military Court*, CBCNEWS.CA, June 23, 2008, <http://www.cbc.ca/world/story/2008/06/23/iraq-contractor.html?ref=rss>.

faced the possibility of a trial by a military court. In such a forum his jury would consist of a military panel, which was hand-selected by a military officer. His judge would be a military judge who has spent his or her entire career serving as a military officer.<sup>6</sup> Such a trial was possible due to the recent amendment to Article 2 of the Uniform Code of Military Justice, which allows military commanders to assert jurisdiction over any person “accompanying the armed force” and “in a time of a declared war or a contingency operation”—an expansive grant of jurisdiction that allows military commanders to subject civilians to the military justice system.

The prospect of submitting a civilian to a system of justice maintained, administered, and designed for military personnel raises a host of legal concerns at the domestic level. It also invokes concerns in international human rights law. This Article briefly examines the nature of military jurisdiction and the military justice system and how that parallel legal universe compares to its civilian counterpart. It then examines the obligations of the United States under the International Covenant for Civil and Political Rights (ICCPR), the application of that treaty to the exercise of military jurisdiction over civilians, and relevant jurisprudence regarding parallel provisions in the European Convention on Human Rights. Ultimately, this article posits that the assertion of military jurisdiction over civilians violates the obligations of the United States under the ICCPR, which restricts the use of military trials for civilians and requires that such trials be not merely fair, but absolutely necessary. Even if there are strong policy arguments favoring such a practice in certain circumstances, until further action is taken at the international level, the availability of federal civilian jurisdiction under the Military Extraterritorial Jurisdiction Act makes the use of military jurisdiction over civilians an unnecessary convenience that military commanders—at the present time—should seek to avoid.

## II. A BRIEF OVERVIEW OF THE MILITARY JUSTICE SYSTEM

A key aspect of any military operation is the maintenance of order and discipline of the deployed force.<sup>7</sup> Such order and disci-

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<sup>6</sup> See Corn, *supra* note 1.

<sup>7</sup> See Lieutenant Colonel James B. Roan & Captain Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. REV. 185, 189 (2002) (citing ROBINSON O. EVERETT, *MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES* 4 (The Telegraph Press 1956)) (“Military operations in modern war demand split

pline has been traditionally maintained over troops through the military justice system. Under this legal regime, military commanders hold the authority to direct preliminary investigations into misconduct, evaluate the results of the investigation, dispose of cases, bring criminal charges, select a jury (known as a “panel”) to hear those cases, and even make the final decision to enforce the trial’s results.<sup>8</sup>

The military justice system exists as a parallel system of justice that operates separately from ordinary U.S. federal and state criminal systems.<sup>9</sup> It uses its own separate laws and procedures that are designed “to promote justice, to assist in maintaining good order and discipline in the Armed Forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”<sup>10</sup> The Supreme Court of the United States has recognized the need for such separate laws and procedures in the military context because the military is “a specialized society separate from civilian society.”<sup>11</sup> As the Court has noted, “Just as military society has been a society apart from civilian society, so ‘military law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.’”<sup>12</sup>

There are two principal instruments that form the core of the military justice system: the Uniform Code of Military Justice and the Manual for Courts-Martial (MCM).<sup>13</sup> Congress implemented the Uniform Code of Military Justice (UCMJ) in 1950 in an attempt to rectify perceived inequalities among the military justice systems of the various Armed Forces and create, as the name im-

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second decisions—decisions that cannot be arrived at through the procedure of a debating society. In many military situations someone individual must be in a position to make choices for a group and have his decision enforced. For this reason, the armed services have a system of rank and of command which is designed clearly to place one person in charge when a group action must be decided upon. Of course, for American civilians, and those of many other lands for that matter, it is difficult to acquire habits of instantaneous obedience to another person’s decisions. Military justice provides a stimulus to cultivate such habits by posing the threat that disobedience of commands will be penalized.”).

<sup>8</sup> Roan & Buxton, *supra* note 7, at 192.

<sup>9</sup> *Id.* at 186.

<sup>10</sup> See MANUAL FOR CTS.-MARSHAL PART 1, PREAMBLE 3 (2008).

<sup>11</sup> Parker v. Levy, 417 U.S. 733, 743 (1974).

<sup>12</sup> *Id.* See also Burns v. Wilson, 346 U.S. 137, 140 (1953).

<sup>13</sup> Roan & Buxton, *supra* note 7, at 192. See also CHARLES A. SHANOR & LYNN HOGUE, NATIONAL SECURITY AND MILITARY LAW 231 (2003).

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plies, a more uniform schema. The UCMJ, therefore, established one common system of justice for all five Armed Forces.<sup>14</sup>

The Executive Branch has implemented the UCMJ in a series of “executive orders that comprise the Manual for Courts-Martial (MCM) . . . [T]he MCM includes procedural and evidentiary rules for courts-martial, guidance on the punitive articles and procedures regarding non-judicial punishment.”<sup>15</sup> It consists of a Preamble, the Rules for Courts-Martial, the Military Rules of Evidence, the Punitive Articles, and Nonjudicial Punishment Procedures.<sup>16</sup>

In spite of their distinct nature, these rules offer a generous amount of legal protection and, for the most part, ensure that the military accused has the same level of constitutional protection as his or her counterpart in a civilian court.<sup>17</sup> Professor Christopher Behan notes that the “modern court-martial has been extensively civilianized” and now “closely resembles trial in federal district court.”<sup>18</sup> The trial, which is adversarial in nature, is presided over by a military judge who rules on evidentiary matters and instructs the panel. The accused is represented by counsel (who can be either civilian or military) and is considered innocent until proven guilty. Further, the government must prove the accused’s guilt beyond a reasonable doubt.<sup>19</sup>

The accused in a court-martial enjoys due process rights that are similar to the fundamental rights the Court recognized in the *Consular and Insular* cases. He has the right to assistance of counsel at all levels of court-martial except the summary court, to be informed of the charges against him, to a speedy trial, to compulsory process of witnesses and evidence, to the privilege against self-incrimination, and he has extensive appellate rights. In short, the UCMJ ensures that a military accused receives due process of law before a competent and impartial tribunal. When placed into its proper context as a legislative court formed in furtherance of a constitutionally enumerated congressional power, the statutory grant of due process in a court-martial com-

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<sup>14</sup> *Id.* See also James Schwenk, *Military Justice and the Media: The Media Interview*, 12 U.S. A.F. ACAD. J. LEGAL STUD. 15, 16 (2002).

<sup>15</sup> *Id.*

<sup>16</sup> See MANUAL FOR CTS.-MARTIAL [hereinafter MCM], Part I (4).

<sup>17</sup> See Major General Jack L. Rives & Major Steven J. Ehlenbeck, *Civilian Versus Military Justice in the United States: A Comparative Analysis*, 52 A.F. L. REV. 213 (2002).

<sup>18</sup> See Christopher W. Behan, *Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Members*, 176 MIL. L. REV. 190, 192-93 (2003).

<sup>19</sup> *Id.*

pares quite favorably with what a criminal accused can demand as a matter of right in the other legislative courts.<sup>20</sup>

Nonetheless, notable differences remain. For instance, where searches and search authorizations are concerned, Fourth Amendment protections differ markedly under military law. A commander may issue a search authorization that serves the same purpose as a warrant.<sup>21</sup> Commanders may also order general inspections without probable cause and without the specificity required for a typical warrant. Military commanders issuing such search authorizations need not be judicial officers and their search authorizations need not be in writing nor supported by oath or affirmation.<sup>22</sup> There is no equivalent to such power in the civilian justice system.

In addition, the right to a grand jury, ensured for civilians under the Fifth Amendment's Grand Jury provision, does not apply in the military justice system.<sup>23</sup> Rather, persons subject to the UCMJ who are accused of offenses to be tried at a General Court-Martial are entitled to an adversarial hearing before a single military officer who performs roughly the same function as a grand jury.<sup>24</sup> This is known as an "Article 32" hearing. Unlike a grand jury's refusal to indict, a recommendation against prosecution by the officer who conducts the Article 32 investigation will not preclude trial by court-martial—though the recommendation is given heavy consideration.<sup>25</sup> The Article 32 investigation, therefore, is more adversarial in nature than a grand jury but does not provide the same sort of "firewall" as a grand jury.

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<sup>20</sup> *Id.* at 241.

<sup>21</sup> See *United States v. Stringer*, 37 M.J. 120, 126 (C.M.A. 1993) ("We note that only the Warrant Clause of the Fourth Amendment expressly requires some sort of writing. However . . . a commander's power to authorize searches is independent of the Warrant Clause of the Fourth Amendment. [Therefore] a military commander may authorize a search based on information that is not necessarily supported by Oath or affirmation. Similarly, since the commander's gate-inspection authorization is not a warrant, the Warrant Clause does not require that it be in writing.") (internal quotes and citations omitted).

<sup>22</sup> See, e.g., *United States v. Lopez*, 35 M.J. 35, 45 (C.M.A. 1992).

<sup>23</sup> See *United States v. Curtis*, 44 M.J. 106, 130 (1996) ("[A] court-martial has never been subject to the jury-trial demands of Article III of the Constitution."); see also *United States v. Gray*, 37 M.J. 751, 755 (A.C.M.R. 1993) (citing *Ex Parte Quirin*, 317 U.S. 1 (1942)).

<sup>24</sup> See Lieutenant Colonel Theodore Essex & Major Leslea Pickle, *A Reply to the Cox Commission on the 50th Anniversary of the Uniform Code of Military Justice*, 52 A.F.L. REV. 233, 250-51 (2002)

<sup>25</sup> *United States v. Schaffer*, 12 M.J. 425, 429 (C.M.A. 1982).

Further, the jurors in a court-martial (referred to as “members”) are not selected randomly, but are instead selected by the “convening authority”—a military commander vested with the authority to convene courts-martial.<sup>26</sup> A convening authority must personally select the best qualified panel members based on the following criteria: age, education, experience, training, length of service, and judicial temperament.<sup>27</sup> This distinctive aspect of the court-martial is often the subject of ridicule as it does not satisfy the Sixth Amendment of the U.S. Constitution, which states that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”<sup>28</sup> As one professor at the Judge Advocate General’s Legal Center and School has noted, “Scholars and military critics debate whether this selection power, combined with a convening authority’s ability to refer a case to court-martial and to grant post-trial clemency, is too encompassing. While these challengers exist, [the method of selecting military panel members] remains untouched by Congress.”<sup>29</sup>

Another rather dramatic difference is the broad range of conduct that is criminalized under the UCMJ. A host of acts are criminalized in the military system because they adversely affect the functioning of a military unit. Examples of such crimes are failure to follow orders, and absence offenses (such as AWOL and desertion).<sup>30</sup> The prime example of the great degree to which conduct may be criminalized in the military is Article 134, which enumerates criminal offenses such as adultery,<sup>31</sup> making disloyal statements,<sup>32</sup> gambling with a subordinate,<sup>33</sup> and even using indecent language.<sup>34</sup> An even more flexible tool in the hands of the military prosecutor is the provision in Article 134, known as the “General Article,” which provides:

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<sup>26</sup> See UNIFORM CODE FOR MILITARY JUSTICE [hereinafter UCMJ], art. 25 (2000); RULE FOR COURT-MARTIAL [hereinafter RCM] 1301(b).

