

**MERCY KILLINGS IN COMBAT:
ENDING THE SUFFERING OF
GRAVELY WOUNDED COMBATANTS –
A BRIEF HISTORY, APPLICABLE LAW,
RECENT PROSECUTIONS, AND
PROPOSALS FOR MUCH NEEDED CHANGE**

A Thesis Presented to The Judge Advocate General's School
United States Army in partial satisfaction of the requirements
for the Degree of Master of Laws (LL.M.) in Military Law

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, the United States Army, the Department of Defense, or any other governmental agency.

BY MAJOR WILL M. HELIXON
JUDGE ADVOCATE GENERAL'S CORPS
UNITED STATES ARMY

20100420271

54TH JUDGE ADVOCATE OFFICER GRADUATE COURSE
APRIL 2006

DISTRIBUTION STATEMENT A
Approved for Public Release
Distribution Unlimited

**MERCY KILLINGS IN COMBAT: ENDING THE SUFFERING OF GRAVELY
WOUNDED COMBATANTS – A BRIEF HISTORY, APPLICABLE LAW, RECENT
PROSECUTIONS AND PROPOSALS FOR MUCH NEEDED CHANGE**

MAJOR WILL M. HELIXON*

-
- * Judge Advocate, U.S. Army. Presently assigned as Student, 54th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Va. J.D. 1993, South Texas College of Law; B.A. 1988, University of North Texas. Previous assignments include Senior Defense Counsel, U.S. Army Trial Defense Service, Region VII, Hanau Field Office, Hanau, Germany (2003-2005); Administrative Law Attorney and Trial Counsel, 1st Infantry Division, Bamberg Legal Center, Bamberg, Germany (2000-2003); Assistant Command Judge Advocate, U.S. Army National Support Element, Operation Joint Forge, Taszar, Hungary (2000); Claims, Legal Assistance and Administrative Law Attorney, Joint Readiness Training Center, Fort Polk, Louisiana, (1998-2000); Secretary for the Joint Staff, Joint Task Force Bravo, Soto Cano Air Base, Honduras (1997); Noncommissioned Officer in Charge, 1st Armored Training Brigade and 16th Cavalry Regiment, U.S. Army Armor Center, Fort Knox, Kentucky (1997-1998); Civilian Criminal Defense Attorney, Harris County, Houston, Texas (1993-1996). Member of the State Bar of Texas. This thesis was submitted in partial completion of the Master of Laws requirement of the 54th Judge Advocate Office Graduate Course.

Table of Contents

I. Introduction	1
A. The <i>coup de grâce</i> – Defining mercy killings.....	5
B. Current military operational commitments	7
C. Recent combat-related mercy killings.....	10
D. Roadmap for change	10
II. Survey of the history of combat-related mercy killings	14
A. General reports of combat-related mercy killings.....	16
1. Medieval battles and sieges	17
2. Napoleonic Wars.....	21
3. Native American Wars.....	29
4. World War I	33
5. Second Burma Campaign of World War II	37
6. Battle and retreat from Kursk in World War II.....	43
7. The Vietnam War.....	45
B. Specifically investigated cases of combat-related mercy killings.....	56
1. Falklands War – killing of burning prisoner of war	56
2. Iraq War – killing of severely wounded Iraqi teen	61
3. Iraq War – killing of insurgent with mortal head wound.....	66
III. Law applicable to combat-related mercy killings	73
A. Possible jurisdictions prohibiting combat-related mercy killings.....	74
1. Jurisdiction of the nation where the mercy killing occurred.....	74
2. Jurisdiction of International Criminal Tribunals.....	78
3. Jurisdiction of the United States	83

B. Applicable law to combat-related mercy killing – the UCMJ	85
1. Punitive article of the UCMJ – actus reus	86
a. Article 118(1), UCMJ – premeditated murder elements.....	91
b. Article 118(2), UCMJ – unpremeditated murder elements	91
c. Article 119(1), UCMJ – voluntary manslaughter elements	92
2. Combat-related mercy killings – mens rea	93
a. Article 118(1), UCMJ – premeditated murder	94
b. Article 118(2), UCMJ – unpremeditated murder.....	106
c. Article 119(1), UCMJ – voluntary manslaughter	107
C. Analysis of common facts in combat-related mercy killings.....	110
D. Charging decision factors for combat-related mercy killing cases	112
IV. Current prosecution of mercy killings as premeditated murder is unjust.....	117
A. Life in prison is a disproportionate potential sentence	117
B. Constructively coerces guilty pleas in an otherwise contested cases.....	121
C. Common defenses do not apply to mercy killings	133
1. Justification	133
2. Mistake of law.....	136
a. Mistake as to a separate non-penal law.....	137
b. Reliance on decision of an authorized public official.....	139
3. Necessity	146
D. Negates defense extenuation and mitigation case.....	153
V. UCMJ should eliminate premeditation as sole factor triggering life	156
A. Premeditation is an over-inclusive aggravating factor.....	158
1. State v. Forrest – a dying father	159

2. Gilbert v. State – a suffering wife.....	161
3. Griffith v. State – a vegetative child	162
B. Revise UCMJ – eliminate premeditation as sole-aggravating factor	163
1. New paradigm approach	165
2. Partial Affirmative Defense	169
3. Modified sentencing burden	171
VI. Conclusion.....	173
Appendix A. New Paradigm Homicide Statute	A-1
Appendix B. Proposed Sentencing Instruction.....	B-3
Appendix C. Proposed Partial Affirmative Defense Instruction	C-5
Appendix D. Mercy Killing Morality Questionnaire	D-6
Appendix E. National Prosecution Standards – Charging.....	E-9
Appendix F. R.C.M. 306(b) & Discussion.....	F-13
Appendix G. MCM, Appendix 21, Analysis of R.C.M. 306(b)	G-15
Appendix H. ABA Standard 3-3.9 – Charging Decision	H-16

Sergeant Halcrow was mortally hurt. His clothing was deranged; it seemed to have been violently torn apart, exposing . . . a wide, ragged opening in the abdomen. It was defiled with earth and dead leaves. Protruding from it was a loop of small intestine. . . .

. . . .
The man who had suffered these monstrous mutilations was alive. At intervals he moved his limbs; he moaned at every breath. He stared blankly into the face of his friend and if touched screamed. In his giant agony he had torn up the ground on which he lay; his clenched hands were full of leaves and twigs and earth. Articulate speech was beyond his power; it was impossible to know if he were sensible to anything but pain. The expression of his face was an appeal; his eyes were full of prayer. For what?

. . . .
There was no misreading that look Consciously or unconsciously, this writhing fragment of humanity, this type and example of acute sensation, this handiwork of man and beast, this humble, unheroic Prometheus, was imploring everything, all, the whole non-ego, for the boon of oblivion. To the earth and the sky alike, to the trees, to the man, to what ever took form in sense or consciousness, this incarnate suffering addressed that silent plea.

. . . .
For what, indeed? For that which we accord to even the meanest creature without sense to demand it, denying it only to the wretched of our own race: for the blessed release, the rite of uttermost compassion, the coup de grâce.¹

I. Introduction

A Soldier² who kills a gravely wounded combatant to end his suffering likely will be charged with premeditated murder. If convicted of premeditated murder, the Soldier will be

¹ AMBROSE BIERCE, THE COLLECTED WORKS OF AMBROSE BIERCE, VOL. II: IN THE MIDST OF LIFE: TALES OF SOLDIERS AND CIVILIANS, 122-132 (Gordian Press, Inc. 1966) (1909), available at <http://www.gutenberg.org/files/13334/13334-h/13334-h.htm#page122>.

² The author uses "Soldier" throughout this thesis; however the concepts herein are equally applicable to any member of the armed forces.

sentenced to life in prison—there is no discretion. Life in prison is the mandatory minimum sentence for a premeditated murder conviction.³ A mandatory life sentence for combat-related mercy killings is unjustifiable for three reasons. First, it subjects the Soldier to a punishment that does not correspond with the moral wrongfulness of the crime. Second, the mandatory minimum sentence constructively coerces the Soldier into a posture to plead guilty to a lesser charge to avoid the risk of the mandatory life sentence. Third, it deprives the Soldier of any meaningful sentencing case by making matters in mitigation and extenuation irrelevant.

By constructively coercing the Soldier to plead guilty, the government undermines the integrity of the military justice system avoiding the burden of proving the Soldier's actions were the cause of the victim's death, by shielding itself from possible defenses, and by avoiding the real risk of jury nullification by the panel members. Furthermore, when the Soldier pleads guilty to avoid the harshness of the potential life sentence, he is required to accept terms of the pretrial agreement that limits his ability to fully litigate the sentencing case. Since mercy killings have been a part of armed conflict for thousands of years,⁴ and since the United States is currently engaged in multiple military operations that require long-term commitments, the likelihood that Soldiers will be charged with premeditated murder for combat-related mercy killings is greater now than at any time in U.S. history. Several operational factors increase the likelihood that Soldiers will face such charges: the increased

³ MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 43(e)(1) (2005) [hereinafter MCM].

⁴ See *infra* Part II.

use of unmanned aerial vehicles (UAVs);⁵ the advent and proliferation of digital cameras possessed by Soldiers on the battlefield;⁶ and the presence journalists embedded with U.S. Soldiers in combat operations.⁷ These advances now record much of what never previously had been seen by the public in the history of war.⁸

As a result, the time is right to amend the Uniform Code of Military Justice (UCMJ) to criminalize more appropriately homicide, and to establish an equitable sentencing range

⁵ *Defense Authorization Request for Fiscal Year 2007 and the Future Years Defense Program: Hearing Before the S. Comm. on Armed Svcs.*, 109th Cong., 2d Sess. 21 (prepared remarks of Hon. Michael W. Wynne, Sec'y of U.S. Air Force), available at <http://armed-services.senate.gov/statemnt/2006/March/Wynne-Moseley%2003-02-06.pdf>.

Leading the way in reconnaissance and imagery, the Air Force is currently flying Predator UAV missions 24 hours a day, 7 days a week. This capability will grow from 8 to 12 total orbits in 2006 to meet increased demand. Predator aircraft are able to transmit live video picture to ground-based targeting teams equipped with the Remote Operations Video Enhanced Receiver (ROVER) system.

Id.

⁶ Tony Perry & Patrick J. McDonnell, *The Digital War: Armed with Cameras and the Internet, Troops Capture an Uncensored, Front-Lines View*, L.A. TIMES, May 19, 2004, at E1. Brigadier General Mark Kimmitt best expressed this reality:

You can't put the genie back in the bottle . . . Soldiers have cameras in the battlefield. They have telephones in the battlefield. They have access to Internet cafes on the base. At a certain point, you just have to trust them to do the right thing - and punish them if they don't.

Id.

⁷ ROBERT HODIERNE, *MEDIA CREDIBILITY IN WAR: THE PHENOMENON OF EMBEDDED REPORTERS* 9-10 (2004), <http://www.hodierne.com/cred.htm> (last visited Mar. 19, 2006). The process of embedding journalists with Soldiers as they fight wars and engage in military operations gives the media virtually unfettered access to the battlefield. "The embedded press system as implemented allowed the press unprecedented access. The system used in Iraq included not only the embedded press, but other forms of press access, including unilateral reporting and official information releases from the U.S. Central Command." CHRISTOPHER PAUL & JAMES J. KIM, *REPORTERS ON THE BATTLEFIELD: THE EMBEDDED PRESS SYSTEM IN HISTORICAL CONTEXT* xviii (2004).

⁸ "Embeds saw what the military units they were with saw. If the embedded journalist was with a combat unit, he typically had a view out the window of his Humvee as it sped north." HODIERNE, *supra* note 5, at 15.

for Soldiers convicted of combat-related mercy killings. One of these changes should include amending Articles 118 and 119 of the UCMJ. New homicide offenses should divide unlawful killings into three distinct categories: first degree murder, second degree murder, and manslaughter, based on aggravating and mitigating circumstances. The harshest punishments, including death, should be reserved for killings classified as first degree murder.

The UCMJ should also eliminate premeditation as the sole factor qualifying a Soldier for the death penalty and triggering the mandatory minimum sentence of life in prison in a murder case. Instead, premeditation should be simply one of several aggravating factors that could be used to classify a homicide as first degree murder. Additionally, an accused Soldier's merciful motive, such as eliminating pain or suffering, must be considered when classifying homicides. A formula that balances the aggravating and mitigating circumstances should then be used to determine the homicide classification—whether it is first degree murder, second degree murder, or manslaughter.

Until the homicide statute is revamped, immediate interim changes should be implemented. These immediate changes could include creating a partial affirmative defense for a combat-related mercy killing. A partial affirmative defense would mitigate, as a matter of law, premeditated and unpremeditated murder to voluntary manslaughter if the defense proves by a preponderance of evidence that the killing was motivated by mercy and the accused believed the victim was gravely wounded. Alternatively, also as an immediate measure, if the motive of mercy is reasonably raised by the evidence, the government would

have an additional sentencing burden before triggering the mandatory minimum sentence of life. The additional sentencing burden would require the government, once the motive of mercy is fairly raised by the evidence, to disprove both beyond a reasonable. Otherwise, the mandatory minimum sentence of life in prison would not be triggered. If the government chooses not to refute the merciful motive, or is unable to disprove it, then the full range of punishment, except death, would be an authorized punishment.

A. The *coup de grâce* – Defining mercy killings

Coup de grâce is a French expression meaning a “death blow delivered mercifully to end [the] suffering”⁹ of a person who is gravely wounded.¹⁰ Delivering a *coup de grâce* has been described as a “mercy killing” intended to end the anguish of a person facing inevitable death or “meaningless existence.”¹¹ Because a *coup de grâce* involves the killing of gravely

⁹ RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY 463 (2d ed. 1998) [hereinafter RANDOM HOUSE].

¹⁰ THE RANDOM HOUSE COLLEGE DICTIONARY 307 (Revised ed. 1980).

¹¹ JACQUES P. THIROUX, ETHICS: THEORY AND PRACTICE 234 (1977). Mercy killing is distinguished from allowing someone to die and mercy death in which the victim requests to be killed.

Mercy killing is similar to mercy death in the sense that it involves a direct action to end someone’s life; the difference is that mercy killing is not done at the person’s request. People who perform mercy killing may assume that the person they are going to kill wants this to be done, but they don’t know for sure, nor do they have the person’s explicit request or permission to perform the act. Very often the decision for mercy killing is based on the belief that the “victim’s” life is no longer worth living because he or she is just merely existing as a mindless organism, not as a full human being.

Therefore, mercy killing can be defined as the involuntary termination of someone’s life by a direct means from a motive of mercy, that is, in an attempt to end suffering and/or a “meaningless existence.”

Id.

wounded combatants in war, combat-related mercy killings are generally more accepted¹² than euthanasia.¹³ Despite this limited acceptance, combat-related mercy killings are not without moral questions¹⁴ or legal consequences.¹⁵

¹² It is one thing to be a combatant engaged in battle, attempting to kill each other one minute, then, after inflicting mortal wounds on your adversary, deciding what to do with him as he is suffering in his final moments of life. It is quite another thing for a doctor in a clinic or hospital environment, bound by an oath to render care to the sick, knowing that hospice and palliative care is readily available, to contemplate euthanasia. This point is illustrated in the debates of the Legislative Assembly for the Australian Capital Territory when they were considering a 1995 medical treatment bill in that would authorize euthanasia for the terminally ill:

I believe that there are two elements that need to be considered, the moral and the legal. Much of the moral issue has already been discussed by previous speakers. I do not wish to canvass those views, except to say that, whilst we may speak about freedom of choice in both life and death, it seems to me that there is a considerable difference between taking one's own life and asking somebody else to help one take it. Mercy killing is a fact of war. For example, a soldier may be too badly wounded to be carried and you do not wish him to fall into the hands of the enemy, for very obvious reasons. There is a difference, however, between that type of behaviour in war and a similar type of behaviour, be it mercy killing or euthanasia, in peace.

DEBATES OF THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY, HANSARD 2293 (daily ed. Nov. 22, 1995) (statement of Mr. Speaker Cornwell), available at <http://www.hansard.act.gov.au/hansard/1995/pdfs/19951122.pdf>.

¹³ While the term "mercy killing" is often used interchangeably with euthanasia, in a combat or battlefield context, euthanasia will rarely be used to describe a *coup de grâce* or "combat-related mercy killing." There is no widespread or commonly accepted definition of euthanasia. However, almost all definitions of euthanasia share common components:

[The first shared component is] that euthanasia involves decisions which have the effect of shortening life. They [definitions] also agree that it is limited to the medical context: 'euthanasia' involves patients' lives being shortened by doctors and not, say, by relatives. Moreover, all three [definitions] concur that characteristic of euthanasia is the belief that death would benefit the patient, that the patient would be better off dead, typically because the patient is suffering gravely from a terminal or incapacitating illness or because the patient's condition is thought to be an 'indignity.'

JOHN KEOWN, EUTHANASIA, ETHICS AND PUBLIC POLICY: AN ARGUMENT AGAINST LEGALISATION 10 (2002) (citations omitted).

¹⁴ The motive of the Soldier for killing the gravely wounded combatant "matters decisively" in assigning a "moral quality" to the killing, and hence moral consensus. The moral analysis of combat-related mercy killings is similar to that of euthanasia:

B. Current military operational commitments

In a post-September 11, 2001 world,¹⁶ military and combat operations have become commonplace,¹⁷ with significant challenges incurred and future long-term commitments

There is no consensus that killing anything (alive) is wrong. But as one adds a subject of the act, or agent, object/ends of this agent, and other circumstances to the genus “killing” to get the quasi-species of “the deliberate killing of people,” one reaches a level where wide consensus can be elicited (e.g. in circumstance where the person deliberately and knowingly killed is innocent, killing is murder and wrong). If one adds yet more specification/determination (the agent has been asked by a terminally ill patient in excruciating pain, under a number of specific further conditions for soundness of mind and informed consent by family and subject, after checks on terminal diagnosis, etc.) this consensus again disappears (mercy killing).

David Ardagh, *The Method of Determination in Moral Reasoning: Moral Universalism and Particularism Reconciled?* 3 (Center for Applied Philosophy and Public Ethics, Working Paper No. 2001/3, 2001), available at <http://www.cappe.edu.au/PDF%20Files/Ardagh1.pdf> (cited with permission of author).

¹⁵ In the three most recent cases of combat-related mercy killings by U.S. Soldiers, all three accused were convicted. Staff Sergeant Johnny Horne, Staff Sergeant Jonathon Alban-Cardenas, and Captain Rogelio Maynulet were convicted in separate courts-martial for killing gravely wounded Iraqis who appeared to be suffering. Scott Canon, *Officer's Fate is on the Line Again; He's Accused of Ordering Murders*, KANSAS CITY STAR, Nov. 13, 2005, at A1. The author was a member of CPT Maynulet's defense team.

¹⁶ On the morning of September 11, 2001, four commercial passenger jets were hijacked within an hour and fifteen minutes of each other, and three were piloted into symbols of American power and wealth: the North and South towers of the World Trade Center in New York City, and the Pentagon in Washington D.C. The result of these terrorist attacks was catastrophic as noted by the 9/11 Commission:

On September 11, the nation suffered the largest loss of life – 2,973 – on its soil as a result of hostile attack in its history. The [Fire Department of New York] suffered 343 fatalities – the largest loss of life of any emergency response agency in history. The [Port Authority Police Department] suffered 37 fatalities – the largest loss of life of any police force in history. The [New York Police Department] suffered 23 fatalities – the second largest loss of life of any police force in history, exceeded only by the number of PAPD officers lost the same day.

NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 311 (Official Gov't. ed., 2004), available at <http://a257.g.akamaitech.net/7/257/2422/05aug20041050/www.gpoaccess.gov/911/pdf/fullreport.pdf>.

¹⁷ Since the beginning of Operation Enduring Freedom, the United States has been engaged in continuous combat overseas on two fronts: Afghanistan and Iraq. As of January 31, 2005, 1,048,884 troops have fought in these military operations, “approximately one-third the number of troops ever stationed in or around Vietnam during 15 years of that conflict.” Mark Benjamin, *How Many Have Gone to War?*, Apr. 12, 2005,

required.¹⁸ Today, U.S. forces are deployed to Iraq,¹⁹ Afghanistan,²⁰ and throughout the world²¹ fighting the Global War on Terrorism.²² For instance, the U.S. Army has 315,000

http://www.salon.com/news/feature/2005/04/12/troops_numbers/. One third of the troops have redeployed at least once to combat zones, with 63% of all active duty Soldiers deploying at least once in support of, or in direct combat operations in Afghanistan and Iraq. *See id.*

¹⁸ The enemy—insurgents and guerrilla fighters who can fade into the community—necessarily prolong the conflict. Dr. Paul Rogers, a professor of peace studies at the University of Bradford, England, and global security consultant to the Oxford Research Group noted:

What the United States is facing in Iraq and Afghanistan is an entrenched form of asymmetric warfare in which determined paramilitaries have sufficient support from their own communities and are fighting on their own territory. With all its reconnaissance and surveillance systems and with all its firepower and communications assets the Pentagon is simply not able to gain the advantage and therefore faces major long-term commitments that are as unexpected as they are difficult to maintain.

Paul Rogers, *The U.S. Military and the 'War on Terror,'* INT'L SECURITY MONTHLY BRIEFING (Oxford Research Group, Oxford, U.K.), Sept. 2005, at 5.

¹⁹ As of December 22, 2005, there were nearly 160,000 U.S. troops in Iraq. Douglass K. Daniel, *Warner: Bush Should Use 'Fireside Chats,'* Dec. 22, 2005, http://ap.washingtontimes.com/dynamic/stories/U/US_IRAQ?SITE=DCTMS&SECTION=HOME&TEMPLATE=DEFAULT&CTIME=2005-12-17-15-08-48.

²⁰ As of December 7, 2005, there were approximately 18,000 U.S. troops in Afghanistan. Robert E. Hunter, *Q&A: NATO troops in Afghanistan,* Dec. 7, 2005, http://www.nytimes.com/cfr/international/slot1_120705.html?pagewanted=print (last visited Dec. 23, 2005).

²¹ ANDREW FEICKER, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, U.S. MILITARY OPERATIONS IN THE GLOBAL WAR ON TERRORISM: AFGHANISTAN, AFRICA, THE PHILIPPINES, AND COLOMBIA 7-13 (Feb. 4, 2005). In addition to Afghanistan and Iraq, the United States is conducting military operations in Africa, the Philippines, Colombia and “other countries or regions” as part of the Global War on Terrorism. *Id.* at 1. In October 2002, the Combined Joint Task Force Horn of Africa (CJTF-HOA) fights terrorism in the countries of Kenya, Somalia, Ethiopia, Sudan, Eritrea, and Djibouti. There are approximately 2,000 personnel stationed in Djibouti as part of CJTF-HOA. *Id.* at 7. In the Philippines, U.S. forces are training Filipino units in “counterinsurgency and counterterrorism tactics.” U.S. troops participate in Balikatan exercises at least annually, utilizing approximately 2,500 troops for each exercise. *Id.* at 9. In Columbia, in 2002, the focus shifted from counter narcotic training to counterinsurgency training for Colombian forces. The United States has about 800 military and civilian personnel in Columbia. *Id.* at 12.

²² President Bush described the all encompassing war on terrorism soon after the 9/11 attacks as:

Ours will be a broad campaign, fought on many fronts. It's a campaign that will be waged by day and by night, in the light and in the shadow, in battles you will see and battles you won't see. It's a campaign waged by [S]oldiers and sailors, Marines and airmen; and also the FBI agents and law enforcement officials and diplomats and intelligence officers. It's a campaign that is being waged in distant lands, and a campaign be waged by our new Office of Homeland Security.

Soldiers “deployed or forward stationed in more than 120 countries to support operations in Iraq, Afghanistan and other theaters of war.”²³ The U.S. Navy has 85 ships deployed “in support of the nation’s interests in the Persian Gulf, the Mediterranean, the Indian Ocean and the Western Pacific.”²⁴ The U.S. Air Force has over 31,000 Airmen deployed supporting the military efforts and “were flying 225 sorties a day.”²⁵ At the beginning of the Iraq War, the U.S. Marine Corps deployed a Marine Expeditionary Force as “a combat ready force of almost 70,000 Marines and Sailors in less than 60 days.”²⁶ All branches of the U.S. military are actively engaged worldwide supporting operations that required the “largest movement of forces” and equipment since WWII.²⁷ Not surprisingly, during these combat operations,

George W. Bush, U.S. President, Remarks at the California Business Association Breakfast in Sacramento, California, (Oct. 17, 2001), in 42 WEEKLY COMP. PRES. DOC. 1499 (Oct. 22, 2001).

²³ *A statement on the Posture of the United States Army, 2005: Presented to the Comm. and Subcomm. Of the U.S. Senate and the H. of Rep.*, 109th Cong. 3-4 (1st Sess. 2005) (written remarks of Hon. Francis J. Harvey, Sec. of the Army, and Gen. Peter J. Schoomaker, Army Chief of Staff). The Army is engaged in operations “we could never have forecasted before September 11, 2001, operating at a very high pace that will likely continue for some time.” *Id.*

²⁴ *2005 Posture Statement of the U.S. Navy: Hearing Before the Defense Subcomm. of the H. Appropriations Comm.*, 109th Cong. 2-3 (1st Sess. 2005) (statement of Adm. Vern Clark, Chief of Naval Operations).

²⁵ *U.S. Air Force Posture Statement – 2005: Presented to the Comm. and Subcomm. Of the U.S. Senate and the H. of Rep.*, 109th Cong. (1st Sess. 2005) (written statement of Hon. Peter B. Teets, Act. Sec. of the Air Force, and Gen. John P. Jumper, Air Force Chief of Staff), available at <http://www.af.mil/library/posture/posture2005.pdf>.

²⁶ *Posture of the U.S Marine Corps, 2004: Presented to the Senate Armed Services Comm.*, 108th Cong. 2-3 (2004) (statement of Gen. Michael W. Hagee, Commandant of the Marine Corps), available at http://www.au.af.mil/au/awc/awcgate/usmc/posture_feb04.pdf. “During this past year, the Marine Corps, both active and reserve, was engaged in operations from Afghanistan, to the Arabian Gulf, the Horn of Africa, Liberia, the Georgian Republic, Colombia, Guantanamo Bay and the Philippines.” *Id.*

²⁷ *Regarding the Fiscal Year 2005 National Defense Authorization Budget Request – Assessing the Adequacy of the Fiscal Year 2005 Budget to Meet Readiness Needs: Hearing Before the Subcomm. on Readiness of the H. Comm. on Armed Services*, 109th Cong. (2004) (statement of Gen. George W. Casey, Jr., Vice Chief of Staff, U.S. Army).

many U.S. troops will be forced to render emergency medical aid to those wounded in the conflict, combatants and civilians alike, and face gravely wounded combatants.

C. Recent combat-related mercy killings

On at least two occasions since the U.S.-led invasion of Iraq in March 2003, Soldiers have ended the apparent suffering of gravely wounded individuals with mercy killings. The first incident involved an insurgent that was gravely wounded when he was shot in the head during a vehicle chase with U.S. forces.²⁸ The second incident involved an Iraqi teenager who was gravely wounded when he was shot by a patrol in a truck suspected of planting improvised explosive devices (IEDs).²⁹ Three courts-martial resulted from these incidents and the government charged each Soldier with premeditated murder,³⁰ carrying a mandatory minimum sentence of confinement for life if convicted.³¹

D. Roadmap for change

²⁸ Bill Glauber, *Chicago Soldier Shot Iraqi Out of Mercy, Officer Testifies*, CHI. TRIB., Sept. 9, 2004, at 18; Bill Glauber, Evan Osnos & Carlos Sadovi, *Murder Case Snares the Perfect Soldier; Chicago GI is 1st Charged in Iraq*, CHI. TRIB., July 25, 2004, at 1.

²⁹ Edmund Sanders, *The Conflict in Iraq; U.S. Soldier Pleads Guilty in 'Mercy' Killing of Iraqi; Staff sergeant is given a three-year prison term*, L.A. TIMES, Dec. 11, 2004, at A13.

³⁰ The government charged Staff Sergeant (SSG) Horne and SSG Alban-Cardenas with premeditated murder. Edmund Sanders, *The Conflict in Iraq; U.S. Soldier Pleads Guilty in 'Mercy' Killing of Iraqi; Staff sergeant is given a three-year prison term*, L.A. TIMES, Dec. 11, 2004, at A13. Additionally, the government charged Captain (CPT) Maynulet with premeditated murder. U.S. Dep't of Defense, DD Form 458, Charge Sheet (May 2000) (*United States v. Maynulet* preferred 12 June 2004) (on file with author).

³¹ MCM, *supra* note 3, pt. IV, ¶ 43(e)(1).

In arguing for why life in prison is not an appropriate mandatory punishment for combat-related mercy killings, such killings must be put into a historical context. Part II of this thesis surveys the history of combat-related mercy killings. The historical survey first reviews general reports of combat-related mercy killings as recorded in various campaigns or wars—from the early accounts, through the Middle Ages and Napoleon, through both World Wars, and beyond, to Vietnam. The historical survey then shifts to officially investigated incidents of combat-related mercy killings—focusing on three contemporary cases, all investigated by their respective services.

After the historical survey, Part III of this thesis examines what law should apply to combat-related mercy killings. After analyzing what jurisdictions could enforce criminal laws against a Soldier for a combat-related mercy killing, this thesis examines the statutes under which a Soldier is likely to face trial. This legal analysis considers the laws of the nation where the combat-related mercy killing occurred, international law, including The Hague and Geneva Conventions, and the domestic law of the United States, focusing on the UCMJ. Once it is determined where a Soldier is likely to be tried, the specific applicable statutes will be examined.

The first part of the statute-specific legal analysis focuses on the *actus reus* of the possible offenses, including premeditated murder, murder and manslaughter. The second part analyzes the *mens rea* requirements for each offense addressed in the *actus reus* section. The third part applies the facts common to all combat-related mercy killings to the elements of the applicable law. This factual application will determine what offense best “fits” the

facts of combat-related mercy killings. The final part of the legal analysis reviews the theories and ethics behind charging decisions, and considers what implications the mandatory minimum sentence life for premeditated murder has on prosecutorial discretion and the charging decisions for courts-martial involving a combat-related mercy killing.

Following the legal analysis, Part IV of this thesis argues that the current practice of the U.S. Army³² of charging combat-related mercy killings as premeditated murder is unjustified. The first argument focuses on why charging premeditated murder is unjust—that the potential punishment does not fit the crime and the Soldier is constructively coerced to plead guilty. The forced guilty plea permits the government to avoid its burden of proving the case, and minimizes the effectiveness of the defense sentencing case. The second argument examines the potential defenses of justification, mistake of law, necessity and duress, and demonstrates why each is likely to fail in a combat-related mercy killing case, thereby exposing the accused to a mandatory minimum sentence of life in prison. The final argument concludes that in the event the Soldier is convicted of premeditated murder, his sentencing case is meaningless.

Part V of this thesis advocates changing the military homicide statutes to avoid the injustices explored in Part IV. The initial proposal for change focuses on revising Articles 118 and 119, UCMJ. This revision's goal is to eliminate premeditation as the sole factor

³² While this thesis is equally applicable to all military services, the three recent cases involving combat-related mercy killing have all been Soldiers tried by courts-martial in U.S. Army courts with prosecutors, defense counsel and military judges all from the U.S. Army.

triggering the death penalty and mandatory minimum sentence of life. Adoption of a homicide statute or a classification system based on aggravating and mitigating factors would accomplish such a goal. The second proposal is to make mercy killing a partial affirmative defense in the *Manual for Courts-Martial* (MCM). If, at trial, the defense proves mercy was the motive for the killing and the accused Soldier believed the victim was gravely wounded, murder would be mitigated to manslaughter. The third proposal for change calls for an immediate modification to the sentencing procedures and jury instructions in premeditated murder cases until the homicide statute is fully revised or the affirmative defense is implemented. The modified sentencing procedure would require the military judge, *sua sponte*, to instruct the members that the government has the burden to *disprove* beyond a reasonable doubt (when raised by the evidence) one of two mandatory sentence triggering prongs. The first is the motive prong and the second is gravely wounded prong. If the government proves that the motive of the Soldier was not mercy, then the mandatory minimum sentence is triggered. Alternatively, if the government proves that the Soldier who committed the mercy killing honestly did not believe the victim was gravely wounded, or that such belief was unreasonable, then the mandatory minimum sentence is also triggered. Once there is some evidence of merciful motive, the mandatory minimum sentence of life only will be imposed if the government proves beyond a reasonable doubt that 1) the motive was not mercy, or 2) the accused Soldier did not think the person's death was inevitable or 3) such belief was unreasonable. If the government chooses not to contest the accused's motive or belief, or fails to disprove them beyond a reasonable doubt, the members would be authorized to adjudicate any punishment except death.

II. Survey of the history of combat-related mercy killings

One of the first accounts of a combat-related mercy killing is the biblical story of King Saul.³³ King Saul battled the Philistines in about 1000³⁴ B.C.E.³⁵ As the Philistines closed in on Saul and his forces at Mt. Gilboa, many of his men were killed, including his sons. Saul was gravely wounded in the battle and ultimately killed.³⁶ There are two accounts of his death.

The first account is from a mourning Israeli Soldier. An Amalekite told David that as the Israeli Army fled from the Philistines on Mount Gilboa he observed Saul leaning against his spear as the enemy chariots closed in on him. He told David that Saul begged him to kill him saying “come and put me out of my misery for I am in terrible pain but life lingers on.”³⁷

³³ Saul is the first king of the Kingdom of Israel. The prophet Samuel, a great judge of Israel, appointed him king as instructed by God after the people of Israel asked to be ruled by a king as other nations were ruled at the time, thereby rejecting “the theocratic regime.” JAMES F. DRISCOLL, *THE CATHOLIC ENCYCLOPEDIA*, VOL. XIII (online ed., K. Knight 2003) (1912), <http://www.newadvent.org/cathen/13486d.htm> (last visited Jan. 10, 2006).

³⁴ Jewish scholars have Saul’s death at 1000 B.C.E. “At around the turn of the millennium, the kingship changed hands. Saul died in battle.” The Department for Jewish Zionist Education, The Jewish Agency for Israel, A Timeline of Jewish History, <http://www.jewishagency.org/JewishAgency/English/Jewish%20Education/Jewish%20History/1300%20BCE%20-%201996%20CE/> (last visited Jan. 2, 2006).

³⁵ When referencing history or theology the abbreviation A.D. (anno Domini, Latin for “in the year of our Lord”) and B.C. (“before Christ”) are often replaced by C.E. (meaning “in the Common Era”) and B.C.E. (meaning “before the Common Era”) respectively. WILLIAM A. SABIN, *THE GREGG REFERENCE MANUAL: A MANUAL OF STYLE, GRAMMAR, USAGE, AND FORMATTING* 312 (10th ed. 2005 (Univ. of Phoenix Custom ed.)).

³⁶ *1 Samuel* 31:1-7 (The Living Bible, Paraphrased).

³⁷ *2 Samuel* 1:1-10 (The Living Bible, Paraphrased).

Knowing death was inescapable; the Israeli Soldier confessed to David he delivered the *coup de grâce*, killing Saul.³⁸

The second account of the death of Saul occurs when archers fired on his position severely wounded him. In agony, Saul groaned to his armor bearer “kill me with your sword before these heathen Philistines capture me and torture me.”³⁹ The armor bearer refused to kill Saul out of fear; therefore fell upon his own sword, ending his pain.⁴⁰ Regardless of which account is accepted, they both demonstrate that over thousands of years ago, the concept of killing a gravely wounded combatant out of mercy had been contemplated.

Similarly, the account of the Zealots at the fortress of Masada when battling the Romans in 74 C.E. demonstrates that the mercy killing to prevent the intolerable future pains associated with slavery, rape, torture and religious persecution also had been contemplated.⁴¹ The Zealots were revolting against the Romans and in 74 C.E. the last of the Zealots where in siege at the fortress at Masada. After a lengthy siege, the Romans broke through the outer wall of the fortress, and because of nightfall, postponed the final assault until the following

³⁸ *Id.*

³⁹ *1 Samuel 31:3-4* (The Living Bible, Paraphrased).

⁴⁰ *Id.* Similarly, Abimelech, on of Gideon’s sons, after he defeated the men of Shechem, captured the city of Thebez. *Judges 10:50* (The Living Bible Paraphrases). The residents of Thebez barricaded themselves inside a fort within the city. As Abimelech prepared to burn the fort, a woman on the roof “threw down a millstone,” crushing his skull. *Judges 10:53*. ““Kill me!” he groaned to his youthful armor bearer. ‘Never let it be said that a woman killed Abimelech!’ So the young man pierced him with his sword, and he died.” *Judges 10:54*.

⁴¹ Masada, <http://people.westminstercollege.edu/faculty/mmarkowski/212/Class-site/byrce/212.html> (last visited Jan. 8, 2006).

morning.⁴² That night, the Zealots decided that if the Romans captured them, survivors would be subjected to inhumane atrocities. As a group, they decided to spare themselves the “intolerable pains” that would be inflicted upon them by the Romans. The Zealots accomplished this with mercy killings.⁴³ The method by which they carried out the mercy killings assured that only one would have to commit suicide:

The men became grief stricken for the murder of their families and resolved to finish the job as quickly as possible. Each man burned everything that he had and “they chose ten men by lot out of them, to slay all of the rest.” These ten made sure that all were dead except for themselves, and once again by lot chose the man who would slay them all, set fire to the fortress and finally kill himself.⁴⁴

A survey of more contemporary examples of the way warriors on the battlefield confronted gravely wounded and suffering combatants creates a tapestry representing the history of combat-related mercy killings.

A. General reports of combat-related mercy killings

The history of combat-related mercy killings is mostly recorded as personal accounts or reports from the field. Usually, there was no investigation or court-martial resulting from the combat-related mercy killing. As a result, most of the documented incidents of such

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

killings are recorded in the personal accounts of war and individual battles, or in the biographies of war survivors. While a complete treatise has not been written on the subject of combat-related mercy killings, several examples are noted throughout history.

1. Medieval battles and sieges

After the Norman Conquest of England by the French Duke William the Conqueror in 1066, the English throne claimed vast tracks of land in both England and France.⁴⁵ Over time, the French began to take back the lands acquired by the English,⁴⁶ and in 1337 demanded the return of the last two provinces: Gascony and Guienne.⁴⁷ This started the Hundred Year War between France and England.⁴⁸

In August 1415, still battling the Hundred Year War, and in an attempt to reclaim lands reacquired by the French, English King Henry V set sail for Harfleur with eight thousand archers and two thousand men-at-arms.⁴⁹ After six weeks, and the loss of over

⁴⁵ CH. PETIT-DUTAILLIS, *THE FEUDAL MONARCHY IN FRANCE AND ENGLAND FROM THE TENTH TO THE THIRTEENTH CENTURY* 60 (C.K. Ogden ed., E.D. Hunt trans., 1936). William claimed the throne through his relationship with Edward the Confessor, not through conquest. *Id.* at 58. In 1051, Edward promised William the throne. *Id.* Edward's son Harold, took a sacred oath on consecrated relics that he would not seek the crown. *Id.*

⁴⁶ *Id.* at 62-66.

⁴⁷ EDOUARD PERROY, *THE HUNDRED YEARS WAR* 69 (1959).

⁴⁸ *Id.*

⁴⁹ JOHN KEEGAN, *THE FACE OF BATTLE* 80-81 (1976).

three thousand English men to battle wounds and disease, Harfleur fell.⁵⁰ With the significant losses and winter approaching, King Henry's "intention of marching down the Seine to Paris" was impossible.⁵¹ His new plan was to battle the French on the march to Calais.⁵² By October 24, 1415, the French reached the English, and were preparing for battle with far superior numbers.⁵³

On October 25, 1415, with the use of thousands of archers, and by goading the French to initiate the attack, the English defeated the French near the Agincourt Castle in an epic battle lasting only a few hours.⁵⁴ While the English suffered modest casualties, the French losses were significant and the prognosis for their wounded was "grave."⁵⁵ By the following morning, many of the wounded French were abandoned on the battlefield.

[I]f they did not bleed to death, [many of the French wounded] would have succumbed to the combined effects of exposure and shock during the night, when temperatures might have descended into the middle-30s Fahrenheit. It was, therefore, not arbitrary brutality when, in crossing the battlefield next morning, the English killed those whom they found alive. They were almost certain to have died, in any case, when their bodies would have gone to join those which the local peasants, under the supervision of the Bishop of Arras,

⁵⁰ *Id.* at 81.

⁵¹ *Id.*

⁵² *Id.* at 81-82.

⁵³ *Id.* In fact, by the battle the following morning, the English had five- to six-thousand men to battle the approximately twenty-five thousand French. KEEGAN, *supra* note 49, at 88.

⁵⁴ *Id.* at 112.

⁵⁵ *Id.* at 112-13.

dug into pits on the site. They are said to have buried about six thousand altogether.⁵⁶

Justification for the Agincourt mercy killings of the gravely wounded French rested on the fact that those left on the battlefield were condemned to “fatal” injuries,⁵⁷ and eventual death was assured.

Similarly, at the siege of Montreuil-Bellay, medical services were largely nonexistent. The limited care available was overwhelmed by the staggering number of wounded Soldiers.⁵⁸ Only the noble and men of rank had hope for treatment; they might be treated by their personal doctors and surgeons if they managed to make it off the battlefield.⁵⁹ Most men languished on the battlefield for at least several hours, and some even days.⁶⁰ If the Soldier could survive his battle wounds and the weather, it is uncertain whether they could

⁵⁶ *Id.* at 113.

⁵⁷ *Id.* at 112-13. Based on the weapons and tactics of the English, the wounds likely suffered by the French offered no chance for survival:

Many [of the French] would have suffered penetrating wounds, either from arrows or from thrusts through the weak spots of their armour. Those which had pierced the intestines, emptying its contents into the abdomen, were fatal: peritonitis was inevitable. Penetrations of the chest cavity, which had probably carried in fragments of dirty clothing, were almost as certain to lead to sepsis. Many of the French would have suffered depressed fractures of the skull, and there would have been broken backs caused by falls from horses in armour at speed. Almost all of these injuries we may regard as fatal, the contemporary surgeons being unable to treat them.

Id. at 113.

⁵⁸ JOHN KEEGAN, RICHARD HOLMES & JOHN GAU, *SOLDIERS: HISTORY OF MEN IN BATTLE 145-46* (1985).

⁵⁹ *Id.* at 146.

⁶⁰ *Id.*

survive the thieves and murders infesting the battlefield of the dead and dying in search of anything of value—money, jewelry, and clothing.⁶¹ Living through the battle was only the first step for survival. The next step was to make it off the battlefield alive.

In the due course the wounded, or at least those of the victorious army, would be collected up in carts and taken to monasteries to be cared for by the monks, or to improvised field hospitals. For those whose wounds were serious the long wait or jolting journey would prove fatal, and often fellow soldiers bowed to the inevitable and quietly finished off the hopelessly injured. Not for nothing was the slim knightly dagger called the misericord – the weapon of mercy.⁶²

Following the Medieval Era, the French surgeon Ambroise Paré witnessed mercy killings in Milan in 1537 when he came upon three Soldiers badly burned and disfigured by gunpowder:

Beholding them with pity there came an old soldier who asked me if there was any means of curing them. I told him no. At once he approached them and cut their throats gently and, seeing this great cruelty, I shouted at him that he was a villain. He answered me that he prayed to God that should he be in such a state he might find someone who would do the same for him, to end that he might not languish miserably.⁶³

Early in the history of warfare, a warrior ethic emerged—one where men of battle would kill fallen combatants who they believed were suffering and death seemed certain.

⁶¹ *Id.*

⁶² *Id.* The misericord is “a medieval dagger used for [delivering] the mercy stroke to a wounded foe.” See RANDOM HOUSE, *supra* note 9, at 1229.

⁶³ RICHARD HOLMES, *ACTS OF WAR: THE BEHAVIOR OF MEN IN BATTLE* 187 (1986).

The underlying theme in these combat-related mercy killings was similar to the Golden Rule.⁶⁴ Warriors delivered the *coup de grâce* in situations where they would want their enemy to do the same for them if similarly wounded. The Napoleonic Wars continued this warrior ethic.

2. Napoleonic Wars

In 1799, Napoleon embarked on a campaign to conquer Syria.⁶⁵ After conquering Malta⁶⁶ and invading Egypt,⁶⁷ Napoleon's mission to conquer Syria had three purposes: defeat the enemies at the Egyptian border to consolidate power to protect against an Anglo-Turkish invasion;⁶⁸ "oblige the Porte⁶⁹ to explain itself" for declaring war on France,⁷⁰ and

⁶⁴ This theory of morality asks the person who is contemplating an action that affects others if he would want to be affected in the same way by someone else's actions. "In other words, if you want to find out what the moral thing to do is in any situation, you should ask yourself what you would like done to or for you if you were going to be the recipient of your own moral action." THIROUX, *supra* note 11, at 159.

⁶⁵ J. CHRISTOPHER HEROLD, BONAPARTE IN EGYPT 263 (1962). In 1799, the Syria consisted of what is modern day Syria, Lebanon, Israel and Jordan. *Id.*

⁶⁶ *Id.* at 46.

⁶⁷ *Id.* at 62-63.

⁶⁸ *Id.* at 266.

⁶⁹ Europeans referred to the Ottoman throne as the Sublime Porte, a named derived from a gate of the Sultan's palace in Istanbul. LIBRARY OF CONGRESS, FEDERAL RESEARCH DIVISION, SYRIA: OTTOMAN EMPIRE, <http://www.country-data.com/cgi-bin/query/r-13475.htm> (last visited Jan. 10, 2006).

⁷⁰ DAVID G. CHANDLER, THE CAMPAIGNS OF NAPOLEON 230 (1966).

[Napoleon's] attempts to open diplomatic relations with the Oriental power were particularly disappointing; Murad Bey sent back a message of defiance to Bonaparte's tentative offers of peace; Djézzar Pasha, governor of Syria, rebuffed all approaches while the Sultan did not even deign to reply to Bonaparte's overtures. The Bey of Tunis and the Pasha of Damascus similarly returned curt answers, and the feeling of complete isolation was reinforced in

possibly begin negotiations; and to cutoff the supplies to the English “cruising squadron” in the Mediterranean Sea from Syria.⁷¹

In early 1799, Napoleon, with nearly 13,000 Soldiers, marched to Syria.⁷² The bubonic plague broke out in Egypt the month before the march to Syria.⁷³ Although the plague had not yet afflicted anyone in the French Army, Napoleon refused to allow Soldiers to call the condition “bubonic plague.”⁷⁴ Rather, he insisted that it be called “only a fever with buboes.”⁷⁵ To Napoleon, the best protection from the plague was moral courage and to keep the army “on the march and occupied.”⁷⁶

Meeting resistance on the march to Syria, Napoleon arrived at Jaffe on March 3, 1799.⁷⁷ For three days, Napoleon planned the assault on Jaffe, and on March 7, 1799, the French successfully took the city.⁷⁸ What happened next was barbaric. The French Soldiers

October [1798] when the Sultan issued a “firman” declaring a Holy War against the French.

Id.

⁷¹ HEROLD, *supra* note 65, at 266.

⁷² *Id.* at 264.

⁷³ *Id.* at 208.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ CHANDLER, *supra* note 70, at 236.

⁷⁸ *Id.*

killed anything that moved, including 3000 Turkish prisoners who had surrendered.⁷⁹

“[T]hroughout that evening, the entire night, and the following morning, the French [Soldiers] went berserk.”⁸⁰ The killing was indiscriminate—men, women, children, Christians, Muslims, young, old—all were butchered by the French Soldiers.⁸¹ For the next two days, the killing of Turkish prisoners continued.⁸² Napoleon ordered the prisoners executed, instructing his Soldiers to not waste ammunition—but to kill the prisoners by stabbing them with their bayonets.⁸³ All told, the French executed 4441 Turkish prisoners of war in four days at Jaffe.⁸⁴

“As if in divine retribution for the incident, the [French] army was instantly afflicted by a severe outbreak of the plague,”⁸⁵ forcing Napoleon to stay in Jaffe an additional week before his final assault on Acre.⁸⁶ By the time the French left for Acre, 300 men had been stricken with the plague, and remained in Jaffe.⁸⁷ A hundred and fifty men were left behind

⁷⁹ *Id.* “Three thousand Turks in the citadel of Jaffa accepted the word of a subordinate French officer that they would be granted quarter, but Bonaparte order the execution of every man and of a further 1,400 prisoners.” *Id.*

⁸⁰ HEROLD, *supra* note 65, at 273.

⁸¹ *Id.* at 276-77.

⁸² *Id.*

⁸³ *Id.* at 277.

⁸⁴ *Id.* at 276.

⁸⁵ CHANDLER, *supra* note 70, at 236.

⁸⁶ *Id.*

⁸⁷ HEROLD, *supra* note 65, at 208.

to attend to them.⁸⁸ When Napoleon finally arrived, it was impossible to seize Acre. Plague now gripped the French Soldiers.⁸⁹ On May 16, 1799, Napoleon discussed what to do about the plague infected Soldiers with his chief doctor, Dr. Desgenettes.⁹⁰ Napoleon suggested mercy killings for the doomed Soldiers in Acre:

“If I were in your place, I should put an end to the sufferings of our plague patients and, at the same time, to the danger they represent for us, by giving them [an overdose of] opium.” If he himself had the plague, Bonaparte continued with the utmost calm, he would ask this to be done for him as a favour.⁹¹

Dr. Desgenettes disagreed with Napoleon’s plan, partly because of medical ethics, and partly because he was aware that many Soldiers could survive the plague.⁹² Dr. Desgenettes responded to Napoleon saying, “my duty is to preserve life.”⁹³ Nothing more was said about mercy killings in Acre. Failure in Acre was destined and imminent. After sixty-three days of battle, eight deadly assaults, and the plague ravaging the French Soldiers, a defeated Napoleon had no other choice but to retreat to Jaffe, and then Egypt.⁹⁴

⁸⁸ *Id.*

⁸⁹ *Id.* at 302.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ CHANDLER, *supra* note 70, at 240-41.

Napoleon's retreat arrived in Jaffe on May 24, 1799, with a hoard of wounded and sick Soldiers.⁹⁵ Between May 25, 1799, and May 27, 1799, 1300 sick and wounded French Soldiers traveled to Egypt by land.⁹⁶ Several hundred others, the most serious cases, sailed to Damietta on the coast of Egypt.⁹⁷ At least fifty French Soldiers languished in the hospital, too sick to move.⁹⁸ Napoleon ordered the mercy killing of the patients that could not be moved.⁹⁹ He made the decision only after deliberative consideration.

An hour afterwards the General-in-Chief [Napoleon] left his tent and repaired to the town, accompanied by Berthier, some physicians and surgeons, and his usual staff. I [Bourrienne] was also one of the party. A long and sad deliberation took place on the question which now arose relative to the men who were incurably ill of the plague, or who were at the point of death. After discussion of the most serious and conscientious kind it was decided to accelerate a few moments, by a potion, a death which was inevitable, and which would otherwise be painful and cruel.¹⁰⁰

After deciding to kill those who were destined to die from the plague anyway, Napoleon walked through the hospital and told the "scarcely sixty" plague-infected patients that "in a few hours the Turks will be here. Let all those who have the strength enough to

⁹⁵ *Id.* at 241.

⁹⁶ HEROLD, *supra* note 65, at 307.

⁹⁷ *Id.*

⁹⁸ *Id.* at 308.

⁹⁹ CHANDLER, *supra* note 70, at 241.

¹⁰⁰ LOUIS ANTOINE FAUVELET DE BOURRIENNE, MEMOIRS OF NAPOLEON BONAPARTE 195 (R. W. Phipps ed., Thomas Y. Crowell & Co. 1885) (1836).

rise come along with us. They shall be carried on litters and horses.”¹⁰¹ Nobody responded, and the “perfect silence, complete dejection, and general stupor of the patients announced their approaching end.”¹⁰²

Dr. Desgenettes refused to participate in the mercy killings, and as a result, the chief pharmacist administered the laudanum [poison] to the dying Soldiers.¹⁰³

There is reason to believe that either Mustafa [the source of the laudanum] or Royer, or both, deliberately gave the men an insufficient dose. “Some of them threw up [the laudanum], felt relieved, recovered, and lived to tell what had happened,” asserts Dr. Desgenettes. Sir Sidney Smith confirms this testimony in his report to Nelson: when the Turks entered Jaffa, he says, “seven poor wretches [were found] left alive in the hospital; they are protected, and shall be taken care of.” There is no evidence that a single man actually died of the poison; on the other hand, there can be no doubt but that Bonaparte gave the orders to poison them.¹⁰⁴

The statement that there is “no evidence that a single man actually died of the poison” begs the question, and is mathematically improbable. With between fifty and sixty¹⁰⁵ plague-infected Soldiers left in the hospital in Jaffe, and with Sir Sidney Smith only finding only

¹⁰¹ *Id.* at 196.

¹⁰² *Id.*

¹⁰³ HEROLD, *supra* note 65, at 308.

¹⁰⁴ *Id.* (citations omitted).

¹⁰⁵ *Id.* (noting that there were “about fifty patients left in the hospital”); *see also* BOURRIENNE, *supra* note 100, at 196 (noting there “were scarcely sixty cases of the plague in the hospital”).

seven,¹⁰⁶ what became of the remaining forty-two to fifty-two Soldiers if they were not dead?

Regardless of the number of deaths, Napoleon intended to end the Soldier's suffering and hasten the French retreat. His private secretary, Bourrienne justified the orders and deaths in his memoirs:

I do not think it would have been a crime to have given opium to the [plague] infected [Soldiers]. On the contrary, it would have been obedience to the dictates of reason. Where is the man who would not, in such a situation, have preferred a prompt death, to being exposed to the lingering tortures inflicted by barbarians? If my child, and I believe I love him as much as any father does his; had been in such a state; my advice would have been the same; if I have been among the infected myself, I should have demanded to be so treated.

Such was the reasoning at St. Helena [when interviewing Napoleon in exile], and such was the view which he [Napoleon] and every one else [at the meeting in Jaffa] took of the case twenty years ago at Jaffa.¹⁰⁷

During the Syrian campaign, it is historically estimated that the French suffered significant casualties: 1200 killed in combat, 1000 dead from disease and 2300 sick or seriously wounded.¹⁰⁸

In September 1812, Napoleon was campaigning to conquer Moscow. Along the campaign, the Russians battled the French and resisted Napoleon's advance. One of the

¹⁰⁶ HEROLD, *supra* note 65, at 308.

¹⁰⁷ BOURRIENNE *supra* note 100, at 198-99. In a survey of 117 mostly military attorneys, only 23% agreed that the killing of the plague-infected Soldiers in Jaffe was "absolutely" or "probably moral." However, 52% believed that such killings were "absolutely" or "probably immoral," with 25% unsure. See *infra* Appendix D: Mercy Killing Morality Questionnaire (scenario G).

¹⁰⁸ HEROLD, *supra* note 65, at 208.

most notable battles “finally opened the road to Moscow and made French occupation of the Kremlin practically a certainty”—the Battle of Borodino.¹⁰⁹ Borodino is noted mostly for its criticism of both the Russians and Napoleon.

[Napoleon] is criticized for rejecting Davout’s suggested strategic turning movement, for refusing to commit his last reserves at the critical moment when total victory hung in the balance, for encouraging his subordinates to make crude and wasteful frontal attacks instead of concentrating sufficient force on the right, and for failing to make his presence felt at moments of crisis.¹¹⁰

Other than clearing the path to Moscow for the French, Borodino failed to achieve any significant military advantage. Countless casualties overloaded the marginally effective medical services.¹¹¹ “Horrific” describes the casualties, with the French suffering at least 30,000 deaths and the Russians at least 44,000.¹¹² The French casualties included “no less than 14 lieutenant-generals and 33 major-generals,” either dead or wounded.¹¹³

[A]lmost one-third of the soldiers who fought [at Borodino] were hit. Captain Eugène Labaume described: “the interior ravines; almost all the wounded, by a natural instinct, had dragged themselves there to avoid new blows; these unfortunates, piled up one on the other, denied aid and swimming in blood, gave horrible groans . . . they asked us to put an end to their horrible agony.

¹⁰⁹ CHANDLER, *supra* note 70, at 806.

¹¹⁰ *Id.* at 807.

¹¹¹ KEEGAN, HOLMES & GAU, *supra* note 58, at 147.

¹¹² CHANDLER, *supra* note 70, at 806-07.

¹¹³ *Id.* at 807.

In the space of a square league almost every spot was covered with the killed and wounded.”¹¹⁴

It is not reported how many of the gravely wounded at Borodino were granted their dying plea for a *coup de grâce*.

3. Native American Wars

Chief Sitting Bull, “was the political and military leader of the Hunkpapa Sioux and finally a coalition of the Sioux, Cheyenne, and Arapaho—the greater Teton Indian nation.”¹¹⁵ Revered as a fair and honorable spiritual leader, Sitting Bull garnered a broad spectrum of respect, and engaged in war only when necessary.

In Sitting Bull’s early years, war was primarily waged against other Indian tribes as the nomadic, northern great plains [sic] Indian tribes competed for food and hunting sources. War was necessary to have the enemy do your will, but was conducted on a limited basis to protect your hunting and sacred areas.

¹¹⁴ KEEGAN, HOLMES & GAU, *supra* note 58, at 147 (citation omitted). Soldiers requesting death to end their agony is not uncommon:

Requests for battlefield euthanasia have, no doubt, occurred on battlefields as long as there have been battlefields. When men have taken up arms against one another, for whatever reason, there have always been those wounded who do not die immediately, but clearly cannot live for long, either because of their wounds or their circumstances. This can generate the desire to hasten their inevitable death, by both the wounded soldier as well as their comrades. These situations have probably occurred throughout history.

U.S. DEP’T OF ARMY, OFFICE OF THE SURGEON GENERAL, *MILITARY MEDICAL ETHICS: VOLUME 2* 386 (Thomas E. Beam ed., 2003) [hereinafter *MILITARY MEDICAL ETHICS*].

¹¹⁵ Michael J. Lavine, *Sitting Bull: Great Commander and Strategist – or Savage? A view through the Clausewitzian Prism* 4 (1996) (unpublished essay at National Defense University, National War College) (on file with author), available at <http://www.ndu.edu/library/n1/96-E-31.pdf>.

It was akin to a romantic type of war where, although warriors were killed and then camps burned and wives and children taken prisoner, there was much tradition and bravery was revered.¹¹⁶

It is during these early years that one of Chief Sitting Bull's first killings was reported. It was a combat-related mercy killing. The raiding Lakota women took a Crow woman as captive¹¹⁷ after a raid on her village.¹¹⁸ Believing the Crow woman to be a "whore," the Lakota women tied her to a tree, piled wood around her and caught her on fire.¹¹⁹ Before she became fully engulfed in flames, the seventeen-year-old Sitting Bull killed her with an arrow.¹²⁰

Not uncommon, the Plains Indians also practiced mercy killings in battles, raids and combat.¹²¹ Tribe elders and medicine men provided scarce and inadequate medical care for the Plains Indians' battle wounded. The limited quality of medical care forced wounded

¹¹⁶ *Id.* at 6.

¹¹⁷ The Crow were the traditional enemy of the Lakota (Sioux) Indians. In fact, the Crow formed alliances with the U.S. Army to battle against the Lakota, who continually expanded westward onto Crow lands, and forcing them further from the plains and abundant buffalo. Frank Rzeczkowski, *The Crow Indian and the Bozeman Trail*, MONTANA: THE MAGAZINE OF WESTERN HISTORY, Winter 1999, at 30, 31.

¹¹⁸ Christine Whiteswan Sterne, *Sitting Bull: The True Story*, <http://www.manataka.org/page55.html> (last visited Mar. 12, 2006).

¹¹⁹ *Id.*

¹²⁰ *Id.* The mercy killing morality survey revealed that of the 117 mostly military attorneys, 62% believed Chief Sitting Bull's killing of the Crow woman was moral. Only 27% thought the killing was immoral, with 11% unsure. See *infra* Appendix D, Mercy Killing Morality Questionnaire (scenario A).

¹²¹ Roderick G. Murchinson III, *A Comparative Analysis of the Battles of Little Big Horn and Isandhlwana/Rorke's Drift and the Similarities Between the American Plains Indians and the Zulus*, MIL. HISTORY J., Dec. 1974, at 40, available at <http://rapidhttp.com/milhist/vol032rm.html>.

warriors to struggle back to their village, and heal on their own.¹²² Mercy killings ended the life of the “obviously too seriously hurt to be moved” warriors.¹²³ The *coup de grâce* was usually accomplished with “a stab directly into the heart with the man’s own knife.”¹²⁴

The Sitting Bull and Plains Indian examples involved wars and raids between different tribes, and involved only Native Americans. In the 1830s, the Comanche Indians began to terrorize Anglos in Texas, particularly in the west.¹²⁵ Beginning with the Fort Parker raid,¹²⁶ the Texas frontiersmen and their families faced hundreds of bloody and brutal clashes with the Comanche “spreading killings, tortures, rapes, and tragic captivities all across the [Texas] borderlands.”¹²⁷ West Texas became “a bloody ground, filled with pioneer families who had lost fathers and sons, wives and daughters, who had buried their mutilated dead and ransomed young women who returned with demented stares.”¹²⁸ Texas’s

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ T.R. FEHRENBACH, *COMANCHES: THE DESTRUCTION OF A PEOPLE* 291 (1979).

¹²⁶ Fort Parker was founded by John Parker, his three sons and other members of his church from Illinois. *Id.* at 283. On May 19, 1836, Fort Parker was attacked by a large party of Native Americans, including Comanches, Kiowas and Wichitas. *Id.* at 284-85. The Native American warriors killed John Parker and four other adults. John Parker was pinned on the ground, scalped alive, and then had his genitals ripped off. *Id.* at 285. His body was further mutilated after he died and five people were kidnapped, including two young women and three children. *Id.* at 285-86. At camp that night, the Native Americans celebrated their victory by dancing with the scalps take at Fort Parker, they beat the children with their bow, tortured the young women, and raped them throughout the night in front of the young children. *Id.* at 286-87. The young women were made slaves of the tribe, and often were kept naked and tied to the horses and forced to run behind them when traveling. *Id.* at 287.

¹²⁷ *Id.* at 291.

¹²⁸ *Id.*

vulnerability resulted from the fact that her frontier was wide open without the protection of forts or outposts like what was seen by the Native Americans in the past, especially in the “contemporary United States’ plains frontier.”¹²⁹ Texas was different.

The Texans had a “sustained determination”¹³⁰ and they moved thousands of families west, usually unprotected from the Comanche.¹³¹ Without the forts and towns, these early settlers were completely vulnerable to uprisings, attacks and raids.¹³² When the Comanche attacked they “rose in sudden, secret hysteria, enflamed by portents (sic), visions, and medicine, and descended upon unsuspecting settlements with fire and slaughter.”¹³³ This slaughter left families and individuals tormented, as torture was commonplace. It was the Texans, like the Mexicans before them, who now started “practicing mercy killing[s] on men who had been left staked out with eyes, tongues, and genitals cut or burned away, who found wives and daughters impaled on sharpened fence stakes, and who buried disemboweled or decapitated infants.”¹³⁴ In many cases, death indeed, was mercy.

The mercy killing of warriors or frontiersmen who were gravely wounded from war wounds was not limited only to North America. Very similar to the American Plains Indians

¹²⁹ *Id.*

¹³⁰ *Id.* at 292.

¹³¹ *Id.* at 291.

¹³² *Id.*

¹³³ *Id.* at 270.

¹³⁴ *Id.*

were the Zulus of South Africa. As semi-nomadic people, the Zulu people followed cattle herds through large areas of Southern Africa, with the cattle serving the same importance to them as the bison for the Plains Indians.¹³⁵ The similarities also extended to their weapons.¹³⁶ Not surprisingly, the Zulus also engaged in mercy killings of their gravely wounded combatants, “usually employed [with] a swift thrust under the armpit.”¹³⁷

Historically, men of war have killed the gravely wounded among them out of a sense of moral duty—the warrior ethic—to eliminate the unnecessary suffering of combatants. The history of combat-related mercy killings has thus far focused on battles and eras where arms and weapons were, by modern standards, rudimentary and battlefield medical care was, at best, in its infancy. Medical care and the lethality of weapons entered the modern era with the World Wars.

4. *World War I*

¹³⁵ Murchinson, *supra* note 121, at 40.

¹³⁶ The Zulu fought generally as light infantryman, while the Plains Indians fought as Cavalry. However many striking similarities existed between the tribes and their weapons:

The basic armament of the Zulu impi was the stabbing spear. They also used knobkerries, axes, and throwing spears and had a few guns. There was a larger variety of weaponry available to the North American Indians, but none of it was really superior to that of the Zulu. The Plains tribes had tomahawks, knives, war clubs and lances for hand to hand combat and bows, throwing spears and some rifles for longer range work. The arms of the two groups were essentially equivalent

Id. at 39.

¹³⁷ *Id.* at 40.

World War I ushered in the era of modern weapons of war. These weapons were significantly more lethal than had previously been seen in war.¹³⁸ For example, World War I was the first war to see the widespread use of machine guns,¹³⁹ the use of chemical weapons¹⁴⁰ and the use of the battle tank.¹⁴¹ In fact, it is estimated that 80% of the British casualties during WWI were a result of the machine gun.¹⁴²

World War I also featured trench warfare. Military tactics followed technology “and the military technology of 1914 dictated trench warfare.”¹⁴³ Driven below ground by “artillery that could hurl explosives for miles” and “machine guns that could blanket a thousand-yard-wide field of fire,” fighting was predominately from protective trenches.¹⁴⁴ “A complex of trenches” defined the battlefield that “marched from horizon to horizon, in two distinct, conspicuous lines, as if a giant chalky finger had zig-zagged across the landscape.”¹⁴⁵ By the end of 1914, the line of trenches stretched “from Switzerland to the

¹³⁸ By World War I, “the destructiveness of modern weapons required that large numbers of fighting men be readily available.” RICHARD A. GABRIEL & KAREN S. METZ, A SHORT HISTORY OF WAR: THE EVOLUTION OF WARFARE & WEAPONS (1992), <http://www.au.af.mil/au/awc/awcgate/gabrmetz/gabr0022.htm> (last visited Mar. 13, 2006).

¹³⁹ *Id.* at <http://www.au.af.mil/au/awc/awcgate/gabrmetz/gabr001d.htm> (last visited Mar. 13, 2006).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ JOSEPH E. PERSICO, ELEVENTH MONTH, ELEVENTH DAY, ELEVENTH HOUR 66 (2004).

¹⁴⁴ *Id.*

¹⁴⁵ LYN MACDONALD, SOMME 11 (1986).

sea.”¹⁴⁶ Between the trenches of the Allies and the Germans existed a swath of land known as “no man’s land.”¹⁴⁷ In “no man’s land” is where the struggle to treat and care for the wounded seemed impossible. Unable to reach the wounded because of the constant barrage of enemy and friendly fire, medics often returned to “no man’s land” under the cover of darkness.¹⁴⁸ Countless times, neither a medic nor a Soldier could do anything for the wounded in “no man’s land” but provide sympathy and attempt comfort:

Two other Middlesex officers besides Choate came back [from no man’s land] unwounded; their names were Henry and Hill, recently commissioned second-lieutenants, who had been lying out in shell-holes all day under the rain, sniping and being sniped at. Henry, according to Hill, had dragged five wounded men into a shell-hole and thrown up a sort of parapet with his hands and the bowie knife which he carried. Hill had his platoon-sergeant beside him, screaming with a stomach wound, begging for morphia; he was done for, so Hill gave him five pellets. We always carried morphia for emergencies like that.¹⁴⁹

Whether motivated by mercy or revenge, the killing of wounded Soldiers happened on both sides of the trenches.

Next to me lay a Royal Welch second-lieutenant named O. M. Roberts, who had joined the battalion only a few days before the show. He told me about High Woods; he had reached the fringe when he got wounded in the groin and fell in a shell-hole. Some time during the afternoon he

¹⁴⁶ GIRARD LINDSLEY MCENTEE, *MILITARY HISTORY OF THE WORLD WAR* 82 (1937).

¹⁴⁷ PERSICO, *supra* note 143, at 68.

¹⁴⁸ ROBERT GRAVES, *GOODBYE TO ALL THAT* 141 (Cassell & Co. Ltd. 1961) (1929).

¹⁴⁹ *Id.*

recovered consciousness and saw a German staff officer working round the edge of the wood, killing off the wounded with a pistol.¹⁵⁰

In the Battle of Somme, men begged for death. A soldier in the 6th Wiltshires of the British Army could hear his good friend “desperately wounded on the first day” screaming for the captain to shoot him to end his suffering.¹⁵¹ What the captain did was a common solution in dealing with Soldiers in agonizing pain facing inevitable death: he “administer[ed] a heavy dose of morphia in the hope it will ease the victim out of his agony.”¹⁵² This scene replayed often in World War II:

[In Flanders Fields], [t]he stretcher bearers retrieved first the seriously wounded British; then the moderately wounded British; then the British dead; then the German lightly wounded. The German seriously wounded had to be mostly ignored, and enemy dead in No Man’s Land were never touched by British [stretcher] bearers except for souvenirs. While on an individual basis the campaign was fought by both armies with reasonable decency, sometimes hopelessly mangled men were administered the *coup de grâce* by their opponents.¹⁵³

¹⁵⁰ *Id.* at 198.

¹⁵¹ HOLMES, *supra* note 63, at 188.

¹⁵² *Id.*

¹⁵³ LEON WOLFF, IN FLANDERS FIELDS 228-29 (1958). The mercy killing morality survey revealed that the majority of military lawyers are evenly split on the morality of administering morphine to a badly wounded Soldier in “no man’s land,” with 39% believing it was moral, 38% believing it was immoral, and 23% unsure about the moral aspect of the act. See *infra* Appendix D, Mercy Killing Morality Questionnaire (scenario I).

With more lethality came more grievous wounds. The Soldier's ethic on the battlefield however remained the same—minimize the suffering of fallen combatants—even if it meant mercy killing those whose death was inevitable. This ethic continued in World War II.

5. Second Burma Campaign of World War II

On December 11, 1941, merely days after bombing Pearl Harbor, the Japanese invaded Burma by bombing a British air base south of Rangoon.¹⁵⁴ The following day, Japanese ground forces began their assault on Burma.¹⁵⁵ Unprepared for the Japanese invasion, the British relied on help from China and the United States to defend Burma, but the Japanese forced these allies out in May 1942.¹⁵⁶

¹⁵⁴ CLAYTON R. NEWELL, *BURMA 1942: THE U.S. ARMY CAMPAIGNS OF WORLD WAR II* 6 (1994).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 22. Several factors precipitated this loss. For example,

In the larger picture, however, the conflicting goals of the countries involved made the loss of Burma almost inevitable. Neither the defenders nor the invaders saw Burma as anything other than a country to be exploited. To Britain, Burma was simply a colony and a useful buffer between China and India; to China, Burma was the lifeline for national survival; to the United States, Burma was the key to keeping China in the war against Japan, which in turn would keep large numbers of Japanese tied up on the Asian mainland and away from American operations in the Pacific. The wishes of the local population remained unaddressed and local resources therefore remained untapped.

Id.

After hazing the Japanese with a brigade of Special Forces infantrymen for much of 1943, the British orchestrated a second Burma campaign in early 1944.¹⁵⁷ Instead of the successful guerrilla tactics employed in 1943, British Brigadier Orde Wingate sought to establish “fixed strongholds” deep in enemy territory from which he could launch attacks.¹⁵⁸ As ordered, the 111th Brigade established one of these strongholds known as Blackpool.¹⁵⁹ Because of the monsoon rains and the rapid increase in the Japanese strength,¹⁶⁰ the 111th Brigade was only able to hold its stronghold for seventeen days before suffering catastrophic casualties and retreating into the jungle.¹⁶¹ The retreat of the 111th Brigade, and the nearly simultaneous retreat of the 77th Brigade from its stronghold,¹⁶² succeed in part due to the mercy killing and abandonment of gravely wounded Soldiers in both brigades.¹⁶³

The jettisoning of casualties did, I regret to say, have to be resorted to in a few instances. The majority of these cases occurred in the course of an

¹⁵⁷ W. J. OFFICER, *CRISIS FLEETING: ORIGINAL REPORTS ON MILITARY MEDICINE IN INDIA AND BURMA IN THE SECOND WORLD WAR 201-02* (James H. Stone, ed. 1969). Major General W.J. Officer was the former Director of Medical Services, Headquarters Far East Land Forces, Singapore, for the British Army. *Id.* at 1.

¹⁵⁸ *Id.* at 202-03 (consisting of a combined force of six British brigades, including the 111th Brigade, two Chinese divisions, and a U.S. infantry regiment).

¹⁵⁹ *Id.* at 201-02.

¹⁶⁰ *Id.* at 204.

¹⁶¹ JOHN MASTERS, *THE ROAD PAST MANDALAY* 252-54 (1961). Lieutenant Colonel John Masters commanded the 111th Brigade. *Id.*

¹⁶² MICHAEL CALVERT, *PRISONERS OF HOPE* 134 (1952). Michael Calvert commanded the 77th Brigade. *Id.*

¹⁶³ OFFICER, *supra* note 157, at 221. After an attack by the Japanese on his stronghold, White City, Calvert led some of his men on a flanking raid outside of White City to counter the Japanese attack. CALVERT, *supra* note 148, at 162. As his men continued to take casualties, his force slowed to the pace of the litter bearers, and began to sustain even more casualties in their efforts to recover seriously wounded Soldiers. *Id.* To avoid complete loss, they were forced to leave some of his wounded men behind. *Id.*

unsuccessful action when withdrawal had to take place under heavy enemy fire without the opportunity allowing of the collection of the more seriously wounded. At other times when wounded were being carried and had, for reasons of speed or insufficiency of bearers, to be abandoned, these were in the majority of cases so seriously wounded that their chances of survival were the slenderest. Such cases, in view of their serious condition, were put humanely out of their misery.¹⁶⁴

The circumstances of the 111th Brigade's retreat and the mercy killing of gravely wounded Soldiers are enlightening to the moral dilemmas frequently encountered by combat leaders. The brigade doctor asked the commander to follow him to a nearby path and laying out on stretchers and blankets were nineteen gravely wounded Soldiers.¹⁶⁵ The commander vividly recalled the condition of five of these Soldiers.¹⁶⁶ The first he saw was naked and a shell had destroyed his stomach leaving a "bloody hollow" between his chest and pelvis exposing his spine.¹⁶⁷ Another Soldier had his hips and legs blown away, with nothing below the waist. The left arm, shoulder and breast of a third Soldier had been completely ripped away.¹⁶⁸ A fourth Soldier laid there with a "whitish liquid" trickling out from where

¹⁶⁴ OFFICER, *supra* note 157, at 221. In discussing the situation with the brigade doctor, Lt. Col. Masters considered that he had about two thousand lives in his hands, and a small mistake or hesitation could cost five times the number of wounded Soldiers to whom they would deliver the *coup de grâce*. MASTERS, *supra* note 161, at 254.

¹⁶⁵ MASTERS, *supra* note 161, at 253.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

once was his face.¹⁶⁹ The last “[Soldier] seemed to have been torn in pieces by a mad giant, and his lips bubbled gently.”¹⁷⁰ All were still cling to life.¹⁷¹

The doctor was blunt. “I’ve got another thirty [Soldiers] on ahead, who can be saved, if we can carry them. These men have no chance.”¹⁷² The doctor informed the commander that the nineteen Soldiers were already full of morphine, and there was no more to spare.¹⁷³ The commander instructed the doctor that he did not want any of the Soldiers “to see any Japanese.”¹⁷⁴ The doctor looked at him and cried in helpless anger, “do you think I want to do it?”¹⁷⁵ In his own words, the commander’s orders were clear: “Give [morphine] to those

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 254.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* Some military doctors believe that battlefield mercy killing of gravely wounded Soldiers so they do not fall into enemy hands “is a justifiable method of treatment available to the physician.” MILITARY MEDICAL ETHICS, *supra* note 114, at 390. In the event that it is necessary to utilize mercy killings, the situation should be evaluated to determine how they are accomplished:

There could be an argument for having the physician removed from the process because society does not expect a physician to be involved with killing patients. However, the physician is already deeply involved and any attempt to separate himself in this situation is just a vain attempt to establish some moral distancing. The method of euthanasia chosen may be important here as well. Using a scarce resource (morphine or other medication) in the face of expected large numbers of patients in the future may be inappropriate. It may be necessary to use a weapon instead. If this is the case, this may also mitigate against the physician being personally involved.

Id. This discussion was generated in response to the question, “What do you do with the patients?” in a hypothetical situation where the U.S. Army has sustained significant casualties in a Soviet-style ground war,

whose eyes are open [and] [g]et the stretcher bearers on at once. Five minutes.”¹⁷⁶ The doctor acknowledged the order, and knew what he had to do.¹⁷⁷

One last time the commander went back up to the ridge, hearing “one by one, carbine shots exploding” behind him from the path where his Soldiers were laying.¹⁷⁸ He desperately covered his ears with his hands “but nothing could shut out the sound.”¹⁷⁹ When the carbine was silent, he went back to the path looking for the bodies of his Soldiers, but they were hidden in the jungle.¹⁸⁰ It was there, on that empty path, that Lieutenant Colonel Masters muttered, “I’m sorry . . . forgive me.”¹⁸¹

The British account of battle against the Japanese at Burma is quite similar to the Japanese account of battle against the Australians and Americans in New Guinea. By April of 1943, the tide had turned against the Japanese in New Guinea with a resounding defeat near Wau.¹⁸² By September, the two main Japanese bases which threatened Australia,

and the doctor was ordered to retreat but several of his patients were too critical to move, and were inevitably going to die. *Id.* at 385 (case study 13-1).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* Even more than the poisoning of Napoleon’s plague-infected Soldiers, 53% of the respondents to the mercy killing morality survey categorized the killings in Burma as immoral. Another 24% were unsure as to the killings’ morality, with only 23% characterizing the deaths as moral.

¹⁸² DAVID DEXTER, THE NEW GUINEA OFFENSIVES 1 (1961).

Salamaua and Lae, fell to the allied forces.¹⁸³ By the following March, the Japanese had lost 35,000 troops, and had been pushed beyond the Sepik, paving the way for the United States campaign through the Philippines.¹⁸⁴

During the allied pursuit of the Japanese in New Guinea, the Japanese fell back, traversed mountains and jungles, and barely survived with minimal food and water.¹⁸⁵ The retreat lasted for months, and devastated the Japanese.¹⁸⁶ Ogawa Masatsugu served with the Seventy-Ninth Regiment of the Twentieth Division participated in the retreat.¹⁸⁷ His account of the retreat is remarkable.

Because our own forces blew up the bridge before we could cross it, we were forced to march an additional month because we were one day late. It was about the tenth day of February 1944. Behind me there were thousands completely dispersed [and] scattered. . . . The dead bodies became road markers. They beckoned to us: "This is the way. Just follow us corpses and you'll get there."¹⁸⁸

¹⁸³ *Id.* at 391.

¹⁸⁴ *Id.* at 817.

¹⁸⁵ Ernest Herr, *The Army that Disappeared*, <http://e.herr.home.att.net/NewGuinea.html> (quoting HARUKO TAYA COOK & THEODORE F. COOK, *JAPAN AT WAR: AN ORAL HISTORY* / HARUKO TAYA COOK & THEODORE F. COOK (1992)) (last visited Mar. 27, 2006).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

Ogawa Masatsugu recounts that while in New Guinea, that the Japanese became unsure of what was killing them, and that he “remember[s] the war as mainly one of suicides and mercy killings.”¹⁸⁹ He continued:

I knew an army doctor, about thirty-five years old, who volunteered to shoot all those who knew they could not survive. This I consider[ed] "sacred murder." Often subordinates asked their superiors to kill them when the main force was about to depart. If you were left behind, that was the end. A man who had the strength left to pull the pin could always blow himself up, so everyone tried to keep one hand grenade until the last moment. Even those who tossed away their rifles never threw away their last grenade.¹⁹⁰

The same moral dilemmas even confronted German Soldiers in the European theater during World War II.

6. Battle and retreat from Kursk in World War II.

In early 1943, after two years of virtual stalemate on the Eastern Front, German forces decided to launch an offensive to take the city of Kursk. Kursk was located in the center of a bulge into German territory along the Eastern Front extending on an imaginary line between the Black Sea and Leningrad.¹⁹¹ As a transportation center with a network of roads and railways allowing “great flexibility,” the capture of Kursk would propel the

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Captain Benjamin R. Simms, *Analysis of the Battle of Kursk*, ARMOR, Mar./Apr. 2003, at 1.

Germans to expand and sustain operations on the Eastern Front.¹⁹² The Battle of Kursk is recorded as one of the “largest and most decisive” battles of World War II, with the German forces utilizing fifty divisions, over 900,000 troops, and 2700 tanks and the Soviets defending with one-hundred divisions, 1,300,000 Soldiers and 3500 tanks.¹⁹³ The offensive was originally authorized by Adolph Hilter to commence in May, but in order to allow for the new Tiger and Panther tanks to be used, the battle actually commenced on July 4, 1943.¹⁹⁴ This allowed Russia sufficient time to prepare to defend against the attack.¹⁹⁵

After a military deadlock for eleven days, Hitler ordered a halt to the attack, and retreat to the positions previously held before the offensive.¹⁹⁶ This was the beginning of the end of the German Eastern Front. As elements of the German Army retreated toward the Dnieper River and back to German controlled territory, they were “forced to abandon a great many men to an almost inconceivable horrible fate, despite their desperate pleas for help.”¹⁹⁷ Some of those who were not abandoned were selected to serve as “covering troops” to slow the Russian Army’s pursuit, leaving them with virtually no chance of survival and resigned

¹⁹² *Id.*

¹⁹³ Andrew Renson & Debbie Anderson, Mine and Countermine Operations in the Battle of Kursk, Final Report, Apr. 25, 2000, <http://www.geocities.com/armysappersforward/kursk.htm> (last visited Jan. 12, 2006).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ GUY SAJER, THE FORGOTTEN SOLDIER 252 (Lily Emmet trans., Robert Laffont 1967) (1971).

“for the juggernaut to crush them.”¹⁹⁸ Upon reaching the Dnieper River, the retreating troops were completely exposed to the Russian pursuit.

With absolute accuracy, the German guns, firing from the other side of the river, had drawn the Bolshevik tanks onto us, and contributed to the horrible deaths of many of our men.

Cries for help drew us from our slimy refuge [in the river], and we ran to do what we could to help the dying – which was very little. We saw sights so horrible they were beyond any imagining. We shot a great many men to put them out of their misery, although mercy killings were strictly prohibited.¹⁹⁹

Regardless of the legal prohibitions, mercy killings continued to be a part of war, especially in the guerilla war of Vietnam.

7. The Vietnam War

In 1966 and 1967, the allied forces poured in to Vietnam implementing a two-pronged strategy: isolate the Viet Cong (VC) from the population centers, and provide a “protective shield” behind which the South Vietnamese government could run the country and economy.²⁰⁰ The Australian Task Force was responsible for the region east of Saigon, including the port of Vung Tau (and its airbase), the approaches to Saigon from their sector

¹⁹⁸ *Id.* at 255.