<sup>27</sup> See UCMJ, art. 25.

<sup>28</sup> U.S. CONST. amend. VI.

<sup>29</sup> See Major Deidra J. Fleming, *Out, Damned Error Out, I Say! The Year in Court-Martial Personnel, Voir Dire and Challenges, and Pleas and Pretrial Agreements*, 2005 ARMY LAW. 45, 46.

<sup>30</sup> David A. Melson, *Military Jurisdiction Over Civilian Contractors: A Historical Overview*, 52 NAVAL L. REV. 277, 317 (2005).

<sup>31</sup> See UCMJ, art. 134, ¶ 62.

<sup>32</sup> *Id.*, ¶ 72.

<sup>33</sup> *Id.*, ¶ 84.

<sup>34</sup> *Id.*, ¶ 89.

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the Armed Forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.<sup>35</sup>

The effect of this article is the criminalization a broad range of otherwise unspecified conduct such as cross-dressing,<sup>36</sup> consensual sex in the presence of a third party,<sup>37</sup> and secretly videotaping one's spouse during sexual activity.<sup>38</sup> Such conduct—even if salacious—is not necessarily criminal for civilians and, therefore, marks a departure from the civilian criminal justice system.

It is worth noting that the military's regime of "morality crime" is not generally the focus of military justice and its application is somewhat uneven within the Armed Forces.<sup>39</sup> Nonetheless, prosecutions for such crimes are certainly not infrequent,<sup>40</sup> nor are

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<sup>35</sup> *Id.*, ¶ 60.

<sup>36</sup> See *United States v. Davis*, 26 M.J. 445 (C.M.A. 1988) (male service member convicted for, at various times, wearing female clothing in and around the Puget Sound Naval Shipyard, specifically for wearing a skirt, nylon stockings, a blouse, and a wig outside the Bachelor Enlisted Quarters of the shipyard; he also appeared at the shipyard's Motion Picture Exchange in female clothing, including a woman's slacks, blouse, coat, and bra).

<sup>37</sup> See *United States v. Carr*, 28 M.J. 661, 663 (N-M.C.M.R. 1989) ("An act of sexual intercourse falls within the ambit of the UCMJ when the participants know that a third person is present. Whether the third person is a willing viewer or a startled passer-by is irrelevant—the knowing presence of another is sufficient to remove the act from the constitutionally protected realm of private conduct.") See also Major Kelly L. McGovern, *Military Members Posing in Sexually Explicit Pictures*, 2008 *ARMY LAW*. 23 ("For servicemembers serving in the Continental United States or in other areas of the world, a commander may charge a Soldier for violating Article 120, of the UCMJ for indecent exposure. If a service member intentionally exposes his or her genitalia, anus, buttocks, or female areola or nipple, in an indecent manner, in any place where the conduct involved may reasonably be expected to be viewed by people other than the servicemember's family or household, then the servicemember violated Article 120 and may be found guilty of indecent exposure. Although the UCMJ does not specifically prohibit making sexually explicit photos for public viewing, it can be argued that the elements of the offense include posing nude for pictures with the intent that those photographs will be made public.").

<sup>38</sup> See *United States v. Raymer*, NMCCA 200401858, 2006 CCA LEXIS 69 (N-M.C.C.A. Mar. 30, 2006).

<sup>39</sup> See Frank Bruni, *Adultery Alone Often Fails to Prompt a Military Prosecution*, N.Y. TIMES, Dec. 13, 1998, available at <http://query.nytimes.com/gst/fullpage.html?res=9C06E1D91F3AF930A25751C1A96E958260>.

<sup>40</sup> See C. Quince Hopkins, *Rank Matters But Should Marriage?: Adultery, Fraternalization, and Honor in the Military*, 9 UCLA WOMEN'S L.J. 177, 204 (1999).

military commanders prohibited from pursuing minor infractions. For instance, as recently as 2002, the Court of Appeals for the Armed Forces—the highest military appellate court—considered the case of a servicemember against whom criminal charges were brought for, among other things, touching a female servicemember’s breasts when she lifted her shirt while they were both in the accused’s bedroom with the door closed, but unlocked, during a party.<sup>41</sup> The Court in this case found that this act of consensual boy-girl fondling did not constitute a crime, but termed it a “close case.”<sup>42</sup>

Whether or not military commanders will be inclined to subject civilians to this regime of law—and to what degree—is difficult to predict. There is nothing in the new amendment to the UCMJ that limits the range of crimes for which civilians can be prosecuted. Commentators note that, because there is no legislative history or other background information for this amendment, it is unclear how far it might reach.<sup>43</sup> As civilians become more integrated into military operations, their conduct can have similar disruptive and service-discrediting effects as that of their uniformed counterparts. Thus, should a civilian’s adultery, sexual behavior, or public comments invoke the ire of a military commander, such a prosecution is possible and, arguably, foreseeable.

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In the past five years, the Air Force, Army, Navy, and Marine Corps have court-martialed 900 men and women for charges that include adultery. In addition, the numbers of such prosecutions are growing within some branches of the service . . . Adultery-related prosecutions in the Air Force grew from 36 in 1990 to 67 in 1996.

*Id.* at 204. See also *News Hour: Fallen Star* (PBS television broadcast May 14, 1997), transcript available at [http://www.pbs.org/newshour/bb/military/jan-june97/flinn\\_5-14.html](http://www.pbs.org/newshour/bb/military/jan-june97/flinn_5-14.html) (noting the prosecution of 67 adultery cases in the airforce in 1997.).

<sup>41</sup> See *United States v. Sims*, 57 M.J. 419, 422 (C.A.A.F. 2002).

<sup>42</sup> *Id.* at 422 (noting, “In this case, the sexual touching was committed in a private bedroom, with the door closed but unlocked. This is a close case, because as in *Izquierdo*, there was a possibility that someone, in this case from the ongoing party, would enter through the closed but unlocked door and observe the sexual activity. However, this case is weaker than *Izquierdo* in two respects: (1) appellant was in his private bedroom, which gave him a greater expectation of privacy than a shared barracks room; and (2) neither party had disrobed. The act in question could have been terminated easily and quickly. Had anyone knocked, called out, or in any way signaled their entry into the room, AB could have quickly pulled her shirt down and covered herself.”).

<sup>43</sup> See Corn, *supra* note 4, at 496 (“Nor is the jurisdiction limited to the type of common-law offenses normally applicable to civilians. Instead, it subjects these civilians to every punitive article in the UCMJ, including offenses unique to the military such as disrespect toward superiors, disobedience of orders, absence without official leave, and desertion.”).

The military justice system is a parallel system of justice that gives members many of the same rights and privileges that are afforded to citizens who face prosecution in civilian courts, but which also maintains notable differences from the procedures and rights afforded in an ordinary civilian trial. While maintaining an overall level of fairness, its differing requirements for a valid search, its lack of a grand jury, its hand-selected panel, and the broad range of criminalized conduct make the military justice system a strikingly different forum than that to which civilians are subjected under U.S. criminal law.

### III. CIVILIANS AND MILITARY JURISDICTION

The Global War on Terrorism has resulted in the large-scale deployment of U.S. military forces abroad. A modern concomitant to the large number of troops is the deployment of large numbers of civilian contractors who work in support of the military. A census by the U.S. military has estimated the number of U.S. government contractors in Iraq to be near 100,000.<sup>44</sup> This number is ten times the estimated number of contractors that deployed during the first Persian Gulf War in 1991, reflecting a growing reliance by the U.S. military on contractors for basic functions such as construction, security, interrogating prisoners, providing meals, and repairing equipment.<sup>45</sup>

Since the middle of the twentieth century, however, the jurisdiction of military commanders has extended only to those serving in the Armed Forces and not civilian personnel.<sup>46</sup> As the Supreme Court noted in *Reid v. Covert*:

Under the grand design of the Constitution civilian courts are the normal repositories of power to try persons charged with crimes against the United States. And to protect persons brought before these courts, Article III and the Fifth, Sixth, and Eighth Amendments establish the right to trial by jury, to indictment by a grand jury and a number of other specific safeguards. By way of contrast the jurisdiction of military tribunals is a very

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<sup>44</sup> See Renae Merle, *Census Counts 100,000 Contractors in Iraq*, WASH. POST, Dec. 5, 2006 available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/04/AR2006120401311.html> ("There are about 100,000 government contractors operating in Iraq, not counting subcontractors, a total that is approaching the size of the U.S. military force there, according to the military's first census of the growing population of civilians operating in the battlefield.").

<sup>45</sup> *Id.*

<sup>46</sup> Melson, *supra* note 30.

limited and extraordinary jurisdiction derived from the cryptic language in Art. I, § 8, and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections.<sup>47</sup>

The Court found that the jurisdiction of military courts is a very limited and extraordinary jurisdiction derived from the cryptic language in Article I, § 8 of the U.S. Constitution, and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. The Court, therefore, held that the UCMJ could not be constitutionally applied to a civilian dependent.<sup>48</sup>

Given the territorial limits of much U.S. criminal law, the lack of military jurisdiction often means a lack of U.S. jurisdiction in instances where a civilian commits a crime overseas. Likewise, the immunity granted to civilian contractors under Status of Forces Agreements and other treaties can mean a lack of jurisdiction by the country where the crime occurred.<sup>49</sup> A lack of interest on the part of the host nation can also result in *de facto* immunity for wrongdoers abroad in situations where host nations are unwilling to prosecute.<sup>50</sup> This jurisdictional gap, depriving military commanders of jurisdiction over civilians within their respective areas of operation, has been an enduring source of frustration for victims seeking justice as well as military commanders seeking to maintain order.

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<sup>47</sup> See *Reid v. Covert*, 354 U.S. 1, 20 (1957).

<sup>48</sup> *Id.* at 21.

<sup>49</sup> See K. Elizabeth Waits, *Avoiding the "Legal Bermuda Triangle": The Military Extraterritorial Jurisdiction Act's Unprecedented Expansion of U.S. Criminal Jurisdiction over Foreign Nationals*, 23 ARIZ. J. INT'L & COMP. L. 493, 494 (2006); see also Coalition Provisional Authority, Order No. 17 (Revised): Status of the Coalition Provisional Authority, MNF—Iraq, Certain Missions and Personnel in Iraq 4 (2004), [http://www.iraqcoalition.org/regulations/20040627\\_CPAORD\\_17\\_Status\\_of\\_Coalition\\_Rev\\_with\\_Annex\\_A.pdf](http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf).

<sup>50</sup> See Waits, 23 ARIZ. J. INT'L & COMP. L. 493 at 511 ("Additionally, host nations are often unable or unwilling to exercise criminal jurisdiction. Consequently, many crimes continue to go unpunished by foreign authorities, as well. Each year, numerous incidents of rape, sexual abuse, aggravated assault, arson, robbery, drug distribution, and a variety of fraud and property crimes committed by American civilians overseas go unpunished due to the host nation's waiver of jurisdiction over these crimes. Surprisingly, most host nations do not wish to assert their jurisdiction to try American civilians in their countries.").

To remedy this problem and the legal void that existed, Congress passed the Military Extraterritorial Jurisdiction Act (MEJA) in 2000. This legislation amended extended criminal jurisdiction to cover both U.S. and foreign civilians who commit criminal acts while employed by or accompanying the Armed Forces outside the United States.

The terms “employed by” and “accompanying” are specifically defined by the statute. Persons “employed by” the Armed Forces include civilian employees of Department of Defense (DOD), DOD contractors or subcontractors, and employees of either contractors or subcontractors. Persons “accompanying” the Armed Forces include the dependents of those “employed by” the Armed Forces. The extraterritorial reach of this statute, thus, makes DOD employees and contractors, including foreign nationals, now subject to criminal prosecution in U.S. federal courts for crimes committed abroad.<sup>51</sup>

However bold a grant of jurisdiction MEJA may have been, the legislation clearly envisioned that the expansive grant of jurisdiction would be asserted by U.S. civilian courts. The section of MEJA dealing with the arrest of suspects, 18 U.S.C. § 3262, notes that

a person arrested [pursuant to MEJA] shall be delivered as soon as practicable to the custody of civilian law enforcement authorities of the United States for removal to the United States for judicial proceedings in relation to conduct referred to in such subsection unless such person has had charges brought against him or her under [the UCMJ] for such conduct.<sup>52</sup>

At the time of MEJA’s enactment, only members of the Armed Forces were subject to the UCMJ. Section 552 of Public Law 109-364 changed that.

Article 2 of the UCMJ enumerates the classifications of persons subject to military jurisdiction. Prior to the passage of Public Law 109-364, paragraph 10 read: “in time of war, persons serving with or accompanying an armed force in the field.” In *United States v. Averette*, the United States Court of Military Appeals held that the words “in time of war” meant a war formally declared by Congress.<sup>53</sup> The court in that case concluded that a civilian em-

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<sup>51</sup> *Id.* at 518.

<sup>52</sup> 18 U.S.C. § 3262(b) (2007).

<sup>53</sup> *United States v. Averette*, 19 C.M.A. 363, 365 (C.M.A. 1970).

ployee of an Army contractor in Vietnam was not subject to trial by court-martial.<sup>54</sup> Thus, the military could only exercise jurisdiction over civilians during a time of formally declared war. This holding has gone unchallenged in the succeeding decades and has been ramified in both military and civilian jurisprudence.<sup>55</sup>

The amended language of Article 2(a)(10) of the UCMJ now states that “in a time of a declared war or a contingency operation” persons serving with or accompanying an armed force in the field are subject to the UCMJ.<sup>56</sup> The new language obviates the requirement of a declaration of war by requiring only that the civilians be with the armed forces during a contingency operation. The effect of this is to expand the jurisdiction of the military over civilians working with the military.<sup>57</sup>

It is worth noting that this jurisdictional grant to the military under the amendment to Article 2 of the UCMJ greatly overlaps the jurisdictional grant given to federal civilian courts under MEJA. Any person charged with a crime while “accompanying the armed force” and “in a time of a declared war or a contingency operation” (per Article 2) largely falls within the same group as “civilians, both U.S. citizens and foreign nationals, who commit criminal acts while employed by or accompanying the Armed Forces outside the United States” (per MEJA). There are some minor spaces in the periphery where there is no overlap. For instance, MEJA does not apply to conduct that would constitute an offense punishable by imprisonment for less than a year,<sup>58</sup> nor does it apply to nationals or those who are “ordinarily resident” in the

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<sup>54</sup> See 19 C.M.A. 363, 41 C.M.R. 363 (Apr. 3, 1970), *petition for reconsideration denied* (Apr. 27, 1970).

<sup>55</sup> See, e.g., *Cole v. Laird*, 468 F.2d 829, 831 fn. 2 (5th Cir. 1972); *Robb v. United States*, 456 F.2d 768, 771 (Ct. Cl. 1972).

<sup>56</sup> The term “contingency operation” is defined in 10 U.S.C. § 101(a)(13) as a military operation that:

(A) Is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or (B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of this title, chapter 15 of this title, or any other provision of law during a war or during a national emergency declared by the President or Congress.

<sup>57</sup> See Katherine Jackson, *Not Quite A Civilian, Not Quite A Soldier: How Five Words Could Subject Civilian Contractors in Iraq and Afghanistan to Military Jurisdiction*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 255, 273-74 (2007).

<sup>58</sup> 18 U.S.C. § 3261(a) (2007).

host nation.<sup>59</sup> Minor offenders, nationals of the host nation, and expatriates, therefore, fall outside of MEJA's jurisdictional reach but not the revised Article 2. Nonetheless, on the whole, the jurisdictional grants are largely redundant. The amendment to Article 2 of the UCMJ, therefore, does not carve much new ground in extending jurisdiction over civilians abroad. Its novelty, rather, is that it makes civilians subject to the military justice system rather than the civilian criminal process. The question remains why the UCMJ was amended in light of the fact that criminal jurisdiction already existed over such persons. Through the darkness left by the absence of any legislative history, one may discern an answer in MEJA's failure to thrive. Commentators note that a major distinction between MEJA jurisdiction and UCMJ jurisdiction is the extant lack of clarity in how MEJA is to be applied and a certain reluctance on the part of civilian law enforcement agencies to do so.<sup>60</sup> The amendment to the UCMJ was designed, in part, to remedy that and provide a clear method of asserting jurisdiction extraterritorially.<sup>61</sup>

On March 10, 2008, U.S. Secretary of Defense Robert Gates issued a memorandum containing guidelines on how this authority is to be exercised by military commanders. In the memorandum, Secretary Gates noted that, when offenses have been committed by civilians who violate U.S. law, the Department of Justice (DOJ) will be notified and afforded "the opportunity to pursue its prosecution of the case in federal district court."<sup>62</sup>

While the DOJ notification and decision process is pending, commanders and military criminal investigators should continue to address the alleged crime. Commanders should ensure that any preliminary military justice procedures that would be required in support of the exercise of UCMJ jurisdiction over civilians continue to be accomplished during the concurrent DOJ notification process. Commanders should be prepared to act, as appropriate, should possible U.S. federal criminal jurisdiction prove to be unavailable to address the alleged criminal behavior.<sup>63</sup>

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<sup>59</sup> 18 U.S.C. § 3267(c) (2007).

<sup>60</sup> Melson, *supra* note 30.

<sup>61</sup> Singer, *supra* note 2.

<sup>62</sup> See Memorandum from Secretary Robert Gates (Mar. 10, 2008), available at <http://fas.org/sgp/othergov/dod/gates-ucmj.pdf>.

<sup>63</sup> *Id.*

Otherwise stated, federal civilian courts will be notified and will have the opportunity to assert their jurisdiction pursuant to MEJA. In the meantime, however, the court-martial process will be gearing up so that the military justice system can take over in the event civilian law enforcement agencies fail to act.

Another difference in MEJA jurisdiction and UCMJ jurisdiction is that MEJA criminalizes only “traditional offenses” rather than the host of “military offenses” described above.<sup>64</sup> Thus, vice-ridden civilian employees (those who are vulgar, adulterous, orgy-frequenting, and have a gambling problem) or civilians who engage in cross-dressing after hours, will still be safe from criminal prosecution under MEJA but will quickly find themselves caught in a web of criminality under the UCMJ—a web of criminality that does not exist in the ordinary, civilian world.

Civilians serving with the military are, therefore, now subject to two separate and very distinct forms of criminal jurisdiction: federal civilian jurisdiction under MEJA and military jurisdiction under the UCMJ. The procedures used in their trials, the rights they are afforded, and the range of criminalized conduct will differ, depending on which forum is chosen. The propriety of subjecting civilians to military jurisdiction and whether such jurisdiction comports with the U.S. Constitution is currently the subject of fierce debate in the United States. Academic ink is already flowing on each side of that argument.<sup>65</sup> There is another legal regime, however, which is also implicated by this jurisdictional coup and which has serious implications for the United States at the international level—the regime of law known as international human rights law.

#### IV. APPLICABLE INTERNATIONAL HUMAN RIGHTS LAW

Commentators note that international human rights law is, in some respects, a new body of law that has been rapidly evolving since the end of World War II.<sup>66</sup> It is generally defined as the law

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<sup>64</sup> Melson, *supra* note 30, at 317.

<sup>65</sup> See Kara M. Sacilotto, *Jumping the (Un)Constitutional Gun?: Constitutional Questions in the Application of the UCMJ to Contractors*, 37 PUB. CONT. L.J. 179 (2008). But see Jackson, *supra* note 57, at 282 (noting, “Despite the fact that the U.C.M.J. has become more robust since the 1950s, it still does not afford criminal defendants a right to a jury trial by their peers and a grand jury hearing. It does not seem likely that the Supreme Court will see the imposition of military jurisdiction as less of a threat to individual rights enumerated in the Constitution than it did almost half a century ago.”).

<sup>66</sup> See Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 A.J.I.L. 580, 590 (2006).

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dealing with the protection of individuals and groups against violations of internationally guaranteed rights and the promotion of these rights.<sup>67</sup>

“International human rights law consists of the body of international rules, procedures, and institutions developed to implement national and international human rights obligations, and to promote respect for human rights in all countries.”<sup>68</sup> Its core is comprised of the United Nations Charter and related instruments. Three instruments, however, are among the most important: the Universal Declaration of Human Rights of 1948 (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).<sup>69</sup>

The UDHR is an important instrument and greatly informs customary international law, but it is not a treaty and is not considered to be formally binding.<sup>70</sup> The ICESCR is a treaty and stands in a position of preeminence on the international plane, but the United States is not a party to it.<sup>71</sup> The ICCPR, however, is a treaty to which the United States is a party.<sup>72</sup> Further, and most importantly for purposes of this Article, the provisions of the ICCPR have direct bearing on the issue of military jurisdiction over civilians.

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<sup>67</sup> See JEFFREY L. DUNOFF, STEVEN R. RATNER, & DAVID WIPPMAN, *INTERNATIONAL LAW, NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH*, 441–43 (2d ed. 2006).

<sup>68</sup> Richard B. Bilder, *An Overview of International Human Rights Law*, in *GUIDE TO INTERNATIONAL HUMAN RIGHTS LAW PRACTICE* 3 (1999).

<sup>69</sup> See HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS LAW IN CONTEXT: LAW, POLITICS, MORALS* 136 (2d ed. 2000).

<sup>70</sup> *Id.* at 142 (“Under international law, approval by the General Assembly of a declaration like the UDHR has a different consequence from a treaty that has become effective through the required number of ratifications. Of course the declaration will have solemn effects as the formal act of a deliberative body of global importance. Its subject matter, like that of the UDHR, may be of the greatest significance. But when approved or adopted, it is horatory and aspirational, recommendatory rather than, in a formal sense, binding.”).