¹⁹⁹ *Id.* at 262.

²⁰⁰ PETER FIRKINS, *THE AUSTRALIANS IN NINE WARS* 434 (1971).

and access to the routes leading to the Saigon River delta.²⁰¹ This responsibility included four mission objectives; seek and destroy the enemy in the region, assist Allied units in emergency, protect and assist civilians consistent with military duties and “advise and assist” the South Vietnamese forces.²⁰²

One of the battalions of that task force was the 6th Battalion, Royal Australian Regiment, and after a few months in country, its headquarters was attacked by mortar fire early on August 17, 1968.²⁰³ As ordered, Delta Company relieved Bravo Company, the first unit searching for the VC who launched the attack.²⁰⁴ Bravo Company located the mortar positions but no enemy.²⁰⁵ After relieving Bravo Company, Delta Company decided to investigate vehicle tracks leading into the Long Tan rubber plantation north of the village.²⁰⁶ Upon discovering new tracks while patrolling to the east, “I gave the orders for a widely-dispersed two (platoon)-up advance through the rubber plantation.”²⁰⁷ Out of nowhere, a small VC patrol walked “right into the middle of 11 Platoon” who opened fire killing one and

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ BOB BUICK & GARY MCKAY, *ALL GUTS AND NO GLORY* 84 (2000).

²⁰⁴ *Id.*

²⁰⁵ Harry Smith, *The Battle of Long Tan by the Men Who Were There*, http://www.diggerhistory.info/pages-battles/long_tan.htm (last visited Jan. 13, 2006) (MAJ Harry Smith was the company commander of D Company during the battle of Long Tan. The main website for this article was Digger history: the unofficial history of the Australian and New Zealand Armed Services).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

assaulting the hut from which the patrol came.²⁰⁸ Delta Company soon was taking mortar fire, and as 11 Platoon advanced, soon drew heavy machine gun fire, found itself pinned down, and taking “heavy casualties.”²⁰⁹

It soon became obvious that [Delta Company] was surrounded, but they formed a flimsy perimeter among the rubber trees, sheltering behind their trunks or scratching out shallow rifle pits in the muddy ground. Wave after wave of the enemy charged forward and were shredded by the coolly directed Australian fire, but new attacks formed up behind the cover of their own dead and then made another suicidal charge of the type which Australians had defeated many times before, when they were attempted by the Japanese or Chinese.²¹⁰

After successful air ammunition re-supply, brilliant friendly artillery fire, and reinforcement from Alpha Company, the VC broke and fled, carrying as many of their dead and wounded as possible.²¹¹

The next morning, elements of the battalion including Delta Company moved back into the area recovering the dead and wounded from 11 Platoon and burying the VC dead.²¹² It was during this sweep that Sergeant (SGT) Bob Buick, who commanded 11 Platoon when

²⁰⁸ *Id.* See also BUICK & MCKAY, *supra* note 203, at 88 (noting the Viet Cong squad regrouped and managed to escape from within the perimeter of Delta Company).

²⁰⁹ Smith, *supra* note 205. See BUICK & MCKAY, *supra* note 203, at 92.

²¹⁰ FIRKINS, *supra* note 200, at 435.

²¹¹ *Id.* at 436. See also BUICK & MCKAY, *supra* note 203, at 94.

²¹² Smith, *supra* note 205. See BUICK & MCKAY, *supra* note 203, at 111-12.

the platoon leader was killed, discovered a gravely wounded VC soldier with a catastrophic head wound.

Movement on the ground in front of me caught my eye and I cautiously investigated. It was a wounded Vietnamese. The poor bastard was lying there with half a metre on his gut spread over the ground. A closer look revealed that most of his head was blown off, exposing his brain tissue. I couldn't believe he could still be alive. His arms and legs were twitching as if trying to crawl; his face was in the dirt with his entrails pierced by sticks. His bloodied body was covered in dirt and leaves, and digested rice was oozing out of the large shrapnel wound in his slashed stomach. Maybe his nerves were causing the twitching, the poor fucking brave bastard, his heart was still working; a quarter of his brain was spilling out of his skull and most of his guts were lying on the ground. I couldn't handle this. It was too much pain for me knowing that he could not possibly survive. I aimed my rifle and shot him twice through the heart. I hope I gave him the peace that he deserved.²¹³

The knowledge that there was nothing that could be done for the VC Soldier, combined with his apparent suffering, motivated SGT Buick to deliver the *coup de grâce*.²¹⁴ Recently, SGT Buick described his actions on the battlefield that day:

[Mercy killing is] something that I think that is part of soldiering. It's just one of those things. It's nothing I'm proud of but it's something I did at the time and if it had been me, I would have hoped that someone would have done the

²¹³ BUICK & MCKAY, *supra* note 203, at 113. The mercy killing morality survey revealed that 52% of the respondents believed his killing of the VC Soldier was moral, while only 27% thought it was immoral. Of the respondent, 21% were unsure of the morality of the killing. See *infra* Appendix D, Mercy Killing Morality Questionnaire (scenario D).

²¹⁴ *Id.* "Another two very badly wounded Viet Cong were shot that morning. These two particular enemy were holding their weapons in the ready to fire position. . . . If they had their hands over their heads they would not have been killed." *Id.* at 113-14.

same for me if the roles were reversed, so it's just one of those things that happens in war. War is not nice at all.²¹⁵

The Delta Company commander, Major Harry Smith agreed with his former platoon sergeant and acknowledged that the wounded VC Soldier was shot “as an act of mercy because of horrific head wounds.”²¹⁶

One of the most chilling accounts of a mercy killing in Vietnam comes from Specialist 4 (SP4) Arthur E. “Gene” Woodley, Jr. SP4 Woodley was a combat paratrooper for the 5th Special Forces Group, 75th Ranger Group, 173d Airborne Division.²¹⁷ In his book, *Bloods: An Oral History of the Vietnam War*,²¹⁸ Wallace Terry recounts SP4 Woodley’s story in his own words.

In early February, 1969, SP4 Woodley led a team of Soldiers to find the wreckage of a helicopter, report on enemy movement and search for prisoners.²¹⁹ After about ten hours of

²¹⁵ 7:30 Report: Hero of Long Tan’s “mercy killing” Upsets Comrades (ABC television broadcast Aug. 17, 2000), <http://www.abc.net.au/7.30/stories/s164813.htm> (transcript).

²¹⁶ Smith, *supra* note 205. In the rain soaked brutal battle, the Australians suffered seventeen killed in action and nineteen wounded from Delta Company, and the Viet Cong left 425 dead and about 350 wounded. FIRKINS, *supra* note 200, at 436.

²¹⁷ The 173d was in continuous combat in Vietnam for more than six years, and earned fourteen campaign streamers and four unit citations. The Society of the 173d Airborne Brigade, <http://www.skysoldier.org/php/skysoldier/history.php> (last visited Jan. 3, 2006). The 173d also had thirteen Soldiers awarded the Medal of Honor, over 6,000 Purple Heart awards, and the only combat parachute assault of the Vietnam War. *Id.* Over 1,700 Soldiers from the 173d died in Vietnam. *Id.*

²¹⁸ WALLACE TERRY, *BLOODS: AN ORAL HISTORY OF THE VIETNAM WAR* (1984).

²¹⁹ *Id.* at 247.

travel by foot, they found the stripped helicopter that appeared to have been downed by enemy gunfire.²²⁰ Near the helicopter, they found a U.S. Soldier who was staked to the ground by his hands, feet, and neck.²²¹ His face was scarred and mutilated, and he had been skinned from the upper chest to his waist.²²² His flesh had been eaten by flies, maggots and jungle animals, exposing his intestines.²²³ Specialist 4 Woodley was shocked to find the Soldier was still clinging to life.²²⁴ The Soldier begged him and his team members to kill him, and SP4 Woodley contacted headquarters for guidance.²²⁵ The guidance from headquarters was “it’s your responsibility.”²²⁶ After agonizing over the right thing to do, SP4 Woodley decided:

I put myself in his situation. In his place. I had to be as strong as he was, because he was askin’ me to kill him, to wipe out his life. He had to be a hell of a man to do that. I don’t think I would be a hell of a man enough to be able to do that. I said to myself, I couldn’t show him my weakness, because he was showin’ me his strength. The only thing I could see that had to be done is that the man’s suffering had to be ended. I put my M-16 next to his head. Next to his temple. I said, “You sure you want me to do this?” He said, “Man, kill me. Thank you.” I stopped thinking. I pulled the trigger. I

²²⁰ *Id.* at 247-48.

²²¹ *Id.* at 248.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* at 249.

²²⁶ *Id.*

cancelled his suffering. When the team came back, we talked nothing about it. We buried him. We buried him. Very deep. Then I cried.²²⁷

Although threatened with a court-martial, nothing happened to SP4 Woodley for administering the *coup de grâce* to this gravely wounded Soldier.²²⁸

Even in Vietnam, mercy killings occurred on both sides of the line. On February 5, 1970, CPT James Lyon piloted a helicopter with a co-pilot and two crew members on a maintenance mission when he experienced a mechanical malfunction, caught fire and crashed.²²⁹

CPT Lyon sustained grievous injuries in the crash.²³⁰ He was thrown clear of the helicopter and burned extensively on his torso and right leg which was severed four inches below his knee. Unable to evade the due to their injuries, the other crewmembers were

²²⁷ *Id.* at 250. According to the respondents in the mercy killing morality survey, an overwhelming 69% considered SP4 Woodley's actions as moral. A slight 17% considered the killing immoral, with 14% unsure of the morality of the killing. See *infra* Appendix D, Mercy Killing Morality Questionnaire (scenario E).

²²⁸ *Id.*

²²⁹ P.O.W. Network, Biography: Parsels, John William, <http://www.pow-network.org/bios/p/p091.htm> (last visited Jan. 8, 2006).

²³⁰ *Id.*

captured by the North Vietnamese Army (NVA) troops.²³¹ That night, they stayed with their captors near the crash site.²³²

For CPT Lyon, the night would be one of the longest in his life, filled with unspeakable pain, and mercifully it would be his last:

Throughout the night, the crew members heard their pilot yelling and moaning in pain. At 0600 hours, Capt. Lyon moaned and then a shot was heard from his position about 30 feet from the aircraft wreckage. No other outcry from Capt. Lyon was heard, and the others believed that he had been killed by the guard.

....

In late March, 1973, [the three captured crewmembers] were released from prisons in North Vietnam. In their debriefings, all three concurred on the story that [CPT] Lyon had apparently been shot. They considered it a mercy killing, because their pilot had been so seriously injured that they doubted that he could survive.²³³

Whether described as a warrior ethic or ethos, killing in war is often honorable. Dave Nelson was the son of a World War II veteran.²³⁴ Raised around guns and tromping around the jungle with his dad, he knew the Army was for him.²³⁵ Nelson became a sniper in

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ JOANNA BOURKE, AN INTIMATE HISTORY OF KILLING: FACE-TO-FACE KILLING IN TWENTIETH-CENTURY WARFARE 37 (1999).

²³⁵ *Id.*

Vietnam, in part because it was impossible for “an ordinary grunt soldier to live by his concept of warrior.”²³⁶

The “warrior ethos,” of which [Nelson] was so proud, emphasized “respect for your enemy” and insisted that “to kill civilians or lose control of yourself and your concepts in life in combat is wrong.” “That’s the concept behind the warrior,” he continued, “[k]ill cleanly, kill quickly, kill efficiently, without malice or brutality.” Yet, in Vietnam, such scruples were impossible for infantrymen. Nelson quickly discovered that he would inevitably kill civilians: his first “kill” was a young boy seen walking too close to a road while on a convoy was passing, and on another occasion, he was forced to watch a young girl he had shot die in front of him²³⁷

As a sniper, Nelson could guarantee all of his kills were legitimate, clean, quick, and without brutality. During his second tour, Nelson came onto a downed U.S. pilot, disemboweled from the crash. Knowing he could not live, he felt compelled to kill the pilot as it “was necessary according to the code of the warrior (an honorable fighting man puts his comrades out of their misery).”²³⁸

Mercy killings are not often written about by military historians, and if they are, they usually take the form of a quietly mentioned anecdote or observation, recalled in memoirs, letters, papers, journals, diaries, interviews and sometimes autobiographies.²³⁹ An example

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* at 38.

²³⁹ Telephone Interview with Surgeon Captain Rick Jolly, former Surgeon Commander in the Falklands War, Royal Marines, in Torpoint, Cornwall, England (Jan. 7, 2004) (stating that mercy killings are usually not talked about but they do occasionally happen).

of this is demonstrated by Dr. Bernard Kouchner. Bernard Kouchner is a medical doctor and the co-founder of *Medecins Sans Frontieres* (MSF), also known as Doctors without Borders.²⁴⁰ In addition to establishing MSF in 1971, Dr. Kouchner served as a physician treating the war wounded in Vietnam and Lebanon.²⁴¹ After the wars, his activities included French politics and government, holding several ministries over the course of next twenty years, including Minister of State for Humanitarian Action, Minister of State for Social Integration, and most recently, the Health Minister.²⁴² In July of 1999, Dr. Kouchner was appointed by the Secretary General of the United Nations (U.N.) as the first Special Representative of the Secretary General (S.R.S.G.) and the head of the U.N. Interim Administrative Mission in Kosovo (UNMIK), and served in that capacity until January 2001.²⁴³ The fact that Dr. Kouchner is a humanitarian is beyond reproach.

It is his history of helping others that puts mercy killings in combat in the proper context. Dr. Kouchner admitted that as a doctor in Vietnam and Lebanon while treating victims of those bloody wars, he engaged in the mercy killing of Soldiers who were suffering unnecessarily and beyond hope.²⁴⁴ Dr. Kouchner hastened the death of these gravely

²⁴⁰ Embassy of France in the United States, Bernard Kouchner, http://www.ambafrance-us.org/atoz/bio/bio_kouchner.asp (last visited Jan. 8, 2006) [hereinafter Embassy of France].

²⁴¹ BBC News, French Minister Admits Mercy Killings, <http://news.bbc.co.uk/1/hi/world/europe/1455521.stm> (last visited Jan. 8, 2006) [hereinafter Admits Mercy Killings].

²⁴² Embassy of France, *supra* note 240.

²⁴³ United Nations Interim Administrative Mission in Kosovo, Bernard Kouchner, <http://www.unmikonline.org/srsg/formersrsg.htm> (last visited Jan. 8, 2006).

²⁴⁴ Admits Mercy Killings, *supra* note 241.

wounded war victims²⁴⁵ by injecting them with morphine.²⁴⁶ He confided, “When people were suffering too much pain and I knew in advance they would die, I would help them [die].”²⁴⁷

²⁴⁵ This practice was not limited to only doctors but was also practiced by medics. An Army field medic recounted some of his experiences in Vietnam, while remaining anonymous for obvious reasons:

In Nam, I gave away all kinds of drugs. I gave out speed for continued days of fighting, and extra morphine to those with injuries who couldn't make it. I was trained for this at camp and on the battlefield I was begged by my fellow soldiers to relieve their pain or send them on into the next world. In the field there was so much noise from artillery fire, whizzing bullets, choking smoke and confusion that we medics were forced to play God over life and death. Mercy killing you might call it or as I was trained, euthanasia. I'll admit that I purposely gave too much morphine to about 2% the soldiers I treated, but this was only because they were too far gone for any medical care. When you're under explosive fire and you see arteries shooting blood out, as a medic you have to make a medical decision about your fellow soldier. Is there any chance he'll make it or is there no chance? When a boy or a man gives you that look in the eyes, that final look, I knew I was there to give them their final relief. Only death can bring final relief.

There were many cases where a leg was blown off with arteries squirting blood and I didn't have enough clamps left, [and] I knew I couldn't help. My fellow soldier was a goner anyway. Sometimes the Med-Evac (sic) choppers couldn't get to us and the wounded were just lined up with too many to care for. If they couldn't survive waiting for medical care in the field or survive a chopper ride back to the base medical chop shop, or MASH as you may know it; I gave them an extra shot of morphine to take them out of their pain, their misery, and this world. As sick as it may seem, I somehow got used to doing this. I learned to see it in (sic) a young man's eyes, when they knew they had no hope nor will to live, and wanted me to painlessly hasten their death. These were eyes that begged me, "medic, please take me out of this pain and world." I'd load up a hypodermic syringe with a certain overdose of morphine to relieve the pain, and end their suffering. I've had nightmares, too many to count, seeing the bloody faces of my fellow soldiers crying out to me for help. Nam nightmares and memories will be with me forever.

Bud Life, <http://www.budlife420.com/pg4/v1e10index.html> (last visited Jan. 13, 2006). With the advent of the Internet and the recent phenomena of blogs and electronic publications, quantity of information available has grown exponentially. At the same time, there are fewer quality controls on what is published electronically or posted on the blogs. As a result, if one is looking information from a blog or electronic publication that has no parallel written publication, it is incumbent on the writer and the reader to consider the context when determining how much credibility to give that information. If this report is true, it gives a harrowing first person account of a medic in Vietnam. If it is untrue, it gives a fictional narrative that describes a medic in Vietnam as perceived by a part of U.S. culture.

²⁴⁶ Admits Mercy Killing, *supra* note 241.

Clearly, from the days of Saul and the Zealots at Masada, through Medieval battles and sieges, the Napoleonic Wars, both world wars and Vietnam, mercy killings have been a grim part of being a Soldier, with each era facing it for what it was—an honorable way to eliminate the suffering of a combatant facing inevitable death. None of those warriors are reported to have faced official inquiries or courts-martial at the time they compassionately acted. Other Soldiers did.

An examination of three modern combat-related mercy killings that were investigated, with two resulting in courts-martial, will provide more depth to the history of mercy killings in combat.

B. Specifically investigated cases of combat-related mercy killings

1. Falklands War – killing of burning prisoner of war

The Falkland Islands are a group of two hundred islands comprising about 4,700 square miles²⁴⁸ situated about 400 miles off the coast of Argentina in the South Atlantic Ocean.²⁴⁹ The islands have no significant natural or strategic resources and are inhabited by

²⁴⁷ *Id.* Not unlike SP4 Woodley, most of the respondents to the mercy killing morality survey believed actions similar to those of Dr. Kouchner were moral, with 69% describing such actions as moral. Only 16% found Dr. Kouchner's actions immoral, with 15% unsure. See *infra* Appendix D, Mercy Killing Morality Questionnaire (scenario F).

²⁴⁸ THE SUNDAY TIMES OF LONDON INSIGHT TEAM, WAR IN THE FALKLANDS: THE FULL STORY 30 (1982).

²⁴⁹ Second Lieutenant Jason McClure, *The Falklands War: Causes and Lessons*, STRATEGIC INSIGHTS, Nov. 2004, at 1, 9, <http://www.ccc.nps.navy.mil/si/2004/nov/mcclureNov04.pdf> (last visited Mar. 13, 2006)

about 2400 people who claim British citizenry.²⁵⁰ With the sovereignty of the islands in dispute for hundreds of years,²⁵¹ on April 2, 1982, Argentina's military government launched an invasion of the Falkland Islands.²⁵² Some suggest the invasion's purpose was to get the British to the negotiating table to settle the sovereignty issue of the islands.²⁵³ However, Argentina seriously miscalculated the British response, and was surprised when the British launched a naval task force to reclaim the islands.²⁵⁴ Not really prepared to fight a full-scale war, Argentina suffered a decisive defeat in just six short weeks of battle.²⁵⁵

STRATEGIC INSIGHT is an electronic publication of the Center for Contemporary Conflict at the Naval Post Graduate School in Monterey, Cal. *Id.*

²⁵⁰ *Id.*

²⁵¹ See INSIGHT TEAM, *supra* note 248, at 29-37 (outlining the history of the possession of the Falkland Islands). The British claim of sovereignty was based on the discovery of the islands by John Davis in 1592. However, it was not until 1690 that the first European landed on the Falkland Islands. Captain John Strong sailed through the sound that separate the two main islands and "put ashore to inspect the immense amounts of kelp, geese, and 'pengwins.'" *Id.* at 31. After that brief stop, several Frenchmen landed at the Falklands naming them Îles Malouines. *Id.* at 32. Between 1698 and 1712, the French charted enough to the north coast to create an accurate map that was published in 1716. *Id.* Britain did not occupy the Falkland Islands until January 15, 1765, which was after the French "raised the flag on February 3, 1764, and on April 5, 1764 . . . [and] colonists held a 'ceremony of possession' at their new fort and settlement of Port Louis." *Id.* at 33. Spain purchased the islands from the French in 1762. *Id.* Britain pulled completely off the islands in May 1774. *Id.* at 35. Argentina claimed it owned the islands for several reasons: it succeeded Spain in territories formerly governed from Buenos Aires; because Spain purchased the islands from France in 1766 acquiring the right of prior occupation; because Britain abandoned its claim by secret declaration in 1771; and because Britain abandoned its settlements in 1774. *Id.*

²⁵² INSIGHT TEAM, *supra* note 248, at 91.

²⁵³ McClure, *supra* note 249, at 8.

²⁵⁴ *Id.* at 6-7.

²⁵⁵ *Id.* at 1. British military operations began on May 1, 1982. INSIGHT TEAM, *supra* note 248, at 155. Argentina surrendered on June 14, 1982. *Id.* at 267.

Unfortunately, as with many wars, significant casualties ensued, especially for only a six-week war. The British lost 252 military personnel, three Falkland Islanders and 777 Brits were wounded in battle.²⁵⁶ The Argentineans confirmed their deaths at 635, and documented that almost 17,000 service members held as prisoners of war (POWs).²⁵⁷ One of those Argentinean POWs was administered a *coup de grâce* to by a British soldier to spare him unbearable pain and agony.²⁵⁸

Immediately following the cease of hostilities near Darwin and Goose Green, the British discovered “very large quantities” of fused unexploded ordinances littering the area.²⁵⁹ Approximately 1000 Argentine POWs were housed in a large sheep-shearing shed in Goose Green.²⁶⁰ The British also discovered a battery of 105mm artillery guns and two caches of mixed ordinances “a few meters from the shed.”²⁶¹ One cache measured fifteen meters long and two meters wide containing “105mm shells, charge bags, boxes of mines, both anti-personnel and anti-tank, loose mines, grenades and what appeared to be aircraft

²⁵⁶ Imperial War Museum, Falklands War 1982, Casualty Statistics, <http://www.iwm.org.uk/server/show/ConWebDoc.2477> (last visited Jan. 7, 2006).

²⁵⁷ *Id.*

²⁵⁸ INSIGHT TEAM, *supra* note 248, at 235.

²⁵⁹ UNITED KINGDOM, BRITISH REPORT IN ACCORDANCE WITH ARTICLE 121 OF THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR OF 12 AUGUST 1949, EXPLOSION OF ORDNANCE ON 1 JUNE 1982 IN WHICH FOUR ARGENTINE SOLDIERS DIED AND EIGHT OTHERS WERE INJURED WHILE IN THE CUSTODY OF BRITISH FORCES AT GOOSE GREEN EAST FALKLAND 1 (1982) [hereinafter FALKLAND REPORT] (on file with author). This report was produced by the British government at the request of the United States Ministry of Defense in the United Kingdom. Portions of the title page and attached witness statements were redacted.

²⁶⁰ *Id.*

²⁶¹ *Id.*

bombs.”²⁶² The senior POW agreed that the POWs would collect the Argentine dead, clear the area and move ammunition from the caches to the collection center.²⁶³

On the afternoon of June 1, 1982, while moving items from the cache to the collection center, an unexploded ordinance ignited and exploded.²⁶⁴ The explosion immediately engulfed three POWs in flames, and a fourth one fell backward into the fire.²⁶⁵ A British sergeant-medic managed to get close to the burning POW, but his multiple attempts to reach him failed because of the intense heat of the fire.²⁶⁶ Unable to reach the POW, the medic acted mercifully:

About four to five minutes after the explosion and start of the intense fire, the Sergeant, who was in considerable distress because he thought he saw the man moving and could not reach him, obtained a self-loading rifle and fired three or four shots with the intention of ending his apparently intense suffering because he considered that he was beyond further assistance and in agony.²⁶⁷

The British initiated an immediate informal investigation wherein the British sergeant-medic relayed the facts of the explosion, attempted rescue, and mercy killing.²⁶⁸

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.* at 2.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 3.

The Argentine officers “accepted”²⁶⁹ the medic’s explanation, and did not pursue the matter further.”²⁷⁰ Subsequent to the informal investigation, a “full inquiry was convened” pursuant to Article 121²⁷¹ of the Third Geneva Convention consisting of four officers, one of whom was a doctor, from units not involved in the POW operations.²⁷² They concluded:

The government of the United Kingdom has made a careful study of this tragic incident and has considered all the facts which emerged from the inquiry and subsequent investigation. All the relevant information has been submitted to the competent legal authorities who have concluded that no proceedings (whether in a civil court or by court martial or through military discipline proceedings) should be instituted against any individual involved.²⁷³

²⁶⁹ The medic’s mercy killing did cause some comment in the press. Many like noted author Richard Holmes believed “he was doing nothing more than render[ing] a fellow soldier a last service: there can be few of us who would not rather perish thus than, in Paré’s words, languish miserably.” HOLMES, *supra* note 63, at 188.

²⁷⁰ FALKLAND REPORT, *supra* note 259, at 3 (1982).

²⁷¹ Geneva Convention Relative to the Treatment of Prisoners of War art. 121, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW III]. In the case of a death involving a prisoner of war (POW), Article 121 requires an official investigation, notification of results of the investigation to the country of the POW, and if the investigation indicates guilt of a party for the death, all measures for prosecution will exhausted, as noted in the actual text of Article 121:

Every death or serious injury of a prisoner of war caused or suspected to have been caused by a sentry, another prisoner of war, or any other person, as well as any death the cause of which is unknown, shall be immediately followed by an official enquiry by the Detaining Power

A communication on this subject shall be sent immediately to the Protecting Power. Statements shall be taken from witnesses, especially from those who are prisoners of war, and a report including such statements shall be forwarded to the Protecting Power.

If the enquiry indicates the guilt of one or more persons, the Detaining Power shall take all measures for the prosecution of the person or persons responsible.

²⁷² FALKLAND REPORT, *supra* note 259, at 3.

²⁷³ *Id.* This is apparently also the conclusion of the Argentine government as there was no objection to either the informal or formal Article 121 inquiry. Attempts to get copies of the ICRC records and reports pertaining to the Goose Green mercy killing in 1982 were rejected. See E-mail from Daniel Palmieri, Historical Research

The Article 121 official inquiry found that the British sergeant-medic believed the burning POW was alive, that he shot him three or four times, that he believed the POW was beyond the point where medical assistance could be any benefit, and that the medic's motive to kill the POW was mercy.²⁷⁴ The British Soldier "wished to spare him further agony"²⁷⁵ and was exonerated for his act of mercy.²⁷⁶

2. Iraq War – killing of severely wounded Iraqi teen

On August 18, 2004, members of Charlie Company, 1st Battalion, 41st Infantry were providing security for a "major mission" in Sadr City, Iraq.²⁷⁷ In addition to providing

Officer, ICRC Historical Archives, to Mr. Geoffrey Com, Special Assistant to The Judge Advocate General of the Army for Law of War Matters, Office of the Judge Advocate General, United States Army (Oct. 26, 2004, 10:41 AM) (informing Mr. Com that the ICRC cannot release information pertaining to the death of an Argentine POW during the Falklands War because the ICRC access rules deem that ICRC files of less than 40 year are not open to the public and referring him to the British Ministry of Defense) (on file with author).

²⁷⁴ FALKLAND REPORT, *supra* note 259, at 3 (1982).

²⁷⁵ *Id.*

²⁷⁶ Former Surgeon Commander and Rick Jolly at Ajax Bay, Falkland Islands during the 1982 war described the actions of the sergeant-medic as "morally courageous" and submitted him for a gallantry award. The sergeant-medic has since been commissioned and retired. Telephone Interview with Surgeon Captain Rick Jolly, former Surgeon Commander in the Falklands War, Royal Marines, in Torpoint, Cornwall, England (Nov. 15, 2004) [hereinafter Rick Jolly Interview]. Dr. Jolly said that the sergeant-medics numerous attempts to save the burning POW, and then when realizing he could not reach him and that the POW was suffering immense pain and inevitable death, his action in mercifully releasing him from that pain stands as an example of humanity in war. Telephone interview with Surgeon Captain Rick Jolly, former Surgeon Commander in the Falklands War, Royal Marines, in Torpoint, Cornwall, England (Jan. 7, 2006). At the time of the incident, another British officer asked Dr. Jolly's opinion of the incident, and he responded, "I just hope I've got the courage to do something like that if it happens to me. It's the bravest thing I have ever heard." INSIGHT TEAM, *supra* note 248, at 235-36.

²⁷⁷ United States v. Alban-Cardenas, 29 (Headquarters, 1st Cavalry Division Jan. 14, 2004) (case number not assigned as of Mar. 27, 2006) [hereinafter Alban-Cardenas Transcript] (testimony of SSG Jonathon Alban-Cardenas).

security for the “multiple task force” mission, the Soldiers “mak[e] sure that . . . the enemy wasn’t placing IEDs . . . [on] the main avenue of approach for [the task force].”²⁷⁸ During the mission, “somebody had thrown a box [out of a truck] and the box was exploding and shooting tracers – bullets out of it. Those bullets hit some [of the] dismount[ed Soldiers].”²⁷⁹ At approximately midnight, one Soldier observed a dump truck “throwing boxes out of the back” and some of the boxes “exploded.”²⁸⁰ Determined to be a threat, the Soldiers of Charlie Company engaged the truck in battle.²⁸¹

The firefight disabled the truck, leaving it on fire.²⁸² Soldiers of Charlie Company reported “secondary explosions” from the back of the truck, supporting the initial suspicion the truck was “trying to plant IEDs throughout the area.”²⁸³ The attack on the truck wounded at least four Iraqis, including one gravely.²⁸⁴ One Soldier reported the gravely wounded Iraqi who was a 16-year-old male near the truck with “his torso . . . pretty much all tore up, [and] his guts laying (sic) on the street, covered in blood.”²⁸⁵ One of the first Soldiers to assess the Iraqi’s condition, Staff Sergeant (SSG) Johnny Horne, reported to SSG Jonathon Alban-

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.* at 30.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 102 (testimony of SGT Richard Devault).

Cardenas that the Iraqi was “severely wounded . . . really hurt, and that there was nothing we could do about him”²⁸⁶ Staff Sergeant Horne told SSG Alban-Cardenas that he was not “going to let him stay like that, and that he was going to take him out of his misery”²⁸⁷

Staff Sergeant Alban-Cardenas returned to his Bradley fighting vehicle to pull security away from the burning truck.²⁸⁸ After some time, SSG Alban-Cardenas became concerned about how long the unit had been at the scene and went to discuss the matter with SSG Horne.²⁸⁹ Near the gravely wounded Iraqi, SSG Alban-Cardenas told SSG Horne they “were staying there too long” and to “shoot the guy, to put him out of his misery, if [you have] the courage enough”²⁹⁰ Staff Sergeant Horne did not respond, so SSG Alban-Cardenas “approached” the wounded Iraqi, “aimed [his] weapon towards his body, and squeezed [the] trigger and put a burst of about . . . three rounds” into his body.²⁹¹ When later asked by the military judge why he shot the body, SSG Alban-Cardenas responded “because that is where we are taught to shoot, ma’am,” it is “considered to be center mass.”²⁹²

²⁸⁶ *Id.* at 22 (testimony of SSG Alban-Cardenas).

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 22-23.

²⁹¹ *Id.* at 23.

²⁹² *Id.*

During his guilty plea, the military judge questioned SSG Alban-Cardenas about the wounds the Iraqi sustained:

MJ [Military Judge]: And what did the back of his body look like?

ACC [SSG Alban-Cardenas]: From his feet to his mid-torso, he was burned. I mean, his feet were the worst. They were black, like charcoal black.

MJ: Were they still in the shape of a foot?

ACC: It was like – the feet were sort of together . . . [like] if you burned a piece of wood. It was just really nasty. His knee was blown. I was like – from the normal position, it was way out. Then he had a hole like – well, part of his right shin was missing and you could see the pelvis. I mean, his hipbone and pelvis – you could see the shape of it and everything. His clothes was (sic) burned. . . . [The] shorts he was wearing . . . were burned and stuck to his skin. Then he had a big hole . . . 10 inches in diameter on his lower back.

MJ: What was the size again? About 10 inches in diameter, you said, in his lower back? Where? Close to his buttocks or higher?

ACC: [T]he lower part of the spine. He was missing a lot of tissue, so you could see his spine. You could see everything, it was so big. Then, as you go up, there was another chunk of tissue gone from between his shoulder blades.

MJ: Did you see his head?

ACC: Yes, ma'am.

MJ: What did his head look like?

ACC: It was soaking with blood.²⁹³

Unfortunately, the three rounds fired by SSG Alban-Cardenas did not end the wounded Iraqi's suffering, and shortly thereafter, SSG Horne shot the wounded Iraqi once in the head.²⁹⁴

²⁹³ *Id.* at 27.

When asked why they did not evacuate the wounded Iraqi, SSG Alban-Cardenas told the military judge that “we don’t have the means to help these people”²⁹⁵ and that there was “no flying over Sadr City, so there was no option of calling an air medevac.”²⁹⁶ When the judge asked “why didn’t you let him lay there,” SSG Alban-Cardenas responded because he has seen what happened to seriously wounded and dead people left in the streets of Iraq – he had seen “dogs chewing [on] peoples’ faces” when left on the street.²⁹⁷

During his sworn testimony on sentencing, SSG Alban-Cardenas discussed his motive in delivering the *coup de grâce* to the wounded Iraqi: “My intention was just to ease his pain, and that’s how I felt. I felt like it was my brother that was laying there with those wounds, and I remembered what was taught, what I was shown by my leaders about what was right and what’s wrong.”²⁹⁸

At his separate court-martial, SSG Johnny Horne testified about his and SSG Alban-Cardenas’ motive in shooting the wounded Iraqi. He testified in his unsworn statement that they did not shoot out of malice, but rather it was “because of the compassion we felt for

²⁹⁴ *Id.* Sergeant Richard Devault testified that he saw the wounded Iraqi before he was shot by SSG Alban-Cardenas and “he looked dead to me.” *Id.* at 102. He continued, “He was going to die if he was not dead already.” *Id.*

²⁹⁵ *Id.* at 28. (testimony of SSG Alban-Cardenas).

²⁹⁶ *Id.* at 34.

²⁹⁷ *Id.* Specialist Travis Vogt of Charlie Company testified at SSG Alban-Cardenas court-martial that he “saw dogs coming up and tearing on the body bags and chewing on body parts within the body bags” of Iraqi’s who were left on the ground. *Id.* at 98.

²⁹⁸ *Id.* at 124 (testimony of SSG Alban-Cardenas).

[him] . . . [and] because of the condition that he was in. It's just not right to let any human just lay there and suffer like that . . . that's why I did it, and I know that's why Sergeant Alban did it."²⁹⁹

A panel of military officers and noncommissioned officers sentenced SSG Johnny Horne to three years confinement,³⁰⁰ while SSG Jonathon Alban Cardenas was sentenced to one year confinement by a military judge.³⁰¹

3. Iraq War – killing of insurgent with mortal head wound

On May 21, 2004, Captain (CPT) Rogelio Maynulet led his team of twenty-four Soldiers with four armored High Mobility Multipurpose Wheeled Vehicles (HMMWV) with mounted .50 caliber machine guns and two M1A2 tanks³⁰² on a “kill or capture” mission³⁰³ of a high value target (HVT)³⁰⁴ near Kufa, Iraq. The mission, the objective, and the details

²⁹⁹ *Id.* at 89-90 (unsworn testimony was played on videotape at SSG Alban-Cardenas' court-martial).

³⁰⁰ *See supra* note 29.

³⁰¹ Alban-Cardenas Transcript, *supra* note 277, at 138. In both cases, SSG Horne and SSG Cardenas pled guilty to unpremeditated murder and conspiracy to commit unpremeditated murder. *Id.* at 80.

³⁰² United States v. Maynulet, No. 04-9847, 242-243 (Headquarters, 1st Armored Division Apr. 1, 2004) (case number not assigned as of Mar. 27, 2006) [hereinafter Maynulet Transcript] (testimony of Mr. Brian Haretuku on the merits).

³⁰³ *Id.* at 441 (testimony of CPT Maynulet on the merits).

³⁰⁴ *Id.* (testimony of CPT Maynulet on the merits), 290 (testimony of SGT Thomas Cassady, the company medic, on the merits).

of why the Soldiers were on that mission are still classified.³⁰⁵ Captain Maynulet commanded one of the blocking and intercept teams positioned on one of the three possible routes to stop the vehicle in which the HVT would be traveling when leaving the Kufa mosque.³⁰⁶ The battalion headquarters canceled this mission the first time CPT Maynulet and his men were in place³⁰⁷ because the HVT took an alternate route.³⁰⁸

The battalion mission utilized an unmanned aerial vehicle (UAV)³⁰⁹ to track the timing and the route of the HVT, and to relay the HVT's location to the intercept teams.³¹⁰ After services at the mosque, the UAV tracked the HVT as he exited the mosque, got into a black sedan, and traveled toward CPT Maynulet's position.³¹¹ Captain Maynulet's tanks engaged the HVT with its M240 coaxial machine gun as it passed the intercept position.³¹²

³⁰⁵ *Id.* at 89 (discussion between the military judge and the assistant trial counsel).

³⁰⁶ Maynulet Transcript, *supra* note 302, at 442 (testimony of CPT Maynulet on the merits).

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 443, 224-26 (testimony of Chief Warrant Office Three Jonathan Daniels, senior theater unmanned aerial vehicle manager, on the merits).

³¹⁰ *Id.* at 443 (testimony of CPT Maynulet on the merits).

³¹¹ *Id.* at 443-44.

³¹² *Id.* at 241 (testimony of Mr. Brian Haretuku, CPT Maynulet's driver on the merits), 246, 444 (testimony of CPT Maynulet on the merits).

The gunfire from the tank did not disable the fleeing sedan, and CPT Maynulet ordered his unit to pursue.³¹³

Captain Maynulet's positioned his vehicle first in a column of vehicles chasing the HVT.³¹⁴ After chasing the sedan for a few minutes, the sedan drove into an opening where the gunner and occupants of CPT Maynulet's vehicle had a clear shot.³¹⁵ They engaged the vehicle, hitting the sedan.³¹⁶ The driver crashed the car into the side of a building, and then sped the car forward into a brick courtyard fence, where it came to rest.³¹⁷ By the time the team from CPT Maynulet's vehicle approached the car, two of the occupants fled into the neighborhood.³¹⁸ The driver of the car was still in the front seat of the car, unresponsive.³¹⁹

As team members passed the car approaching the house adjacent to the courtyard where the crash occurred, some checked the driver to make sure he was not a threat to the

³¹³ *Id.* at 444 (testimony of CPT Maynulet on the merits).

³¹⁴ *Id.* at 243 (testimony of Mr. Brian Haretuku, CPT Maynulet's driver on the merits).

³¹⁵ *Id.*

³¹⁶ *Id.* at 241.

³¹⁷ *Id.* at 245 (testimony of Mr. Brian Haretuku, CPT Maynulet's driver on the merits); *id.* at 445 (testimony of CPT Maynulet on the merits).

³¹⁸ *Id.* at 445-46 (testimony of CPT Maynulet on the merits).

³¹⁹ *Id.* at 247 (testimony of Mr. Brian Haretuku, CPT Maynulet's driver on the merits), 290 (testimony of SGT Thomas Cassady, the company medic, on the merits), 448 (testimony of CPT Maynulet on the merits).

mission.³²⁰ His condition was grave at best. The assault and impact from the crash severely wounded the insurgent. He suffered a bullet wound to the back of the head³²¹ causing part of his skull ripped off,³²² exposing brain matter and scattering it in the car.³²³ Bleeding profusely, the insurgent suffered from a substantial loss of blood³²⁴ and could make only snoring, choking and gurgling noises.³²⁵ Captain Maynulet ordered the company medic to remove the driver from the car and treat him.³²⁶

As ordered, the medic removed the driver from the car, placing him on the ground near the car.³²⁷ The medic estimated that the insurgent had a one-inch by six-inch gapping wound in the back of his head³²⁸ and that he had lost over a liter and a half of blood.³²⁹ He

³²⁰ *Id.* at 547-48 (testimony of SFC James Boucher, platoon sergeant, on the merits). In fact, Sergeant First Class Boucher testified that if he would have seen the driver move at all, he would have shot him again because he would have considered him a threat. *Id.*

³²¹ *Id.* at 247 (testimony of Brian Haretuku, CPT Maynulet's driver on the merits), 549 (testimony of SFC James Boucher, platoon sergeant, on the merits).

³²² *Id.* at 291 (testimony of SGT Thomas Cassady, the company medic, on the merits).

³²³ *Id.* at 450-51 (testimony of CPT Maynulet on the merits), 547-550 (testimony of SFC James Boucher, platoon sergeant, on the merits).

³²⁴ *Id.* at 291 (testimony of SGT Thomas Cassady, the company medic, on the merits describing the loss of at least 1.5 liters of blood), 548 (testimony of SFC James Boucher, platoon sergeant, on the merits).

³²⁵ *Id.* at 247 (testimony of Mr. Brian Haretuku, CPT Maynulet's driver on the day of the mission, on the merits describing the sounds as choking), 451 (testimony of CPT Maynulet on the merits describing the sounds as gurgling), 338 (testimony of SGT Thomas Cassady, the company medic, on the merits describing the sounds as snoring).

³²⁶ *Id.* at 448 (testimony of CPT Maynulet on the merits), 332 (testimony of SGT Thomas Cassady, the company medic, on the merits).