<sup>71</sup> See Monica Schurtman, *Los “Jonkeados” and the NAALC: The Autotrim/Customtrim Case and its Implications for Submissions Under the NAFTA Labor Side Agreement*, 22 *ARIZ. J. INT’L & COMP. L.* 291, 371 n. 385 (2005) (noting that “[t]he United States signed the ICESCR on Oct. 5, 1977, but never ratified it.”).

<sup>72</sup> See Marian Nash (Leich), *U.S. Practice: Contemporary Practice of the United States Relating to International Law*, 89 *A.J.I.L.* 96, 104 (1995).

A. *The International Covenant on Civil and Political Rights*

The ICCPR was adopted in New York on December 16, 1966. It entered into force for the United States on September 8, 1992. The Senate resolution giving its advice and consent to ratification was adopted on April 2, 1992, subject to five reservations, five understandings, and four declarations.<sup>73</sup> The Covenant articulates many of the same human rights articulated in the Universal Declaration of Human Rights, but focuses (as its name implies) on those rights considered “civil and political.”<sup>74</sup>

It guarantees numerous civil and political rights to all individuals. These rights are “essentially those civil and political rights reflected in the Western, liberal, democratic tradition.” These “rights are primarily limitations upon the power of the State to impose its will upon the people under its jurisdiction.” Specific rights enumerated in the ICCPR include: freedom of thought, conscience, and religion; freedom of opinion and expression; freedom of association; the right of peaceful assembly; the right to vote; equal protection of the law; the right to liberty and security of the person; the right to a fair trial, including the presumption of innocence; the right of privacy; freedom of movement, residence, and immigration; freedom from slavery and forced labor; protection from torture or cruel, inhumane, or degrading treatment or punishment; and the right to life.<sup>75</sup>

A key part of the ICCPR is the establishment of the UN Human Rights Committee, an institution created to ensure that member states comply with their obligations pursuant to the ICCPR. The Human Rights Committee has two principal mechanisms to ensure compliance by member states: (1) the review of periodic reports member states must submit on measures they have taken to implement the rights delineated in the ICCPR; and (2) an inter-state complaint mechanism that allows member states to assert that another member state is not fulfilling its obligations under the ICCPR.<sup>76</sup> In addition, pursuant to an Optional Protocol, states may agree to allow the Human Rights Committee to consider com-

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<sup>73</sup> *Id.* at 96.

<sup>74</sup> DUNOFF ET AL., *supra* note 67, at 449.

<sup>75</sup> See Brenda Sue Thornton, *The New International Jurisprudence on the Right to Privacy: A Head-On Collision with Bowers v. Hardwick*, 58 ALB. L. REV. 725, 734 (1995).

<sup>76</sup> *Id.* at 736.

plaints (called “communications”) filed by individuals through what is known as the individual communication process.<sup>77</sup>

The nature of the Human Rights Committee and its jurisprudence is not the easiest to ascertain. It is considered neither a judicial nor even a quasi-judicial entity, yet it issues general comments intended to clarify its understanding of the ICCPR and “final views” intended to conclude the individual communication process.<sup>78</sup> The Human Rights Committee’s decisions, nonetheless, have no binding force—even among parties to the Optional Protocol. Member states, therefore, are not legally obligated to comply with the Committee’s findings.<sup>79</sup>

The question of the direct binding force of the Committee’s decisions is not, however, the end of the inquiry. Though not binding, the Committee’s decisions are considered highly persuasive authority for ICCPR interpretation. This is because the Human Rights Committee is considered the authoritative interpreter of the rights articulated in the ICCPR.<sup>80</sup> As such, its decisions and views are given great credence internationally and have a norm-creating property that can serve to create customary international law.<sup>81</sup>

What can be stated with a high degree of certainty is that the HRC is the sole body which is authorized to make authoritative interpretations of the ICCPR, thus when the Committee pronounces upon the content or meaning of a right contained in the Covenant, it does so with undeniable authority.<sup>82</sup>

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<sup>77</sup> See Optional Protocol to the International Covenant on Civil and Political Rights (Mar. 23, 1976) [hereinafter Optional Protocol], available at <http://www.ohchr.org/english/law/pdf/ccpr-one.pdf>.

<sup>78</sup> See ALEX CONTE, SCOTT DAVIDSON, & RICHARD BURCHILL, *DEFINING CIVIL AND POLITICAL RIGHTS* 6 (2005).

<sup>79</sup> See William J. Aceves, *Actio Popularis? The Class Action in International Law*, 2003 U CHI. LEGAL F. 353, 361 (citing KIRSTEN A. YOUNG, *THE LAW AND PROCESS OF THE U.N. HUMAN RIGHTS COMMITTEE* 176 (2002)).

<sup>80</sup> See, e.g., *United States v. Duarte-Acero*, 208 F.3d 1282, 1287-88 (11th Cir. 2000) (looking to HRC’s guidance as the “most important” component in interpreting an ICCPR claim (brackets omitted)); Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT’L & COMP. L. 1, 19 (1995) (referring to the Human Rights Committee as “the authoritative and prestigious body of experts from 18 countries established to monitor compliance with the International Covenant on Civil and Political Rights.”); see also Celina Romany, *Black Women and Gender Equality in a New South Africa: Human Rights Law and the Intersection of Race and Gender*, 21 BROOK. J. INT’L L. 857, 884 (2006) (noting that the Human Rights Committee is “an authoritative interpreter of the ICCPR.”).

<sup>81</sup> See Diane Marie Amann, *International Law Weekend Proceedings: The Rights of the Accused in a Global Enforcement Arena*, 6 ILSA J. INT’L & COMP. L. 555, 565 (2000).

<sup>82</sup> CONTE ET AL., *supra* note 78.

Although the United States is not a party to the Optional Protocol,<sup>83</sup> when ratifying the ICCPR, the United States “accept[ed] the competence of the Human Rights Committee to receive and consider communications under Article 41 [state-to-state complaints] in which a State Party claims that another State Party is not fulfilling its obligations under the Covenant.”<sup>84</sup> The United States, thus, is subject to the inter-state complaint mechanism that allows the Committee to receive and consider communications from one State Party claiming that another State Party is not fulfilling its obligations under the ICCPR. Accordingly, should a State Party ever file such a complaint against the United States, the Committee would have a role in evaluating the alleged violation. It should be noted, however, that no State Party has ever done so.<sup>85</sup>

### B. *The ICCPR and Due Process*

Article 14 of the ICCPR lays out the principal obligations regarding due process in criminal trials. Pursuant to Article 14, state parties must ensure criminal defendants receive a fair and public hearing before a “competent, independent and impartial tribunal established by law.”<sup>86</sup> In addition, Article 14 requires numerous substantive rights such as the presumption of innocence, due process rights, and the right to appeal a conviction to a “higher tribunal according to law.”<sup>87</sup> States must also ensure that all persons are equal before the courts and tribunals, guaranteeing nondiscrimination during the legal process.<sup>88</sup>

### C. *International Human Rights Law and Military Jurisdiction Over Civilians*

Noticeably absent from the language in Article 14 of the ICCPR is any mention of military jurisdiction over civilians. Even so, a marked distaste for military jurisdiction over civilians has

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<sup>83</sup> See Sean D. Murphy, *Canadian Deportation to United States of Death-Penalty Convict*, 98 A.J.I.L. 180 n. 7 (2004) (noting, “The first optional protocol . . . allows states to submit themselves to a system of investigation and quasi-adjudication of individual complaints by the Human Rights Committee. Canada is a party to the first optional protocol, whereas the United States is not.”).

<sup>84</sup> Leich, *supra* note 73, at 111.

<sup>85</sup> Thornton, *supra* note 75, at 737.

<sup>86</sup> See International Covenant on Civil and Political Rights, art. 14(1), Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) [hereinafter ICCPR].

<sup>87</sup> *Id.* at art. 14(2)-(5).

<sup>88</sup> *Id.* at art. 14 (1).

manifested itself in a number of decisions and comments by the Human Rights Committee. In 1984, the Committee issued General Comment 13 (“Equality before the courts and the right to a fair and public hearing by an independent court established by law”), which was its first elaboration on the due process provisions of Article 14 of the ICCPR. In that initial General Comment, the Human Rights Committee noted that many countries maintain military or special courts which have jurisdiction over civilians.<sup>89</sup> The Committee expressed disfavor with such trials:

This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14.<sup>90</sup>

That disfavor was later translated into international jurisprudence when, in 2003, the Human Rights Committee had the opportunity to articulate the permissible boundaries of military jurisdiction over civilians with greater specificity. In the case of *Madani v. Algeria*, the Committee considered the military detention and prosecution of Abassi Madani, one of the founding members and a leader of the *Front Islamique du Salut* (Islamic Salvation Front).<sup>91</sup> The *Front Islamique du Salut* organized a series of strikes and peaceful marches to protest an electoral law passed by the Algerian government. Madani was subsequently arrested at his party’s headquarters by military police and brought before a military court to stand trial.<sup>92</sup>

The Algerian military court before which Madani stood was established by the Algerian Code of Military Justice, the competence of which was established by Algerian law.<sup>93</sup> Such courts are

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<sup>89</sup> See U.N. Human Rights Committee, *General Comment 13: Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (Art. 14): 13/04/84* (Apr. 13, 1984), [hereinafter General Comment 13], ¶ 4.

<sup>90</sup> *Id.*

<sup>91</sup> See *Abbassi Madani v. Algeria*, CCPR/C/89/D/1172/2003, ¶ 2.1, available at <http://daccessdds.un.org/doc/UNDOC/DER/G07/425/26/PDF/G0742526.pdf?OpenElement>.

<sup>92</sup> *Id.* at ¶ 2.2.

<sup>93</sup> *Id.* at ¶ 4.4.

competent to adjudicate special military offenses as well as offenses against state security when the maximum available penalty exceeds five years imprisonment.<sup>94</sup> The presiding judge in such courts is a “professional judge who sits in the ordinary law-courts,” is subject to the same regulations as other members of the judiciary, “and whose professional career and discipline is overseen by a constitutional body that is ultimately answerable to the head of state.”<sup>95</sup> Its decisions can be appealed to the Algerian Supreme Court.<sup>96</sup>

In this forum, Madani was accused of “jeopardizing state security and the smooth operation of the national economy” through organizing a strike.<sup>97</sup> He was subsequently convicted and sentenced to twelve years of “rigorous imprisonment.”<sup>98</sup> Madani was generally mistreated during his time in prison and, in 1995, was briefly moved from prison to a residence normally reserved for dignitaries visiting Algeria. This respite was short-lived, however, and he was quickly returned to prison after refusing to concede the demands of army representatives that he renounce his political rights.<sup>99</sup> He remained in prison under “harsh conditions” until his release on July 15, 1997.<sup>100</sup>

Upon his release, Madani sent a letter to the UN Secretary General and was interviewed by a foreign journalist. After these actions, he was placed under house arrest and informed by members of the military police that he was forbidden from leaving his apartment in Algiers and forbidden from making statements or expressing any opinion. The military police made it clear that violation of these prohibitions would mean his return to prison.<sup>101</sup>

On March 31, 2003, a Communication was submitted by Madani’s son, Mr. Salim Abbassi, to the Human Rights Committee under Article 5 of the Optional Protocol to the ICCPR, which allows the Committee to consider communications “in the light of all written information made available to it by the individual and by the State Party concerned.”<sup>102</sup> Among the many allegations in the

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at ¶ 2.2.