³²⁷ *Id.* at 336.

³²⁸ *Id.* at 337.

described the injury as the worst head wound he had ever seen, or for which he trained.³³⁰

The medic admitted that there could even have been additional head wounds on the back of the skull and in the upper back, but because he failed to examine either area, he does not know for sure.³³¹ However, both CPT Maynulet and Sergeant First Class Boucher saw brain matter on the shoulder and clothes of the insurgent, and in the car.³³² After medically evaluating the insurgent, the medic informed CPT Maynulet that “he wasn’t going to make it,”³³³ that there was nothing that can be done for him,³³⁴ and he did not expect him to live more than twenty minutes.³³⁵

The catastrophic head wound caused the insurgent’s right arm to move in a motion perpendicular to the ground and back and fourth from the chest.³³⁶ According to the medic,

³²⁹ *Id.*

³³⁰ *Id.* at 336.

³³¹ *Id.* at 336-37, 339.

³³² *Id.* at 450-51 (testimony of CPT Maynulet on the merits), 547-550 (testimony of SFC James Boucher, platoon sergeant, on the merits).

³³³ *Id.* at 333 (testimony of SGT Thomas Cassady, the company medic, on the merits).

³³⁴ *Id.* at 342.

³³⁵ *Id.* at 340.

³³⁶ *Id.* at 557-88. This issue was hotly contested at trial. The defense theory was that the government could not prove the insurgent was alive, and the movement of the arm could have been post-mortem spinal reflexes. Compare *id.* and *id.* at 589-604, with *id.* at 612-48. Dr. Robert Gullick testified that the movements of the arm captured on the UAV tape could have been post-mortem spinal reflexes. *Id.* at 457-88. Dr. Charles Rawling testified that it was not possible to exclude spinal reflexes as the cause of the arm movement, and one could not conclude that more complex brain activity caused the movements. *Id.* at 589-604. Dr. Rocco Armonda testified that the arm movements appeared volitional, and not the result of post-mortem spinal reflexes. *Id.* at 612-48. Dr. Armonda estimated the chances the movements were post-mortem spinal reflexes “were in the single digits . . .” *Id.*

this movement appeared to be an unconscious reflex caused by the massive head injury.³³⁷

Unable to continue to watch the insurgent suffer in apparent pain, CPT Maynulet delivered the *coup de grâce* and shot him twice in the head. At his trial, the lead defense counsel questioned CPT Maynulet about why he shot the gravely wounded insurgent:

[Q. Defense Counsel]

[A. CPT Rogelio Maynulet]

Q. Let's go back to when you were looking at the insurgent on the ground. What did you do after you saw these movements that you described earlier?

A. It was disturbing.

Q. Why?

A. I felt pretty helpless. It's hard to describe. You're so use [sic] to being able to affect events. I was use [sic] to fixing Iraqis or having my Soldiers able to fix people that were injured and having this guy, who was clearly suffering, and not being able to do anything about it was pretty disturbing. I felt helpless.

....

Q. So, what did you do then?

A. I fired a round at the Iraqi's head.

....

Q. So, did you fire again?

A. Yes, I did.

Q. Why did you do that?

A. He was in a state that I didn't think was dignified. I had to put him out of misery.

Q. Were you authorized to do that?

A. I think I was.

Q. Why?

³³⁷ *Id.* at 340 (testimony of SGT Thomas Cassady, the company medic, on the merits).

- A. It was the right thing to do. I think it was the honorable thing to do. I don't think allowing him to continue in that state was proper.³³⁸

After four days of trial, the court-martial panel of officers acquitted CPT Maynulet of assault with intent to commit murder, but found him guilty of the lesser included offense of assault with intent to commit voluntary manslaughter.³³⁹ On sentencing, assistant defense counsel asked CPT Maynulet how he felt about the gravely wounded insurgent on the ground dying before he shot him. Captain Maynulet responded without hesitation:

He was an enemy; there's no question about it. But, when they are out of the battle, they are still people and we're trained and we're conditioned in some respects to kind of distance ourselves from how the enemy is; they're the enemy. Maybe my mistake was that I knew the Iraqi people as a people. Everyone is different -- I mean, subject to some cultural differences and some religious beliefs, they are the same. I may have projected myself, you know, onto that Iraqi, and I didn't want to be in his position. I didn't want to be in his state. If I ever were in that state, I would hope that someone would afford me the dignity of a quick death.³⁴⁰

Bourrienne described of this notion of dignity when writing about Napoleon in Jaffe justifying the mercy killing of the plague victims as "obedience to the dictates of reason,"³⁴¹ The old Soldier spoke of dignity when he responded to Dr. Paré that "he prayed to God" that

³³⁸ *Id.* at 451-53 (testimony of CPT Maynulet on the merits).

³³⁹ *Id.* at 745) (announcing of the findings by the president of the panel).

³⁴⁰ *Id.* at 813 (testimony of CPT Maynulet on sentencing).

³⁴¹ BOURRIENNE, *supra* note 100, at 198-99.

someone would do the same for him so that “he might not languish miserably;”³⁴² Sergeant Buick referenced the same dignity when he explained that it was “compassion and respect to another warrior” that motivated his actions in Long Tan;³⁴³ and Dr. Rick Jolly offered the very same dignity when he described the act of releasing the burning Argentine POW from immense pain in the face of inevitable death “stands as an example of humanity in war.”³⁴⁴ This historical survey has established that mercy killings are an unfortunate but real part of war.

Dignified or not, before deciding whether to prosecute a Soldier for delivering a *coup de grâce* to a gravely wounded combatant, it must be determined what law applies. The identification of applicable law can only be made after examining the domestic criminal law of the country where the killing occurred, the relevant international humanitarian law, and the domestic criminal law of the United States.

III. Law applicable to combat-related mercy killings

Before one can decide what law applies to a combat-related mercy killing, all the possible jurisdictions that have the authority to regulate the conduct of U.S. Soldiers must be identified. Once the jurisdictions with authority are identified, it should be determined what

³⁴² HOLMES, *supra* note 63, at 187.

³⁴³ Letter from Robert S. Buick, 6th Royal Australian Regiment (ret.), to author (Jan. 14, 2006) (on file with author).

³⁴⁴ Rick Jolly Interview, *supra* note 276.

criminal statutes or legal provisions in that jurisdiction that make the killing of a human being unlawful. After finding the specific provisions of law criminalizing killing, the ability and likelihood of the identified jurisdictions to enforce those criminal statutes against a U.S. Soldier must be analyzed. For the jurisdictions where a Soldier realistically faces a possible trial, the specific elements of the criminal provisions prohibiting the killing of people must be analyzed as they apply to combat-related mercy killings. Only after this analysis can one determine what law should apply to a combat-related mercy killing and how such cases should be charged (if at all).

A. Possible jurisdictions prohibiting combat-related mercy killings

Identifying the possible jurisdictions is straight-forward. A U.S. Soldier committing a combat-related mercy killing in a foreign country during a combat or a military operation could be subject to the jurisdiction of the nation where he commits the crime, the jurisdiction of international criminal tribunals, and the jurisdiction of the United States.

1. Jurisdiction of the nation where the mercy killing occurred

Generally when in a foreign country, U.S. Soldiers are subject to the criminal laws of that nation.³⁴⁵ This general rule is based on the concept of state sovereignty; the notions of “integrity and inviolability of territorial sovereignty” and that each nation “is master in its

³⁴⁵ W. A. Stafford, *How to Keep Military Personnel from Going to Jail for Doing the Right Thing: Jurisdiction, ROE & the Rules of Deadly Force*, ARMY LAW., Nov. 2000, at 1, 9.

own territory.”³⁴⁶ The United States has a long history of recognizing territorial sovereignty of nations and acknowledging that “[t]he jurisdiction of [a] nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself.”³⁴⁷ Since the 1950s, the United States has recognized that the territorial sovereignty of nations meant that U.S. Soldiers were subject to the criminal jurisdiction of foreign countries while within their borders.³⁴⁸

This general rule can mutate, depending on the status of the Soldier—whether he and the United States Army are in the country with permission, without permission or as an occupier. If the United States is present at the request of, or with the permission of the nation where the mercy killing occurred, then the specific legal status agreement between the two countries would determine what law applies.³⁴⁹ If the United States is present with permission, but there is no legal status agreement, then the U.S. Soldiers would be subject to local criminal law.³⁵⁰ If the United States is in the country without permission, but not as an

³⁴⁶ BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 11 (2d ed. 1995).

³⁴⁷ *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812).

³⁴⁸ Steven J. Lepper, *A Primer on Foreign Criminal Jurisdiction*, 37 A.F. L. Rev. 169, 170 (1994).

³⁴⁹ Stafford, *supra* note 345, at 7-8. These agreements are usually in the form of status of forces agreements (SOFA), defense cooperation agreements, access agreements, exchange of diplomatic notes or temporary agreements that outline the legal status of U.S. troops while in the foreign country. *Id.* “These [agreements] generally grant primary jurisdiction to the sending state for *official acts*, and crimes in which the victim is a sending state member.” *Id.* at 8; see Lepper, *supra* note 348, at 175-76 (noting that it is the policy of the U.S. military to view broadly what is encompassed by official acts).

³⁵⁰ “Today, it is widely agreed that in absence of a treaty like a SOFA, jurisdiction over foreign forces rests *exclusively* with the host state.” Lepper, *supra* note 348, at 171. “[I]n the absence of an international agreement governing criminal jurisdiction, U.S. military forces abroad are legally at the mercy of the host nation – including the sovereign’s definition of crime, defenses thereto, pretrial detention, procedure, and punishment.” Stafford, *supra* note 345, at 9.

occupier, local criminal laws would apply to U.S. Soldiers.³⁵¹ However, during an occupation, U.S. troops would not be subject to local criminal law.³⁵² Therefore, local criminal law may apply to a Soldier who commits a combat-related mercy killing if he is in the country without the permission of the government (but not as an occupier), or if he is there with permission of the local government, but there is no agreement with the United States regarding his legal status.

In either case, the likelihood of a U.S. Soldier being tried in a foreign criminal court for a mercy killing in a combat environment is minimal.³⁵³ Historically, it has been the practice of the United States to try Soldiers accused of serious offenses by court-martial. For

³⁵¹ Examples would include transit through a country without permission, flying over airspace without permission and pursuit across borders. In such cases, Soldiers are subject to local criminal law:

But if, without such express permission, an army should be led through the territories of a foreign prince, might the territorial jurisdiction be rightfully exercised over the individuals composing that army?

Without doubt, a military force can never gain immunities of any other description than those which war gives, by entering a foreign territory against the will of its sovereign.

Henry Wheaton, *Elements of International Law*, in 19 THE CLASSICS OF INTERNATIONAL LAW 1, 132 (James Brown Scott, ed., Carnegie Endowment for Int'l Peace 1936) (1866).

³⁵² GERHARD VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY - A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION 101 (1957). See U.S. DEP'T OF ARMY, PAM. 27-10, THE LAW OF LAND WARFARE para. 374 (18 July 1956) [hereinafter DA PAM 27-10] (noting that during occupation, U.S. military and civilian personnel are not subject to "local law or the jurisdiction of the local courts" unless expressly ordered by competent authority).

³⁵³ During war or in a failed state, the United States generally exercises its own jurisdiction through orders of commanders and the Uniform Code of Military Justice (UCMJ). MCM, *supra* note 3, R.C.M. 201. See Stafford, *supra* note 345, at 8 (noting there is little risk of Soldiers facing local criminal law by not having a legal status agreement "in combat or in a stateless society" because the United States "exerts its own jurisdiction" in such instances). Since the Soldier administering the mercy killing, generally, would be the victor in the battle, fight or skirmish, it is doubtful that the local authorities could exercise criminal jurisdiction, even if it applied.

instance, in Vietnam between 1965 and 1973 there were eighty-one cases of substantiated violations of international humanitarian law committed by U.S. forces resulting in several courts-martial.

Thirty-six war crime incidents, however, resulted in trials by courts-martial on charges ranging from premeditated murder or rape to involuntary manslaughter, negligent homicide, and the mutilation of enemy dead. Sixteen trials involving thirty men resulted in findings of not guilty or dismissal after arraignment, while twenty cases involving thirty-one soldiers resulted in conviction.³⁵⁴

Since Vietnam, Soldiers have routinely been tried by courts-martial for offenses committed in military operations against local nationals even when that nation could have exercised its territorial jurisdiction.³⁵⁵ The same is true in Operation Iraqi Freedom and Operation Enduring Freedom. Since 2003, 230 Soldiers have been court-martialed in Iraq, 58 have been court-martialed in Kuwait, and 29 have been court-martialed in Afghanistan, with no Soldier being tried in the local criminal courts of those jurisdictions.³⁵⁶ During combat or military operations, the United States will continue to try its soldiers by courts-

³⁵⁴ FREDRIC L. BORCH, JUDGE ADVOCATES IN COMBAT 21-22 (2001).

³⁵⁵ *Id.* at 270 (Dominican Republic); *id.* at 113-15 (Panama); In Afghanistan, Kuwait and Iraq since September 11, 2001, a total of 389 Soldiers have been court-martialed in those countries. U.S. ARMY COURT OF CRIMINAL APPEALS, U.S. ARMY JUDICIARY, IRAQ/KUWAIT/AFGHANISTAN STATISTICS SINCE 11 SEP 2001, at 1 (2006) [hereinafter COURT-MARTIAL STATISTICS] (noting statistics through Feb. 2, 2006) (on file with author).

³⁵⁶ COURT-MARTIAL STATISTICS, *supra* note 355, at 1.

martial, rather than subjecting them to the jurisdiction of the country where they are operating.³⁵⁷

2. *Jurisdiction of International Criminal Tribunals*

The second source of law or jurisdiction that could apply to a combat-related mercy killing is international humanitarian law, also known as the law of war.³⁵⁸ International humanitarian law is comprised of conventional law (treaties)³⁵⁹ and customary international law³⁶⁰—and determining which of these two bodies of law applies to a combat-related mercy

³⁵⁷ This was the expressed motive of the command of the 1st Armored Division in Iraq in the case of *United States v. Maynulet*. CPT Roligeo Maynulet was charged with premeditated murder for a combat-related mercy killing on June 12, 2004, in Baghdad. See *supra* Part II.B.3. The Article 32 Investigation was begun in Baghdad in June 24, 2004, but with a firm end date of June 28, 2004. This was to permit CPT Maynulet, and his wife CPT Brooke Maynulet, to redeploy to Germany before the change of authority from the Coalition Provisional Authority to the interim Iraqi government. This was despite the fact that CPT Maynulet's unit was not scheduled to return to Germany for several weeks. The sole purpose of flying CPT Maynulet out of Iraq before the change of authority was to prevent the possibility of the interim Iraqi government from exercising any claim of territorial jurisdiction over the case. Interview with Major (MAJ) John Rothwell, Criminal Law Professor, The Judge Advocate General's Legal Center & School, in Charlottesville, Va. (Mar. 8, 2006) [hereinafter Rothwell Interview] (Major Rothwell was the chief of military justice, for the 1st Armored Division, in Baghdad, Iraq, and assistant trial counsel in the prosecution of *United States v. Maynulet*).

³⁵⁸ It is a growing trend to refer to the law of war as international humanitarian law. Alex G. Peterson, *Order Out of Chaos: Domestic Enforcement of the Law of Internal Armed Conflict*, 171 MIL. L. REV. 1, n.24 (2002). This thesis will use the phrase "international humanitarian law," in part, because it is the language used in the international criminal tribunals. The creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY) established jurisdiction to try persons committing serious violations of international humanitarian law. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. SCOR, 48th Sess., para. 54, U.N. Doc. S/25704 (1993) [hereinafter ICTY Report]. Additionally, the creation of the International Criminal Tribunal for Rwanda (ICTR) was established "for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law." S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtng., para. 1, U.N. Doc S/RES/955 (1994) [hereinafter ICTR Resolution].

³⁵⁹ "An international agreement creates obligations binding between the parties under international law." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES § 102 cmt. f (1986).

³⁶⁰ A practice or rule becomes customary international law when "it is reflected in both state practice and *opinio juris*." Peterson, *supra* note 358, at 8. *Opinio juris* is recognition by a country that a practice or rule has legal force and that country is willing to be bound by it. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE

killing depends on the type of conflict—whether it is an internal armed conflict or an international armed conflict. Internal armed conflicts generally receive only the protections of customary international law,³⁶¹ while international armed conflicts are protected by the entire body of international law, including customary international law.³⁶²

An international armed conflict includes “declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”³⁶³ While not defined in the text of the Geneva Conventions, the “modern test for armed conflict is ‘whether such force constitutes an armed attack, in the context of its scope, duration and intensity.’”³⁶⁴ An internal armed conflict is defined in the negative as an “armed conflict not of international character”³⁶⁵

UNITED STATES § 102 cmt. c. (1986). Customary international law applies to all parties to a conflict, even non-state actors, such as insurgents. Peterson, *supra* note 358, at 30.

³⁶¹ Much of the customary international has been codified in conventional law, such as Common Article 3 and Protocol II. Peterson, *supra*, note 358, at 26-27.

³⁶² *Id.* at 10-11.

³⁶³ This definition is common in Article 2 of all four Geneva Conventions of 1949. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GWS I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea art. 2, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GSS II]; GPW III, *supra* note 271, art. 2; Geneva Convention Relative to the Protection of Civilian Persons in the Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GPC IV].

³⁶⁴ Peterson, *supra*, note 358, at 9-10 (quoting WALTER GARY SHARP, SR., CYBERSPACE AND THE USE OF FORCE 66-67 (Aegis Res. Corp. 1999)). The International Committee of the Red Cross Commentary on common article 2 listed scope, duration and intensity as the factors to consider in determining whether hostilities rise to the level of armed conflict. COMMENTARY ON THE GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN THE TIME OF WAR 17-21 (Jean S. Pictet ed., 1958).

³⁶⁵ This definition is common in Article 3 of all four Geneva Conventions of 1949. GWS I, *supra* note 363, art. 3; GSS II, *supra* note 363, art. 3; GPW III, *supra* note 271, art. 3; GPC IV, *supra* note 363, art. 3.

In an internal armed conflict, killing a person out of combat is proscribed by customary international law and limited conventional law that has become customary, including Common Article 3 of the Geneva Conventions³⁶⁶ and Article 4 of the Additional Protocol II to the Geneva Conventions (Protocol II).³⁶⁷ As noted earlier, in an international armed conflict, the full body of international law applies. Regardless the character of the conflict, a combat-related mercy killing is forbidden—both by conventional law³⁶⁸ and customary international law³⁶⁹—and would apply to a U.S. Soldier.

³⁶⁶ Common Article 3 of the Geneva Conventions has become customary international law which binds the United States, and been applied as such by the International Court of Justice (ICJ), by the ICTY, and the ICTR. Anthony Cullen, *Key Developments Affecting the Scope of International Armed Conflict in International Humanitarian Law*, 183 MIL. L. REV. 66, 81-82 (2005).

The ICJ's position on the customary status of Common Article 3 is supported by the ICTY jurisprudence. The Appeals Chamber of the ICTY in the *Tadic* case referred to the Common Article as a provision embodying "certain minimum mandatory rules." The rules "reflect 'elementary considerations of humanity' applicable under customary international law to any armed conflict, whether of an internal or international character." The Appeals Chamber goes on to state "customary international law imposes criminal responsibility for serious violations of Common Article 3." This view of the common Article as customary international law is upheld in the subsequent case law of the ICTY. It is also supported in the jurisprudence of the ICTY's sister institution, the ICTR. According to the *Akayesu* case before the ICTR, "It is today clear that the norms of Common Article 3 have acquired the status of customary law in that most States, by their domestic penal codes, have criminalized acts which if committed during internal armed conflict, would constitute violations of Common Article 3."

Id. (citations omitted). "Common Article 3" refers to Article 3 of each of the four Geneva Conventions. Common Article 3 specifically prohibits "violence to life" and requires that the "wounded and sick" will be cared for. GWS I, *supra* note 363, art. 3; GSS II, *supra* note 363, art. 3; GPW III, *supra* note 271, art. 3; GPC IV, *supra* note 363, art. 3.

³⁶⁷ Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, *reprinted in* 16 I.L.M. 1442 (1977) [hereinafter Protocol II]. Protocol II prohibits violence to life and murder. *Id.* art. 4.

³⁶⁸ Article 12 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field requires that the "wounded or sick" must be "respected and protected in all circumstances." It further requires:

Historically, violations of international humanitarian law were prosecuted by criminal tribunals established after the close of hostilities. The statutes used by these ad hoc criminal tribunals also appeared to forbid mercy killings.³⁷⁰ To eliminate the need to establish these post-hostility, ad hoc criminal tribunals, the United Nations set forth to create an international court. The product was the Rome Statute of the International Criminal Court³⁷¹ (Rome Statute). The Rome Statute criminalizes violations of the international humanitarian law, including killing a combatant who is out of the battle due to his wounds.³⁷² As a result,

They shall be treated humanely and cared for by the Party to the conflict in whose power they may be, without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria. Any attempts upon their lives, or violence to their persons, shall be strictly prohibited; in particular, they shall not be murdered or exterminated, subjected to torture or biological experiments; they shall not willfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created.

GSW I, *supra* note 363, art. 12. Article 13 of the Geneva Convention Relative to the Treatment of Prisoners of War requires that “prisoners of war must at all times be humanely treated” and “at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.” GPW III, *supra* note 271, art. 13. The Hague Convention prohibits the killing of a Soldier who is out of the battle due to sickness or wounds. Hague Convention (IV) Respecting the Laws and Customs of War on Land art. 23, Oct. 18, 1907, 36 Stat. 2277, T.S. 539 [hereinafter Hague IV].

³⁶⁹ See *supra* notes 357-358.

³⁷⁰ See Charter of the International Military Tribunal, London, 8 August 1945, 59 Stat. 1544, 82 U.N.T.S. 279 (making murder a war crime and crime against humanity to be tried by the Nuremberg Tribunal in Germany after World War II); TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 250 (1949) (making murder a war crime and a crime against humanity to be tried by military tribunals of the Allies in their respective zones of occupation in Germany after World War II); Charter of the International Military Tribunal for the Far East art. 5, Jan. 19, 1946, *as amended* Apr. 26, 1946, T.I.A.S. No. 1589 (making murder a war crime and a crime against humanity to be tried International Military Tribunal for the Far East in Tokyo after World War II); ICTY Report, *supra*, note 358, annex, art. 2-4 (making murder a crime against humanity and war crime to be tried by the ICTY); ICTR Resolution, *supra*, note 358, annex, art. 3 (making murder as a crime against humanity to be tried by the ICTR).

³⁷¹ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1988) [hereinafter Rome Statue].

³⁷² The Rome Statute prohibits the “willful killing” of people and the “killing or wounding of a combatant who, having laid down his arms or having no longer means of defense . . .” *Id.* art. 8(2)(b)(vi).

U.S. Soldiers who commit a combat-related mercy killing could be subject to the jurisdiction of any post-hostility ad hoc criminal tribunal or the International Criminal Court (ICC).³⁷³

Despite being subject to the jurisdiction of the ICC and any ad hoc international criminal tribunal, it is very unlikely that a U.S. Soldier would be tried before either one for a combat-related mercy killing. The policy of the United States military to prosecute violations of international humanitarian law by courts-martial,³⁷⁴ combined with the “complimentary nature” of the ICC jurisdiction³⁷⁵ and its focus on “large-scale commission

³⁷³ Even if the United States does not ratify the Rome Statute, U.S. Soldiers could still face trial for violations of international humanitarian law by the International Criminal Court (ICC).

U.S. nationals could be subject to investigation and trial by the ICC if the country in which the alleged crime occurred is either a party to the Rome Statute or consents to the ICC’s jurisdiction, and has or is able to gain custody of the alleged U.S. offender. This possibility appears to exist mainly with respect to U.S. military personnel stationed or found in such a country.

JENNIFER ELSEA, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, INTERNATIONAL CRIMINAL COURT: OVERVIEW AND SELECTED LEGAL ISSUES 25 (June 5, 2002).

³⁷⁴ See *supra* notes 252-357 and accompanying text. United States Army doctrine requires Soldiers who violate international humanitarian law to face trial by court-martial.

Violations of the law of war committed by persons subject to the military laws of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code. . . . Commanding officers of the United States troops must insure that war crimes committed by members of their forces against enemy personnel are promptly and adequately punished.

DA PAM 27-10, *supra* note 352, para. 507(b).

³⁷⁵ The jurisdiction of the ICC is limited, and unless a case is referred by the U.N. Security Council, jurisdiction will vest with the ICC “only when the state with custody of the accused is unable or unwilling to genuinely prosecute.” ELSEA, *supra* note 373, at 22. The offending Soldier would almost always be in the custody of the United States, and therefore, if prosecuted, the ICC would not have jurisdiction over the case.

of crimes”³⁷⁶ will keep U.S. Soldiers committing combat-related mercy killings out of the ICC or ad hoc international criminal tribunals in the future.

3. *Jurisdiction of the United States*

The final source or jurisdiction of law that could apply to a Soldier who commits a combat-related mercy killing is the domestic criminal law of the United States. This domestic criminal law includes the federal murder statute,³⁷⁷ the War Crimes Act³⁷⁸ and

³⁷⁶ The focus of the prohibition against international humanitarian law violations in the Rome Statute is “when [they are] committed as part of a plan or policy or as part of a large-scale commission of crimes.” Rome Statute, *supra* note 371, art. 8(1). Therefore, it is doubtful that a U.S. Soldier would find himself before the ICC for a combat-related mercy killing, since as defined by this thesis, such killing would not be part of a plan, policy or large-scale commission of crimes.

³⁷⁷ 18 U.S.C. § 1111 defines murder as “the unlawful killing of a human being with malice aforethought.” 18 U.S.C. § 1111(a) (2000). The Statute continues:

Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

Id.

³⁷⁸ In 1996, the United States passed the War Crimes Act that gave the United States the authority to prosecute violations of The Hague Regulations and Geneva Conventions in the courts of the United States. It specifically authorizes the prosecution of war crimes committed by or against nationals of the United States whether the crime occurred inside or outside of the United States. 18 U.S.C. § 2441(a)-(b) (2000). While the statute applies to U.S. Soldiers, it was directed against those who commit war crimes against U.S. Soldiers.

While it is difficult to believe, in the absence of a military commission or an international criminal tribunal, the United States currently has no means, by which we can try and prosecute perpetrators of war crimes in our courts. The Geneva Convention of 1949 granted the authority to prosecute individuals for committing “grave breaches” of the Geneva Convention, however, the authority was not self-enacting. The Geneva Convention directed

several punitive articles of the UCMJ.³⁷⁹ The U.S. Federal District Courts do not have the territorial jurisdiction to enforce the federal murder statute against a Soldier who committed a combat-related mercy killing in a foreign country.³⁸⁰ However, both the War Crimes Act and the UCMJ are extraterritorial, and could be applied to a Soldier regardless of where the killing occurred.³⁸¹ Although, in theory, a Soldier could face trial for violating international humanitarian law and killing someone in violation of the War Crimes Act—in reality, it is

each of the participating countries to enacting implementing legislation. The United States never did.

Today [before passage of the War Crimes Act], it would be possible, to find a known war criminal vacationing in our country, unconcerned with being punished for his crime. A modern-day Adolf Hitler, could move to the United States without worry, as he could not be found guilty in our courts of committing a war crime.

Lamar Smith (Texas), Statement, War Crimes Act of 1996, H.R. 3680, 142 Cong. Rec. H. 8620, 104th Congress, 2nd Session, July 29, 1996 (Vol. 142, No. 113).

³⁷⁹ Although each state has murder statutes that could apply to a combat-related mercy killing, the states can only exercise territorial jurisdiction over criminal statutes. For example, Texas requires a connection to the state, such as the “conduct or a result that is an element of the offense occurs inside the state” for territorial jurisdiction over an offense. TEX. PENAL CODE ANN. § 1.04 (2005). Before a Soldier could be tried in a state court for a combat-related mercy killing, the actual incident would have had to happen within the territory of that state, and therefore it is unforeseeable that state law will ever apply to a combat-related mercy killing. *See generally* State v. Meyers, 825 P.2d 1062 (Hawaii 2002) (noting that under HRS § 701-106(a), Hawaii had jurisdiction of a crime if either the conduct or its result that was an element of the offense occurred within the state and that it had jurisdiction over a terroristic threat because the call was received in Hawaii and the threats were heard in Hawaii despite the call originating in California); People v. Brown, 109 Cal. Rptr. 2d 879, 889 (Cal. Ct. App. 2001) (explaining that the California Penal Code extends criminal jurisdiction over crimes partially committed in the state, and to crimes where the intent and any act was committed in the state).

³⁸⁰ The United States has limited jurisdiction to prosecute a Soldier for murder under the federal statute. *See* 18 U.S.C. § 1111 (limiting federal jurisdiction to areas within the special maritime and territorial jurisdiction of the United States). The special maritime and territorial jurisdiction of the United States is defined in 18 U.S.C. § 7, and does not include any area that is within the jurisdiction of another state. *See* 18 U.S.C. § 7.

³⁸¹ Rule for Courts-Martial (RCM) 201 provides “[t]he code applies in all places.” MCM, *supra* note 3, R.C.M. 201(a)(2); *see supra* note 378.

almost certain that the Soldier would be tried by a court-martial for violating punitive articles of the UCMJ.³⁸²

Since it is unlikely that a U.S. Soldier who commits a combat-related mercy killing will face trial in the a foreign country's court, in the ICC, in an ad hoc international criminal tribunals or in the U.S. Federal District Courts, this thesis will focus on the relevant law where a Soldier is likely to be tried—the punitive articles of the UCMJ in military courts-martial.³⁸³

B. Applicable law to combat-related mercy killing – the UCMJ

For an act to be considered criminal, two components must be present. First, the specific conduct must be prohibited by law, statute or custom; second, the person engaging in that conduct must have the requisite state of mind when committing the prohibited acts. These two principles are known as *actus reus*³⁸⁴ and *mens rea*³⁸⁵ respectively. Both must be

³⁸² See generally ELSEA, *supra* note 373, at 19-20 (noting that while a U.S. Soldier could be tried under the War Crimes Act of 1996, “ordinarily, [the] U.S. practice is to try U.S. service members by court-martial rather than in federal court for offenses against the law of war”). See *supra* notes 352-57, 374 and accompanying text.

³⁸³ Jurisdiction to try violations of international humanitarian law is through Article 18, UCMJ. “War crimes are within the jurisdiction of general courts-martial.” LAW OF LAND WARFARE, *supra* note 352, para. 505(d); UCMJ art. 18 (2005).

³⁸⁴ Black's Law Dictionary defines *actus reus* as follows:

The wrongful deed that comprises the physical components of a crime and that generally must be coupled with *mens rea* to establish criminal liability; a forbidden act <the *actus reus* for theft is the taking of or unlawful control over property without the owner's consent>. – Also termed deed of crime; overt act. . . .

BLACK'S LAW DICTIONARY 37 (7th ed. 1999).

present before criminal liability attaches to any conduct.³⁸⁶ An analysis of which punitive articles of the UCMJ apply to combat-related mercy killings must include an examination of both the *actus reus* and *mens rea* associated with the act of killing a gravely wounded combatant.

1. Punitive article of the UCMJ – actus reus

This thesis has defined mercy killing as a killing “intended to end the anguish of a person facing inevitable death.”³⁸⁷ The act of killing is an essential part of that definition. Since combat-related mercy killings are not recognized as lawful, the articles of the UCMJ that prohibit killing in combat define the *actus reus* for mercy killings.

³⁸⁵ *Black’s Law Dictionary* defines *mens rea* as follows:

The state of mind that the prosecution, to secure a conviction, must prove that the defendant had when committing a crime; criminal intent or reckless <the *mens rea* for theft is the intent to deprive the rightful owner of the property>. *Mens rea* is the second of two essential elements of every crime at common law, the other being the *actus reus*. . . . Also termed mental element; criminal intent; guilty mind. . . .

BLACK’S LAW DICTIONARY 999.

³⁸⁶ *United States v. Willis*, 46 M.J. 258, 261 (1999) (noting that there are varying degrees of *mens rea* ranging from intent to commit the crime, to reckless misconduct, to negligent misconduct).

³⁸⁷ *See supra* Part I.A.

Ordinarily, in combat, belligerents are entitled to “combatant immunity,” and killing on the battlefield is not a crime.³⁸⁸

The moral and legal justification for providing this preferential status [combatant immunity] lies in the fact that the POW [prisoner of war] was, prior to capture, performing obligations and duties as a lawful combatant on behalf of and under command of the enemy State, these obligations and duties being of the kind and quality which the captor has also demanded of its own nationals or individuals owing or assuming allegiance to it. The POW owes no duty to the captor unless and until he is captured and thus he cannot be punished for his prior acts except for war crimes³⁸⁹

However, once a combatant is no longer in the battle due to wounds sustained in the fight and is no longer a threat, he becomes a protected person, and the act of killing him is no longer protected with combatant immunity.³⁹⁰

Once the protection of combatant immunity is pierced, a U.S. Soldier who commits a mercy killing in a military operation would be subject to the prohibitions of the UCMJ.³⁹¹

³⁸⁸ Major Geoffrey S. Corn & Major Michael L. Smidt, “*To Be or Not to Be, That is the Question*” *Contemporary Military Operations and the Status of Captured Personnel*, ARMY LAW., June 1999, at 14-15.

³⁸⁹ R. C. HINGORANI, PRISONERS OF WAR 9 (1982).

³⁹⁰ See *supra* notes 366-72 and accompanying text.

³⁹¹ Article 2, UCMJ, lists the persons who are subject to the UCMJ and includes the following:

(1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.

....

Therefore, a closer examination of the relevant punitive articles of the UCMJ is necessary to determine how combat-related mercy killings should be charged (if at all) and ultimately prosecuted.

The articles of the UCMJ that govern unlawful killings are Article 118 (Murder), Article 119 (Manslaughter), Article 119a (Death or Injury of Unborn Child)³⁹² and Article 134 (Negligent Homicide).³⁹³

Article 118, UCMJ contains four separate murder provisions.³⁹⁴ They are commonly known as premeditated murder, unpremeditated murder, depraved heart murder³⁹⁵ and felony

(3) Members of a reserve component while on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service.

UCMJ art. 2(a) (2005).

³⁹² MCM, *supra* note 3, pt. IV, ¶ 44a. While possible, it is unlikely a Soldier will face a pregnant combatant in a military operation. Even in the unlikely event that happens, if the government knew the combatant was pregnant, they would still have the burden to prove the child in utero was alive at the time the Soldier delivered the *coup de grâce* to the mother. That burden would border on impossible, since the mother would have sustained mortal or grave wounds prior to the mercy killing. Therefore it is unlikely that Article 119a, UCMJ would apply in a combat-related mercy killing.

³⁹³ *Id.* pt. IV, ¶ 85. As defined by this thesis, combat-related mercy killings are intentional killings, and therefore negligent homicide would not apply. *See supra* Part I.A.

³⁹⁴ MCM, *supra* note 3, pt. IV, ¶ 43.

³⁹⁵ *Id.* pt. IV, ¶ 43(a)(3). It is unlikely that a Soldier committing a mercy killing would be charged under a depraved-heart theory since both death and the act causing death are intended consequences in a mercy killing. *See supra* Part I.A. The elements for depraved heart (act inherently dangerous) murder are:

(a) That a certain or described person is dead; (b) That the death resulted from the intentional act of the accused; (c) That this act was inherently dangerous to another and showed a wanton disregard for human life; (d) That the accused knew that death or great bodily harm was a probable consequence of the act; and (e) That the killing was unlawful.

murder.³⁹⁶ For convictions of premeditated murder and felony murder, the authorized punishment is either death or life imprisonment.³⁹⁷ For convictions of unpremeditated murder and depraved heart murder, the court-martial may direct any punishment except death.³⁹⁸ This includes sentencing the accused to no punishment.³⁹⁹ For a combat-related

MCM, *supra* note 3, pt. IV, ¶ 43(b)(3); *see also* Major Eugene R. Milhizer, *Murder without Intent: Depraved-Heart Murder under Military Law*, 133 MIL. L. REV. 205 (1991) (tracing the history and application of depraved-heart murder in the military).

³⁹⁶ MCM, *supra* note 3, pt. IV, ¶ 43(a)(4). Felony murder would not apply in a combat-related mercy killing since the element requiring the Soldier to be engaged in another listed felony would be absent. The elements of felony murder are:

(a) That a certain named or described person is dead; (b) That the death resulted from the act or omission of the accused; (c) That the killing was unlawful; and (d) That, at the time of the killing, the accused was engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson.

Id. pt. IV, ¶ 43(b)(4).

³⁹⁷ *Id.* pt. IV, ¶ 43(e)(1). Wherever life imprisonment is authorized, the court-martial may also authorize life in prison without eligibility for parole (LWOP). *Id.* R.C.M. 1003(b)(7). It should be noted that none of the international statutes or the War Crimes Act discussed in the previous section authorize mandatory minimum punishments. *See supra*, Part III.A. Compare MCM, *supra* note 3, pt. IV, ¶ 43(e)(1) (establishing a mandatory minimum sentence of life imprisonment for premeditated murder), with Rome Statute, *supra* note 371, art. 77 (authorizing the maximum punishment in the ICC not to exceed thirty years unless “justified by the extreme gravity of the crime and individual circumstances of the convicted person” in which case a term of life imprisonment may be imposed with no mandatory minimum), and ICTR Resolution, *supra* note 358, annex, art. 23 (establishing the maximum punishment for crimes against humanity tried by the ICTR as a “term of imprisonment” with no mandatory minimum sentences), and ICTY Report, *supra* note 358, ¶ 115 (establishing the punishment for crimes against humanity and violations of the law of war tried by the ICTY as a term of confinement with no mandatory minimum sentences), and 18 U.S.C. § 2441(a) (2000) (establishing the range of punishment for war crimes resulting in death from “a term of any years” to death but not creating any mandatory minimum punishment).

³⁹⁸ MCM, *supra* note 3, pt. IV, ¶ 43(e)(2).

³⁹⁹ *Id.* R.C.M. 1002. R.C.M. 1002 provides:

Subject to limitations in this Manual, the sentence to be adjudged is a matter within the discretion of the court-martial; except when a mandatory minimum sentence is prescribed by the code, a court-martial may adjudge any punishment authorized in this Manual, including the maximum punishment or any lesser punishment, or may adjudge a sentence of no punishment.

mercy killing, neither depraved heart murder nor felony murder are applicable.⁴⁰⁰ However, both premeditated murder and unpremeditated murder are potential charges facing a Soldier who commits a combat-related mercy killing, each with drastically different potential punishments – from a mandatory minimum punishment of life in prison to as little as no punishment.⁴⁰¹

Article 119, UCMJ (Manslaughter), is divided into two types; voluntary⁴⁰² and involuntary⁴⁰³ manslaughter. Since involuntary manslaughter involves culpable negligence rather than an intentional act, it would not apply to a combat-related mercy killing. Therefore, the three punitive articles of the UCMJ that could apply to a combat-related mercy

Id. The military judge instructs the members during the sentencing phase of the trial that “[i]t is the duty of each member to vote for a proper sentence for the offense(s) of which the accused has been found guilty. Your determination of the kind and amount of punishment, if any, is a grave responsibility. . . .” DEP’T OF ARMY, PAM. 27-9, MILITARY JUDGES’ BENCHMARK para. 8-3-20 (12 Sep 2002) [hereinafter DA PAM 27-9].

⁴⁰⁰ This is true because, by definition, in combat-related mercy killings, both the outcome (death) and the means causing the outcome (firing M16 at head of insurgent) are intended. *See supra* notes 9-13.

⁴⁰¹ *See supra* note 397-399.

⁴⁰² MCM, *supra* note 3, pt. IV, ¶ 44(a)(a). The elements of voluntary manslaughter are:

(a) That a certain named or described person is dead; (b) That the death resulted from the act or omission of the accused; (c) That the killing was unlawful; and (d) That, at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon the person killed.

Id. pt. IV, ¶ 44(b)(1).

⁴⁰³ *Id.* pt. IV, ¶ 44(a)(b). The elements of involuntary manslaughter are:

(a) That a certain named or described person is dead; (b) That the death resulted from an act or omission of the accused; (c) That the killing was unlawful; and (d) That this act or omission of the accused constituted culpable negligence, or occurred while the accused was perpetrating or attempting to perpetrate an offense directly affecting the person other than burglary, sodomy, rape, robbery, or aggravated arson.

Id. pt. IV, ¶ 44(b)(2).

killing include premeditated murder, unpremeditated murder and voluntary manslaughter.

The elements of each will be examined below.

a. Article 118(1), UCMJ – premeditated murder elements

The UCMJ prohibits the unlawful killing of a human being when the actor “has a premeditated design to kill.”⁴⁰⁴ Proof of premeditated murder requires the government to prove the following elements: “(a) That a certain named or described person is dead; (b) That the death resulted from the act or omission of the accused; (c) That the killing was unlawful; and (d) That, at the time of the killing, the accused had a premeditated design to kill.”⁴⁰⁵ Failure of the premeditation element still may result in a conviction of unpremeditated murder, assuming the accused had the intent to kill or cause great bodily harm.⁴⁰⁶

b. Article 118(2), UCMJ – unpremeditated murder elements

Unpremeditated murder is prohibited by Article 118(2) of the UCMJ. It prohibits the unlawful killing of a human being when the actor “intends to kill or inflict great bodily harm.”⁴⁰⁷ Proof of unpremeditated murder requires the government to prove the following

⁴⁰⁴ *Id.* pt. IV, ¶ 43(a)(1).

⁴⁰⁵ *Id.* pt. IV, ¶ 43(b)(1).

⁴⁰⁶ *United States v. Hoskins*, 343 M.J. 343, 346 (C.M.A. 1993) (holding that evidence was insufficient to sustain a premeditated murder conviction, but sufficient to affirm the allegation of unpremeditated murder).

⁴⁰⁷ *MCM*, *supra* note 3, pt. IV, ¶ 43(a)(2).

elements: “(a) That a certain death resulted for the act of omission of the accused; (b) That the death resulted from the act or omission of the accused; (c) That the killing was unlawful; and (d) That, at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon a person.”⁴⁰⁸ The only difference in the elements between murder and premeditated murder is the proof of a premeditated design to kill.⁴⁰⁹

c. Article 119(1), UCMJ – voluntary manslaughter elements

Voluntary manslaughter is prohibited by Article 119(1), UCMJ. It prohibits the unlawful, intentional killing of a human being “in the heat of sudden passion caused by adequate provocation.”⁴¹⁰ Surprisingly, the proof of voluntary manslaughter requires the government to prove the same elements as required for unpremeditated murder.⁴¹¹ Therefore, if the government charges the accused with voluntary manslaughter, the proof required is identical to that of unpremeditated murder.

The difference between the two offenses [unpremeditated murder and voluntary manslaughter] is that if, notwithstanding the accused’s intentional state of mind, he kills while “in the heat of sudden passion caused by adequate provocation,” what would otherwise be unpremeditated murder is mitigated to

⁴⁰⁸ *Id.* pt. IV, ¶ 43(b)(2).

⁴⁰⁹ There is a constitutionally “meaningful distinction between premeditated and unpremeditated murder” in that premeditated murder requires proof of the additional element of “premeditated design to kill.” *United States v. Loving*, 41 M.J. 213, 279 (1994).

⁴¹⁰ MCM, *supra* note 3, pt. IV, ¶ 44(a)(a).

⁴¹¹ “The elements the government must prove for voluntary manslaughter are, somewhat paradoxically, identical to those of unpremeditated murder.” *United States v. Schap*, 49 M.J. 317, 319-20 (1998).

voluntary manslaughter. This latter mental state, though part of the statutory definition of the offense, is neither an element that the government must prove nor an affirmative defense that the defense must prove.⁴¹²

If on the other hand, the government charges premeditated or unpremeditated murder, and the evidence raises the issue of “sudden heat of passion,” in order to satisfy due process, the government must “prove beyond doubt the absence of the heat of passion on sudden provocation.”⁴¹³

Before determining which articles of the UCMJ should apply to those Soldiers who commit mercy killings in combat, it is necessary to examine the *mens rea* of the individual prohibitions against such killings for premeditated murder, unpremeditated murder and voluntary manslaughter.

2. Combat-related mercy killings – mens rea

Again, *mens rea* describes the necessary mental state for the commission of the crime. The only practical difference between premeditated murder, unpremeditated murder and voluntary manslaughter rests in the proof of the *mens rea* or mental state during the killing.

⁴¹² *Id.* at 320.

⁴¹³ *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975) (holding that a Maine statute that required a defendant to prove he acted in heat of passion on sudden provocation by “a fair preponderance of the evidence” as violative of due process and, therefore, unconstitutional).

a. Article 118(1), UCMJ – premeditated murder

To sustain a premeditated murder conviction, the government must prove that the accused formed a premeditated design to kill—meaning both the formation of a specific intent to kill and the consideration of the act intended to cause the death.⁴¹⁴ Proof of this “premeditated design to kill” distinguishes premeditated murder from unpremeditated murder.⁴¹⁵ Much of the litigation surrounding premeditated murder as proscribed by the UCMJ has focused on this distinction, and specifically on what entails consideration of the act intended.⁴¹⁶ The MCM defines premeditation as:

A murder is not premeditated unless the thought of taking life was consciously conceived and the act or omission by which it was taken was intended. Premeditated murder is murder committed after the formation of a specific intent to kill someone and consideration of the act intended. It is not necessary that the intention to kill have been entertained for any particular or considerable length of time. When a fixed purpose to kill has been deliberately formed, it is immaterial how soon afterwards it is put into execution. The existence of premeditation may be inferred from the circumstances.⁴¹⁷

⁴¹⁴ United States v. Loving, 41 M.J. 213, 279 (1994).

⁴¹⁵ *Id.*

⁴¹⁶ See United States v. Cole, 54 M.J. 572 (2000); see also United States v. Curtis, 44 M.J. 106 (1996); United States v. Eby, 44 M.J. 425 (1996); United States v. Loving, 41 M.J. 213, 279 (1994); United States v. Hoskins, 36 M.J. 343 (C.M.A. 1993); United States v. Teeter, 16 M.J. 68 (C.M.A. 1983); United States v. Matthews, 16 M.J. 354 (C.M.A. 1983); United States v. Levell, 43 M.J. 847 (N-M. Ct. Crim. App. 1996); United States v. Viola, 26 M.J. 822 (A.C.M.R. 1988).

⁴¹⁷ MCM, *supra* note 3, pt. IV, ¶ 43(c)(2)(a).

On occasion, the military courts have defined “consideration of the act intended” as a killing “after reflection by a cool mind.”⁴¹⁸ In fact, as recently as 1994, the highest military appellate court went as far as to conclude that the military courts have adopted a “cool mind” distinction for determining whether the accused “considered the act intended” to cause the death,⁴¹⁹ citing with approval *United States v. Hoskins*.⁴²⁰

In *Hoskins*, the Court of Military Appeals (later the Court of Appeals for the Armed Forces) held that the intent to kill alone is insufficient to sustain a conviction for premeditated murder.⁴²¹ The court continued:

We must find that there is more than evidence of intent before we can affirm the decision below in this case; what we must also find is evidence of a “premeditated design to kill.” Premeditation requires that one with a cool mind did, in fact, reflect before killing. W. LaFare and A. Scott, *Substantive Criminal Law* § 7.7(a) (1986):

It has been suggested that for premeditation the killer asks himself the question, “Shall I kill him?” The intent to kill aspect of the crime is found in the answer, “Yes, I shall.” The

⁴¹⁸ *United States v. Viola*, 26 M.J. 822, 829-30 (A.C.M.R. 1988) (noting that premeditation does not necessarily connote planning nor does it contemplate that the intent to kill be entertained for any period of time).

⁴¹⁹ See *Loving*, 41 M.J. at 80. The court specifically held “we have no difficulty accepting the congressional determination that an intentional killing preceded by consideration of the fatal act with a “cool mind” is more serious and deserving of more severe punishment than an intentional killing without such consideration. *Id.*

⁴²⁰ *United States v. Hoskins*, 36 M.J. 343 (1993).

⁴²¹ *Id.* at 346.

deliberation part of the crime requires a thought like, “Wait, what about the consequences? Well, I’ll do it anyway.”⁴²²

It appeared as if the Court of Military Appeals had defined with specificity the meaning of “consideration of the act intended” by holding that a premeditated design to kill required that the “killing must have been committed after reflection by a cool mind.”⁴²³

This “reflection by a cool mind” distinction is significant for a Soldier who commits a combat-related mercy killing. Arguably, in the heat of battle, faced with a gravely wounded combatant, a Soldier could answer “Yes, I should kill the combatant to end his suffering.” However, because of the intensity of the situation and the circumstances of the environment—combat, under fire, at risk of his own death, seeing horrific battlefield wounds and an ongoing mission—the Soldier may not necessarily ask, let alone answer, the second question—“What about the consequences?” The difference for the Soldier is stark: it could be the difference between life in prison and no punishment.

However, two have cases reduced the “reflection by a cool mind” distinction to nothing more than some “consideration after formation of intent,” and thereby exposing a

⁴²² *Id.* at 346.

⁴²³ *See id.*; *Loving*, 41 at 280; *United States v. Viola*, 26 M.J. 822, 829 (A.C.M.R. 1988).

Soldier who commits a combat-related mercy killing to conviction for premeditated murder and life in prison. These cases are *United States v. Eby*⁴²⁴ and *United States v. Levell*.⁴²⁵

In *United States v. Eby*, the defense requested a “cool reflection” instruction as described in *Hoskins*. Specifically, the defense requested the following instruction:

Having a premeditated design requires that one with a cool mind did, in fact, reflect before killing. It has been suggested that, in order to find premeditation, you must find that AT1 Eby asked himself the question, “Shall I kill her?” The intent to kill aspect of the crime is found in the answer, “Yes, I shall.” The deliberation part of the crime requires a thought like, “Wait, what about the consequences? Well, I’ll do it anyway.” Intent to kill alone is insufficient to sustain a conviction for premeditated murder.⁴²⁶

The Court of Appeals for the Armed Forces (CAAF) held the first and last sentences in the proposed instruction were, “in substance,” covered in the tailored instructions.⁴²⁷ The trial court instructed the members as follows:

The term “premeditated design to kill” means the formation of a specific intent to kill and consideration of the act intended to bring about death. The premeditated design to kill does not have to exist for any measurable or particular length of time. The only requirement is that it precede the killing. *You are further advised that the evidence raises the issue whether the accused acted in the heat of sudden passion. Passion means the degree of rage, pain, or fear which prevents cool reflection You may . . .*

⁴²⁴ *United States v. Eby*, 44 M.J. 425 (1996).

⁴²⁵ *United States v. Levell*, 43 M.J. 847 (N-M. Ct. Crim. App. 1996)

⁴²⁶ *See Eby*, 44 M.J. at 427.

⁴²⁷ *Id.*

*consider evidence of the accused's passion in determining whether he possessed sufficient mental capacity to have the premeditated design to kill. An accused cannot be found guilty of premeditated murder if, at the time of the killing, his mind was so confused by anger, rage, or sudden resentment that he could not or did not premeditate. . . . Thus, if you are convinced beyond a reasonable doubt that sufficient cooling off time had passed between the provocation and the time of the killing which would allow a reasonable person to regain his self control and refrain from killing, you must decide whether he in fact had the premeditated design to kill. If you are not convinced beyond a reasonable doubt that the accused killed with premeditation, you shall, in accordance with his plea, find him guilty of unpremeditated murder.*⁴²⁸

The trial court further held that the defense was not entitled to the remainder of the instruction “because of the danger of misleading the jury” since there is “no requirement as to a particular thought process for the formation of a premeditated design to kill.”⁴²⁹

In *Eby*, the military judge combined the premeditated murder instruction⁴³⁰ with the instruction on passion and ability to premeditate⁴³¹ from the Military Judges’ Benchbook.

⁴²⁸ *Id.* at 427-28 (emphasis added).

⁴²⁹ *Id.* at 428. The court indicated that the questions posed in dicta in *Hoskins* were “an appropriate vehicle of argument to the factfinder, but it is not a basis for an instruction.” *Id.* While the specific requested questions may be inappropriate, the court still failed to instruct that the accused must affirmatively reflect on decision to kill with a cool mind.

⁴³⁰ The premeditated murder definition states:

The killing of a human being is unlawful when done without legal justification or excuse. “Premeditated design to kill” means the formation of a specific intent to kill and consideration of the act intended to bring about death. The “premeditated design to kill” does not have to exist for any measurable or particular length of time. The only requirement is that it must precede the killing.

DA PAM 27-9, *supra* note 399, para. 3-43-1(d).

⁴³¹ When raised by the evidence, the military judge will instruct the members on the ability of the accused to premeditate. The passion may prevent premeditation instruction informs the members as follows:

However, it is not the same to instruct that the accused may not have had the capacity to form a premeditated design to kill because of sudden passion (which requires a positive determination that there was a sudden passion preventing cool reflection), as it is to instruct that premeditation affirmatively requires cool reflection. It is an error in logic to conclude that because there was not a “sudden passion” preventing cool reflection, that there necessarily was reflection by a cool mind.⁴³² The trial court in *Eby* refused to affirmatively instruct the members that the definition of premeditation required “reflection by a cool mind” despite the seemingly clear language of *Hoskins*, *Viola* and *Loving*.

An issue has been raised by the evidence as to whether the accused acted in the heat of sudden “passion.” Passion means a degree of rage, pain, or fear which prevents cool reflection. If sufficient cooling off time passes between the provocation and the time of the killing which would allow a reasonable person to regain self-control and refrain from killing, the provocation will not reduce murder to the lesser offense of voluntary manslaughter. However, you may consider evidence of the accused’s passion in determining whether (he) (she) possessed sufficient mental capacity to have “the premeditated design to kill.” An accused cannot be found guilty of premeditated murder if, at the time of the killing (his) (her) mind was so confused by (anger) (rage) (pain) (sudden resentment) (fear) (or) () that (he) (she) could not or did not premeditate. On the other hand, the fact that the accused’s passion may have continued at the time of the killing does not necessarily demonstrate that (he) (she) was deprived of the ability to premeditate or that (he) (she) did not premeditate. Thus, (if you are convinced beyond a reasonable doubt that sufficient cooling off time had passed between the provocation and the time of the killing which would allow a reasonable person to regain (his) (her) self-control and refrain from killing), you must decide whether (he) (she) in fact had the premeditated design to kill. If you are not convinced beyond a reasonable doubt that the accused killed with premeditation, you may still find (him) (her) guilty of unpremeditated murder, if you are convinced beyond a reasonable doubt that the death of (state the name of the alleged victim) was caused, without justification or excuses, by an (act) (failure to act) of the accused and (the accused intended to kill or inflict great bodily harm on the victim) (the act of the accused was inherently dangerous to others and showed a wanton disregard for human life).

Id. para. 3-43-1, note 5.

⁴³² This logic completely eliminates the non-premeditated murder as a possible offense. This instruction establishes only two choices—either there was a sudden passion preventing cool reflection, or there was cool reflection establishing premeditation. Absent is the condition where there was neither a sudden passion preventing cool reflection, nor reflection by a cool mind.

The second case eroding the “reflection by a cool mind” distinction is *United States v. Levell*.⁴³³ In *Levell*, a group of Marines were out at a local club drinking. Outside there is an argument between a couple of Marines and Private (PVT) Levell’s girlfriend.⁴³⁴ As the argument intensifies, a punch is thrown causing PVT Levell to get his gun.⁴³⁵ Other Marines confront PVT Levell, discouraging him from brandishing a gun.⁴³⁶ One of the instigators of the argument falls near PVT Levell, who then picks up the gun he had previously dropped, removes it from the case, and fires a shot into the Marine’s chest.⁴³⁷

In his trial for premeditated murder, the defense requested an instruction defining premeditated design to kill, and stating that the “government must prove to you beyond a reasonable doubt that the killing was committed by the accused after reflection by a cool mind.”⁴³⁸ The military judge refused the instruction stating:

I am opposed to the language “after reflection by cool minds.” I am opposed of [sic] it for the following reason, that language presupposes, in my mind,

⁴³³ *United States v. Levell*, 43 M.J. 847 (N-M. Ct. Crim. App. 1996).

⁴³⁴ *Id.* at 848.

⁴³⁵ *Id.*

⁴³⁶ *Id.*

⁴³⁷ *Id.* at 849.

⁴³⁸ *Id.*

that one cannot premeditate murder while in an agitated state of mind, on in the heat of passion. This is not the law as I read the law.⁴³⁹

The military judge continued, “[b]ut, to give them [the members] that instruction using the language ‘after reflection by cool minds’ suggests to me, and I’m sure would suggest to them, that you couldn’t premeditate while in an agitated state. This is not true. You can, and the law recognizes the fact you can.”⁴⁴⁰

In justifying his denial of the requested instruction, the military judge concluded, “[b]ut, to tell them that there has to be a cooling off period, and only then can he premeditate, is not the law, and that’s what the language suggests.”⁴⁴¹ The military judge also prohibited the defense counsel from arguing that “passion means a degree of anger, rage, pain or fear which prevents cool reflection.”⁴⁴²

Instead, the military judge merely instructed the members on passion and the ability of the accused to premeditate, not on the necessity of cool reflection.⁴⁴³

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*

⁴⁴² *Id.* at 849.

⁴⁴³ *Id.* at 850. The military judge gave the following instruction:

Now you are advised that the killing of a human being is unlawful when done without legal justification or excuse. The term "premeditated design to kill," means the formation of a specific intent to kill and consideration of the act intended to bring about death.

In upholding the military judge's denial of the requested instruction, the Navy-Marine Court of Criminal Appeals held that the standard requiring "reflection by a cool mind" did not apply to instructions to members, but rather was applied only to determining the sufficiency of the evidence.⁴⁴⁴ In fact, the court held that "neither *Hoskins*, *Loving* or *Viola* held or even vaguely suggested that court members must be specifically instructed that a 'cool mind' is needed to sustain a premeditated murder conviction."⁴⁴⁵ In doing so, the court held that the members must only be instructed on the distinction between premeditated

The premeditated design to kill does not have to exist for any measurable or particular length of time. The only requirement is that it must precede the killing.

Now if you do not find beyond a reasonable doubt that at the time of the killing of Sergeant Christopher J. Smith, the accused had a premeditated design to kill Sergeant Smith then you may not find Private Levell guilty of the premeditated murder of Sergeant Smith.

You are advised that an issue has been raised by the evidence as to whether the accused acted in the heat of sudden passion. "Passion" means the degree of rage, pain, or fear which prevents cool reflection. The [sic] sufficient cooling off time passes between the provocation and the time of the killing which would allow a reasonable person to regain self-control and refrain from killing. Provocation will not reduce murder to the lesser offense of voluntary manslaughter. However, you may consider evidence of the accused's passion in determining whether he possessed sufficient mental capacity to have the premeditated design to kill.

An accused cannot be found guilty of premeditated murder if at the time of the killing his mind was so confused by anger, rage, pain, sudden resentment, or fear that he could not or did not premeditate. On the other hand, the fact that the accused's passion may have continued at the time of the killing does not necessarily demonstrate that he was deprived of the ability to premeditate or that he did not premeditate. Thus, if you are convinced beyond a reasonable doubt that sufficient cooling off time had passed between the provocation and the time of the killing which would allow a reasonable person to regain his self-control and refrain from killing you must decide whether he in fact had the premeditated design to kill.

Id.

⁴⁴⁴ *Id.* at 851.

⁴⁴⁵ *Id.*

murder and unpremeditated murder⁴⁴⁶—which as stated earlier is “consideration of the act intended.”⁴⁴⁷

Adding no clarity to the matter, the court summarily stated “‘consideration of the act intended’ to bring about death are not terms of art and have ordinary meanings,” and therefore need no further instruction.⁴⁴⁸

The ordinary meaning of consideration is “the act of considering; careful thought; meditation; deliberation.”⁴⁴⁹ The ordinary meaning of consider is “to think carefully about, especially in order to make a decision; contemplate; reflect on.”⁴⁵⁰ Deliberate means “careful consideration before decision.”⁴⁵¹ Taken as a whole, the ordinary meaning appears more closely akin to “reflection by cool mind” than the current instruction of “consideration of act intended.”

Furthermore, the court in *Levell* noted that the “‘cool mind’ distinction was adopted to explain what evidence is needed to sustain a conviction.” The court continued:

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.* The court noted that “while we would not have found error had the military judge given it [the requested instruction] to the members, we believe his rationale for not giving it made sense.” *Id.* As a practice tip, all defense counsel should be requesting this “cool reflection” instruction, and all trial counsel should be referring the military judge to the decision in *Levell* in premeditated murder cases.

⁴⁴⁸ *Id.* at 850.

⁴⁴⁹ RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY 434 (2d ed. 1998).

[The cool mind distinction] clarifies the Code's language regarding a "premeditated design to kill" and the MCM's [Manual for Courts-Martial's] language of what is meant by a "consideration of the act intended." In light of *Hoskins* and *Loving*, it is now clear that these terms contemplate a reflection by a cool mind before the fatal act in order to sustain a conviction. The nature and extent of the "premeditated design to kill" and "consideration of the act intended" have not changed. We do not read *Hoskins* as establishing a stricter test for what the prosecution must prove or as modifying what the court held in *Teeter*.⁴⁵²

The court's reliance on *Teeter*, although historical and frequently cited by military appellate courts, is misplaced. The facts of *Teeter* are in no way close to those in *Levell*. In *Teeter*, the Court of Military Appeals held that the facts alone were sufficient to sustain a premeditated murder conviction. In that case, the accused "chased the victim until she fell and was rendered unconscious. He then tied her up, raped her, and, and after placing a towel around her neck to catch the blood, proceeded to slit her throat. He finished up by stabbing her 32 times."⁴⁵³

Additionally, in *Teeter*, the accused did not object to the instruction given on the standard definition of premeditation,⁴⁵⁴ nor did he propose an alternate instruction. It is no wonder under those facts that the court held:

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.* at 527.

⁴⁵² See *Levell*, 43 M.J. at 851.

⁴⁵³ United States v. *Teeter*, 16 M.J. 68, 71 (1983) (quoting United States v. *Teeter*, 12 M.J. 716, 725 (1981)).

⁴⁵⁴ See *supra* notes 417, 430 and accompanying text.

The words “consideration of the act intended to bring about death” are not terms of art. They have ordinary meanings and are readily understandable by court members. It does not appear that the court members had difficulty with the instruction since they did not request clarification. There is no requirement that length be substituted for clarity. In any event, if appellant was unsatisfied with the instruction, he had more than sufficient opportunity to object and to propose an alternative instruction. Failing this, and because clear injustice is absent, appellant’s belated objection is untimely.⁴⁵⁵

Such was not the case in *Eby* or *Levell*. In both cases, the defense objected to the instruction offered by the court, and proposed alternative instructions and definitions. It appears strained, if not ingenuous, for the need to clarify the language “premeditated design to kill” and define what is meant by a “consideration of the act intended” for the military judges and appellate courts to apply when examining the sufficiency of evidence, while at the same time holding the “plain language” is sufficient for panel members with no legal training to convict a Soldier of premeditated murder.

As a result, to prove premeditation, the government only must prove the undefined additional element of “consideration of the act intended” to kill.⁴⁵⁶ This standard has been

⁴⁵⁵ See *Teeter*, 16 M.J. at 72.

⁴⁵⁶ Compare MCM, *supra* note 3, pt. IV, ¶ 43(c)(2)(a) (defining premeditation as “consideration of the act intended”), with *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Judgment, ¶ 139 (May 21, 1999) (holding by the ICTR that murder as a crime against humanity requires premeditation by forming the intent to kill “after a cool moment of reflection”), and *Prosecutor v. Kupreskic & Others*, Case no. IT-95-16-T, Judgment, ¶ 560 (Jan. 14, 2000) (acknowledging that premeditation requires the actor to form his “intent to kill after a cool moment of reflection”).

described as falling “far short of deliberation”⁴⁵⁷ and formed in as little as three seconds when engaged in a fight where a loved one is in potential danger.⁴⁵⁸

Applying the “consideration of the act intended” definition as currently interpreted, it appears that a Soldier who commits a combat-related mercy killing could face premeditated murder charges for hastening the death of a gravely wounded combatant.

b. Article 118(2), UCMJ – unpremeditated murder

The *mens rea* necessary to sustain a conviction for unpremeditated murder is simply the specific intent to kill or inflict great bodily harm.⁴⁵⁹ Failure of the government to prove that the accused had a premeditated design to kill but did intend to kill or inflict great bodily injury will result in a conviction for unpremeditated murder.⁴⁶⁰ While the federal murder

⁴⁵⁷ *United States v. Matthews*, 16 M.J. 354, 379 (C.M.A. 1983). The Court specifically held that under the current definition of premeditation, which is the same definition used today, “[c]ertainly premeditation as thus interpreted falls far short of ‘deliberation’” This “short of deliberation” view was recently affirmed when it was cited by *United States v. Cole* for the proposition that “[a] murder is premeditated when the thought of taking life was consciously conceived, and the act or omission by which life was taken was both intended and considered,” noting *Matthews* held that “premeditation [as defined by the MCM] falls far short of ‘deliberation.’” 54 M.J. 572, 580 (A.C.C.A. 2000).

⁴⁵⁸ *United States v. Levell*, 43 M.J. 847, 849 (N-M. Ct. Crim. App. 1996).

⁴⁵⁹ *United States v. Schap*, 49 M.J. 317, 319 (1998).

⁴⁶⁰ *Id.*

statute requires malice aforethought,⁴⁶¹ the UCMJ has “legislatively supplanted” the malice aforethought requirement with “specific intent to kill or inflict great bodily harm.”⁴⁶²

As applied to a combat-related mercy killing, undoubtedly the Soldier will have the requisite *mens rea* to be charged with unpremeditated murder. In each case, the intent is to eliminate the suffering by hastening death—the Soldier necessarily possesses the specific intent to both kill the gravely wounded combatant, and commit the act that causes the death.

c. Article 119(1), UCMJ – voluntary manslaughter

If voluntary manslaughter is charged, the government must prove the same elements as with unpremeditated murder,⁴⁶³ for which the maximum authorized punishment for is confinement for fifteen years.⁴⁶⁴ If on the other hand, voluntary manslaughter is raised by the evidence as a lesser included offense of premeditated murder or unpremeditated murder, then the government has an additional burden.

⁴⁶¹ See *supra* note 377. Malice with respect to 18 U.S.C. § 1111 has been defined as specific intent to kill:

Malice aforethought is the condition of a person’s mind. Since no one can look into the mind of another, the only way to decide what is in his mind is to infer it from his acts and that inference is one of fact for the jury. Malice aforethought does not mean simply hatred or ill will, but also embraces the state of mind with which one intentionally commits a wrongful act without legal justification or excuse.

United States v. Celestine, 510 F.2d 457, 459 (9th Cir. 1975).

⁴⁶² United States v. Morgan, 33 M.J. 1055, 1059 (A.C.M.R. 1991) (citations omitted).

⁴⁶³ Compare MCM, *supra* note 3, pt. IV, ¶ 44(b)(1), with *id.* ¶ 43(b)(2).

⁴⁶⁴ *Id.* pt. IV, ¶ 44(e)(1).

After the accused presents some evidence showing that the killing was done “in the heat of sudden passion caused by adequate provocation,”⁴⁶⁵ the government must disprove that the killing was done in the “heat of passion caused by adequate provocation” beyond a reasonable doubt.⁴⁶⁶

Voluntary manslaughter also appears to apply to a combat-related mercy killing. One could envision a Soldier engaged in heated combat, seeing his fellow Soldiers killed in action, faced with a situation where he acts in the heat of sudden passion caused by adequate provocation by hastening the death of a gravely wounded combatant. In fact, in perhaps the only contested combat-related murder trial to date, the military judge, *sua sponte*, instructed

⁴⁶⁵ The military judge, in the case that the evidence raises that the killing was done in the heat of sudden passion caused by adequate provocation, has the *sua sponte* duty to instruct the panel members as follows:

The lesser offense of voluntary manslaughter is included in the crime of unpremeditated murder. Voluntary manslaughter is the unlawful killing of a human being, with an intent to kill or inflict great bodily harm, done in the heat of sudden passion caused by adequate provocation. Acts of the accused which might otherwise amount to murder constitute only the lesser offense of voluntary manslaughter if those acts were done in the heat of sudden passion caused by adequate provocation. Passion means a degree of anger, rage, pain or fear which prevents cool reflection. The law recognizes that a person may be provoked to such an extent that in the heat of sudden passion caused by adequate provocation, he strikes a fatal blow before he has had time to control himself. A person who kills because of passion caused by adequate provocation is not guilty of murder. Provocation is adequate if it would cause uncontrollable passion in the mind of a reasonable person. The provocation must not be sought or induced as an excuse for killing or doing harm.

If you are not satisfied beyond a reasonable doubt that the accused is guilty of murder but you are satisfied beyond a reasonable doubt that the killing, although done in the heat of sudden passion caused by adequate provocation, was done with the intent to kill or inflict great bodily harm, you may still find him guilty of voluntary manslaughter.

DA PAM 27-9, *supra* note 390, para. 3-42-2, note 3.

⁴⁶⁶ *United States v. Schap*, 49 M.J. 317, 320 (1998).

the panel members on the lesser included instruction of voluntary manslaughter.⁴⁶⁷ A closer examination of the common facts in a combat-related mercy killing demonstrates that the

⁴⁶⁷ In *United States v. Maynulet*, the government charged CPT Maynulet with assault with intent to commit murder. At the close of the defense case, the military judge, *sua sponte*, instructed the members of the lesser included offense of assault with intent to commit voluntary manslaughter:

The court is further advised that the offense of assault with the intent to commit voluntary manslaughter is a lesser-included offense of the offense set forth in the specification of The Charge. When you vote, if you find the accused not guilty of the offense charged, that is assault with the intent to commit murder, then you should consider the lesser-included offense of assault with the intent to commit voluntary manslaughter, also in violation of Article 134 of the Uniform Code of Military Justice. In order to find the accused guilty of this lesser offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of the same elements as I told you earlier for assault with the intent to commit murder except the intent for this lesser-included offense is to commit the offense of voluntary manslaughter rather than murder, which is the intent for The Charge.

The lesser offense of voluntary manslaughter is included in the crime of murder. Voluntary manslaughter is the unlawful killing of the human being, with an intent to kill, done in the heat of sudden passion caused by adequate provocation. Acts of the accused which might otherwise amount to murder constitute only the lesser offense of voluntary manslaughter if those acts were done in the heat of sudden passion caused by adequate provocation. "Passion" means a degree of anger, rage, pain, or fear, which prevents cool reflection. The law recognizes that a person may be provoked to such an extent that in the heat of sudden passion caused by adequate provocation, he strikes a fatal blow before he had time to control himself. A person who kills because of passion caused by adequate provocation is not guilty of murder. Provocation is adequate if it would cause uncontrollable passion in the mind of a reasonable person. The provocation must not be sought or induced as an excuse for killing or doing harm.

If you are not satisfied beyond a reasonable doubt that the accused is guilty of murder but you satisfied beyond a reasonable doubt that the killing, although done in the heat of sudden passion caused by adequate provocation, was done with the intent to kill, you may still find him guilty of voluntary manslaughter.

The intent to kill does not have to exist for any measurable or particular time before the act which causes the death. All that is required is that it exists at the time of the act which caused the death.

As with The Charge, to convict the accused of this lesser-included offense, proof that the accused only intended to inflict great bodily harm upon the alleged victim is not sufficient. The prosecution must prove beyond a reasonable doubt that the accused specifically intended to kill the wounded paramilitary member.

Maynulet Transcript, *supra* note 302, at 697-99 (instructions on findings by the Hon. James Pohl). After deliberating for two hours and forty six minutes, the members returned with the verdict "not guilty of assault with intent to murder, but guilty of assault with intent to commit voluntary manslaughter." 742-45.

elements of premeditated murder, unpremeditated murder and voluntary manslaughter all could be applied to such a killing.

C. Analysis of common facts in combat-related mercy killings

All combat-related mercy killings share common facts, regardless of the individual circumstances of the particular killing. These shared facts include: 1) a person is dead; 2) the death resulted from the act of person administering the *coup de grâce*; 3) the killing was unlawful;⁴⁶⁸ 4) the killing occurred during combat, battle or a military operation using force; 5) at the time of the killing, the Soldier had the intent to kill the gravely wounded person; and 6) the killing was done with premeditation. These common facts are present in all combat-related mercy killings and can be seen in all of the examples highlighted in the history section of this thesis.⁴⁶⁹

The *coup de grâce* is clearly designed to kill, and always requires premeditation as defined by military law.⁴⁷⁰ The Soldier must mentally processes that the wounded combatant is in great pain and suffering, and then independently assesses his condition. After concluding that he is going to die regardless of what medical aid is rendered, the Soldier must then assesses what actions, if any should be taken. At a minimum, there will always be

⁴⁶⁸ This assumes there is no legal defense to the killing. The potential defenses of justification, mistake of law and necessity will be examined later. See *infra* Part IV.E.

⁴⁶⁹ See *supra* Part II.

⁴⁷⁰ See *supra* Part III.B.2.a.

two alternatives—do nothing and let the combatant suffer until he dies from the previously inflicted wounds, or hasten his death. After determining that hastening his death is the appropriate course of action, the Soldier then must consider how to achieve that end, either by morphine, by shooting, by stabbing, by poison, or by other means. At a minimum, all combat-related mercy killings require these four distinct areas of deliberation; a determination of suffering, the assessment of assured death from existing wounds, the determination that hastening his death is better than doing nothing, and a decision on how to hasten the death of the suffering combatant.

In addition to sharing common facts, all combat-related mercy killings share the motive to eliminate the suffering of a combatant who is destined to die from their wounds. This altruistic motive is always accompanied by shocking circumstances. Battlefield wounds are generally inflicted by the most lethal weapons known to mankind at the time. The results are often horrific—massive open head wounds exposing brain matter, abdominal wounds exposing internal organs, limbs blown from the body, flesh burned from the body—and the sights, sounds and smells of the situation confronting a Soldier who is contemplating a combat-related mercy killing are nothing short of what the law could recognize as “heat of sudden passion.”⁴⁷¹

With common facts and motives, the determination of what specification to apply seems relatively straight forward. Simply apply the facts and determine what specification’s

⁴⁷¹ See *supra* note 467 and accompanying text.

elements best mirrors the facts of the combat-related mercy killing. However, the decision by the government on which offense to charge, premeditated murder, unpremeditated murder or manslaughter, requires more than a formulistic application of elements to the facts of the case. The charging decision should also require the exercise of sound judgment and the application of other recognized charging decision factors.

D. Charging decision factors for combat-related mercy killing cases

Unlike civilian jurisdictions, in the military, any person subject to the UCMJ may prefer, or initiate charges against any other person subject to the code.⁴⁷² The only requirement is that the person preferring charges “must sign the charges and specifications under oath before a commissioned officer of the armed forces authorized to administer oaths” and swear that he “has personal knowledge of or has investigated the matters set forth in the charges and specifications and they are true in fact to the best of that person’s knowledge and belief.”⁴⁷³ In theory, this permits anyone who has personal knowledge of a crime—either as a witness, victim, or co-conspirator—or anyone who investigated the crime—either as a military police officer, appointed investigator, or commander—to initiate a court-martial. In

⁴⁷² MCM, *supra* note 3, R.C.M. 307(a).

⁴⁷³ *Id.* R.C.M. 307(b).

practice, it is the military prosecutors who almost always decide what to charge, and then drafts the charge sheet for the company level commander to prefer.⁴⁷⁴

As demonstrated above, a combat-related mercy killing can be charged multiple ways; as a premeditated murder, as an unpremeditated murder or as a voluntary manslaughter.⁴⁷⁵ A prosecutor or commander has enormous discretion as to which of these three charges should be preferred.⁴⁷⁶ In fact, a prosecutor's discretion is at its greatest when "charging offenses on the borderline, where clouded and troubling determinations about the defendant's state of mind make the difference between murder, manslaughter, negligent homicide, and no charge at all."⁴⁷⁷

As a result, the American Bar Association (ABA) has identified several factors that should be considered by prosecutors when making charging decisions. The ABA standards

⁴⁷⁴ Interview with Major James Teixeira, Jr., former chief of military justice, 1st Cavalry Division, in Charlottesville, Va. (Mar. 15, 2006) [hereinafter Teixeira Interview] (noting that in his three years as chief of military justice there was only one time someone other than his prosecutors decided on charges and drafted them for preferral of a case, and in that instance most of the charges were ultimately dismissed). See Major William T. Barto, *Alexander the Great, the Gordian Knot, and the Problem of Multiplicity in the Military Justice System*, 152 MIL. L. REV. 1, 24 (1996) (noting that the best way to prevent multiplicity in charges is for chiefs of military justice to review charges drafted by inexperienced prosecutors, thereby implying most, if not all court-martial charges are drafted by military prosecutors).

⁴⁷⁵ See *supra* Part III.C.

⁴⁷⁶ Of course, as a practical matter, the charging decision would be one made after consultation with the senior trial counsel, chief of military justice, deputy staff judge advocate and staff judge advocate. Teixeira Interview, *supra* note 474 (explaining that the charging decisions in *United States v. Horne* and *United States v. Alban-Cardenas* involved multiple discussions involving the trial counsel, chief of military justice and the staff judge advocate); Rothwell Interview, *supra* note 357 (noting that the charging decision in *United States v. Maynulet* involved discussions with the trial counsel, chief of military justice and the staff judge advocate).

⁴⁷⁷ Carolyn B. Ramsey, *Homicide on Holiday: Prosecutorial Discretion, Popular Culture, and the Boundaries of the Criminal Law*, 54 HASTINGS L. J. 1641, 1668 (2003).

for exercising prosecutorial discretion in charging states that the “prosecutor is not obligated to present all the charges which the evidence might support.”⁴⁷⁸ In fact, in “some circumstances and for good cause” the prosecutor may not go forward with the case if the decision is “consistent with the public interest.”⁴⁷⁹ However, in exercising charging discretion, the prosecutor should consider the following factors:

- (i) the prosecutor’s reasonable doubt that the accused is in fact guilty;
- (ii) the extent of the harm caused by the offense;
- (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
- (iv) possible improper motives of the complainant;
- (v) reluctance of the victim to testify;
- (vi) cooperation of the accused in the apprehension or conviction of others; and
- (vii) availability and likelihood of prosecution by another jurisdiction.⁴⁸⁰

The MCM incorporates the same rationale for commanders and prosecutors to use in determining what charges should be preferred for courts-martial. It specifically notes that “commanders should consider . . . the nature of and circumstances surrounding the offense and the extent of the harm caused by the offense . . . [and the] appropriateness of the authorized punishment to the particular accused or offense.”⁴⁸¹

⁴⁷⁸ AM. BAR ASS’N., ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTIONS AND DEFENSE FUNCTIONS 3-3.9(b) (3d ed. 1993) [hereinafter ABA STANDARDS]; *see infra*, Appendix H, ABA Criminal Justice Standard 3-3.9(b) – Charging Decision.

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.*

⁴⁸¹ MCM, *supra* note 3, R.C.M. 306(b) discussion (B) & (C); *see infra*, Appendix F, R.C.M. 306(b) and discussion; *see also infra*, Appendix G, MCM, Appendix 21, Analysis of R.C.M. 306(b).

While the National Prosecution Standards of the National District Attorney's Association (NDAA) do not address the "appropriateness of the authorized punishment" in its factors to consider when charging, they do emphasize "[t]he nature of the offense . . . characteristics of the offender . . . [p]ossible deterrent value of [the] prosecution to the offender and society in general . . . [and a]ny mitigating circumstances" all should be considered before making a charging decision.⁴⁸²

The charging factors most applicable to a combat-related mercy killing include the "extent of the harm caused by the offense," the "disproportionate authorized punishment to the offense," and "mitigating circumstances." Complete evaluation of these three factors justify charging combat-related mercy killings as either unpremeditated murder or voluntary manslaughter.

Several reasons support this conclusion. First, the harm caused by the killing is *de minimus* because the victim is already gravely wounded, and death is inevitable. Second, arguably the failure to administer a *coup de grâce* is more harmful than allowing the combatant to languish in pain until his ultimate death. Pain, agony and suffering in the final moments of life cannot be considered worthy of prolonging with death inevitable. Third, despite its premeditation, few would argue that the combat-related mercy killing is the type of vile and evil killing contemplated by the mandatory minimum sentencing scheme for such

⁴⁸² NAT'L DISTRICT ATT'YS ASS'N, NATIONAL PROSECUTION STANDARDS ¶ 43.6 (2d ed. 1991) [hereinafter PROSECUTION STANDARDS]; see *infra*, Appendix E, National Prosecution Standards, ¶¶ 43.1-43.6 & Commentary.

murders. Finally, there are significant mitigating circumstances: the Soldier is faced with moral dilemma having no clear answer, and is forced to choose between two evils. His choice to end the combatant's suffering is motivated by, in the simplest of terms, good rather than evil.

In applying the complete ABA, MCM and NDAA charging decision factors to combat-related mercy killings, there appears to be scant reasoning to expose a Soldier to life in prison for hastening the inevitable death⁴⁸³ of a gravely wounded combatant.

Unfortunately, the trend is for the U.S. Army prosecutors to mechanically apply the elements of premeditated murder to the facts of the combat-related mercy killing in making their charging decision and to giving insufficient weight to other charging decision factors.⁴⁸⁴ The result is that all prosecutions to date for combat-related mercy killings have been preferred as premeditated murder.⁴⁸⁵

⁴⁸³ It is worth restating the fundamental definition of a mercy killing presupposes the suffering combatant is going to die. Of course, this fact is susceptible to proof as is any other fact in a court-martial. The proposed partial affirmative defense and the proposed sentencing instruction requires both the objective and subjective component of the actor's belief of the impending death of the wounded person before delivering the *coup de grace*. See *infra* Appendix C, Proposed Mercy Killing Sentencing Instruction; See also *infra* Appendix F, Proposed Mercy Killing Partial Affirmative Defense.

⁴⁸⁴ Rothwell Interview, *supra* note 357 (indicating that in *United States v. Maynulet*, after reviewing the video from the UAV, collectively the staff judge advocate, chief of justice and prosecutor concluded that the elements of premeditated murder more accurately reflected the conduct of CPT Maynulet than unpremeditated murder or voluntary manslaughter); Teixeira Interview, *supra* note 474 (noting that although there was some concern about the mandatory minimum, SSG Horne and SSG Alban-Cardenas were charged with premeditated murder because the elements were met).

⁴⁸⁵ See *supra* notes 29-30 and accompanying text.

IV. Current prosecution of mercy killings as premeditated murder is unjust

Charging combat-related mercy killings as premeditated murder undermines the goal of justice, and could result in inequities that risk eroding confidence in the military justice system. The inequities include the potential for a disproportionate sentence for the offense and the constructive coercion of guilty pleas in cases that would otherwise be litigated. Additionally, since most potential defenses will not apply to a combat-related mercy killing, a conviction for premeditated murder and imposition of the mandatory minimum sentence will render the defense extenuation and mitigation case meaningless.