<sup>98</sup> *Id.* at ¶ 2.3.

<sup>99</sup> *Id.* at ¶ 2.5.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at ¶ 2.6.

<sup>102</sup> *See id.* at ¶ 1; *see also* Optional Protocol, art. 5.

Communication was the complaint that Madani's trial before a military court was in violation of Article 14 of the ICCPR.<sup>103</sup>

In considering whether Article 14 was violated by the use of a military court to try Madani (a civilian), the Committee referred back to General Comment 13. While reaffirming its view that the ICCPR does not prohibit the exercise of military jurisdiction over civilians, the Committee noted:

It is incumbent on a State Party that does try civilians before military courts to justify the practice. The Committee considers that the State Party must demonstrate, with regard to the specific class of individuals at issue, that the regular civilian courts are unable to undertake the trials, that other alternative forms of special or high-security civilian courts are inadequate to the task, and that recourse to military courts is unavoidable. The State Party must further demonstrate how military courts ensure the full protection of the rights of the accused pursuant to article 14.<sup>104</sup>

Thus, pursuant to the Committee's interpretation of the ICCPR, in order to comply with Article 14, a State exercising military jurisdiction over civilians must satisfy a four-pronged test: the regular civilian courts must be unable to undertake the trials, other alternative forms of special or high-security civilian courts must be inadequate to the task, recourse to military courts must be unavoidable, and the State Party must demonstrate how military courts ensure the full protection of the rights of the accused. This ruling creates a presumption that the military trial of a civilian is a violation of Article 14 of the ICCPR and places the burden of rebutting the presumption on the State.<sup>105</sup>

The test put forth in *Madani* has received little criticism since it was articulated. Sangeeta Shah, a Lecturer at University of Nottingham School of Law, in her excellent discussion of this subject argues, however, that the test places too much value on the perception given by the conduct of such trials. In Shah's view, "there must be some objective assessment of the proceedings to establish that they are in fact biased or have been conducted in a manner that is 'unfair.'"<sup>106</sup> In other words, the proceeding should be evalu-

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<sup>103</sup> See *Abbassi Madani v. Algeria*, CCPR/C/89/D/1172/2003, ¶¶ 1, 3.3.

<sup>104</sup> *Id.* ¶ 8.7.

<sup>105</sup> See Sangeeta Shah, *The Human Rights Committee and Military Trials of Civilians*, 8 *HUM. RTS. L. REV.* 139-43 (2008).

<sup>106</sup> *Id.* at 147.

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ated to determine whether or not it was actually unfair before any presumptions are made. Such a view, however, has not prevailed in subsequent Committee findings, nor has it been a basis for sustained attack.

On July 24, 2007, the Committee approved General Comment No. 32, a revised General Comment on Article 14 of the ICCPR, on the right to a fair trial and equality before the courts and tribunals.<sup>107</sup> This replaced General Comment No. 13 and summarized the emerging view regarding military jurisdiction over civilians:

While the Covenant does not prohibit the trial of civilians in military or special courts, it requires that such trials are in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned . . . [I]t is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14. Trials of civilians by military or special courts should be exceptional, i.e. limited to cases where the state party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials.

General Comment 13 was far less severe in that it recognized such trials and merely opined that military trials of civilians should be “very exceptional” and should afford the full guarantees stipulated in article 14.” General Comment 32 is much more restrictive than its predecessor in that it would only permit such trials when resorting to them is necessary and justified by objective and serious reasons, and where the regular civilian courts are unable to undertake the trials. This reflects the growing international consensus on the undesirability of military trials and the tightening of the rules permitting them.<sup>108</sup>

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<sup>107</sup> See United Nations Office at Geneva (UNOG), News & Media, *Human Rights Committee Adopts Revised General Comment on Right to a Fair Trial* (July 24, 2007), available at [http://www.unog.ch/80256EDD006B9C2E/\(httpNewsByYear\\_en\)/01FFED40F0C07C7AC1257322004B924F?OpenDocument](http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/01FFED40F0C07C7AC1257322004B924F?OpenDocument).

<sup>108</sup> Shah, *supra* note 105, at 143.

V. DOES THE TRIAL OF CIVILIANS UNDER THE UCMJ  
COMPORT WITH INTERNATIONAL LAW?

As noted above, the Human Rights Committee is the institution established by the ICCPR to interpret the provisions of the ICCPR.<sup>109</sup> Although its jurisprudence is extensive, the Committee's comments and views have no binding force and member states, are therefore not always legally obligated to comply with them. Even so, the Committee's findings are considered persuasive authority for ICCPR interpretation.<sup>110</sup> Further, the great international credence given to its decisions and views have a norm-creating property that can serve to establish customary international law.<sup>111</sup> As such, the *Madani* decision provides a guideline for when a State may legally assert military jurisdiction over a civilian without violating its obligations under the ICCPR.

An analysis of the recent amendment to the UCMJ under the current test articulated by the Human Rights Committee reveals the assertion of military jurisdiction over civilians to be problematic. According to the test articulated by the Human Rights Committee, the assertion of UCMJ jurisdiction over civilians is presumptively a violation of Article 14 of the ICCPR.<sup>112</sup> The burden rests on the United States to demonstrate that the use of the military justice system in such a fashion is permissible according to the four-pronged test articulated in the *Madani* decision.

A. *The Capacity of Regular Civilian Courts in the United States*

The first prong of the *Madani* test, that regular civilian courts lack the capacity to undertake the trials, would be extremely difficult to satisfy in the case of the United States, where, from an operational standpoint, the civilian courts are clearly functional and capable of hearing criminal cases brought before them. Further, from a legal standpoint, MEJA, passed by Congress in 2000, extended U.S. criminal jurisdiction to both U.S. and foreign persons who commit criminal acts while employed by or accompanying the Armed Forces outside the United States. Federal criminal jurisdiction already exists, therefore, over much of that same group of persons who would be subject to the UCMJ—persons serving with or

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<sup>109</sup> CONTE ET AL., *supra* note 78.

<sup>110</sup> Aceves, *supra* note 79.

<sup>111</sup> Amann, *supra* note 81, at 565.

<sup>112</sup> Shah, *supra* note 105, at 143.

accompanying U.S. forces.<sup>113</sup> Any jurisdictional “underlap” between MEJA and Article 2 of the UCMJ could be remedied by amending MEJA to increase its reach. Accordingly, as federal civilian courts in the United States are both operationally and legally capable of exercising jurisdiction over any civilian who would be subject to U.S. military jurisdiction, the first prong of the *Madani* test would be extremely difficult to satisfy.

B. *The Availability of Other Alternative Forms of Special or High-Security Courts*

The second prong of the *Madani* test, that other alternative forms of special or high-security civilian courts are inadequate to the task, would be satisfied in the case of the United States, as the U.S. legal system does not have any special or high-security civilian courts. As no alternative courts exist, it follows that other alternative forms of special or high-security civilian courts are inadequate to the task.

C. *The Necessity of Recourse to Military Courts*

The third prong, that recourse to military courts is unavoidable, would usually not be satisfied in the case of the United States for the same reasons detailed above. The ability of the United States to enact legislation such as MEJA, which extended the jurisdiction of U.S. civilian courts to both U.S. and foreign persons who commit criminal acts while employed by or accompanying the Armed Forces outside the United States, effectively undermines the argument that recourse to military courts is a necessity. In fact, federal criminal jurisdiction already exists over much of that same group of persons who would be subject to the UCMJ.<sup>114</sup> It is, therefore, quite possible to make those civilians accompanying the armed forces abroad subject to the ordinary civilian criminal justice system.

One might possibly argue that military exigencies make MEJA impractical and that, due to the fast pace of operations on the ground, the quick application of military justice is a necessity. Peter Singer, of the Brookings Institution, seems to advocate such an argument:

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<sup>113</sup> See UCMJ, art. 2.

<sup>114</sup> *Id.*

The difference is that MEJA was never designed to apply to military/security missions or the context of conflict zones (its point of origin was a family abuse case at a US base in Germany) and has proven to be pretty much mythical in application to the contractor world (the only MEJA case activated was a domestic dispute at a base in Turkey). Court martials [sic], for all their faults, are designed for the context of military action and conflict, such as being better set up to interpret things like whether someone violated the rules of engagement than a civilian court could. And, while they can be equally politicized or leave out senior leaders in who gets charged (Abu Ghraib for example), they actually do happen, as opposed to the non-application of the old laws to contractors, which haven't yet after more than 4 years and 100,000 guys in such roles.<sup>115</sup>

The problem with such an argument is that it hinges on military convenience and the notion of the "best practice" rather than true necessity. The fact that the military can address and resolve problems more efficiently than most civilian agencies does not mean that it necessarily should do so—nor that it must. Thus, although MEJA may have been underused and civilian law enforcement agencies slow to act, it still exists as a workable solution—one that displaces the argument that recourse to military courts is somehow unavoidable.

The fact that civilian law enforcement agencies were afforded the opportunity but failed to effectively utilize MEJA does not serve to make military jurisdiction "necessary." A failure in that regard is merely a systemic failure on the part of the agencies responsible for carrying out the prosecution of a suspect. Unwillingness or ineptitude in asserting civilian jurisdiction is unfortunate, but cannot make an otherwise disapproved practice permissible.

#### D. *The Protections Afforded the Accused in Military Courts*

Finally, pursuant to the last prong of the test articulated in *Madani*, the State Party must demonstrate how military courts ensure the full protection of the rights of the accused. The United States may well have its strongest argument in this regard for assertion of UCMJ authority over civilians. As noted above, the military justice system provides for many of the same constitutional protections as U.S. civilians receive and such a rights-intensive pro-

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<sup>115</sup> Singer, *supra* note 2.

cess seems to satisfy the provisions of Article 14 of the ICCPR.<sup>116</sup> Even the significant differences that exist in the composition of a court-martial versus a civilian trial do not seem hostile to Article 14. For instance, though the manner of selecting jurors in a court-martial does not satisfy the Sixth Amendment of the U.S. Constitution, Article 14 of the ICCPR does not require that the accused enjoy the right to a jury of the State and district wherein the crime shall have been committed. In fact, the ICCPR does not even require a jury at all. Likewise, nothing in Article 14 requires a grand jury or states that only judicial officers may authorize a search.<sup>117</sup> In fact, nothing in Article 14 seems to demand anything that the U.S. military justice system does not provide.