A. Life in prison is a disproportionate potential sentence

The main two reasons that Soldiers who violate the UCMJ are punished are to prevent other Soldiers from committing the same or similar crimes, and to punish the Soldier for engaging in the prohibited conduct.⁴⁸⁶ These two underlying reasons represent separate and sometimes competing philosophies for why we punish—for utilitarian and retributive purposes.⁴⁸⁷

⁴⁸⁶ BARBARA A. HUDSON, UNDERSTANDING JUSTICE: AN INTRODUCTION TO IDEAS, PERSPECTIVES AND CONTROVERSIES IN MODERN PENAL THEORY 3 (2d ed., 2003).

⁴⁸⁷ *Id.* H. L. A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN PHILOSOPHY OF LAW 1-2 (1968); SAMUEL H. PILLSBURY, JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER 5 (1998) (labeling retribution as deontological philosophy); NIGEL WALKER, WHY PUNISH? THEORIES OF PUNISHMENT REASSESSED 6-7 (1991).

The utilitarian argues that we sentence offenders to send a message to him and others not to engage in similar conduct. This is known as deterrence.⁴⁸⁸ Deterrence takes two forms: individual deterrence, where the accused is discouraged from re-offending,⁴⁸⁹ and general deterrence, where other Soldiers are deterred from committing the same offense out of “fear of potential punishment.”⁴⁹⁰ Despite receiving mixed reviews for its effectiveness,⁴⁹¹ both individual and general deterrence are embraced by the military justice system as factors to consider in determining an appropriate sentence.⁴⁹²

On the other hand, the retributivists seek to punish Soldiers who violate the UCMJ because they “deserve it.”⁴⁹³ Retribution theory seeks to proportionally punish for past crimes as opposed to preventing future crimes.⁴⁹⁴ This is the sentencing factor the military judge refers to as “punishment of the wrongdoer.”⁴⁹⁵ Under retribution theory, the

⁴⁸⁸ HUDSON, *supra* note 486, at 18-19.

⁴⁸⁹ Individual deterrence is achieved through both incapacitation (prevention) and rehabilitation. *Id.* at 19.

⁴⁹⁰ *Id.*

⁴⁹¹ JOHANNES ANDENAES, PUNISHMENT AND DETERRENCE 41-44 (1974).

⁴⁹² Military judges instruct members that among the “several matters” to consider when sentencing an accused, “our society recognizes” that “rehabilitation of the wrongdoer” and “deterrence of the wrongdoer and those who know of his crime and his sentence from committing the same or similar offense” are two of the five recognized reasons for sentencing in the military. DA PAM 27-9, *supra* notes 399, paras. 2-5-21 & 8-3-11. Additionally, the “protection of society from the wrongdoer” and “preservation of good order and discipline in the military” are also specifically articulated reasons for punishment in a court-martial. *Id.* These instructions closely parallel “incapacitation” and general deterrence.

⁴⁹³ HUDSON, *supra* note 486, at 38.

⁴⁹⁴ *Id.*

⁴⁹⁵ DA PAM 27-9, *supra* note 399, paras. 2-5-21 & 8-3-21.

punishment meted out for an offense “should be commensurate to the seriousness of that offense,”⁴⁹⁶ and is “justified simply as return for moral evil.”⁴⁹⁷ Therefore, sentences should be determined based on moral blameworthiness, with the harshest punishments reserved for the most morally reprehensible crimes.⁴⁹⁸ To the retributivist, the more morally reprehensible the crime, the more harsh the punishment should be.

Under both theories, the mandatory minimum sentence of life is a significantly disproportionate punishment for a combat-related mercy killing. To the extent deterrence works,⁴⁹⁹ in a combat-related mercy killing case it is served by the imposition of any punishment. The Soldier to whom deterrence is directed is the ultraistic, morally-centered individual, who because he would be tormented by the notion of a gravely wounded combatant suffering until his ultimate death, hastens such death. Guiding this morally-centered Soldier’s conduct is his sense of right and wrong—and no particular amount of punishment for conduct he believes to be morally correct (and perhaps even mandated) will

⁴⁹⁶ HUDSON, *supra* note 486, at 38.

⁴⁹⁷ HART, *supra* note 487, at 81.

⁴⁹⁸ HUDSON, *supra* note 486, at 41.

⁴⁹⁹ The main reason mercy killings are punished is that “it will often be difficult to distinguish the true mercy killing from the murder dressed up as a mercy killing, [therefore] we cast the net of prohibition somewhat wider than the particular conduct we want to deter.” Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1222 (1985). Judge Posner does concede that the law can prevent “dressed up” mercy killings by “requiring the mercy killer to prove . . . it was a true mercy killing.” *Id.* at n.51.

alter that conduct. Therefore, deterrence fails because the Soldiers who would administer a *coup de grâce* act according to their conscious as opposed to fear of potential punishment.⁵⁰⁰

From a retribution perspective, combat-related mercy killings as a category of murder should be punished the least,⁵⁰¹ if at all. In determining the “seriousness” of a combat-related mercy killing for punishment purposes, retributivists examine the “affect” the killing had on the victim’s “quality of life.”⁵⁰² Quality of life is determined by considering the affect the combat-related mercy killing had on the victim’s “physical integrity, material support and amenity, freedom from humiliation and degrading treatment, and privacy and autonomy.”⁵⁰³

As applied to combat-related mercy killings, if there is any affect on the “quality of life” of the gravely wounded combatant, it is enhanced. The wounded combatant’s “physical integrity” was destroyed when the original catastrophic wounds were inflicted during combat. At this point, the only consideration relating to his “physical integrity” becomes the

⁵⁰⁰ This is apparent from the examples examined in the historical survey. *See supra* Part II. The old Soldier killed the burned Soldiers so they “might not languish miserably.” *See supra* note 63 and accompanying text. SP4 Woodley recalled that he just “stopped thinking” and ended the suffering of the wounded Soldier. *See supra* note 227 and accompanying text. SGT Buick killed the horribly wounded VC Soldier out of “compassion and respect.” *See supra* note 343 and accompanying text. The British medic shot the burning POW to end his “intense suffering.” *See supra* note 267 and accompanying text. SSG Alban-Cardenas shot the Iraqi teen to “ease his pain.” *See supra* note 298 and accompanying text. SSG Horne shot the Iraqi teen because it was “not right” to let him “suffer like that.” *See supra* note 299 and accompanying text. CPT Maynulet killed the gravely wounded insurgent because “it was the right thing to do.” *See supra* note 338.

⁵⁰¹ Of all murders, mercy killings are the least aggravating. Michael L. Radelet & Hugo Adam Bedau, *ABA’s Proposed Moratorium: The Execution of the Innocent*, 61 LAW & CONTEMP. PROB. 105, 110 (1984).

⁵⁰² HUDSON, *supra* note 486, at 44.

⁵⁰³ *Id.*

duration of his continued suffering before death. Any material support is irrelevant,⁵⁰⁴ however since the gravely wounded combatant's suffering is eliminated, peace and comfort are enhanced, consistent with the concept of not depriving one of their amenities. The mercy killing also affords the combatant the dignity of a quick death, thereby ending the indignity of suffering helplessly until his ultimate death. One must keep in mind that unlike all other killings, the combatant is acutely aware of the risk of death on the battlefield and has accepted that risk. Finally, privacy and autonomy disappeared when the combatant was initially gravely wounded and rendered helpless to do anything but suffer in agony. Regardless of the conduct of the Soldier contemplating mercifully killing the wounded combatant, whether he kills him quickly or lets him "languish miserably" until his ultimate death, the wounded combatant has no free will or control over his own actions. Therefore, from a retribution perspective, many of the factors justifying punishment are missing.

Irrespective of which punishment theory is applied to combat-related mercy killings, there is little justification for punishing the Soldier who delivers a *coup de grâce* to a gravely wounded combatant, and even less justification to subject him to life in prison.

B. Constructively coerces guilty pleas in an otherwise contested cases

As noted earlier, the facts of a combat-related mercy killing case would meet the elements of premeditated murder, unpremeditated murder and voluntary manslaughter. The

⁵⁰⁴ This factor would apply to larceny and other property related crimes where the victim is deprived of the material support and amenities of their personal or real property.

decision on which of those three charges to prefer for trial by court-martial rests with the prosecutor. While “the prosecutor should not attempt to utilize the charging decision *only as a leverage device* in obtaining guilty pleas to lesser charges,”⁵⁰⁵ generally there is nothing improper about charging a greater offense that is substantiated by the evidence, in part, for a tactical advantage.⁵⁰⁶ In upholding a conviction and mandatory life sentence after the prosecutor sought a habitual offender indictment when the accused refused to plead guilty to the non-habitual forgery indictment, the Court held:

To hold that the prosecutor’s desire to induce a guilty plea is an “unjustifiable standard,” which, like race or religion, may play no part in his charging decision, would contradict the very premises that underlie the concept of plea bargaining itself. Moreover, a rigid constitutional rule that would prohibit a prosecutor from acting forthrightly in his dealings with the defense could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged.⁵⁰⁷

This same rationale, in part, served as the basis for the charging decisions in the three most recent combat-related mercy killing prosecutions. In *United States v. Alban-Cardenas* and *United States v. Horne*, the government considered charging unpremeditated murder but

⁵⁰⁵ PROSECUTION STANDARDS, *supra* note 482, at 130 (defining paragraph 43.4, Inappropriate Leveraging) (emphasis added); see *infra* Appendix E, National Prosecution Standards, ¶¶ 43.1 – 43.6 & Commentary.

⁵⁰⁶ In *Bordenkircher v. Hayes*, the accused, a two-time felon, refused to plead guilty to forging a check for \$88.30, an offense that as indicted could be punished “by a term of 2 to 10 years in prison.” 434 U.S. 357, 358 (1977). The prosecutor informed the accused and counsel that if he did not accept the state’s offer to plead guilty for five years in prison and save “the court the inconvenience and necessity of trial,” he would seek an additional indictment under the state’s habitual criminal statute, which if convicted, carried a mandatory sentence of life in prison. *Id.* The accused refused, was subsequently indicted under the habitual criminal statute, convicted of forging the \$88.30 check, and sentenced to life in prison. *Id.* at 359. The Supreme Court held that such “give-and-take negotiation[s]” were permissible and did not violate Due Process. *Id.* at 362.

⁵⁰⁷ *Id.* at 364-65.

instead “decided not to take the premeditated murder charge off the table.”⁵⁰⁸ Tactically, the government “did not want to give up the most serious charge.”⁵⁰⁹ In *United States v. Maynulet*, after considering the “R.C.M. 306 factors,” the government preferred the charge of premeditated murder, in part, to “encourage pretrial negotiations and a plea from the accused.”⁵¹⁰ In all three prosecutions, the government tactically used the threat of a mandatory minimum sentence of life in prison to in an attempt to induce the Soldiers to plead guilty.

While such tactical posturing may be a necessary part of the civilian adversary process, in a court-martial of a Soldier returning from combat after killing a gravely wounded combatant out of mercy, such posturing trivializes and minimizes the Soldier’s sacrifice. This is especially true given the widely recognized fact that the moral culpability of the Soldier committing a mercy killing is minimal as compared to other murders.⁵¹¹ In fact, the secular moralist H. L. A. Hart suggests that there “seems to be no relevant moral difference”

⁵⁰⁸ Teixeira Interview, *supra* note 474.

⁵⁰⁹ *Id.* (conceding, however, that nobody believed that they should be sentenced to life in prison).

⁵¹⁰ Rothwell Interview, *supra* note 357.

⁵¹¹ See Joanna Harrington, *The Challenge to Mandatory Death Penalty in the Commonwealth Caribbean*, 98 AM. J. INT’L L. 126, 130 (2004) (noting there is a difference between a mercy killing and other forms of murder and having a single punishment for all does not address the problem of differential culpability); Jeffery G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CIN. L. REV. 803, 804 (indicating that the killer’s moral culpability in mercy killings “was at least debatable”); HART *supra* note 487, at 25 (arguing that the “commonsense scale of gravity” distinguishes the “the moral iniquity and harmfulness” between a “mercy killing and murder for gain”); Stephen Morse, *Criminal Law: Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 36 (1984) (distinguishing the culpability of a “true mercy killing” and mercenary killing); U.S. SENTENCING GUIDELINES MANUAL § 5K2.11 (2004) [hereinafter SENTENCING GUIDELINES] (indicating that a reduced sentence may be appropriate . . . in the case of a mercy killing).

between giving a drug to a dying patient to ease his pain (but accelerating his death) and shooting a man “trapped in the cabin of a blazing [truck] from which it was impossible to free him . . . to save him from further agony as he [is] slowly being burnt to death.”⁵¹² This moral rationale applies equally to combat-related mercy killings.⁵¹³

Instead of acknowledging this reduced moral culpability and considering the risk of a disproportionate sentence in their original charging decision,⁵¹⁴ the government prosecutors charged the cases in a manner that constructively coerced the Soldiers to submit offers to plead guilty to lesser charges because they were facing the risk of a mandatory minimum sentence of life in prison.⁵¹⁵ These phenomena of “overextended culpability” and the threat of “grossly disproportionate sentences” have been termed “overcriminalizaion,”⁵¹⁶ and threaten the integrity of the criminal judicial process.

⁵¹² HART *supra* note 487, at 122-24.

⁵¹³ See *infra* Appendix D, Mercy Killing Morality Questionnaire and Results (demonstrating the divergent opinions about the morality combat-related mercy killings).

⁵¹⁴ See *supra* Part IV.A.

⁵¹⁵ Captain Stan Martin, military defense counsel for SSG Johnny Horne said that “95% of the reason” that SSG Horne pleaded guilty to unpremeditated murder “was the possibility of life in prison” because the case was initially charged as a premeditated murder. If the case was charged as unpremeditated murder, SSG Horne would have been “much more likely to contest the case” on the grounds that he acted out of mercy. Telephone Interview with Captain Stan Martin, defense counsel for SSG Johnny Horne, in Tampa, Fla. (Mar. 16, 2006) [hereinafter Martin Interview]. Captain Katherine Gilabert, military defense counsel for SSG Jonathan Alban-Cardenas said that the “only thing that kept it from being a full contest was the mandatory minimum sentence of life in prison” if SSG Alban-Cardenas was convicted of premeditated murder. Telephone Interview with Captain Katherine Gilabert, defense counsel for SSG Jonathan Alban-Cardenas, in Wuerzburg, Germany (Mar. 20, 2006) [hereinafter Gilabert Interview].

⁵¹⁶ Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 717 (2005).

For prosecutors, overcriminalization produces a dangerous disparity of power, with, for instance, extreme sentences via mandatory minimums applied as leverage to squeeze out information or guilty pleas. Prosecutorial supremacy through overcriminalization is troubling enough when the underlying crime and attached penalties are tenuous to begin with. But it also emasculates the constitutional rights of the accused - the presumption of innocence, the right to trial by jury, the requirement of proof beyond a reasonable doubt, and so on - threatening prolonged sentences for those who demand their day in court. It seems no stretch to argue that defendants are literally punished for exercising their rights. The menace of excessive punishment is most alarming, however, when it is used to extract pleas from those with legitimate claims of innocence or excuse.⁵¹⁷

The coerciveness of the mandatory minimum sentence of life in prison is abundantly clear⁵¹⁸ and once the Soldier is constructively coerced to plead guilty to avoid the possibility of the mandatory minimum sentence, he gives up even additional rights at the guilty plea proceeding.⁵¹⁹

A comparison of the three recently prosecuted combat-related mercy killing cases demonstrates how being constructively coerced,⁵²⁰ by the way the case is charged, to plead

⁵¹⁷ *Id.* at 725-26.

⁵¹⁸ The “inducement of guilty pleas” is one of the stated goals of mandatory minimum penalties of the U.S. sentencing guidelines. U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 14-16 (1991). The mandatory minimum sentences permit federal prosecutors to “coerce” guilty pleas. Susan R. Klein & Jordan M. Steiker, *The Search for Equality in Criminal Sentencing*, 2002 SUP. CT. REV. 223, 235 (2002).

⁵¹⁹ The military judge advises the accused that by pleading guilty he gives up “the right against self-incrimination,” “the right to a trial of the facts,” and the “right to be confronted by and to cross-examine witnesses called against you.” DA PAM 27-9, *supra* note 399, para 2-2-1.

⁵²⁰ The government’s response to the author’s proposition that the charging decision constructively coerces Soldiers to plead guilty is that the guilty plea is still voluntarily and knowingly entered. Additionally, the plea still must withstand the providence inquiry before being accepted by the military judge. *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969). While this response is legally correct, it fails to address the underlying premise that utilizing the charging decision as leverage or as a tactic to get the Soldier to plead guilty amounts to a

guilty significantly alters the presentation of the defense case. Two of the recent cases resulted in plea bargains and the other one was a full contest. In the two cases that resulted in plea bargains, *United States v. Horne* and *United States v. Alban-Cardenas*, the government prosecutors preferred the charges as premeditated murder and the convening authority referred them as the same. “If there was no plea bargain [from SSG Horne or SSG Alban-Cardenas], the government would not have dropped the premeditated murder charge because the elements were met by the facts of the case.”⁵²¹ On the other hand, in *United States v. Maynulet*, the prosecutors preferred the case as premeditated murder, but the convening authority referred the case as assault with intent to commit murder,⁵²² which carried a maximum punishment of twenty years.⁵²³ As a result, the CPT Maynulet no longer faced the prospect of a mandatory minimum, and was under much less pressure to plead guilty.

constructively coerced plea. Surely the government recognizes that when faced with a mandatory sentence of life in prison, even the most improvident Soldier will admit to the elements of the offense to get a light sentence. This would be true even if they believe they were legally and morally justified in ending the suffering of the wounded combatant.

⁵²¹ Teixeira Interview, *supra* note 474.

⁵²² The convening authority rejected the recommendation of the Article 32 Investigating Officer and the Staff Judge Advocate to refer the case as premeditated murder. *See* Memorandum, Staff Judge Advocate, 1st Armored Division, to Commander, 1st Armored Division, subject: Advice on Disposition of Court-Martial Charges – CPT Rogelio M. Maynulet (6 Dec. 2004) (recommending referral of the charged offenses by General Court-Martial as non-capital premeditated murder) (on file with author); Memorandum, Commander, 1st Armored Division, to Staff Judge Advocate, 1st Armored Division, subject: Direction of the Convening Authority (6 Dec. 2004) (instructing the staff judge advocate to amend the premeditated murder charge to assault with intent to commit murder) (on file with author).

⁵²³ MCM *supra* note 3, pt. IV, ¶ 64(e)(1).

At his trial, although convicted of the lesser included offense of assault with intent to commit voluntary manslaughter,⁵²⁴ CPT Maynulet's sentence did not include confinement.⁵²⁵ In contrast, at their guilty pleas, SSG Horne was sentenced to three years confinement⁵²⁶ and SSG Alban-Cardenas was sentenced to one year confinement.⁵²⁷ Although the cases were factually different, by pleading guilty neither SSG Horne nor SSG Alban-Cardenas were able to fully litigate their cases—and possibly be acquitted, have the jury nullify their case,⁵²⁸ or realistically receive a sentence of no confinement.

In *United States v. Horne*, the government's "terms of the plea bargain agreement" prevented the defense from presenting their case as forcefully as in a full contest.⁵²⁹ The agreement "forced [the defense] to waive the presence" of witnesses not physically located in Iraq, and rely to on stipulations of expected testimony instead.⁵³⁰ Additionally, the

⁵²⁴ See *supra* note 468.

⁵²⁵ The court-martial sentenced CPT Maynulet to "be dismissed from the service." Maynulet Transcript, *supra* note 302, at 872.

⁵²⁶ See Maynulet Transcript, *supra* note 302, at 742.

⁵²⁷ Alban-Cardenas Transcript, *supra* note 268, at 138.

⁵²⁸ See Major Bradley J. Huestis, *Jury Nullification: Calling for Candor from the Bench and Bar*, 173 MIL. L. REV. 68, 84-85 (2002) (noting that while there is no right to jury nullification, and therefore a nullification instruction is not required, the military panel has the power to nullify as a check against overzealous prosecutors and to register discontent with unpopular laws).

⁵²⁹ Martin Interview, *supra* note 515.

⁵³⁰ *Id.* This is a common requirement for overseas courts-martial and, in most cases, promotes judicial economy. The author is not asserting that the use of such "waiver of overseas" witness provisions is improper or contrary to public policy. The author is merely highlighting the second-level effects from the constructively coerced guilty plea in cases that would otherwise be fully litigated but for the charging decision of premeditated murder and the subsequent mandatory life sentence.

government's refusal to assist with witness logistics necessitated the defense's "use of a stipulation of expected testimony" for their expert forensic psychiatrist "who was stranded in Kuwait."⁵³¹ The government refused the defense request to arrange logistics to get the expert to the sentencing hearing despite having the capability to do so.⁵³² Finally, the government forced the defense was to present the testimony of SSG Horne's mitigation witnesses, including his parents, sister and daughter via digital video disk (DVD), rather than testify in person at sentencing or even by video-conference (VTC).⁵³³ In fact, the government prosecutors would not agree to support a defense motion to move the trial to the VTC-capable III Corps courtroom, which was on the same base camp as the 1st Cavalry Division courtroom and about a mile away.⁵³⁴ When SSG Horne's defense counsel advised the government prosecutors that he intended to seek an order from the military judge compelling the government to "produce logistics for VTC testimony," they threatened to "pull the deal from [the defense]."⁵³⁵ Although the defense counsel believed that the military judge "would not have allowed the deal to be pulled on those grounds . . . [SSG] Horne was understandably

⁵³¹ *Id.*

⁵³² *Id.*

⁵³³ *Id.*

⁵³⁴ E-mail from CPT Stan Martin, defense counsel for SSG Johnny Horne, to author (Mar. 21, 2006, 1:48 PM) (on file with author).

⁵³⁵ *Id.*

not willing to take that risk.”⁵³⁶ As a result, “the defense was not able to put on the same mitigation case” as they would have “had the court-martial been a full contest.”⁵³⁷

In *United States v. Alban-Cardenas*, the defense ability to litigate their case was hampered by the “terms of the pretrial agreement.”⁵³⁸ Specifically, government did not produce two of the defense experts because “they were outside the Baghdad area” and the pretrial agreement required SSG Alban-Cardenas to “waive all witnesses not in the Baghdad area.”⁵³⁹ The first expert, a military doctor, planned to testify that the Iraqi teen “would have died within minutes” from the resulting wounds received in the original attack, even with immediate evacuation “to the best hospital, under the best of conditions.”⁵⁴⁰ The second, a forensic psychologist who evaluated SSG Alban-Cardenas via video teleconference, intended to testify about SSG Alban-Cardenas mental state at the time of the killing.⁵⁴¹ Instead, the government permitted the use of letters sent to the court, rather than live testimony—even though the military doctor was elsewhere in Iraq.⁵⁴² Mitigation witnesses fared no better. A

⁵³⁶ *Id.* This is illustrative of how coercive the premeditated murder charging decision truly is. Despite the confidence of his defense counsel that the military judge would not permit the government to back out of the plea bargain for petitioning the court to order the government to make witnesses available via video-teleconferencing, the accused who is facing life in prison chooses not to demand his basic trial rights out of fear losing the deal. See Luna, *supra* note 516, at 725-26.

⁵³⁷ Martin Interview, *supra* note 515.

⁵³⁸ Gilabert Interview, *supra* note 515.

⁵³⁹ *Id.*

⁵⁴⁰ *Id.*

⁵⁴¹ *Id.*

⁵⁴² *Id.*

lieutenant colonel and sergeant major who intended to testify in person about SSG Alban-Cardenas' good military character—instead the defense begrudgingly agreed to stipulations of expected testimony rather than present live testimony.⁵⁴³

By contrast, *United States v. Maynulet* was a fully contested court-martial tried in Wiesbaden, Germany.⁵⁴⁴ As a result, the defense forced the government to produce eleven witnesses for merits, and eight witnesses for sentencing.⁵⁴⁵ Ten of the merits witnesses and five of the sentencing witness were “overseas witnesses”⁵⁴⁶ who would have been waived as a terms of a plea agreement similar to those in *United States v. Horne* and *United States v. Alban-Cardenas*.⁵⁴⁷ Additionally, the defense had three government-funded experts appointed to the defense team.⁵⁴⁸

⁵⁴³ *Id.*

⁵⁴⁴ Before the trial, the defense fully investigated the case in an Article 32 Investigation. See MCM, *supra* note 3, R.C.M. 405. The Article 32 Investigation was conducted on 25-28 June 2004 in Baghdad, Iraq, and on 28 July 2004, 8-10 September 2004, and 14 October 2004 in Hanau, Germany. U.S. Dep't of Defense, DD Form 457, Investigation Officer's Report (15 Nov. 2004). The Investigating officer produced thirty-two defense witnesses, either in person or telephonically, and considered forty-three defense exhibits. *Id.* As a term of the plea agreement in *United States v. Horne*, the accused unconditionally waived the Article 32 Investigation. CPT Martin Interview, *supra* note 515.

⁵⁴⁵ Telephone Interview with Captain Clinton Campion, assistant defense counsel for CPT Maynulet, U.S. Army Trial Defense Services, in Anchorage, Alaska (Mar. 20, 2006) [hereinafter Campion Interview].

⁵⁴⁶ *Id.*

⁵⁴⁷ The defense witness were the “four corners of the Earth” including: one from Iraq; two from Spain; two from Monterey, California; two from Fort Polk, Louisiana; two from Chicago, Illinois; two from Washington D.C.; one from San Antonio, Texas; one from Roslyn, Virginia and one from Fort Hood, Texas. *Id.*

⁵⁴⁸ *Id.* (noting that a neurosurgeon, a spinal neurosurgeon and law of war expert greatly assisted the defense in preparing for trial).

The defense strategy on the merits was two-fold: “put the government to their burden” by challenging that the wounded insurgent was “brain dead” at the time of the shooting,⁵⁴⁹ and put CPT Maynulet’s good character “before the members early and often.”⁵⁵⁰ In fact, of the eleven merits witnesses, “six were purely good Soldier and character witnesses” and four others were “mixed good Soldier and fact witnesses.”⁵⁵¹ In addition, eight stipulations of expected testimony were read to the members highlighting CPT Maynulet’s exceptionally good character.⁵⁵²

The defense strategy on sentencing was three-fold: develop specific instances of how CPT Maynulet helped the effort in Iraq (including showing his compassion for the Iraqi people), demonstrate how he continued to perform in an outstanding manner upon his return

⁵⁴⁹ *Id.*

⁵⁵⁰ *Id.* The good character of the accused is a defense on the merits in the military. In fact, in *United States v. Maynulet* the defense requested and received the following instruction on the merits:

To show the probability of his innocence, the defense has produced evidence of the accused’s character for law abidingness with the Law of War, non-aggressiveness, non-violence, peacefulness, leadership, being an outstanding Soldier and commander, integrity, compassion and compassion to Iraqis, excellent duty performance, brilliant officer, outstanding military student, courage, truthfulness, boldness, and innovation.

Evidence of these character traits of the accused may be sufficient to cause a reasonable doubt as to his guilt. On the other hand, evidence of these character traits may be outweighed by other evidence tending to show the accused’s guilt.

Maynulet Transcript, *supra* note 302, at 706-07.

⁵⁵¹ Campion Interview, *supra* note 545.

⁵⁵² Maynulet Transcript, *supra* note 302, at 412. “Since this was a contest, [the defense was] able to force the government to agree to favorable stipulations of expected testimony. If they did not agree, we would have litigated production of the witnesses to the military judge.” Campion Interview, *supra* note 537.

to Germany while awaiting trial, and to humanize him for the panel members.⁵⁵³ Specific instances of good conduct were elicited from CPT Maynulet's former brigade commander,⁵⁵⁴ a counter-terrorism special agent with the Federal Bureau of Investigations,⁵⁵⁵ and by the commander of the unit who replaced his unit in Iraq.⁵⁵⁶ CPT Maynulet's two supervisors (he worked in two division staff sections upon his return to Germany) from the division staff testified about his stellar performance while pending trial.⁵⁵⁷ Finally, CPT Maynulet was humanized by the testimony of his wife,⁵⁵⁸ mother⁵⁵⁹ and father, a Cuban exile who had previously been imprisoned by Fidel Castro because he "believed in freedom."⁵⁶⁰

Had CPT Maynulet been "forced to plead guilty to avoid the risk of a mandatory sentence of life in prison" the defense would have had "a completely different strategy" and probably not been permitted to submit their case "to a panel of officers, had far fewer live character witnesses, fewer stipulations of expected testimony and no medical or law of war experts appointed to the defense team."⁵⁶¹ CPT Maynulet's assistant defense counsel

⁵⁵³ Campion Interview, *supra* note 545.

⁵⁵⁴ Maynulet Transcript, *supra* note 302, at 786.

⁵⁵⁵ *Id.* at 774.

⁵⁵⁶ *Id.* at 778.

⁵⁵⁷ *Id.* at 791, 796.

⁵⁵⁸ *Id.* at 798.

⁵⁵⁹ *Id.* at 836.

⁵⁶⁰ *Id.* at 806.

⁵⁶¹ Campion Interview, *supra* note 454.

conceded “under those conditions, it is very doubtful that CPT Maynulet would have gone home that night. His sentence, almost assuredly, would have included confinement.”⁵⁶²

C. Common defenses do not apply to mercy killings

If charged with premeditated murder for a combat-related mercy killing, the risk a Soldier will be convicted is substantial because many of traditional defenses will not apply or will likely fail. Specifically, the defenses of justification, mistake of law, necessity and duress⁵⁶³ are of limited value to a Soldier charged with premeditated murder under the UCMJ.

1. Justification

Killing in the furtherance of a legal duty is considered justified. In fact, Rule for Courts-Martial 916(h) provides that “[a] death, injury, or other act caused or done in the

⁵⁶² *Id.*

⁵⁶³ Coercion and duress are specifically excluded as a defense to murder, and will not be discussed further.

It is a defense to any offence *except killing an innocent person* that the accused’s participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer bodily injury if the accused did not commit the act. The apprehension must reasonably continue throughout the commission of the act. If the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or another person to the harm threatened, this defense shall not apply.

MCM, *supra* note 3, R.C.M. 916(h) (emphasis added).

proper performance of a legal duty is justified and not unlawful.”⁵⁶⁴ Statutes, regulations, and orders can serve as the basis of this duty, and the justification defense specifically applies to the killing of an enemy combatant during a military operation or battle.⁵⁶⁵ The triggering mechanism for justification is the existence of a legal duty to engage in the otherwise proscribed conduct.⁵⁶⁶ Failure to establish legal authority for the duty, as opposed to moral authority, is fatal and justification will not apply.⁵⁶⁷

⁵⁶⁴ *Id.* R.C.M. 916(c).

⁵⁶⁵ *Id.* R.C.M. 916(c) discussion.

⁵⁶⁶ *United States v. Rockwood*, 52 M.J. 98, 112 (1999). Captain Rockwood was a counter intelligence officer with the U.S. Forces as part of Joint Task Force 190 in Haiti in 1994. Concerned with intelligence reports indicating “deplorable conditions” at the National Penitentiary in Port au Prince, CPT Rockwood was incensed that the task force was increasing force protection measures, rather than inspecting the National Penitentiary. *Id.* at 100-01. Without authority, CPT Rockwood decided to personally inspect the National Penitentiary and did not report to duty. When he finally returned to his place of duty, he was ordered to report to the combat support hospital for a mental evaluation, based in part on a note he left on his bunk when he went to inspect the hospital that stating, among other things, “I have done what is legal to stop something that is plainly illegal. Now you coward[s] can court-martial my dead body.” *Id.* at 101. After reporting to the hospital, he left in violation of the orders of the evaluating psychiatrist to tell his commander what he saw at the prison. During the discussion with his battalion commander, CPT Rockwood was repeatedly disrespectful and “disobeyed orders to be ‘at ease’ and to ‘be quiet.’” *Id.*

⁵⁶⁷ *Id.*. In holding that it was not error for the military judge to fail to instruct the panel members on the defense of justification, the court noted:

[Captain Rockwood] cites us to no legal authority – international or domestic, military or civil – that suggests he had a “duty” to abandon his post in counterintelligence and strike out on his own to “inspect” the penitentiary. Neither does he suggest any provision of any treaty, charter, or resolution as authority for the proposition. Further, he does not here claim that he received personal orders via television from the Commander-in-Chief. Moreover, he cites no authority for the proposition that his observations at the penitentiary supplied him with a duty that permitted him to be disrespectful to LTC Bragg [his battalion commander], to disobey his orders to be at ease, or to depart from the field hospital where he was being detained. In this circumstance, we conclude that the military judge did not err in declining to provide a justification instruction.

Id.

Justification can be applied when other defenses may be present. For instance, if a Soldier is lawfully ordered by his commander to travel to Tikrit and apprehend a Soldier who is absent without leave (AWOL), the apprehending Soldier has the legal authority to arrest the AWOL Soldier. Assume in the process of the apprehension, the AWOL Soldier resists his detention by wrestling the Soldier apprehending him. During the scuffle, the AWOL Soldier is shot and killed. In that instance, the act of killing the AWOL Soldier by the apprehending Soldier may be legally justified and not unlawful.⁵⁶⁸

Before an accused charged with a combat-related mercy killing could claim justification as a defense, he would have to demonstrate that he was acting pursuant to a legal duty—either by statute, regulation or order. There are no statutes, regulations or orders that authorize the killing of a gravely wounded combatant, no longer a threat, by U.S. Armed

⁵⁶⁸ See *United States v. Evans*, 38 C.M.R. 36, 41 (C.M.A. 1967) (holding that it was error not to give a justification instruction where the testimony of the accused indicated that a prisoner was shot in a struggle during his apprehension). The court noted:

Accused's testimony further makes clear that [the individual being apprehended] was an armed individual, who had, to accused's knowledge, resisted prior apprehension by "lock[ing] and load[ing]" his automatic rifle on another Marine. His discarded uniform and assumption of garb known to have been worn by the enemy, as well as the Vietnamese Army, colors his resolve not to be returned to duty and, when -- according to accused's testimony -- he attempted to disarm his captor, clearly raised an issue as to whether the subsequent homicide was justifiable as having been committed by an apprehending officer in the necessary execution of his duties.

The doctrine has been well stated in *Warren on Homicide*, Perm ed., § 145, at page 623:

"Where persons having authority to arrest or imprison, or otherwise to execute the public justice, and using the proper means for that purpose, are resisted in so doing, and the party resisting is killed in the struggle, such homicide is justifiable. . . . But although a peace officer in the discharge of his duty is protected while acting as an officer and within the law, he can not take the life of a citizen unless necessity therefore exists."

Id.

Forces.⁵⁶⁹ As a result, the defense of justification would not apply to combat-related mercy killings. However, an honest mistake of law regarding one's legal authority to kill to eliminate the suffering of a combatant who will soon die, in limited instances, may be a defense.

2. *Mistake of law*

Generally, mistake of law is not a defense to criminal conduct.⁵⁷⁰ However, in two limited circumstances, mistake of law is a cognizable defense in a court-martial—first, if the mistake relates to a separate non-penal law, and second, if the mistake is the reliance on the decision or advice of an authorized public official.⁵⁷¹ Despite its limited application, the military judge has the duty to instruct the members on all defenses, including mistake of law, *sua sponte*, if they are reasonably raised by the evidence.⁵⁷² This duty applies even if the

⁵⁶⁹ Telephone Interview with Geoffrey Corn, Special Assistant to The Judge Advocate General of the Army for Law of War matters, in Hanau, Germany (Jan. 11, 2005). Mr. Corn was appointed to the defense team in *United States v. Maynulet* as a law of war consulting expert.

⁵⁷⁰ MCM, *supra* note 3, R.C.M. 916(l)(1). Mistake of the law is not a defense to the crimes listed in the punitive articles of the UCMJ because they are generally regarded as *mala in se*. *Mala in se* “are crimes [that] are ‘inherently and essentially evil’ [and] are invariably immoral” and should be easily recognized by Soldiers. “This recognition largely eliminates concerns of legality and notice. Additionally, the social costs of allowing a mistake of law defense in *mala in se* crimes may be unacceptably high.” Michael L. Travers, *Mistake of Law in Mala Prohibita Crimes*, 62 U. CHI. L. REV. 1301, 1327 (1995) (citation omitted). *Mala in se* crimes are “inherently immoral” or patently evil such as “murder, arson or rape.” BLACK’S LAW DICTIONARY 971 (7th ed. 1999). On the other hand, *mala prohibita* crimes are “prohibited by statute, although the act itself is not necessarily immoral” and include regulatory violations and crimes “such as jaywalking and running a stoplight.” *Id.*

⁵⁷¹ MCM, *supra* note 3, R.C.M. 916 discussion (l)(1).

⁵⁷² *United States v. Carr*, 18 M.J. 297, 301 (C.M.A. 1984).

only evidence of the defense is the testimony of the accused.”⁵⁷³ Doubts regarding whether the “evidence is sufficient to require an instruction should be resolved in favor of the accused.”⁵⁷⁴ In a combat-related mercy killing case, mistake of law may arise if the accused honestly believed his act of killing was in accordance with regulation, statute or custom, or if the accused was acting in reliance to guidance provided by authorized government agents.

a. Mistake as to a separate non-penal law

The first circumstance where mistake of law is a defense in the military is when a Soldier relies on a separate, non-penal law to justify his conduct. The basis for this principle is that such reliance negates the criminal specific intent of the crime.⁵⁷⁵

⁵⁷³ United States v. Ferguson, 15 M.J. 12, 17 (C.M.A. 1983).

⁵⁷⁴ United States v. Steinruck, 11 M.J. 322, 324 (C.M.A. 1981).

⁵⁷⁵ ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 1031 (3d ed. 1982). Recognizing that an honest mistake of law does not undermine the moral code of criminal law, it was gradually accepted that such mistake was a defense when the accused relied on a non-penal law for his conduct.

Hence it is not surprising that at an early day it was recognized that an intent to take a chattel that the taker is not *animus furandi* [intending to steal], however erroneous the belief [of authority] may be. Hence one who takes and carries away the chattel of another under such a bona-fide belief is not guilty of larceny even if his error was due to mistake of some nonpenal law. And in time it came to be accepted as a general rule that if the offense charged requires any specific intent, a mistake of a nonpenal law that negatives that intent leaves the defendant innocent.

Id. (citations omitted).

*United States v. Sicley*⁵⁷⁶ was the first military court to recognize mistake of law as a defense. In *Sicley*, a Sailor transferred from New Jersey to San Diego. Believing his wife would soon join him from New York, the Sailor rented a furnished apartment, and had a finance clerk “draft a claim which would entitle him to payment for his wife’s travel.”⁵⁷⁷ The Sailor signed a voucher certifying his wife left New York on “September 23, 1951, and arrived at San Diego, California, on October 17, [1951].” Ultimately, marital strife precluded any travel by his wife.⁵⁷⁸ In October of 1953, the Sailor was divorced, and later that year, the claim for travel was deducted from his pay.⁵⁷⁹

In explanation of his action in filing the false claim he had set in motion, the accused testified that he had inquired into the meaning of the dates September 23, 1951, and October 17, 1951, which appeared on the document's face, but was told that this recitation amounted to no more than “office routine.” Moreover, noting that the form he had signed contained a statement requiring the claimant to certify that the claim represented the entire travel of all dependents which has been or *will be* performed, he made no further inquiry and affixed his signature to the voucher. He felt justified in doing this -- he said -- for the reason that friends had informed him that dependents’ travel funds might lawfully be drawn in advance. The accused concluded his testimony by insisting that, despite receipt of notice of the pending divorce proceedings, he had at no time lost hope that his wife would join him in California.⁵⁸⁰

⁵⁷⁶ *United States v. Sicley*, 20 C.M.R. 118 (C.M.A. 1955).

⁵⁷⁷ *Id.* at 121.

⁵⁷⁸ *Id.*

⁵⁷⁹ *Id.* at 122.

⁵⁸⁰ *Id.*

The Court of Military Appeals held that the Sailor's honest⁵⁸¹ belief he was entitled to payment of travel expenses associated with the anticipated move of his wife, entitled him to defend his actions with mistake of law even though he fraudulently certified her travel.⁵⁸²

b. Reliance on decision of an authorized public official

The second circumstance where mistake of law is a defense in the military is when a Soldier relies on the decision of an authorized public official to justify his conduct. Until the Army Court of Criminal Appeals decided *United States v. Ivey*,⁵⁸³ no military cases have considered or discussed this aspect of mistake of law.⁵⁸⁴

In *Ivey*, among a litany of weapons distribution, narcotics possession, and narcotics distribution charges, the Soldier was charged with "making false and fictitious statement[s]

⁵⁸¹ The court was clear in rejecting the "honest and reasonable belief" standard for specific intent crimes and in adopting the "honest belief" standard.

Therefore, we hold that one accused of larceny who contends that he acted under an honest claim of right in obtaining the property allegedly stolen is entitled to have that defense – whether it be one of mistake of law or fact – submitted to the court-martial in terms of honest misconception alone.

Id. at 128.

⁵⁸² *Id.* at 127. See also *United States v. Johnson*, No. 84-4432, 1985 CMR LEXIS 3414, at *16 (N.M.C.M.R. July 29, 1985) (holding accused's honest belief he was entitled to repossess property not fully paid for was a "full defense to larceny" because such belief negated the specific intent to permanently deprive the owner of the property).

⁵⁸³ *United States v. Ivey*, 53 M.J. 685 (A.C.C.A. 2000).