The problem, however, is one of independence of the tribunal—or the perception thereof. Article 14 demands that the accused receive “a fair and public hearing by a competent, independent and impartial tribunal established by law.”<sup>118</sup> The judge presiding over a court-martial proceeding is a military officer to whom the UCMJ provides a great deal of independence. For instance, the military judge is not appointed by the convening authority but is, instead, designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member. In addition, effectiveness, fitness, or efficiency of the military judge is not subject to review by the convening authority nor any member of his staff.<sup>119</sup> Even so, the fact remains that the judge is ultimately a military officer and does not enjoy a lifetime appointment to the bench—meaning that the military judge occupies his or her position knowing that he or she could eventually return to life among the ranks of his or her fellow military officers. This has led more than one author to question the reality of military judges’ complete independence.<sup>120</sup> Similarly, with regard to the

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<sup>116</sup> Behan, *supra* note 18, at 241. See also Major General Jack L. Rives, *Chief Justice Warren on the Bill of Rights and the Military*, 60 A.F. L. REV. 1, 2 (2007) (arguing, “Today, our military justice system provides protections above and beyond those afforded in the civilian criminal system (such as broader discovery obligations on the part of the government; equal access to witnesses; unparalleled opportunities for clemency; and more frequent Supreme Court review of military cases; to name a few).”).

<sup>117</sup> See ICCPR, art. 14(1).

<sup>118</sup> *Id.*

<sup>119</sup> See UCMJ, art. 26(c).

<sup>120</sup> Corn, *supra* note 1 (“[T]he judge that presides over the trial, while a lawyer, is assigned to the bench for a limited period of time and does not enjoy the same degree of absolute independence associated with life-tenured judges.”); see also Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madis-*

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panel, whether the test of “independent and impartial” can be met by a group of military officers selected by a commanding military officer is a debatable proposition. Even within the United States, this method of selecting officers has led to questions as to its fundamental fairness and potential lack of independence.<sup>121</sup>

These questions of fairness become even more acute when considering the fact that the person being subjected to the military justice process will not be a member of the military, but will be a civilian—an outsider to the institution. Commentators have noted a sociological and cultural gap between the military class and civilians that can lead to mistrust between the two groups.<sup>122</sup> The effects of this gap may well result in anti-civilian bias or the application of different standards. For instance, it is well documented that rank and military achievement bestow definite advantages on the accused in the military justice system and serve to bolster the testimony of witnesses.<sup>123</sup> Elizabeth Lutes Hillman notes that soldiers with “long and impressive military records can overwhelm the testimony of lesser ranking or civilian accusers.”<sup>124</sup> Civilians with no rank and no military experience could be singularly disadvantaged in such a forum as they *ipso facto* lack such rank and status.

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*onian Democracy*, 70 GEO. WASH. L. REV. 649, 667 (2002) (“One of the most central guarantees for criminal defendants in the federal system is the guarantee of an Article III judge with lifetime tenure. Although this same guarantee is not imposed on the states as an essential constitutional right, it offers protection in the federal system for defendants against the desire of elected or appointed judges to appease popular or political interests. The “independence” of judges with lifetime tenure can be overstated but there should be no honest debate that such protection from termination or retaliation fosters independent thought and action. In the military, judges operate in an environment that could not be more inimical to such independence. These judges often rotate from their judicial roles into non-judicial roles. Any given judge can thus expect to serve in a different capacity in a matter of years. The promotion and reputation of such officers can be significantly affected by their rulings in criminal cases, particularly high-profile cases.”).

<sup>121</sup> See, e.g., Beth Hillman, *Chains of Command: The U.S. Court-Martial Constricts the Rights of Soldiers—And That Needs to Change*, LEGAL AFFAIRS, May-June 2002, at 50-52; see also Edward T. Pound, *Unequal Justice*, U.S. NEWS & WORLD REP., Dec. 16, 2002, at 19-30.

<sup>122</sup> See Everett Dolman, Presentation at the International Studies Ass’n Annual Meeting, Hilton Hawaiian Village, Honolulu, Hawaii, *Social and Political Attitudes of Civilians and Military Officers 2004*, Mar. 5, 2005, [http://www.allacademic.com/meta/p70907\\_index.html](http://www.allacademic.com/meta/p70907_index.html).

<sup>123</sup> See Elizabeth Lutes Hillman, *The “Good Soldier” Defense: Character Evidence and Military Rank at Courts-Martial*, 108 YALE L.J. 879, 906-07 (1999).

<sup>124</sup> *Id.* at 906.

Another aspect of the military justice system that may well serve to disadvantage civilians is the system's express concern with the well-being of the military. As the UCMJ notes, "The purpose of military justice is to promote justice, to assist in maintaining good order and discipline in the Armed Forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."<sup>125</sup> An interesting view of how such interests interplay with the administration of justice was seen in *United States v. Sharatt*, the case of a military member accused of killing Iraqi civilians in Haditha. The investigating officer, in explaining his rationale for recommending dismissal of the charges, stated:

To believe the government version of facts is to disregard clear and convincing evidence to the contrary [setting] . . . a dangerous precedent that [, in my opinion,] . . . may encourage others to bear false witness against Marines as a tactic to erode public support of the Marine Corps and mission in Iraq.<sup>126</sup>

Thus, accusations against service members were dismissed, at least in part, because they were potentially damaging to the institution and its mission. In a system where the good of the institution and its mission can legitimately influence outcomes, a civilian who is not part of that institution, and whose cause at trial does not bear on the well-being of that institution, stands at a considerable disadvantage in comparison to his military counterparts.

#### E. *The Principle of Equality*

Sangeeta Shah remarks that the argument for permitting a military trial based purely on its fairness is derived from "the assumption that the trial of civilians by a military court is undesirable only because such trials will not 'ensure the equitable, impartial, and independent administration of justice.'"<sup>127</sup> There is, however, another equally compelling rationale for disallowing military jurisdiction over civilians: it violates the principle of equality set out in Article 14(1) of the ICCPR. Commentators note that the principle of equality requires that all persons accused of a crime be afforded the same treatment. Prosecuting some civilians before military tribunals, therefore, represents a deviation from the norm that is

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<sup>125</sup> See UCMJ, art. 3.

<sup>126</sup> See Officer Advises Against Trial for Marine, ASSOCIATED PRESS, July 11, 2007, available at <http://abcnews.go.com/US/wireStory?id=3365193>.

<sup>127</sup> Shah, *supra* note 105, at 148.

automatically suspect.<sup>128</sup> Thus, even if a judicial procedure can be shown to be fair overall, it may still violate international law if other citizens are afforded different treatment in a separate procedure.

Given the differences in procedure and the advantages to military personnel noted above, the inequalities faced by a civilian before a military court—even one as rights-intensive as the UCMJ—are evident. Procedural fairness alone, therefore, is not the only concern driving the averseness in international law toward military trials of civilians.

[T]he use of military rather than civilian courts is an abuse of the principle of equality before the courts. A State that wishes to use military courts to try civilians must address each of these concerns. The requirements that States demonstrate the necessity of the military trial and how such trials fulfill the requirements of a fair trial as set out in Article 14, as set out by the Human Rights Committee in *Madani*, ensure that States do consider and tackle these concerns.<sup>129</sup>

The factors set forth in *Madani* are designed to prevent unnecessary short-circuiting of the ordinary protections of civilian courts as well as to protect the principle of equality enshrined in Article 14(1) of the ICCPR. Demonstrating fairness alone is, therefore, inadequate for the purpose of addressing all of those concerns.

In the case of the recent amendment to the UCMJ, the principle of equality is difficult to reconcile with the practice of subjecting certain select civilians to trials that do not grant the same constitutional rights as other trials and in which military members are given marked advantages. Even if one accepts that the military justice system provides a trial that is fair, one cannot deny—when compared to the federal civilian trials—that it is, nonetheless, unequal.

#### VI. DIFFERENT APPROACHES, INTERPRETATIONS, AND EXPERIENCES

Given the clear implications of the Human Rights Committee's interpretation of Article 14 vis-à-vis military jurisdiction over civilians, the question remains as to whether such an interpretation is the correct one or if one can identify another interpretation, or a

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 150.

difference in opinion, as to the permissibility of asserting military jurisdiction over civilians.

A separate instrument that pertains exclusively to European States is the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The ECHR provides for two different procedures to ensure member state compliance with its provisions: an individual petition procedure and an inter-state procedure.<sup>130</sup> Pursuant to either of these two procedures, member states may be held accountable by the European Court of Human Rights (ECtHR) for infringements of recognized rights.<sup>131</sup> All states are subject to the individual petition procedure and final decisions by the ECtHR are considered to be binding.<sup>132</sup>

Article 6 of the ECHR lays out substantive requirements in the criminal process such as the presumption of innocence, the right to be promptly informed of the charges, and the right to legal assistance. It is similar article to Article 14 of the ICCPR in its substance and, in fact, the two are often the subject of comparison and analogy in scholarship and international jurisprudence.<sup>133</sup> The ECtHR's interpretation of Article 6, thus, provides an opportunity to analyze how an alternate body views analogous provisions and, therefore, to determine if there is any measure of emerging international consensus.

The issue of military jurisdiction over both soldiers and civilians is one that has been frequently litigated before the ECtHR. In the case of *Incal v. Turkey*, the ECtHR considered the case of an individual convicted of disseminating Kurdish separatist propaganda and who was tried before a "National Security Court."<sup>134</sup> In finding a violation of Article 6(1) of the ECHR in that case, it articulated the view that "[i]n deciding whether there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified."<sup>135</sup> In addition to that test of objective fair-

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<sup>130</sup> STEINER & ALSTON, *supra* note 69, at 797.

<sup>131</sup> *Id.*

<sup>132</sup> See CLARE OVEY & ROBIN C.A. WHITE, JACOBS AND WHITE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS 11 (4th ed. 2006).

<sup>133</sup> See Russell A. Miller, *Before the Law: Military Investigations and Evidence at the Iraqi Special Tribunal*, 13 MICH. ST. J. INT'L L. 107, 140-41 (2005).

<sup>134</sup> See *Incal v. Turkey*, 1998-IV Eur. Ct. H.R. 1548 at 487.

<sup>135</sup> *Id.*

ness, the ECtHR has articulated the following caution and additional criteria:

It is, however, a different matter where the national legislation empowers a military court to try civilians on criminal charges. While it cannot be contended that the Convention absolutely excludes the jurisdiction of military courts to try cases in which civilians are implicated, the existence of such jurisdiction should be subjected to particularly careful scrutiny, since only in very exceptional circumstances could the determination of criminal charges against civilians in such courts be held to be compatible with [A]rt 6. The power of military criminal justice should not extend to civilians unless there are compelling reasons justifying such a situation, and if so only on a clear and foreseeable legal basis. The existence of such reasons must be substantiated in each specific case. It is not sufficient for the national legislation to allocate certain categories of offence to military courts *in abstracto*.<sup>136</sup>

Thus, the ECtHR approach would allow for military jurisdiction over civilians only when the proceedings are objectively fair, when there are compelling reasons for the assertion of such jurisdiction, and when there is a clear and foreseeable legal basis.

A. *The Experience of the United Kingdom before the ECtHR*

In *Martin v. United Kingdom*, the ECtHR considered the application of military jurisdiction over a British civilian who was a minor living with his family in Germany, where his father was serving in the army. The applicant was charged with the murder of a young civilian woman and court-martialed.