⁵⁸⁴ The author searched the LEXIS database for the term "916(l)(1)" in the Armed Forces Court of Appeals and Published Court of Criminal Appeals library to identify cases discussing R.C.M. 916(l)(1) – Ignorance or Mistake of Law. Only *United States v. Ivey* addressed the "reliance on the advice of a government official" aspect of the mistake of law defense (last searched Mar. 24, 2006).

to a firearms dealer” in connection with the sale.⁵⁸⁵ Using his military orders and military identification card to establish state residency, the accused purchased three handguns for his out-of-state friends⁵⁸⁶ because state law prohibited gun sales to non-residents.⁵⁸⁷ On appeal, the Soldier challenged the factual and legal sufficiency of the “false and fictitious” statements convictions. He challenged that his false statements were made “knowingly” because he relied on the advice of the federally licensed gun dealer regarding the definition of “actual buyer.”⁵⁸⁸ The Soldier asserts the misleading advice of the federally licensed gun dealer negated the “knowledge” requirement of the offense.”⁵⁸⁹

The court understood the accused’s argument as asserting a mistake of law defense. Relying on the discussion of R.C.M. 916(l)(1), the court indicated “reliance on the pronouncement of an authorized official” is a potential defense—applicable “when a government official assures a defendant that certain conduct is legal and the defendant reasonably relies on the official’s pronouncements.”⁵⁹⁰ The court noted that the discussion of R.C.M. 916(l)(1) “suggests, without using that terminology, that ‘entrapment by

⁵⁸⁵ United States v. Ivey, 53 M.J. 685, 687 n.2 (A.C.C.A. 2000).

⁵⁸⁶ The accused was a “high ranking member[] of a Gangster Disciples chapter in Colorado Springs, Colorado” and his friends were members of the Gangster Disciples in Gary, Indiana. United States v. Ivey, 53 M.J. 685, 687 (A.C.C.A. 2000).

⁵⁸⁷ *Id.* at 688.

⁵⁸⁸ *Id.* at 696.

⁵⁸⁹ *Id.*

⁵⁹⁰ *Id.* at 698.

estoppel’⁵⁹¹ may be a defense in trials by courts-martial.’⁵⁹² Signaling acceptance of the “entrapment by estoppel” defense in the military, the court did not reach the issue, holding instead that a federally licensed gun dealer was not an authorized “government official,”⁵⁹³ and the accused was not “misinformed as to the law by one upon whom he had a right to rely.”⁵⁹⁴ Mistake of law in the form of “entrapment by estoppel” is rooted in to the Due

⁵⁹¹ *Id.* Comparison of the language in the discussion of R.C.M. 916(l)(1) with the language used in the federal cases that recognize the defense of “entrapment by estoppel” clearly supports the Army Court of Criminal Appeals’ conclusion that the language in the discussion amounts to the defense of “entrapment by estoppel.” Compare MCM, *supra* note 3, R.C.M. 916(l)(1) discussion (noting that mistake of law may be a defense when “the mistake results from the reliance on the decisions or pronouncement of an authorized public official or agency”) with *Hood v. United States*, 342 F.3d 861, 865 (8th Cir. 2003) (noting to prevail entrapment by estoppel, the defendant must “demonstrate that he reasonably relied on a statement by the government and that the government’s statement mislead him into believing his conduct was legal”), and *United States v. Pitt*, 193 F.3d 751, 758 (3d Cir. 1999) (holding the defense of entrapment by estoppel “arises when a government official tells a defendant that certain conduct is legal and the defendant commits what otherwise would be a crime in reasonable reliance on the official representation”), and *United States v. Ortegón-Uvalde*, 179 F.3d 956, 959 (5th Cir. 1999) (explaining entrapment by estoppel applies “when a government official tells a defendant that certain conduct is legal and the defendant commits what would otherwise be a crime in reasonable reliance on the official’s representation.”) quoting *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1369 n.18 (11th Cir. 1994) and *United States v. Howell*, 37 F.3d 1197, 1204 (7th Cir. 1994) (holding entrapment by estoppel applies “when, acting with actual or apparent authority, a government official affirmatively assures the defendant that certain conduct is legal and the defendant reasonably believes that official”), and *United States v. Nichols*, 21 F.3d 1016, 1018 (10th Cir. 1994) (holding entrapment by estoppel applies when “an agent of the government affirmatively misleads a party as to the state of the law and that party proceeds to act on the misrepresentation....”), and *United States v. Corso*, 20 F.3d 521, 528 (2d Cir. 1994) quoting *United States v. Weitzenhoff*, 1 F.3d 1523, 1534 (9th Cir. 1993) (holding entrapment by estoppel applies “when an authorized government official tells the defendant that certain conduct is legal and the defendant believes the official”) and *United States v. Clark*, 986 F.2d 65, 69 (4th Cir. 1993) (noting that entrapment by estoppel applies “when a government official tells the defendant that certain activity is legal, the defendant commits the activity in reasonable reliance on that advice, and prosecution for the conduct would be unfair”), and *United States v. Levin*, 973 F.2d 463, 468 (6th Cir. 1992) (establishing the elements of entrapment by estoppel as “(1) a government must have announced that the charged criminal act was legal; (2) the defendant relied on the government announcement; (3) the defendant’s reliance was reasonable; and, (4) given the defendant’s reliance, the prosecution would be unfair”), and *United States v. Smith*, 940 F.2d 710, 714-715 (1st Cir. 1990) (holding entrapment by estoppel applies when “an official assures a defendant that certain conduct is legal, and the defendant reasonably relies on that advice and continues to initiate the conduct”).

⁵⁹² *Ivey*, 53 at 698.

⁵⁹³ *Id.* (citing *United States v. Howell*, 37 F.3d 1197 (7th Cir. 1994).

⁵⁹⁴ *United States v. Ivey*, 53 M.J. 685, 698-99 (A.C.C.A. 2000).

Process Clause.⁵⁹⁵ The Supreme Court held convictions for conduct in reliance on “active misleading” advice by government officials violates the Due Process Clause.⁵⁹⁶

The defense of “entrapment by estoppel” is almost always inapplicable to crimes that disregard “the basic moral values of a society,” such as sexual assault, maiming, torture and murder.⁵⁹⁷ The reasoning is clear—a person does not need the government to tell them morally repugnant conduct is illegal. When dealing with moral conduct, people should inherently know right from wrong, regardless of what the government says, and with this knowledge, each person should have the ability to obey the law, despite the mistaken pronouncement of an authorized government official.⁵⁹⁸ This reasoning serves as the bedrock for the maxim that ignorance of the law is no excuse.

However, the consensus regarding the morality of a combat-related mercy killing is anything but universal.⁵⁹⁹ Additionally, the law recognizes exceptions to the “crimes against

⁵⁹⁵ *Raley v. Ohio*, 360 U.S. 423, 438-39 (1959).

⁵⁹⁶ *Id.* Four defendants were ordered to testify at an Ohio State Legislative Hearing on Communist and labor union activities. *Id.* at 426. The all were advised by the committee chairman that they had the right not to answer incriminating questions. All four invoked the right after the committee chairman’s advice. *Id.* Later, all four were prosecuted for failing to testify before the committee in violation of state law. The prosecution was based on state law that provided immunity for individuals testifying before the committee and criminalized failure to do so. *Id.* at 426-28.

⁵⁹⁷ John T. Parry, *Culpability, Mistake, and Official Interpretations of Law*, 25 AM. J. CRIM. L. 1, 24-25 (1997).

⁵⁹⁸ *See id.*

⁵⁹⁹ *See supra* notes 511-13 and accompanying text. *See also infra* Appendix D, Mercy Killing Morality Questionnaire & Results (demonstrating in some instances, as many as 69% respondents believed a combat-related mercy killing was moral).

moral values” prohibition to the entrapment by estoppel defense.⁶⁰⁰ For instance, in *Commonwealth v. Twitchell*, the state supreme court reversed a manslaughter conviction because the trial judge refused to introduce evidence supporting a mistake of law defense.⁶⁰¹ In *Twitchell*, the father of a two-year-old boy was convicted of manslaughter for failing in his duty to provide medical care for his son.⁶⁰² As a practicing Christian Scientist, the father believed in “healing by spiritual treatment.”⁶⁰³ As part of his defense, the father wanted to introduce evidence that he relied on the state attorney general’s opinion that criminal statute “expressly precluded imposition of criminal liability as a negligent parent for failure to provide medical care because of religious beliefs.”⁶⁰⁴ In reversing the trial judge, the court held the father was “entitled to present [entrapment by estoppel] to the jury.”⁶⁰⁵

The defense raised mistake of law in the combat-related mercy killing case of *United States v. Maynulet*⁶⁰⁶ and requested a mistake of law instruction.⁶⁰⁷ The defense believed that the evidence raised a valid mistake of law defense—that the accused labored

⁶⁰⁰ *Commonwealth v. Twitchell*, 617 N.E.2d 609, 619 (1993).

⁶⁰¹ *Id.*

⁶⁰² *Id.* at 613.

⁶⁰³ *Id.* at 612.

⁶⁰⁴ *Id.* at 618.

⁶⁰⁵ *Id.* at 620.

⁶⁰⁶ See *supra* Part II.B.3. (detailing the facts underlying the *United States v. Maynulet* case).

⁶⁰⁷ *Maynulet* Transcript, *supra* note 302, at 488-494, 531-40, 651-66 (defense counsel arguing for mistake of law instruction).

under the mistaken belief that the hastening of death of the gravely wounded insurgent was authorized—and argued to the military judge that the panel members should be instructed on mistake of law.⁶⁰⁸ The defense sought to introduce the pre-deployment law of war training slides as an attachment to a stipulation of fact, agreed to by the government, outlining the contents of the law of war class CPT Maynulet received.⁶⁰⁹ The training material had no specific reference to mercy killings, and although it did teach that killing a person out of the battle was prohibited, it also implored Soldiers to “minimize human suffering.”⁶¹⁰

In a hearing outside the presence of the jury, the defense law of war expert testified regarding the training provided by the government.⁶¹¹ Paying particular attention to the “minimize unnecessary suffering” slide, the expert testified that without further explanation of the “minimize unnecessary suffering” principle as noted on the slides, “it could lead to a misunderstanding of what that principle requires.”⁶¹² In a colloquy with the military judge, the defense law of war expert concluded:

When I looked at this training briefing, what struck me was this Soldier was animated by principles that were, in my opinion, not effectively articulated, and I think that’s relevant to whether or not he believed, had an honest and reasonable belief that his conduct was criminal. I’m not saying it was right; I

⁶⁰⁸ *Id.* at 453 (testimony of CPT Maynulet that no briefings addressed what to do in the situation he faced and that he believed he was “easing suffering” as taught during the law of war briefing).

⁶⁰⁹ *Id.* at 652.

⁶¹⁰ *Id.* at 655-56.

⁶¹¹ *Id.* at 667-80 (testimony of Mr. Geoffrey Corn).

⁶¹² *Id.* at 672.

think from my perspective the relationship of his understanding of the law, the nature of the briefing, and the nature of situation that he found himself in doesn't mean that it would be improper to convict him for an unlawful killing, but I think it does justify allowing the [panel] members to consider whether under all these circumstances, he did have an honest and reasonable mistake as to what his obligation was under the controlling legal authority on the battlefield at that time.⁶¹³

In denying the defense request, the military judge held that the belief of the accused his actions were authorized because he was minimizing suffering "is motive, not a defense."⁶¹⁴

I agree with Mr. Corn's evaluation that this is probably a matter of equity; however, I am compelled [by] what I perceive the law to be. After looking at it all day and after thinking about it for quite a while, I can find no authority that would permit a mistake of law defense to apply in this case, based on what I have. In the cases that I've cited, talked to you about, *Rockwood*, *Hewitt-Vaughn*, [sic] *Calley*, and . . . *Duffy*, all, although none directly on point, seem to say that mistake of law is not a defense, and since it's not a recognized defense under these circumstances, although there is

⁶¹³ *Id.* at 677-78. The defense law of war expert then couched the argument on instructing on the mistake of law in terms of equity:

Maybe, Your Honor, maybe what I'm saying is, maybe it's more of an equitable argument that when the government asks a Soldier to engage in combat and puts him in that position, then the government – and then chooses to criminally prosecute that Soldier for transgressing the bounds on the battlefield, the government bears a responsibility to prepare that Soldier effectively for that situation. I think a mistake of law instruction, particularly having sat through this case, in light of the fact that the government has emphasized the ROE training and the possession of the ROE card that the accused had, is legitimate to allow the members to question whether or not this officer was effectively prepared for the situation that he would confront.

Id. at 679.

⁶¹⁴ *Id.* at 453.

evidence raised why he did it, that goes to mitigation and motive, but it does not go to a defense.⁶¹⁵

Despite the apparent acceptance of mistake of law in reliance on a government official's pronouncement by the Army Court of Criminal Appeals, it is unlikely that a Soldier accused of a combat-related mercy killing can successfully advance mistake of law as a defense. In addition to the combat-related mercy killing being a *mala in se* crime, absent extraordinary circumstance, the Soldier would be hard pressed to establish the official's contrary pronouncement relied upon that would authorize the killing of a gravely wounded combatant.

3. *Necessity*

Another possible defense to combat-related mercy killings is necessity, also called "choice of evils."⁶¹⁶ Arguably, if a wounded combatant's fate is certain, and death is inevitable within a relatively short period of time regardless of evacuation and medical intervention, then the act of killing to eliminate suffering can be characterized as a choice between evils, and theoretically, not subject to criminal liability.⁶¹⁷ In such a case, necessity is premised on the fact the immediate painless death of a gravely wounded and suffering

⁶¹⁵ *Id.* at 682.

⁶¹⁶ See generally Milhizer, *supra* note 395 (exploring the need for the defense of necessity in the military justice system and proposing adoption of the Model Penal Code defense of necessity).

⁶¹⁷ "In a criminal prosecution it shall be a defense if it can be established as a matter of law that the actor's conduct, in the only way that it seemed reasonably possible under the circumstances, avoided greater harm than it caused." PERKINS & BOYCE, *supra* note 575, at 1072.

combatant is a lesser harm than the prolonged suffering,⁶¹⁸ until the inevitable death, of the same combatant.⁶¹⁹

Traditionally, necessity is raised only when the accused is faced with “a choice of evils”⁶²⁰ brought about “by the situation itself”⁶²¹ and specifically not the actions of another

⁶¹⁸ A difficulty with the application of the necessity defense is that it requires a balancing of harms without providing a scale or matrix for such balancing. With combat-related mercy killings, this difficulty is acute. Unlike most killings in the civilian community, the initial attempt to kill in combat is not only lawful, but the duty of the actor. In fact, a Soldier who “willfully fails to do his utmost to . . . destroy any enemy troops” could be prosecuted, and if convicted of this misbehavior before the enemy, subject to death. UCMJ art. 99 (2005). After gravely wounding the enemy, the balancing of values shifts. On one side is the harm of hastening a person’s inevitable death. On the other side is elimination of severe pain and suffering. Complicating the value balancing is its context: combat between warriors, trained to kill the enemy, instilled with a deep sense of tradition of honor, bravery, respect for the dignity of combatants and commitment to honor on the battlefield.

Even if we can agree on a catalogue of harms, we still face the problem of comparing those harms. Sometimes a comparison may be straightforward. Most of us would agree that snatching a purse from someone is not as bad as hitting the person over the head and then snatching the purse, or that killing a person quickly or painlessly is less cruel than torturing that person to death. These comparisons work because we are evaluating harms that exist largely on the same scales of values, and there is broad consensus about – or at least no serious conflict over – the values and the scales.

John T. Parry, *The Virtue of Necessity: Reshaping Culpability and the Rule of Law*, 36 HOUS. L. REV. 397, 416 (1999). Attempting to defend a combat-related mercy killing on the basis of necessity requires the balancing and weighing of values that may not be comparable. It is not surprising that many individual “values are so distinct as to be incommensurable, because as individuals actually experience these values, they do not rest on a single scale and cannot be reduced to comparisons along a shared, single dimension.” Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism and Democratic Politics*, 90 COLUM. L. REV. 2121, 2146 (1990).

⁶¹⁹ The common law necessity defense does not delineate between different harms and values associated with a single individual, as would be the case in a combat-related mercy killing. While some legal texts do weigh property harm verses personal harm, death verses injury, and the number of deaths avoided by the otherwise criminal conduct, none weigh quality of life. Specifically, there is no discussion about minimizing the suffering of gravely wounded, soon-to-die, combatants with immediate painless death. See WAYNE R. LAFAVE, CRIMINAL LAW 523-34 (4th ed. 2003); see PERKINS & BOYCE, *supra* note 575, at 1065-74.

⁶²⁰ *United States v. Rockwood*, 52 M.J. 98, 112 (1999). “The only purpose of a statute on choice of evils is to provide for a situation in which it is proper for law to dictate the choice must be made, for the reason that no other would be morally acceptable.” PERKINS & BOYCE, *supra* note 575, at 1071-72.

⁶²¹ *Rockwood*, 52 M.J. at 112. The common law requires that “the harm must be committed under the pressure of physical or natural force, rather than human force.” *United States v. Rankin*, 34 M.J. 326, 328-29 (C.M.A.

person.⁶²² To apply, the accused must have an honest belief that his actions were necessary to avoid a greater harm, and that belief must have been reasonable under the circumstances.⁶²³ Finally, there can be no other alternative, other than the actions of the accused, “that would have caused lesser harm.”⁶²⁴ Public policy serves as the basis for the necessity defense—as the law should “promote the achievement of higher values at the expense of lesser values.”⁶²⁵ Presumably, society as a whole is improved when a violation of the law is tolerated for behavior that is morally just and minimizes harm to others.⁶²⁶ That is the *theory* of the defense of necessity.

In *reality*, today it is unlikely that the defense of necessity will offer a Soldier facing charges of premeditated murder for a combat-related mercy killing any real chance of acquittal. Several reasons support this realistic view.

1992) (quoting *Allison v. City of Birmingham*, 580 So. 2d 1377, 1380 (Ala. Cr. App. 1991) quoting Note, *Necessity as a Defense to a Charge of Criminal Trespass in an Abortion Clinic*, 48 U.Cin.L.Rev. 501 (1979)). This traditional view requires the circumstance causing the choice of evils to be “the physical forces of nature” such as a hurricane, tornado, storm, lightening, earthquake or blizzard. LAFAVE, *supra* note 619, at 523.

⁶²² *United States v. Washington*, 57 M.J. 394, 398 (2002).

⁶²³ *United States v. Bailey*, 444 U.S. 394, 410 (1979). The defense of necessity is designed to “spare a person from punishment” if he “reasonably believed that criminal action ‘was necessary to avoid a harm more serious than sought to be prevented by the statute defining the offense.’” *Id.* (quoting the lower circuit court in *United States v. Bailey*, 585 F. 2d 1087, 1097-98 (D.C. Cir. 1978)).

⁶²⁴ *Rockwood*, 52 M.J. at 112.

⁶²⁵ LAFAVE, *supra* note 619, at 524.

⁶²⁶ *Id.*

First, it is doubtful that the defense of necessity extends to the military and applies in a court-martial. Necessity is not provided for in the Manual for Courts-Martial⁶²⁷ or the Military Judges' Benchbook,⁶²⁸ the two main authoritative texts governing courts-martial. Further, both the Army⁶²⁹ and Navy & Marine Corps⁶³⁰ Service courts have soundly rejected the common law defense of necessity in the military. In rejecting necessity, the Army Court of Military Review distinguished the military from its civilian counterpart:

The benefit of rejecting the necessity defense goes to the core of discipline within a military organization. In no other segment of our society is it more important to have a single enforceable set of standards. The facts of this case are a textbook example. The appellant chose, contrary to his military duties, to assist his ill mother. This decision was based on his own set of values and priorities. No notice was provided to the unit. If conscious regard was given by the appellant to the impact his choice would have on readiness or his fellow soldiers, it is not reflected in the record. To now authorize an after-the-fact judicial review on the merits of those personal values has no place in the military justice system.⁶³¹

The Navy and Marine Court of Criminal Appeals echoed the Army Court's concerns about applying necessity in a military environment, elaborating:

[T]he ramifications of an individual choosing to commit an illegal act, in order to avoid what they perceived to be a greater harm, are drastically

⁶²⁷ MCM, *supra* note 3, R.C.M. 916 (Defenses).

⁶²⁸ DA PAM. 27-9, *supra* note 399, at Ch. 5 (Special and Other Defenses).

⁶²⁹ United States v. Banks, 37 M.J. 700, 702 (A.C.M.R. 1993).

⁶³⁰ United States v. Olinger, 47 M.J. 545 (N-M. Ct. Crim. App. 1997).

⁶³¹ Banks, 37 M.J. at 702.

different in the military than they are in civilian life. In civilian life, innocent individuals may be adversely affected by the commission of an illegal act. In the military, however, the consequences may be much greater. Such a decision affects an individual's shipmates, the safety and efficiency of the ship, as well as the effectiveness of the mission.⁶³²

The Court of Appeals for the Armed Forces refused to apply necessity each time they confronted with the defense.⁶³³ Despite leaving the door slightly opened for the future,⁶³⁴ the court signaled that it only in a rare case would necessity would apply in the military:

[S]urely . . . in a military context, the defense [of necessity] is far more likely to arise in law school hypotheticals, than in the reality of military service, and then only where the flouting of military authority is not involved. It is for these reasons, perhaps, that this court has circled around the necessity defense, not sure whether to pull the defense fully on board, but not willing to cast it fully adrift, lest its presence is required on deck in unforeseeable circumstances.⁶³⁵

The majority opinion in *United States v. Washington* is straightforward. The court reasoned that it is inconceivable that the defense of necessity in the military would permit a

⁶³² *Olinger*, 47 M.J. at 51.

⁶³³ See *United States v. Washington*, 57 M.J. 394 (2002); *United States v. Rockwood*, 52 M.J. 98 (1999); *United States v. Rankin*, 34 M.J. 394 (1992).

⁶³⁴ *Washington*, 57 M.J. at 398. The Court refused to determine if necessity applied to the military justice system, and noted that even if it did, the necessity would have to arise from a natural force, not human:

Likewise, if the defense of necessity applies in the military justice system – a question which we need not resolve at this time – similar considerations would call for an application of the prevailing civilian doctrine regarding the requirement for the necessity to arise from a natural force, as opposed to a human action.

Id.

⁶³⁵ *Id.* at 402 (citations omitted) (Baker, J., concurring opinion).

Soldier to disobey an order based on the “reasonable apprehension” that “another innocent person would immediately be killed” if he complied with the order.⁶³⁶ “Such an interpretation suggests that the President designed the rule to alter one of the core values of military service—the willingness of the individual to sacrifice his or her life or well-being for the sake of the nation.”⁶³⁷

In rejecting the necessity defense, the military courts have not addressed the issues that arise in a combat-related mercy killing. Instead, all of the cases rejecting necessity involve military unique crimes: missing movements or being absent without authority (*Olinger, Banks, Rankin*) or violating military orders (*Sanchez, Rockwood, Washington*). Nothing in those opinions suggests the courts are willing to entertain necessity as a defense absent extraordinary circumstances.

Rather, the military courts have directed the accused to raise necessity in a different forum—to the prosecutors,⁶³⁸ sentencing authority⁶³⁹ or convening authority.⁶⁴⁰ In *United*

⁶³⁶ *Id.* at 397.

⁶³⁷ *Id.*

⁶³⁸ This remedy traditionally has offered little hope to a Soldier accused of a combat-related mercy killing. In all three of the recent prosecutions of combat-related mercy killings, the accused faced premeditated murder charges as a result of the charging decisions of the government prosecutors. *See supra* note 508-10 and accompanying text.

⁶³⁹ This remedy is unavailable to Soldiers facing premeditated murder charges because of the mandatory minimum sentence of life. *See MCM, supra* note 3, pt. IV, ¶ 43(e)(1).

⁶⁴⁰ This remedy is the most likely to benefit the accused. In *United States v. Maynulet*, the convening authority, at the request of the defense, referred the combat-related mercy killing as an assault with the intent to commit murder. This was contrary to the advice of the investigating officer and staff judge advocate. *See supra* note 522 and accompanying text.

States v. Olinger, the court justified rejecting necessity by expressing its opinion that a service member foreclosed the defense was not without a remedy:

Prior to trial, a commander has discretion to dispose of offenses by members of that command. Also, mitigating or extenuating circumstance may be taken into consideration when determining a disposition that is appropriate and fair. After trial, the convening authority may, as a matter of command prerogative, modify the findings and sentence of a court-martial.⁶⁴¹

The Army Court of Military Review in *United States v. Banks* agreed, suggesting that the issues giving rise to necessity that they refused to recognize as a separate defense are “matters would certainly be appropriate in extenuation and mitigation on sentencing” and “[i]t should not be forgotten that the court-martial has the authority to adjudge a sentence of no punishment in appropriate cases.”⁶⁴² Neither of these statements in the prosecution of a combat-related mercy killing because the UCMJ requires a mandatory minimum sentence of life if the Soldier is convicted.⁶⁴³

Today, necessity is not a recognized defense in the military. If at some time in the future, necessity is recognized in the military, the condition giving rise to the necessity must be caused by non-human factors. This requirement alone would preclude Soldiers charged with a combat-related mercy killing from raising necessity as a defense because almost

⁶⁴¹ *United States v. Olinger*, 47 M.J. 545, 51 (N-M. Ct. Crim. App. 1997) (citations omitted).

⁶⁴² *United States v. Banks*, 37 M.J. 700, 702 (A.C.M.R. 1993).

⁶⁴³ MCM, *supra* note 3, pt. IV, ¶ 43(e)(1).

certainly the injuries were caused by humans, probably enemy combatants. Finally, since combatants will not be held criminally liable for inaction, such as letting a gravely wounded Soldier die naturally, necessity may not be applicable because the act of killing is not the only way to minimize the harm—as the mere passage of time will end the harm in relatively short course.

D. Negates defense extenuation and mitigation case

The MCM provides that the defense “may present matters in extenuation and mitigation” during the sentencing phase of a court-martial.⁶⁴⁴ Matters in extenuation “serve[] to explain the circumstances surrounding the offense, including those reasons for committing the offense.”⁶⁴⁵ Matters in mitigation are evidence introduced “to lessen the punishment . . . or to furnish grounds for a recommendation of clemency. [They] include[] . . . acts of good conduct or bravery and evidence of the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a servicemember.”⁶⁴⁶

At times, referred to as “the defense counsel’s show,”⁶⁴⁷ the importance of the defense sentencing case in the military cannot be underestimated. Evidence that may never

⁶⁴⁴ *Id.* at R.C.M. 1001(c)(1).

⁶⁴⁵ *Id.* at R.C.M. 1001(c)(1)(A).

⁶⁴⁶ *Id.* at R.C.M. 1001(c)(1)(B).

see the light of day in a civilian criminal trial is commonplace in courts-martial. The Military Rules of Evidence permit the defense to “introduce affidavits or other written statements . . . concerning the character of the accused.”⁶⁴⁸ Additionally, for non-character evidence, on sentencing, the defense can request the military judge to “relax the rules” permitting the introduction of “letters, affidavits, certificates of military and civil officers, and other writings of similar authenticity and reliability.”⁶⁴⁹ Rules restricting the type of evidence that the government can introduce do not apply to the defense.⁶⁵⁰

Adding to the importance of the defense sentencing case for a combat-related mercy killing is that most defenses are inapplicable. Recall, in denying the defense requested instruction on mistake in *United States v. Maynulet*, the court said “mistake of law is not a defense, and since it’s not a recognized defense under these circumstances, although there is evidence raised why he did it, that goes to mitigation”⁶⁵¹ Furthermore, when the court ruled necessity was not a recognized defense in the military they noted the facts underlying

⁶⁴⁷ Major Larry Gaydos, *A Prosecutorial Guide to Court-Martial Sentencing*, 114 MIL. L. REV. 1 (1986).

⁶⁴⁸ MCM, *supra* note 3, M.R.E. 405(c).

⁶⁴⁹ *Id.* at R.C.M. 1001(c)(3).

⁶⁵⁰ *United States v. Griggs*, 61 M.J. 402, 409 (2005) (holding that rule prohibiting testimony regarding whether a Soldier should be discharged from the service “does not preclude [the defense from offering] evidence that a witness would willingly serve with the accused again). The importance the Court of Appeal for the Armed Forces gives to the defense sentencing case is exemplified in *Griggs* where they reversed a sentence of confinement for 150 day and a bad-conduct discharge for an Airman facing the maximum of forty-two years confinement and a dishonorable discharge. *Id.* at 413 (Crawford, J., dissenting). “Convicted of five drug offenses” the Airman “received little more than one percent of the maximum permissible confinement and forty percent” of what the government argued for. *Id.*

⁶⁵¹ *Maynulet Transcript*, *supra* note 302, at 682; *see supra* notes 611-615 and accompanying text.

the defense “would certainly be appropriate in extenuation and mitigation on sentencing” and “[i]t should not be forgotten that the court-martial has the authority to adjudge a sentence of no punishment in appropriate cases.”⁶⁵² Finally, the courts have held motive is irrelevant on findings but “often serves a proper and useful function during the sentencing phase of the trial . . . to show mitigating circumstances.”⁶⁵³

Ironically, when a Soldier is convicted of premeditated murder for a combat-related mercy killing, the best case scenario is confinement for life with eligibility for parole. Where is the defense mitigation? The answer—it is effectively eliminated with the government charging decision. This frustration was similarly expressed by the Florida Supreme Court when affirming a life sentence in a domestic mercy killing case:

Finally, this court notices that this aged defendant has been a peaceful, law-abiding and respectable citizen up until this time. No one has suggested that he will again kill or enter upon a criminal career. However, the *absolute rigidity of the statutory minimum sentences* do not permit consideration of these factors, for that matter, they, different from the sentencing guidelines, *do not take into account any mitigating circumstances*. Whether such sentences should somehow be moderated so as to allow a modicum of discretion and whether they should allow distinctions to be made in sentencing between different kinds of wrongdoers, for instance, between a hired gangster killer and one, however misguided, who kills for love or mercy, are all questions

⁶⁵² United States v. Banks, 37 M.J. 700, 702 (A.C.M.R. 1993); see *supra* notes 637-642 and accompanying text.

⁶⁵³ United States v. Martin, 20 M.J. 227, 232 (C.M.A. 1985) (Everett, C.J., concurring); see *infra* notes 659-664 and accompanying text.

which, under our system, must be decided by the legislature and not by the judicial branch. We leave it there.⁶⁵⁴

Since the mandatory minimum sentence of life for premeditated murder necessarily excludes all defense mitigation evidence, the homicide statutes should be modified to properly allow the consideration of such evidence in a combat-related mercy killing case.

V. UCMJ should eliminate premeditation as sole factor triggering life

The law of homicide developed to punish those who killed with wickedness in their heart, and evil in their mind.⁶⁵⁵ “Moral blameworthiness required the offender make a free, voluntary, and rational choice to do evil.”⁶⁵⁶ Acting without evil motive demonstrated the

⁶⁵⁴ Gilbert v. State, 487 So. 2d 1185, 1192 (Fla. 1986) (emphasis added).

⁶⁵⁵ Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in Criminal Law Past and Present*, 1993 UTAH LAW REV. 635, 663 (1993). The development of the law that excluded children and the insane from those able to act with culpability, added the requirement of “moral agency [or the] formation of evil designs” before one could have the requisite criminal mental state.

These considerations support the view that mens rea as originally conceived constituted a normative judgment of subjective wickedness, required not simply that the actor intended to commit the offense, but also that the offense be committed by a responsible moral agent for wicked purposes. Thus, for Blackstone, mens rea required that offenders possess a “vicious will”; for Bishop it required an “evil mind.” Professor Sayre saw the meaning of mens rea in early law as “little more than a general immorality of motive.”

Id. (citations omitted).

⁶⁵⁶ *Id.* at 665 (citing Francis E. Sayre, *Mens Rea*, 45 HARV. L. REV. 974, n.12 (1932)).

absence of *mens rea*.⁶⁵⁷ This generalized concept of evil motive as a prerequisite for criminal conduct eventually evolved over the centuries to an offense specific required *mens rea*.⁶⁵⁸

The original notion of *mens rea* as evil motive was gradually transformed by a centuries-long process that attempted to identify specific states of mind required for the commission of particular offenses. No longer was *mens rea* conceptualized as a single evil state of mind requisite for all criminality, but rather as a description of the specific state of mind required for a given crime.⁶⁵⁹

For homicide, the “intent to kill” supplanted the former requirement of an “evil motive,” and a specific “state of mind” replaced the “immoral motive” as the focus of the *mens rea* inquiry.⁶⁶⁰ Formerly the gravamen for accessing criminal liability and *mens rea*, a person’s motive is now irrelevant for determination of guilt, and is only a factor in sentencing.⁶⁶¹ Military case law fully embraces this view of motive.⁶⁶²

Under the law, however, it is the intent and not the motive that determines the criminality of an act. “Intention is a determination to act in a certain way;

⁶⁵⁷ *Id.* at 666 (explaining the development of self-defense, coercion, mistake of law, and mistake of fact as defenses to criminal conduct).

⁶⁵⁸ *Id.* at 667.

⁶⁵⁹ *Id.*

⁶⁶⁰ *Id.*

⁶⁶¹ JEROME HALL, GENERAL PRINCIPALS OF CRIMINAL LAW 100-102 (2d ed. 1960).

⁶⁶² *United States v. Huet-Vaughn*, 43 M.J. 105, 114 (1995) (holding doctor’s motive for refusing to deploy to Operation Desert Shield was irrelevant to whether she quit her unit with intent to avoid hazardous duty or skirt important service); *United States v. Martin*, 20 M.J. 227, 232 (C.M.A. 1985) (Everett, C.J., concurring) (noting that the motive of the accused “often serves a proper and useful function during the sentencing phase of the trial . . . to show mitigating circumstances”).

motive is that which incites and stimulates the formation of the intention. There is no distinction of greater importance in the criminal law.”⁶⁶³

Somewhat paradoxically, evidence of motive is often proof of intent. In *United States v. Huet-Vaughn*, the court noted that evidence that Dr. Huet-Vaughn refused to deploy support of Operation Desert Shield due to her moral reservations about the impending conflict, her motive tended “to prove rather than disprove the requisite intent” to avoid hazardous duty.⁶⁶⁴ The same is true in a combat-related mercy killing case. When the Soldier testifies that “he shot the insurgent to eliminate his suffering,” he provides the evidence that he intended to kill the insurgent. When determining guilt, the law bestows no benefit upon the good or pure motives.⁶⁶⁵ In the military, the most harshly punished homicide is premeditated murder requiring “consideration of the act intended.”⁶⁶⁶ Reliance on premeditation as the sole aggravating factor triggering the mandatory minimum sentence in life in prison is over-inclusive, ignoring both motive and mitigating circumstances.

A. Premeditation is an over-inclusive aggravating factor

⁶⁶³ *United States v. Tilton*, 34 M.J. 1104, 1107 (A.C.M.R. 1992) (quoting *United States v. Kastner*, 17 M.J. 11, 13 (C.M.A. 1983).

⁶⁶⁴ *Huet-Vaughn*, 43 M.J. at 114.

⁶⁶⁵ *United States v. Kabat*, 797 F.2d 580, 587-88 (8th Cir. 1986), *cert. denied*, 481 U.S. 1030 (1987) (holding that the religious motives and protection of humanity from destruction were irrelevant for nuclear protestors when determining intent for damaging nuclear missile sites).

⁶⁶⁶ MCM, *supra* note 3, pt. IV, ¶ 43(c)(2)(a). See *supra* Part III.B.2.a.

Premeditation as the sole aggravating factor triggering life in prison does not consider the mitigating circumstances of combat-related mercy killings.⁶⁶⁷ Although *Horne*, *Alban-Cardenas*, and *Maynulet* all received favorable outcomes, it was a result of a trial and plea bargains to lesser offenses. Had the defense not agreed to plead,⁶⁶⁸ or had the government preceded on the premeditated murder charges,⁶⁶⁹ drastically different outcomes were probable. Demonstrating the drastic outcomes are three state court cases: *State v. Forrest*,⁶⁷⁰ *Gilbert v. State*,⁶⁷¹ and *Griffith v. State*.⁶⁷²

1. *State v. Forrest – a dying father*

Two days before Christmas in 1985, John Forrest admitted his dying father to the hospital for the last time.⁶⁷³ The elder Forrest was no stranger to hospitals.⁶⁷⁴ “Severe heart

⁶⁶⁷ See SAMUEL H. PILSBURY, JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER 99 (1998) (arguing the concept of premeditation is “overbroad” and classifies “too many homicides in the worst offense category”); see also Tom Stacy, *Changing Paradigms in the Law of Homicide*, 62 OHIO ST. L.J. 1007, 1024 (arguing that premeditation is “overinclusive” because premeditation “sometimes has a mitigating significance” and “sometimes premeditation coexists with mitigating factors” justifying lesser classification).

⁶⁶⁸ Major Teixeira, chief of military justice for the *United States v. Horne* and *United States v. Alban-Cardenas* prosecutions indicated that “if they did not offer to plead guilty, the premeditated murder charges would not have been dropped” because the elements of the offense were met with the facts of the case. Teixeira Interview, *supra* note 474.

⁶⁶⁹ Captain Maynulet indicated that had the convening authority referred his case as a premeditated murder rather than an assault with intent to commit murder, he probably would have still gone to trial because he considered his actions as “morally correct.” Telephone Interview with Captain Rogelio Maynulet, in Las Vegas, Nev. (Feb. 25, 2006)

⁶⁷⁰ *State v. Forrest*, 362 S.E.2d 252 (N.C. 1987).

⁶⁷¹ *Gilbert v. State*, 487 So. 2d 1185 (Fla. 1986).

⁶⁷² *Griffith v. State*, 548 So. 2d 244 (Fla. 1989).

⁶⁷³ *Forrest*, 362 at 253.

disease, hypertension, a thoracic aneurysm, numerous pulmonary emboli and a peptic ulcer” pushed him to the brink of death.⁶⁷⁵ A nursing assistant confirmed John Forrest crying as he visited his father the following day—on Christmas Eve.⁶⁷⁶ Near his bed, John Forrest continued to weep, telling his father how much he loved him.⁶⁷⁷ Unable to speak, his father could manage only to cough, gurgle and rattle.⁶⁷⁸ Severely distraught, John Forrest removed a small handgun from his pocket and shot his father four times in the head.⁶⁷⁹ Still sobbing, John Forrest walked out of his father’s room, and dropped the gun in the hall near the door as he left.⁶⁸⁰ Freely admitting that he killed his father, John Forrest made a series of oral statements: “You can’t do anything to him now. He’s out of his suffering. . . . I killed my daddy. . . . [M]y dad won’t have to suffer anymore. . . . I know the doctors couldn’t do it, but I could. . . . I promised my dad I wouldn’t let him suffer. . . .”⁶⁸¹ “The pathologist who performed the autopsy . . . determined the cause of death was the four bullet wounds to the head . . . [but the elder Forrest] had been ‘in a great deal of stress’ and probably would have

⁶⁷⁴ *Id.*

⁶⁷⁵ *Id.*

⁶⁷⁶ *Id.*

⁶⁷⁷ *Id.* at 254.

⁶⁷⁸ *Id.*

⁶⁷⁹ *Id.*

⁶⁸⁰ *Id.*

⁶⁸¹ *Id.*

died within twenty-four hours.”⁶⁸² At his trial, John Forrest was convicted of premeditated murder, and sentenced “to the mandatory life term.”⁶⁸³

2. *Gilbert v. State – a suffering wife*

After fifty-one years of marriage, constant pain and confusion now dominated Ms. Emily Gilbert’s life.⁶⁸⁴ Suffering from osteoporosis and Alzheimer’s disease, Emily regularly took Percodan to ease the pain caused by arthritis.⁶⁸⁵ At times, her pain was so severe that she cried to her friends “I’m so sick I want to die, I want to die.”⁶⁸⁶ Some days, friends would find her “crying on the sofa and looking very sick.”⁶⁸⁷ On March 2, Emily’s pain was so severe that her husband, Roswell Gilbert rushed her to the hospital.⁶⁸⁸ After arriving, Emily refused to stay and uncooperatively demanded to return home.⁶⁸⁹ Two days later, after lunch, Rowell Gilbert gave Emily “four Percodan tablets” for pain and “put her on the sofa.”⁶⁹⁰ Mr. Gilbert then went downstairs for a community meeting, but Emily

⁶⁸² Timothy Paul Brooks, *Mercy Killing and Malice in North Carolina*, 66 N.C.L. Rev. 1160, 1161 (1988) (citing Defendant-Appellant’s Brief at 3).

⁶⁸³ *Id.*

⁶⁸⁴ *Gilbert v. State*, 487 So. 2d 1185, 1187 (Fla. 1986).

⁶⁸⁵ *Id.*

⁶⁸⁶ *Id.*

⁶⁸⁷ *Id.*

⁶⁸⁸ *Id.*

⁶⁸⁹ *Id.*

⁶⁹⁰ *Id.*

followed.⁶⁹¹ Mr. Gilbert brought his wife back up to his apartment.⁶⁹² From the couch she cried, “Please, somebody help me. Please, somebody help me.”⁶⁹³ Unable to see his wife in pain anymore, Mr. Gilbert got his gun and shot Emily in the head twice, killing her.⁶⁹⁴ At his trial, Mr. Gilbert testified that the “only important thing was to terminate her suffering.”⁶⁹⁵ He continued, “If I put her in a nursing home and they won’t let me stay there and she’s separated from me. It would be a horrible death for her. She would die.”⁶⁹⁶ At his trial, the seventy-five year old Roswell Gilbert was convicted of premeditated murder and sentenced to the mandatory term of life.⁶⁹⁷

3. *Griffith v. State – a vegetative child*

Charles Griffith was the proud father of a three-year-old daughter named Joy. A little more than a week before Halloween in 1984, as Joy played, her head became lodged and remained stuck “in the footrest of a living room chair.”⁶⁹⁸ Described as a “bizarre and

⁶⁹¹ *Id.*

⁶⁹² *Id.*

⁶⁹³ *Id.*

⁶⁹⁴ *Id.*

⁶⁹⁵ *Id.* at 1188.