The ECtHR found that there was a clear and foreseeable legal basis for the exercise of military jurisdiction in *Martin* due to a 1955 British military law allowing for military jurisdiction over civilians in such circumstances.<sup>137</sup> That element was, therefore, satisfied. The Court was, however, less accepting of the British government's argument for the second element—the compelling need for military jurisdiction—expressing considerable doubt as to whether considerations such as practicality and convenience to the military command were sufficiently “compelling” to justify the trial of a civilian before a military tribunal. Nonetheless, the Court indi-

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<sup>136</sup> See *Martin v. United Kingdom*, App. No. 40426/98, Eur. Ct. H.R. (2006), ¶ 44, *available at* <http://cmiskp.echr.coe.int>.

<sup>137</sup> *Id.*, at ¶ 45.

cated that it had no need to decide the matter on such grounds because of another fatal flaw: the composition, structure, and procedure of the court-martial were all sufficient to raise a legitimate fear as to lack of independence and impartiality of the tribunal.<sup>138</sup>

In finding a violation of Article 6, the Court noted:

[A]ll six members of the tribunal were subordinate in rank to the Convening Officer, and the senior member was under his ultimate command. The two civilian members of the court-martial who came from the United Kingdom solely for the purposes of the trial were also under the Convening Officer's command for the purpose of offences committed while they were in Germany.<sup>139</sup>

Thus, the lack of independence of the court-martial from the Convening Officer was fatal to the exercise of military jurisdiction over a civilian.

Shortly after the events that gave rise to the complaint in *Martin*, the British government enacted legislation that separated the authority to convene a court-martial from the authority to select members.<sup>140</sup> The office of the “convening officer” was abolished and the responsibilities of convening of a court-martial, appointing members, summoning witnesses, and selecting venue were made the responsibility of an independent “Court Administration Officer.”<sup>141</sup> Further, the role of prosecutor was given to the “Prosecuting Authority,” who is appointed by the Queen, and has absolute discretion to decide whether or not to prosecute, what type of court-martial would be appropriate, and what charges should be brought. The Prosecuting Authority also brings the charges, conducts the prosecution, and, in particular, has the power to make all decisions concerning the prosecution.<sup>142</sup>

In addition—and in response to the decision in *Martin*—the British government has recently enacted legislation that provides

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<sup>138</sup> *Id.* (“[T]he Court has considerable doubts whether such considerations were sufficiently “compelling” to justify the trial of a civilian before a military tribunal.”).

<sup>139</sup> *Id.*, at ¶ 49.

<sup>140</sup> See *Morris v. United Kingdom*, App. No. 38784/97, 34 Eur. Ct. H.R., ¶¶ 19-21 (2002).

<sup>141</sup> See Joint Committee On Human Rights, SIXTEENTH REPORT, APPENDIX 9: INFORMATION NOTE PREPARED FOR THE COMMITTEE OF MINISTERS BY THE MINISTRY OF DEFENCE, ON *MARTIN V. UNITED KINGDOM* APPLICATION NO. 40426/98 FOR 3-4 APRIL MEETING [hereinafter Joint Committee Report], available at <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/128/12819.htm>.

<sup>142</sup> See *Cooper v. United Kingdom*, App. No. 48843/99, 39 Eur. Ct. H.R., ¶¶ 22-23 (2003).

for certain civilians, such as contractors or dependents of members of the armed forces living abroad, to be tried by either a standing court-martial or a Service Civilian Court (SCC), which contains no military members.<sup>143</sup> Such courts are similar to a magistrates' court in England and Wales in that they have similar powers of punishment. They can impose a maximum sentence of imprisonment for a term not exceeding six months (twelve months if consecutive sentences are awarded.) They cannot award imprisonment or a fine for a civil offence in cases where a magistrates' court in England and Wales would not have the power to do so.<sup>144</sup>

The U.K. Parliament hopes that these modifications of the regime of law dealing with military jurisdiction broadly—and its relationship to civilians in particular—will bring British law into conformity with the ECHR and avoid future violations of Article 6.<sup>145</sup>

B. *The ECtHR, the Human Rights Committee,  
and an Emerging Norm*

The jurisprudence of the ECtHR and the Human Rights Committee demonstrate striking similarities and an emergent norm. Each notes that the assertion of military jurisdiction over a civilian is possible, each requires that the military proceedings be fair, and each requires that such jurisdiction only be exercised in extraordinary circumstances. The distinction between the two is the degree to which the government will be required to demonstrate the necessity of military jurisdiction. The Human Rights Committee's interpretation of the ICCPR would practically prohibit any military trial of a civilian where a civilian forum is available as an alternative. The ECtHR's interpretation of the ECHR, on the other hand, requires only a "compelling interest." This, however, may be a distinction without great difference, given the ECtHR's noted skepticism of the interests articulated in *Martin*.<sup>146</sup> Although the limits of this "compelling interest" requirement have not been clearly delineated, the dicta in *Martin* indicates that mere convenience of the military command will be insufficient. The recent

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<sup>143</sup> Joint Committee Report, *supra* note 141.

<sup>144</sup> See U.K. Armed Forces Act 2006, c. 52, ¶ 545.

<sup>145</sup> Joint Committee Report, *supra* note 141.

<sup>146</sup> *Martin v. United Kingdom*, *supra* note 136, ¶ 45 (“[T]he Court has considerable doubts whether such considerations were sufficiently ‘compelling’ to justify the trial of a civilian before a military tribunal.”).

amendment to the UCMJ would, therefore, likely fare no better under the test articulated under the ECtHR than under that articulated by the ICCPR; command convenience cannot serve to legitimize the assertion of military jurisdiction over a civilian so long as a viable alternative exists.

The views of the Human Rights Committee and the ECtHR echo the growing international consensus on the “undesirability of military trials of civilians.”<sup>147</sup> This consensus is also reflected in the United Nations Draft Principles Governing the Administration of Justice through Military Tribunals, which state that “[m]ilitary courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts.”<sup>148</sup> Interestingly, the United Nations Office of the High Commissioner for Human Rights, in a 2004 resolution addressing those Draft Principles, reaffirmed “that everyone has the right to be tried by ordinary courts or tribunals using established legal procedures and that tribunals that do not use procedures duly established under the law shall not be created to displace the jurisdiction belonging to the ordinary courts.”<sup>149</sup> In a report commenting on the UN Draft Principles, Special Rapporteur Emmanuel Decaux notes the rationale for the prohibition:

The Human Rights Committee’s practice over the past 20 years, particularly in its views concerning individual communications or its concluding observations on national reports, has only increased its vigilance, in order to ensure that the jurisdiction of military tribunals is restricted to offenses of a strictly military nature committed by military personnel. Many thematic or country rapporteurs have also taken a very strong position in favor of military tribunals’ lack of authority to try civilians. Similarly, the jurisprudence of the European Court of Human Rights, the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights and the African Commission on Human and People’s Rights is unanimous on this

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<sup>147</sup> Shah, *supra* note 105, at 139, 143.

<sup>148</sup> See U.N. ECON. & SOC. COUNCIL [ECOSOC], Sub-Comm’n on Prot. of Human Rights, *Draft Principles Governing the Administration of Justice through Military Tribunals*, Principle No. 5, U.N. Doc. E/CN.4/2006/58 at 4 (2006), available at <http://www1.umn.edu/humanrts/instree/DecauxPrinciples.html>.

<sup>149</sup> See United Nations Office of the High Commissioner for Human Rights, Sub-Comm. on Human Rights Resolution 2004/27, *Issue of the Administration of Justice through Military Tribunals*, available at [http://ap.ohchr.org/documents/E/SUBCOM/resolutions/E-CN\\_4-SUB\\_2-RES-2004-27.doc](http://ap.ohchr.org/documents/E/SUBCOM/resolutions/E-CN_4-SUB_2-RES-2004-27.doc).

point. As the Basic Principles on the Independence of the Judiciary put it, “everyone has the right to be tried by ordinary courts or tribunals using established legal procedures.” Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.<sup>150</sup>

Even, therefore, if not yet an established custom in international law—which it may now be—such statements and Draft Principles, along with decisions by the Human Rights Committee and ECtHR, give strong indications that the prohibition on military jurisdiction over civilians is at least *lex ferenda* disfavoring military trials of civilians.

## VII. THE ISSUE OF EXTRATERRITORIALITY

Given the impact of this general rule against (and concomitant limitations on) military jurisdiction over civilians, the question arises as to whether governments can evade its reach by arguing that the rule does not apply to State conduct abroad. With regard to the provisions of the ICCPR, it has long been the view of the United States government that the ICCPR does not apply outside of the territory of a State Party and is only applicable to a State’s conduct within its own borders.<sup>151</sup> This view is based on Article 2(1) of the ICCPR, which provides that “each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind.”<sup>152</sup> A strict reading of this language leads to the conclusion that the ICCPR is only territorial in its application.

Authoritative international bodies, however, have eschewed such an interpretation of Article 2(1) and ruled that the provisions of the ICCPR do have extraterritorial effect. For instance, the International Court of Justice (ICJ) has held that “the [ICCPR] is applicable in respect of acts done by a State in exercise of its juris-

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<sup>150</sup> See “Administration of Justice, Rule of Law, and Democracy,” Report Submitted by the Special Rapporteur, Principle No. 5(21), at <http://www.eak-online.de/fix/files/600/docs/DecauxReport.pdf>.

<sup>151</sup> See Matthew Waxman, Head of U.S. Delegation, Principal Deputy Director of Policy Planning, Dep’t of State, Opening Statement to U.N. Human Rights Comm. (July 17, 2006), available at <http://www.usmission.ch/Press2006/0717Waxman.html> (speaking on the extraterritorial application of the ICCPR).

<sup>152</sup> See ICCPR 2(1).

diction outside its own territory.”<sup>153</sup> Likewise, the Human Rights Committee has found that the enjoyment of Covenant rights is not limited to citizens of State Parties but must also be available to all individuals subject to the jurisdiction of the State party in question.<sup>154</sup> The Committee has made clear that this applies to

those within the power or effective control of the forces of a State party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.<sup>155</sup>

Commentators have, likewise, noted that a reading of the ICCPR that limits its application exclusively to conduct occurring within national territory is inconsistent with the Covenant’s *travaux préparatoires*, many of the instrument’s provisions, as well as its core purpose.<sup>156</sup> The strictly territorial view of the ICCPR, therefore, is one that has not prevailed on the international plane.

Even if one disregards the decisions of the ICJ and the Human Rights Committee, however, and insists on the territorial application of the ICCPR, as this article has demonstrated, the limitations on the application of military jurisdiction over civilians is more than the function of a single treaty or a lone entity’s interpretation thereof. It is, rather, increasingly a consensus view of the international community and, thus, an emerging norm in international law. It is quite arguable that it is in the process of becoming a

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<sup>153</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 43 (July 9). For an excellent discussion of the extraterritorial application of international human rights law, see Damira Kamchibekova, *State Responsibility for Extraterritorial Human Rights Violations*, 13 BUFF. HUM. RTS. L. REV. 87 (2007).

<sup>154</sup> Hum. Rts. Comm., General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 10 (2004).

<sup>155</sup> *Id.*

<sup>156</sup> See RENÉ PROVOST, *INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW* 22 (2002) (“The obligation to ‘ensure’ rights does impose duties on the state which are in excess of the obligation to respect the rights entrenched in the Covenant, lending further support to a wider application of the instrument.”). See also Douglass Cassel, *Pretrial and Preventive Detention of Suspected Terrorists: Options and Constraints Under International Law*, 98 J. CRIM. L. & CRIMINOLOGY 811, 818-19 (2008) (noting, “IHRL and IHL apply in differing ways in the four international law settings. During peacetime IHRL applies to State Parties that have joined IHRL treaties, and to other States to the extent IHRL norms are recognized as customary international law. Despite unpersuasive objections by the United States and Israel, IHRL [applies] outside a State’s territory, so long as the detainees are within the effective custody and control of the State.”).

custom. As the U.S. Army Operational Law Handbook makes clear, “Human rights law established by treaty generally only binds the state in relation to persons under its jurisdiction; human rights law based on CIL [customary international law] binds all states, in all circumstances.”<sup>157</sup> Thus, it is recognized that the customary law of human rights applies to U.S. armed forces wherever they may act.<sup>158</sup> There is no territorial limit in such circumstances. Accordingly, once this nascent practice blooms into customary international law, there will be no distance one may travel to elude it.

### VIII. CONCLUSION

Although the UCMJ provides for an impressive array of legal protections for accused service members, when compared to civilian courts, there is an undeniable difference in the procedural aspects of a military trial, the rights afforded, and the range of behavior criminalized under the UCMJ. Further, federal civilian courts in the United States still remain viable alternative fora for civilians accompanying the armed forces through the exercise of MEJA. Therefore, in accordance with the international obligations of the U.S. under Article 14 of the ICCPR and the test articulated by the Human Rights Committee in *Madani v. Algeria*, the exercise of military jurisdiction over civilians allowed by the current amendment to the UCMJ places the United States in violation of its obligations and emergent trends in international human rights law.

This is not to say that civilians can never be legitimate subjects of military jurisdiction under international human rights law. There will be some cases in which the facts and circumstances are extraordinary enough that the Human Rights Committee’s strict standard will be met. Exceptional circumstances may well render civilian courts truly inadequate as fora for certain cases, thus making military jurisdiction appropriate. For instance, the special circumstances surrounding enemy combatants captured on the battlefield may well provide a sound basis for arguing against the

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<sup>157</sup> See INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., OPERATIONAL LAW HANDBOOK 39 (2008). See also PROVOST, *supra* note 156, at 26 (noting that aside from some extremely limited circumstances, “human rights law embodies a principle of universal enjoyment of rights by all individuals. This universality must be contrasted to the patchwork protections afforded individuals by humanitarian law.”).

<sup>158</sup> See Cassel, *supra* note 156, at 818-19.

use of civilian courts.<sup>159</sup> In more banal cases, however, the argument against civilian courts will become strained.

The ramifications for violations of this rule are somewhat limited on the domestic front as the United States considers the provisions of Article 14 of the ICCPR to be non-self-executing.<sup>160</sup> Likewise, U.S. courts have held that the ICCPR does not create individual rights that are judicially enforceable in U.S. courts.<sup>161</sup> Nonetheless, some U.S. courts have been willing to give the ICCPR and the decisions of the Human Rights Committee great persuasive authority in their decisions.<sup>162</sup> Therefore, while there is little risk of a successful private claim based on a violation of the ICCPR, its provisions and the Human Rights Committee's views are far from irrelevant.

On the international plane, such violations expose the United States to potential inter-state complaints under the ICCPR. Although this procedure has never been used, the possibility of such a complaint technically exists and, therefore, cannot be ignored. The more likely and immediate impact of disregarding international obligations, however, is the damage such violations cause to the United States' international reputation.<sup>163</sup> International law considers every treaty in force to be binding upon the parties to it and requires those parties to perform those obligations in good faith.<sup>164</sup>

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<sup>159</sup> See LTC Joseph Bialke, *Al-Qaeda & Taliban: Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. REV. 1, 70 (2004) (noting, "Civilian law enforcement organizations and civilian criminal courts are ill-equipped generally to investigate, assume jurisdiction over, and adjudicate criminal acts of war alleged to have occurred abroad by enemy combatants during an international armed conflict. In extraordinary circumstances involving national security, this is also true in regard to war crimes occurring on domestic soil. Indeed, a domestic civilian criminal justice system simply is not designed to render justice adequately to captured enemy soldiers accused of violations of LOAC that are alleged to have occurred in a theater of war many thousands of miles away. It follows that crimes committed by unlawful combatants within the context of an international armed conflict may remove such combatants from a domestic civilian criminal justice system and place them into a military forum authorized under LOAC.").

<sup>160</sup> See 138 CONG. REC. S4783-84 (statement of presiding officer of resolution of ratification).

<sup>161</sup> See *Beazley v. Johnson*, 242 F.3d 248, 267 (5th Cir. 2001); *United States v. Duarte-Acero*, 208 F.3d 1282, 1287 (11th Cir. 2000).

<sup>162</sup> See *United States v. Duarte-Acero*, 208 F.3d at 1287; *Ma v. Reno*, 208 F.3d 815, 830 (9th Cir. 2000).

<sup>163</sup> See Andrew T. Guzman, *The Limits of International Law: Reputation and International Law*, 34 GA. J. INT'L & COMP. L. 379, 383-91 (2006).

<sup>164</sup> See Vienna Convention on the Law of Treaties, art. 26, opened for signature May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

Disregarding such obligations can have an adverse impact on the United States' relationships with other countries and have damaging foreign policy implications.<sup>165</sup>

There are, however, solutions to the problem. The easiest way of avoiding any conflict with the ICCPR would be for the United States to enter a reservation to the treaty insofar as it prohibits the assertion of military jurisdiction over civilians during contingency operations. Article 19(c) of the Vienna Convention allows states to "formulate a reservation [to a treaty] unless . . . the reservation is incompatible with a treaty's object and purpose."<sup>166</sup> Allowing the limited assertion of military jurisdiction over civilians in circumstances that otherwise comply with Article 14 of the ICCPR should not be seen as incompatible with the ICCPR's object and purpose. Such a reservation should, therefore, be a valid one.

Likewise, to the extent that the limitations on military jurisdiction are an emerging trend in international human rights law, the United States could become a "persistent objector. "According to the persistent objector rule, states that have persistently objected during the emergence of a custom are not bound by it."<sup>167</sup> By announcing its formal rejection of the rule during its development, the United States could thereby obtain "persistent objector" status to this particular customary international law.<sup>168</sup>

While such outright rejection of this rule may seem extreme, there are sound arguments for doing so. Lieutenant-Colonel Michael R. Gibson, a Canadian military lawyer with the Office of the Judge Advocate General of the Canadian Forces, offers compelling reasons for the use of military jurisdiction over civilians in a

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<sup>165</sup> See Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 533 (1998) (noting, "although the legislative intent conception is not strong, particularly with respect to the new customary international law, it probably still carries some force. It seems likely that, at least in a weak sense, the political branches (particularly the Executive) still care about international law, if for no other reason than that violations of international law may have negative effects on the relationship between the United States and other countries.").

<sup>166</sup> See Vienna Convention on the Law of Treaties art. 19(c), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 333 [hereinafter Vienna Convention].

<sup>167</sup> See Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 A.J.I.L. 757, 765 fn. 90 ((citing Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rules of Law*, 92 RECUEIL DES COURS 1, 49-50 (1957 II)).

<sup>168</sup> See *Id.*

2009]

## AN UNNECESSARY CONVENIENCE

99

deployed setting.<sup>169</sup> Lieutenant-Colonel Gibson notes that allowing military tribunals to function in such a manner can, in many instances, vindicate human rights and further the ultimate purpose of instruments like the ICCPR.<sup>170</sup>

Respect for human rights and the maintenance of military discipline are not mutually exclusive. This is not a Manichean dynamic. The actual practice of military courts of different states today is just as diverse as the character of their parent societies. Some are deserving of praise, others of opprobrium, just as the human rights records of different countries are generally, and no doubt in much the same measure. Military courts should be neither sanctified nor demonized. They are too important both for states and for the rule of law to do so.<sup>171</sup>

Lieutenant-Colonel Gibson emphasizes that military courts can act as a vehicle for the advancement of respect for human rights and that the failure to exercise military jurisdiction can often equate to a lack of accountability for human rights abusers.<sup>172</sup> Accordingly, there is a reasonable basis for reserving the right to assert military jurisdiction over civilians in a deployed setting or formally objecting to an emerging norm that would prohibit such action.

Alternatively, barring a limited or outright rejection of the rule, the experience of the United Kingdom could inform the policies of the United States and serve as a model whereby violations of international human rights law could be avoided. The establishment of independent civilian courts to try civilian offenders accompanying the armed forces could serve to assuage concerns of unfairness and inequality—so long as those civilian courts generally abide by the same procedures in place in domestic civil courts.

Another option that builds on the existing legal infrastructure would be to energize the application of MEJA to prosecute civilians in U.S. District Court. The DOJ could dedicate a number of attorneys and staff to interface with DOD personnel, military commanders, and Judge Advocates to facilitate the assertion of criminal jurisdiction on a greater scale—making the process easier and

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<sup>169</sup> See Lieutenant Colonel Michael R. Gibson, *International Human Rights Law and the Administration of Justice through Military Tribunals: Preserving Utility while Precluding Impunity*, 4 J. INT'L L. & INT'L REL. 1, 48 (2008).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 48.

<sup>172</sup> *Id.*

more available. A joint DOD/DOJ MEJA task force could even be established to carry out this function. Agencies could work jointly to make the existing system work.

In the meantime, however, until there is a remedy to this issue, military lawyers should take the Human Rights Committee's *Madani* test into account when advising commanders on such matters and perform a "necessity analysis" in each case where commanders seek to assert military jurisdiction over a civilian. That analysis should consider the availability of civilian courts, the potential use of MEJA, and the facts of each individual case that make it appropriate or inappropriate for civilian courts. Until there is further action on the international level, cases that cannot pass muster under the four-part *Madani* test—and most will not—should be diverted to civilian courts.

Something radical has begun in Iraq—but without accompanying efforts to remedy the international legal conflicts described herein—it is neither necessary nor well-advised. Until the flaws of the current regime are remedied or greater action is taken at the international level, commanders should be wary of engaging in this practice and should seek to employ MEJA rather than asserting military jurisdiction over civilians. Further, civilian law enforcement agencies should recognize the difficult position of military commanders in the field and willingly assist in the exercise of federal civilian jurisdiction over those persons commanders seek to prosecute. Maintaining the international reputation and integrity of the United States by complying with treaty obligations and international norms is worth the effort.