⁶⁹⁶ *Id.*

⁶⁹⁷ *Id.* at 1186-87.

⁶⁹⁸ *Griffith v. State*, 548 So. 2d 244, 245 (Fla. 1989).

tragic,” the accident deprived Joy of oxygen for a considerable period of time.⁶⁹⁹ The lack of oxygen caused “severe head injuries” and ultimately “extensive brain damage.”⁷⁰⁰ Joy did not recover from her injuries, but rather “remained in a chronic vegetative state.”⁷⁰¹ For eight months she required “continuous and intensive hospital care.”⁷⁰² Charles Griffith, devastated by Joy’s condition, shot her twice in the chest, killing her “as she lay in her hospital bed.”⁷⁰³ When questioned about the shooting, Mr. Griffith said he shot Joy because “I didn’t want her to suffer anymore.”⁷⁰⁴ At his trial, Charles Griffith was convicted of premeditated murder and, as required by statute, “sentenced to the capital life sentence of life imprisonment without the possibility of parole for twenty-five years.”⁷⁰⁵

B. Revise UCMJ – eliminate premeditation as sole-aggravating factor

⁶⁹⁹ *Id.*

⁷⁰⁰ *Id.*

⁷⁰¹ *Id.*

⁷⁰² *Id.*

⁷⁰³ *Id.*

⁷⁰⁴ *Id.*

⁷⁰⁵ *Id.*

Illustrative in *Forrest, Gilbert, and Griffith*, is the ever present-danger of homicide statutes mandating a mandatory minimum sentence of life for premeditation. The inequities arise when planning and calculation are substituted for culpability.⁷⁰⁶

For most of this nation's history, premeditated murder has occupied the highest level on the criminal hierarchy of most jurisdictions. . . . [A] cool and preconceived design to kill is the hallmark of the worst forms of homicide. . . . [T]he moral force of the doctrine comes from the way that premeditation often serves as a proxy for the worst motives to kill [C]ulpability analysis should focus on the motives, not the coolness or calculation of the decision to do wrong.⁷⁰⁷

The UCMJ should abandon the premeditation approach,⁷⁰⁸ and adopt a homicide statute that adequately allows the court or members to equate the moral culpability of a combat-related mercy killing with equitable punishment, considering all the aggravating and mitigating factors. Adopting the “new paradigm” homicide statute⁷⁰⁹ would accomplish this goal.⁷¹⁰

⁷⁰⁶ See Pillsbury, *supra* note 487, at 100.

⁷⁰⁷ *Id.*

⁷⁰⁸ “[P]remeditation certainly fails as the dividing line between degrees of murder.” Matthew A. Pauley, *Murder by Premeditation*, 36 AM. CRIM. L. REV. 145, 169 (1999). “Deliberate premeditation . . . is a poor indicator of relative blameworthiness. Perhaps the use of premeditation as a dividing line between first and second-degree murders should be discarded.” Sean J. Kealy, *Hunting the Dragon: Reforming the Massachusetts Murder Statute*, 10 B.U. PUB. INT. L.J. 203, 245 (2001). In classifying homicides, “premeditation and deliberation [do] not appear to serve a useful function.” Daniel Givelber, *The New Law of Murder*, 69 IND. L.J. 375, 383 (1994).

⁷⁰⁹ “New paradigm” is a used to describe the “classification of intentional homicides to their relative seriousness” eliminating premeditation as the sole aggravating factor authorizing death or mandatory life punishments. Tom Stacy, *Changing Paradigm of the Law of Homicide*, 62 OHIO ST. L.J. 1007, 1008-9 (2001). A “new paradigm” homicide statute was drafted by Professor Tom Stacy from the University of Kansas School

1. New paradigm approach

The “new paradigm” homicide statute focuses on determining a series of aggravating and mitigating factors to classify homicide.⁷¹¹ Premeditation is only an aggravating factor when accompanied by evil motives. Members are instructed that after finding the accused had the specific intent to kill, they must determine the aggravating and mitigating factors to classify the homicide—first degree murder, second degree murder or voluntary manslaughter.⁷¹² The aggravating factors include:

(a) the killing was planned, and the planning exhibited exclusive concern for the accused's selfish financial, sexual, emotional, or other interests and callous disregard for the victim's interests;

(b) the killer had a family or other intimate relationship with the victim, and the killing was neither motivated by an understandable view of the victim's best interests nor provoked by the victim's serious abuse of the accused or of some other family member;

(c) the killing occurred while the accused was committing a separate felony involving violence or sexual predation;

of Law, and published in 2001. *Id.* at 1059-60. His complete draft statute is reproduced in an appendix. *See infra* Appendix A, New Paradigm Homicide Statute.

⁷¹⁰ Serious consideration should be given to adopting the Model Penal Code homicide statute. The Model Penal Code abandons the classic degrees of murder, and leaves much of the classification determination to the discretion of the court of jury. *See* Matthew A. Pauley, *Murder by Premeditation*, 36 AM. CRIM. L. REV. 145, 166-67 (1999). The Model Penal Code provides aggravating and mitigating factors for the determination of the sentence when a person is convicted of murder, and provides a more encompassing voluntary manslaughter definition than the adequate provocation statutes similar to the UCMJ. *See* MODEL PENAL CODE §§ 210.0-210.6 (1980). Analysis of the Model Penal Code's application to the military justice system is the subject of another paper on another day.

⁷¹¹ Stacy, *supra* note 707, at 1009.

⁷¹² *Id.* at 1059.

(d) the killing involved torture or the knowing infliction of protracted pain or suffering;

(e) the killing involved more than one victim;

(f) the victim was a law enforcement officer or was vulnerable by reason of age or disability.⁷¹³

In addition to the mitigating factors listed in the “new paradigm” statute, for the military, an additional mitigating factor should be added: during a military operation, the accused believed the victim was gravely wounded and the motive of the accused was to end the victim’s suffering. With the modification, the mitigating factors of the “new paradigm” homicide statute include:

(a) the killer was in an extreme state of passion that was provoked by the victim's commission of a serious legal wrong against the killer or the killer's family;

(b) the victim consented to the killing to relieve suffering;

(c) if the defenses of duress or necessity were extended to homicide, the killing would be within one of those defenses;

(d) the accused genuinely but unreasonably believed that deadly force was needed to prevent the imminent infliction of death or serious bodily harm by an unlawful aggressor.

(e) during a military operation, the accused believed the victim was gravely wounded and the motive of the accused was to end the victim’s suffering.⁷¹⁴

⁷¹³ *Id.* at 1060.

⁷¹⁴ *Id.*

Under the “new paradigm” homicide statute, classification of a combat-related mercy killing requires determining the aggravating and mitigating circumstances in such killings. This is achieved by examining the shared facts of all combat-related mercy killings.⁷¹⁵ The shared facts in all combat-related mercy killings include: 1) a person is dead; 2) the death resulted from the act of person administering the *coup de grâce*; 3) the killing was unlawful; 4) the killing occurred during combat, battle or a military operation using force; 5) at the time of the killing, the Soldier had the intent to kill the gravely wounded person; and 6) the killing was done with premeditation.

None of the “new paradigm” homicide statute’s aggravating circumstances apply to combat-related mercy killings. Although the killing was clearly premeditated, the motive did not include “selfish financial, sexual, emotional, or other interests [or] callous disregard for the victim's interests.”⁷¹⁶ Potentially, two mitigating circumstances in the “new paradigm” homicide statute apply to the combat-related mercy killings. Clearly, the killings occur during military operations, and mercy motivated the Soldier, specifically eliminating the suffering of the gravely wounded combatant. Additionally, the members could conclude that it is a greater harm to allow the combatant to suffer until his inevitable death, as opposed to

⁷¹⁵ For analysis of common facts as applied to elements under the UCMJ, *see supra* Part III.C.

⁷¹⁶ Stacy, *supra* note 707, at 1060.

swift dignified death that eliminates suffering.⁷¹⁷ With such conclusion, the necessity defense mitigating factor may apply. Therefore, no aggravating factors and possibly two mitigating factors of the “new paradigm” homicide statute apply to combat-related mercy killings

According to the “new paradigm” homicide statute, voluntary manslaughter is defined as the presence of “one mitigating factor and no aggravating factor[s].”⁷¹⁸ Therefore, instead of premeditated murder under the UCMJ, the combat-related mercy killing is classified as a voluntary manslaughter under the proposed statute. This classification changes the potential punishment from the mandatory minimum of confinement for life, to a maximum of confinement of fifteen years.⁷¹⁹ Unlike the UCMJ, the “new paradigm” homicide statute appropriately focuses on the “moral valuation of the act and on the need for

⁷¹⁷ See *supra* notes 616-626 and accompanying text. In considering a war scenario where the United States is involved in a Soviet-style ground war and taking significant casualties, a doctor is contemplating euthanatizing his patient before the retreat. In analyzing the ethical consideration, medical ethicists noted:

Is it ever in his own interest for the patient to die? Is life such an overriding “good” that nothing that shortens it could ever be in the patient’s best interest? If the patient is imminently dying, could the slight hastening of his death be considered in his best interests? This is somewhat beyond most constructions of beneficence in that it is counterintuitive to suggest that dying is better than living, but in very unusual situations this may well be true. Could psychological suffering by the patient waiting for the enemy to capture him, perhaps torture him, then kill him cause more harm than his dying? It may be that in these extreme situations this harm could occur and a very real suffering be removed by mercy killing.

MILITARY MEDICAL ETHICS, *supra* note 114, at 391.

⁷¹⁸ Stacy, *supra* note 707, at 1059.

⁷¹⁹ Compare MCM, note 3, pt. IV, ¶ 43(e)(1), with *id.* pt. IV, ¶ 44(e)(1).

punishment.”⁷²⁰ The proposed statute also recognizes that “mercy killings are different from the standard homicide and should not receive the same treatment.”⁷²¹

2. *Partial Affirmative Defense*

As an alternative to adopting the “new paradigm” homicide statute, the creation of a partial affirmative defense for mercy killings would mitigate the harsh effects of premeditation as the sole aggravating factor triggering confinement for life.⁷²² Rule for Court Martial 916 should be modified as follows:

(1) *Not defenses generally.*

(1) *Ignorance or mistake of law. . . .*

(2) *Voluntary intoxication. . . .*

(3) *Mercy killing.* The motive for killing, including mercy, is not a defense to homicide. However, a prosecution for premeditated murder or unpremeditated murder is mitigated to voluntary manslaughter, if at the time of the killing, the accused reasonably believed victim was gravely wounded, and the killing was motivated by mercy. The accused must prove this defense by a preponderance of the evidence.⁷²³

⁷²⁰ Stacy, *supra* note 707, at 1068.

⁷²¹ Brooks, *supra* note 682, at 1170.

⁷²² The author credits Major Jim Levine and Major Dave Combs for suggesting that a partial affirmative defense may be another way to mitigate the harsh effects of the mandatory minimum sentence of confinement for life for combat-related mercy killings.

⁷²³ See *infra* Appendix C: Proposed Partial Affirmative Defense Instruction.

The proposed RCM 916(1)(3) would put the burden on the defense to prove by a preponderance of evidence⁷²⁴ the combat-related mercy killing was committed to end the suffering of a gravely wounded person in combat. For the purposes of this rule, gravely wounded would be defined as follows:

“Gravely wounded” is suffering from wounds that are so extensive that even with optimal medical resources, survival would be unlikely. Examples of grave wounds include, but are not limited to, unresponsiveness with penetrating head wounds, high spinal cord injuries, mutilating explosive wounds involving multiple anatomical sites and organs, open pelvic injury with uncontrolled bleeding, second and third degree burns in excess of 60% total body surface area, profound shock with multiple injuries, and agonal respiration. These injuries, or others, individually or in combination, are so severe that survival is unlikely.⁷²⁵

Furthermore, mercy would be defined as “a compassionate or kind forbearance shown toward another person. It includes acts of kindness, compassion, easing suffering, and favor.”⁷²⁶ Application of these definitions to the proposed affirmative defense would permit Soldiers who believed their conduct was morally correct to litigate their case, and would give

⁷²⁴ This mirrors the burden of the accused in asserting mistake of fact regarding age in a carnal knowledge prosecution. See *supra* MCM, note 3, R.C.M. 916(j)(2).

It is a defense to a prosecution for carnal knowledge that, at the time of sexual intercourse, the person with whom the accused had sexual intercourse was at least 12 years of age, and the accused reasonably believed the person was at least 16 years of age. The accused must prove this defense by a preponderance of the evidence.

Id.

⁷²⁵ MILITARY MEDICAL ETHICS, *supra* note 114, at 382-83 (citing to T. E. BOWEN & R. F. BELLAMY, THE EMERGENCY WAR SURGERY NATO HANDBOOK 184-86 (2d ed., 1988)) (reproduced in Exhibit 13-3). The definition is derived from the description of “expectant casualties.” *Id.*

⁷²⁶ See RANDOM HOUSE, *supra* note 9, at 1203.

the members the ability to judge the actions based on moral culpability. With the affirmative defense, the accused Soldier would not be “constructively coerced” into pleading guilty, despite the charging decision of the government prosecutor.

3. Modified sentencing burden

As an alternative to the both the “new paradigm” statute and the partial affirmative defense, the government should have an additional sentencing burden for combat-related mercy killing cases. This additional sentencing burden is applied in the same manner as “the heat of sudden passion under adequate provocation” triggers the voluntary manslaughter instruction.⁷²⁷ If there is no evidence of “heat of sudden passion,” then there is no voluntary manslaughter instruction. Under the additional sentencing burden, if there is no evidence of the motive of the accused Soldier, or the evidence shows a motive other than mercy, then there is not additional burden, and the mandatory minimum applies. The same with the accused Soldier’s belief the victim was gravely wounded.⁷²⁸ Once there is some evidence of both the accused Soldier believed the victim was gravely wounded and he killed him to ease his suffering, then the burden shift to the government to trigger the mandatory minimum. Otherwise, the full range of punishment applies, except death. With voluntary manslaughter, the government must prove beyond a reasonable doubt that there was no “heat of sudden

⁷²⁷ See *supra* Part III.B.1.c. See also Part III.B.2.c (applying voluntary manslaughter to facts of combat-related mercy killing).

⁷²⁸ The additional sentencing burden would utilize the same definitions as used with the partial affirmative defense.

passion caused by adequate provocation.” Similarly, with the additional sentencing burden, to trigger the minimum sentence of life, the government must prove beyond a reasonable doubt that the accused did not believe the victim was gravely wounded or that he did not kill him to ease his suffering. Additionally, if the government proves the accused Solders belief that the victim was gravely wounded was unreasonable, then the mandatory minimum will still apply. Rule for Court Martial 1003 should be modified as follows:

(e) Circumstance negating mandatory minimum sentence for premeditated murder.

(1) *Some evidence of merciful motive.* If an accused is found guilty of premeditated murder, if there is some evidence the motive of the accused was mercy and the accused believed the victim was gravely wounded, the accused shall punished, except death, as the court-martial directs.

(2) *Burden for mandatory sentence.* Notwithstanding R.C.M. 1003(e)(1), the mandatory minimum sentence of life with eligibility for parole will apply if the prosecution proves beyond a reasonable doubt:

(A) The accused’s motive was not mercy; or

(B) The accused did not believe the victim was gravely wounded; or

(C) The accused’s belief that the victim was morally wounded was unreasonable.⁷²⁹

Under this proposal (after there is some evidence of mercy and the victim was gravely wounded), the government can trigger the mandatory minimum sentence if they disprove any one of three facts beyond a reasonable doubt. This additional sentencing burden also

⁷²⁹ See *infra* Appendix B: Proposed Sentencing Instruction.

provides a vehicle for the Soldier who believes the combat-related mercy killing was morally correct conduct to try the case without the significant risk of the mandatory minimum sentence of life in prison. Even with this protection, the Soldier faces the full range of punishment, including life in prison.

VI. Conclusion

The current way the government prosecutes combat-related mercy killings is fundamentally unfair. Instead of charging unpremeditated murder or voluntary manslaughter, the government charges the Soldier with premeditated murder, thereby triggering the mandatory minimum sentence of confinement for life if convicted. This practice ignores the originally conceived purpose of the mandatory minimum sentence of life—punishing the most heinous of murders based on evilness and significance of the killing, not the manner by which the act originated.⁷³⁰ In the case of a combat-related mercy killing, premeditation fails as the determinative factor for culpability or moral blameworthiness for the killing.⁷³¹

Using premeditation as the sole factor elevating the punishment for a combat-related mercy killing from as little as no punishment to the mandatory minimum punishment of

⁷³⁰ See PILSBURY, *supra* note 667, at 100-01 (noting the focus should be on culpability).

⁷³¹ See Pauley, *supra* note 708, at 169; see also Givelber, *supra* note 708, at 383; see generally PILSBURY, *supra* note 667, at 99 (arguing premeditation is overbroad); Stacy, *supra*, note 667, at 1024 (arguing premeditation is overinclusive).

confinement for life ignores that premeditation, in some instances, is a mitigating circumstance.⁷³² The mitigating nature of mercy killings is recognized in other areas of the law, including the federal sentencing guidelines⁷³³ and the considerations for release from confinement for individuals convicted by federal district courts.⁷³⁴

Additionally, the government practice of charging Soldiers with premeditated murder for a combat related mercy killing “constructively coerces” them to plead guilty to lesser offense to avoid the mandatory minimum sentence of confinement for life. Facing the possibility of the mandatory minimum, defense counsel may be derelict in their duty not to encourage the Soldier to submit an offer to plead guilty for a sentence cap of a few years, thereby staving-off the possibility of confinement for life. Resulting from the Soldier’s “constructively coerced” guilty plea, the government avoids the burden of proving the case,

⁷³² See Givelber, *supra* note 667, at n.39.

⁷³³ See SENTENCING GUIDELINES, *supra* note 511, § 5K2.11 (indicating a reduced sentence may be appropriate in the case of a mercy killing).

⁷³⁴ United States v. Garcia, 340 F3d 1013, 1018 (9th Cir. 2003). In evaluating the scope of the Mandatory Detention Act of 1990 which prohibited the release of violent offenders from confinement while pending appeal, the court noted mercy killings were a possible exception to the act. *Id.* Conceding that there was little legislative history on the Act, the court quoted a letter from the Assistant Attorney General Carol T. Crawford to the Bill’s sponsor, Sen. Paul Simon:

We are, however, somewhat concerned about the mandatory nature of the proposed amendment. While confinement will be the proper result in the vast majority of cases of persons convicted for crimes of violence and serious drug offenses, there may be rare instances in which release, under appropriate conditions, would be proper. For example, suppose a situation in which the convicted defendant does not pose either a danger to the community if released or a risk of flight, and in which the appeal raises a substantial question of law (e.g. an elderly man convicted under 18 U.S.C. 1111 of the mercy killing of his spouse, who has lived in the community all his life without prior incident, and who is challenging the applicability of the federal murder statute to mercy killings . . .)

Id.

including withstanding attack on causation, disproving sudden heat of passion causing adequate provocation for the killing,⁷³⁵ possibility of jury nullification,⁷³⁶ and realistically loses the chance of a punishment not including confinement.⁷³⁷

The government practice of charging premeditated murder for combat-related mercy killings renders the defense mitigation case meaningless. If the Soldier contests the combat-related mercy killing on the merits and is convicted the panel members have three choices; death if referred capital, life without the possibility of parole, and life with the possibility of parole. Regardless of how powerful the mitigation case of the accused Soldier, the best possible outcome is confinement for life with eligibility for parole—a complete loss, especially given the sentences imposed in the three mercy killing cases tried in 2005. In those cases, all facing lesser charges, the sentences imposed included a dismissal with no jail time,⁷³⁸ a bad-conduct discharge with one year confinement,⁷³⁹ and a bad-conduct discharge with three years confinement.⁷⁴⁰ That stands in stark contrast to the mandatory minimum

⁷³⁵ See Part III.B.2.c. (demonstrating how voluntary manslaughter may apply to a combat-related mercy killing).

⁷³⁶ See Huestis, *supra* note 528, at 85 (noting it is the right of military panels to nullify as a check on overzealous prosecutors).

⁷³⁷ Compare *United States v. Maynulet*, *supra* Part II.B.3., with *United States v. Alban-Cardenas* and *United States v. Horne*, *supra* Part II.B.3. See also *supra* Part IV.B (comparing the presentation of witnesses and evidence in *Maynulet*, *Horne*, and *Alban-Cardenas*).

⁷³⁸ See *Maynulet Transcript*, *supra* note 302, at 872.

⁷³⁹ See *Alban-Cardenas Transcript*, *supra* note 227, at 138.

⁷⁴⁰ See *Sanders*, *supra* note 29, at A13.

sentence of life a Soldier convicted of premeditated murder faces for an honorably motivated combat-related mercy killing.

Because the discretion to charge rests with commanders and government prosecutors, it is impossible to insure that future Soldiers facing a court-martial for a combat-related mercy killing will not be charged with premeditated murder. Therefore the UCMJ should be modified to eliminate premeditation as the sole aggravating factor triggering mandatory confinement for life. Homicide classifications should reflect the reality of the mitigating circumstances of combat-related mercy killings. The draft “new paradigm” homicide statute accomplishes this goal. Adopting the “new paradigm” homicide statute specifically eliminates premeditation as the sole determinative factor for which homicides will face the mandatory minimum sentence of life, and recognizes as mitigating the motive to eliminate the pain of a gravely wounded individual. This change brings possible punishments for a combat-related mercy killing “in line” with the seriousness and wrongfulness of the crime. The proposed change encourages Soldiers who believe their conduct was morally justified under the circumstances to present their case to a panel of military officers to judge the morality of that conduct with minimal risk of a mandatory sentence of confinement for life. At the same time, the proposed change permits the Soldier to force the government to prove his actions actually caused the death of the victim—lest we forget that the victim suffered grave wounds at the time. To do this, the government will be forced to prove that the wounded combatant did not die from initially sustained grave wounds. Further, the proposed change permits the panel members, in their judgment and based on the unique facts of the case, to exercise their right to nullify it with their verdict. Finally, the “new paradigm”

homicide statute permits panel members to exercise their discretion in evaluating the merits of the defense mitigation case. Unlike the results in *Forrest*, *Gilbert*, and *Griffith*, the “new paradigm” homicide statute permits the members to adjudicate a just sentence that fairly reflects the complete defense mitigation case.

Until the “new paradigm” homicide statute is adopted, or the classification structure of the UCMJ changed to eliminate premeditation as the sole aggravating factor, separate action should be taken to minimize the potential harsh results. This should be done in either of two ways: adding a partial affirmative defense for mercy killing or adding an additional government triggering burden for the mandatory minimum sentence of confinement for life.

The partial affirmative defense mitigates premeditated and unpremeditated murder to voluntary manslaughter as a matter of law if the defense proves the Soldier reasonably believed the victim was gravely wounded and he delivered the *coup de grâce* to eliminate the victim’s suffering. The burden of proof for the defense is the preponderance of evidence, which enables the true mercy killing cases to be successfully defended, while at the same time preventing “dressed up” mercy killings from escaping the full wrath of justice.⁷⁴¹

The additional sentencing burden, on the other hand, does not mitigate the findings of the court, but rather adds an additional hurdle to the imposition of a mandatory minimum sentence of confinement for life. If, during either the findings or sentencing phase of the

⁷⁴¹ See Posner, *supra* note 499, at n.51.

court-martial, there is some evidence that the accused-Soldier believed the victim was gravely wounded and he committed the killing to ease his suffering, then the mandatory minimum will not apply. In that case, the full range of punishment, except death, is available for the court. If the government chooses, they can trigger the mandatory minimum by proving beyond a reasonable doubt that the accused Soldier's motive was not mercy or that he did not honestly or reasonably believe the victim was gravely wounded. This additional sentencing burden serves as a safety net, permitting those Soldier's who believe their conduct was morally right to fully litigate their case before a panel of officers.

Mercy killings have been a part of war since the beginning of war itself.⁷⁴² Specific weapons were designed for the purpose of administering a *coup de grâce* to gravely wounded combatants.⁷⁴³ It is a recent phenomenon to prosecute Soldiers for combat-related mercy killings, and the law has not adapted to this new category of homicide. Immediate action is necessary to protect Soldiers from the harshness of the mandatory minimum sentence of life for combat-related mercy killings. Any of the three proposals insures that the moral culpability of the Soldier's actions will be equated with a proper punishment that considers all the mitigating evidence.

⁷⁴² See MILITARY MEDICAL ETHICS, *supra* note 114, at 286.

⁷⁴³ See RANDOM HOUSE, *supra* note 9, at 1229 (defining misericord as a medieval dagger used to kill gravely wounded in battle).

Appendix A. New Paradigm Homicide Statute

New Paradigm Homicide Statute⁷⁴⁴

(A) First-degree murder. If the jury finds beyond a reasonable doubt that there is at least one aggravating factor and no mitigating factor present or that the aggravating factor(s) substantially outweigh(s) any mitigating factor(s), it shall return a verdict of first-degree murder.

(B) Voluntary manslaughter. If the jury finds beyond a reasonable doubt that there is at least one mitigating factor and no aggravating factor present or that the mitigating factor(s) substantially outweigh(s) any aggravating factor(s), it shall return a verdict of voluntary manslaughter.

(C) Second-degree murder. The jury shall return a verdict of second-degree murder if it makes neither the finding specified in (A) nor the finding specified in (B).

(1) Aggravating Factors:

(a) the killing was planned, and the planning exhibited exclusive concern for the accused's selfish financial, sexual, emotional, or other interests and callous disregard for the victim's interests;

(b) the killer had a family or other intimate relationship with the victim, and the killing was neither motivated by an understandable view of the victim's best interests nor provoked by the victim's serious abuse of the accused or of some other family member;

(c) the killing occurred while the accused was committing a separate felony involving violence or sexual predation;

(d) the killing involved torture or the knowing infliction of protracted pain or suffering;

(e) the killing involved more than one victim;

⁷⁴⁴ If the jury finds beyond a reasonable doubt that the defendant intended to kill the victim, it shall decide whether to classify the killing as first-degree murder, second-degree murder, or voluntary manslaughter as described in (A)-(C) in the proposed new paradigm statute, based upon the aggravating and mitigating circumstances specified in (1) and (2). Tom Stacy, *Changing Paradigm of the Law of Homicide*, 62 OHIO ST. L.J. 1007, 1059-1060 (2001).

(f) the victim was a law enforcement officer or was vulnerable by reason of age or disability.

(2) Mitigating circumstances:

(a) the killer was in an extreme state of passion that was provoked by the victim's commission of a serious legal wrong against the killer or the killer's family;

(b) the victim consented to the killing to relieve suffering;

(c) if the defenses of duress or necessity were extended to homicide, the killing would be within one of those defenses;

(d) the accused genuinely but unreasonably believed that deadly force was needed to prevent the imminent infliction of death or serious bodily harm by an unlawful aggressor.

Additional military mitigating circumstance

(e) during a military operation, the accused believed the victim was gravely wounded and the motive of the accused was to end the victim's suffering.⁷⁴⁵

⁷⁴⁵ This mitigating circumstance was not in the draft proposed by Professor Tom Stacy. *See id.*

Appendix B. Proposed Sentencing Instruction

(MANDATORY LIFE)

The accused has been found guilty of premeditated murder.

There is some evidence that the accused believed (state the name of the victim) was gravely wounded and (his) (her) motive for killing was mercy.

If the government proves beyond a reasonable doubt that the accused's motive for killing (state the name of the victim) was not mercy, then the mandatory minimum sentence you can adjudge is confinement for life with eligibility for parole. Likewise, if the government proves beyond a reasonable doubt that the accused did not believe (state the name of the victim) was gravely wounded, or if you believe beyond a reasonable doubt that the accused's belief that (state the name of the victim) was gravely wounded was unreasonable, then the mandatory minimum sentence you can adjudge is confinement for life with eligibility for parole.

By "reasonable doubt" is intended not a fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt suggested by the material evidence or lack of it in this case. It is an honest misgiving generated by insufficiency of proof of guilt. Proof beyond a reasonable doubt means proof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty.

The accused's belief is reasonable if it was based on information, or lack of it, which would indicate to a reasonable person that (state the name of the victim) was gravely wounded at the time of the killing.

In deciding whether the accused was not motivated by mercy, and did not honestly and reasonably believe (state the name of the victim) was gravely wounded at the time of the killing, you should consider the probability or improbability of all the evidence presented on these issues. You should consider all the evidence presented on this issue, (including but not limited to the accused's (age) (education) (experience) (military training) (medical training)) (nature of the military mission) ((nature) (severity) (location) of the wounds inflicted on (state the name of the victim)) (reliance on advice of (combat life saver) (medic) (nurse) (doctor) (other)) (the practicality of medical evacuation (by air) (by ground)) (efforts rendered to medically treat (state name of the victim)) (here the military judge may specify other significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

If you are not convinced beyond a reasonable doubt that the accused's motive was not mercy and you are not convinced beyond a reasonable doubt that the accused reasonably believed (state the name of the victim) was gravely wounded at the time of the killing, then the maximum punishment that may be adjudged in this case is:

Appendix C. Proposed Partial Affirmative Defense Instruction

The evidence has raised mercy as the accused's motive for the killing, as alleged in (the) Specification(s) () of (the) (Additional) Charge ().

For "mercy killing" to be a partial defense, the burden is on the defense to convince you by the preponderance of the evidence that the accused honestly and reasonably believed (state the name of the victim) was gravely wounded and (his) (her) motive for killing (state name of the victim) was mercy. A preponderance of evidence means that it is more likely than not that a fact exists. In this case, if you are convinced that, at the time of the killing, it is more likely than not that the accused was motivated by mercy; and that (he) (she) honestly and reasonably believed (state the name of the victim) was gravely wounded, then "mercy killing" is a partial defense to the offense of (premeditated murder) (unpremeditated murder) and you must find the accused not guilty of (premeditated murder) (and) (unpremeditated murder).

To be reasonable, the accused's belief must have been based on information, or lack of it, which would indicate to a reasonable person that (state the name of the victim) was gravely wounded at the time of the killing.

In deciding whether the accused was motivated by mercy, and honestly and reasonably believed (state the name of the victim) was gravely wounded at the time of the killing, you should consider the probability or improbability of all the evidence presented on these issues. You should consider all the evidence presented on this issue, (including but not limited to the accused's (age) (education) (experience) (military training) (medical training)) (nature of the military mission) ((nature) (severity) (location) of the wounds inflicted on (state the name of the victim)) (reliance on advice of (combat life saver) (medic) (nurse) (doctor) (other)) (the practicality of medical evacuation (by air) (by ground)) (efforts rendered to medically treat (state name of the victim)) (here the military judge may specify other significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

"Mercy" is a compassionate or kind forbearance shown toward another person. It includes acts of kindness, compassion, easing suffering, and favor.

Appendix D. Mercy Killing Morality Questionnaire

Responding to this mercy killing morality questionnaire were 117 company and field grade judge advocates from the 25th Criminal Law Advocacy Course, the 169th Officer Basic Course and the 54th Graduate Course.

Killing Scenarios

Scenario A – In the 1840s, a male Native American sees female from a warring tribe staked to tree and being set on fire by females from the raiding tribe. The male, from the raiding tribe, shoots female tied to tree through heart killing her before she is engulfed in flames.

Is the killing moral? Absolutely • Probably • Unsure • Probably Not • Absolutely Not
27 (23%) • 46 (39%) • 13 (11%) • 18 (16%) • 13 (11%)

Scenario B – In the Iraq War, an Iraqi insurgent is fleeing from U.S. forces in a civilian vehicle. During the chase he is shot in the head, creating a gaping wound from the back of the skull to the front of the skull, 1 inch wide and 6 inches long. Brain matter is exposed and a part “the size of a man’s fist” is blown out. The medic assesses the insurgent and concludes that “there is nothing that can be done for him” and informs the leader of the operation he is going to die. Although unconscious, the insurgent’s arm is moving in a ratcheting motion, and appears to be a reflex motion of some sort. He has lost 1½ liters of blood. Air evacuation is not authorized, and the insurgent objectively appears to be suffering. The leader of the operation shoots the insurgent in the head killing him.

Is the killing moral? Absolutely • Probably • Unsure • Probably Not • Absolutely Not
23 (20%) • 40 (35%) • 11 (9%) • 22 (19%) • 20 (17%)

Scenario C – During the Falklands War, a Prisoner of War is voluntarily moving munitions, when a round explodes. The POW is caught on fire, and can be seen moving clearly through the flames. A medic attempts to get to the POW, but the heat of the fire is too great. The British medic fires 4 rounds into the POW until he stops moving.

Is the killing moral? Absolutely • Probably • Unsure • Probably Not • Absolutely Not
20 (17%) • 35 (30%) • 22 (19%) • 25 (21%) • 15 (13%)

Scenario D – A Soldier sees movement on the ground in front of him and cautiously investigates. It is a wounded Vietnamese Soldier, injured the night before

in a battle. He is lying there with half a meter of intestines spread over the ground. A closer look revealed that most of his head was blown off, exposing his brain tissue. His arms and legs were twitching as if trying to crawl; his face was in the dirt with his entrails pierced by sticks. His bloodied body was covered in dirt and leaves, and digested rice was oozing out of the large shrapnel wound in his slashed stomach. The Soldier shoots him twice in the heart, killing him.

Is the killing moral? Absolutely • Probably • Unsure • Probably Not • Absolutely Not
29 (25%) • 32 (27%) • 24 (21%) • 20 (17%) • 12 (10%)

Scenario E – In the Vietnam War, near a downed helicopter, a U.S. Ranger found a U.S. Soldier who was staked to the ground by his hands, feet, and neck. His face was scared and mutilated, and he had been skinned from the upper chest to his waist. His flesh had been eaten by flies, maggots and jungle animals, exposing his intestines. The Soldier was still clinging to life, but moving him would almost certainly kill him. Still conscious, the Soldier begs the Ranger to kill him. The Ranger shoots the Soldier in the head, killing him instantly.

Is the killing moral? Absolutely • Probably • Unsure • Probably Not • Absolutely Not
37 (32%) • 44 (37%) • 16 (14%) • 9 (8%) • 11 (9%)

Scenario F – A U.S. Soldier is evacuated to a field hospital in Iraq. He has sustained massive head trauma, exposing brain matter, some of which was blown out. He has also lost both legs and one arm when his vehicle hit an improvised explosive device. The Soldier is not expected to live more than an hour, and is miraculously fading “in and out” of consciousness. Expecting the Soldier to die shortly, the attending surgeon administers an analgesic that will eliminate any pain, and certainly shorten his life. The soldier dies 10 minutes after the administration of the analgesic.

Is the killing moral? Absolutely • Probably • Unsure • Probably Not • Absolutely Not
39 (33%) • 42 (36%) • 17 (14%) • 10 (9%) • 9 (8%)

Scenario G – In 1799, French troops are marching through Syria on a campaign against the Turks. During the campaign, 50 French troops are stricken with the bubonic plague, and are dying in a military hospital. The prognosis for the troops is grave, and none can be evacuated on their own. The Turks are closing in on the hospital, and will be there within hours. Knowing the tortuous fate of the French Soldiers in the hands of the Turks, poison is administered to all 50 French troops stricken with bubonic plague and all but 7 die.

Are the killings moral? Absolutely • Probably • Unsure • Probably Not • Absolutely Not
6 (5%) • 21 (18%) • 29 (25%) • 30 (26%) • 31 (26%)

Scenario H – During World War II, in the Burma Campaign, 19 British Soldiers are severely wounded. The doctor estimates they all will die in a matter of hours. The wounds are horrific; from complete loss of the body from the hips down, to gaping head wounds, to exposed intestines. The doctor estimates he can save 30 different soldiers if the troops carrying the 19 can be used to evacuate the 30. The Japanese are hours away from closing in on the British location. The commander ordered that none of his Soldiers shall see the Japanese. The 19 Soldiers are each shot in the head by the doctor.

Are the killings moral? Absolutely • Probably • Unsure • Probably Not • Absolutely Not
11 (9%) • 16 (14%) • 28 (24%) • 30 (26%) • 32 (27%)

Scenario I – During World War I, the British were battling the Germans in prolonged trench warfare. A British Soldier is severely wounded by artillery, and has lost a leg and an arm. Bleeding profusely, the Soldier is unable to be moved because he is in “no man’s land” between the trenches, and is expected to die. A medic administers a lethal dose of morphine to the wounded soldiers.

Is the killing moral? Absolutely • Probably • Unsure • Probably Not • Absolutely Not
9 (8%) • 37 (31%) • 27 (23%) • 34 (29%) • 10 (9%)

Appendix E. National Prosecution Standards – Charging

Pre-Trial

It was possible in some cases, the Court agreed, that the availability of such agreements might “tempt prosecutors to bring frivolous charges, or to dismiss meritorious charges, to protect the interests of other officials.” But a *per se* rule of automatically invalidating such agreements both “improperly assumes prosecutorial misconduct” and “fails to credit other relevant public interests[.]” Many Section 1983 suits are marginal and some even frivolous, the Court analyzed, yet the burden of defending such lawsuits may be great. “To the extent release-dismissal agreements protect public officials from the burdens of defending such unjust claims, they further this important public interest.”

What the Court adopted was a case-by-case approach for assessing the propriety of such agreements, as utilized by lower courts in such cases as *Bushnell v. Rossetti*, 750 F.2d 298 (4th Cir. 1984), and *Jones v. Taber*, 648 F.2d 1201 (9th Cir. 1981). NDAA supports the ruling of the Court and has made it an integral part not only of this standard but also, as noted, of the Charging, Diversion, and Plea Negotiations standards, *infra*. While the ruling of the Court was in the context of plea negotiations, the Court’s rationale is equally applicable in the prosecutor’s screening, charging, and diversion functions. To the extent that the revised Standards for Criminal Justice of the American Bar Association refuse to follow the U.S. Supreme Court ruling in *Town of Newton v. Rumery*, they are expressly rejected by the NDAA standards.

CHARGING

43.1 Prosecutorial Discretion

In the exercise of the discretion to prosecute, the prosecutor should determine which charges should be filed and how charges should be presented before a grand jury or court.

43.2 Propriety of Charges

The prosecutor should file charges which adequately encompass the offense or offenses believed to have been committed by the accused.

129

National Prosecution Standards

43.3 Charges Substantiated by Evidence

The prosecutor should file only those charges which he reasonably believes can be substantiated by admissible evidence at trial.

43.4 Inappropriate Leveraging

The prosecutor should not attempt to utilize the charging decision only as a leverage device in obtaining guilty pleas to lesser charges.

43.5 Civil Liability

The prosecutor should not file charges for the purpose of obtaining from a defendant a release of potential civil claims against victims, witnesses, law enforcement agencies and their personnel, or the prosecutor and his personnel.

43.6 Factors to Consider

The prosecutor should exercise his discretion to file only those charges which he considers to be consistent with the interests of justice. Factors which may be considered in this decision include:

- a. The probability of conviction;
- b. The nature of the offense;
- c. The characteristics of the offender;
- d. Possible deterrent value of prosecution to the offender and society in general;
- e. Likelihood of prosecution by another criminal justice authority;
- f. The willingness of the offender to cooperate with law enforcement;
- g. Aid to other criminal justice goals through non-prosecution;
- h. The interests of the victim;
- i. Possible improper motives of a victim or witness;
- j. The availability of adequate civil remedies;
- k. The age of the offense;
- l. Undue hardship caused to the accused;
- m. A history of non-enforcement of a statute;
- n. Excessive cost of prosecution in relation to the seriousness of the offense;
- o. Recommendations of the involved law enforcement agency;

- p. The expressed desire of an offender to release potential civil claims against victims, witnesses, law enforcement agencies and their personnel, and the prosecutor and his personnel, where such desire is expressed after the opportunity to obtain advice from counsel and is knowing and voluntary; and
- q. Any mitigating circumstances.

COMMENTARY

The charging function of the prosecutor is the decision as to what charges are to be brought against an offender, once the determination has been made that criminal proceedings are to be instituted. The charging decision entails determination of the following issues:

1. What possible charges are appropriate to the offense or offenses; and
2. What charge or charges would best serve the interests of justice?

Determination of these issues is the prerogative and responsibility of the prosecutor. Application of the prosecutor's determination to any specific situation involves a complex charging decision. The selection of a particular charge by the prosecutor will have an important bearing upon the conduct of the criminal proceedings. The charging decision is not an exact science, since the prosecutor, in deciding what he feels to be the maximum charge supported by the available evidence, necessarily operates with less than total knowledge of the facts and possible trial situation. As a result, the initial charging decision may have to be modified and reduced to a lesser charge as the prosecutor gains additional information about the offense and offender.

In reaching the charging decision, acting within the parameters of then-available information, the prosecutor should seek to make a charging determination which appropriately reflects both the offense and the offender. The charge(s) selected should be supported by probable cause and should be supported by the available admissible evidence. Where possible, the penalty or sentence for the charge should reflect the severity of the offense.

National Prosecution Standards

The means by which a prosecutor elects to implement charging decisions is closely related to the mechanism utilized in reaching screening decisions; indeed, the two functions may be appropriately combined in a single individual or office division.

Diversion participation should only be done at the prosecutor's discretion, and the prosecutor should not yield to external pressures in either selecting a charge or deciding if diversion alternatives are a proper course of action. Diversion may be done at any stage of the proceeding but with the option of continued prosecution. That does not preclude diversion alternatives after a formal charge, and at this stage the threat of criminal prosecution is even greater to the accused and thus positive participation in diversion alternatives and favorable results may be more likely.

Initial standards or guidelines for charging will be established by the prosecutor only. In the one-person office, the prosecutor will also act as the agent for implementing these guidelines. Larger offices may find it convenient, particularly in respect to minor offenses, to delegate much of the responsibility for charging to selected individuals or to establish a separate office division for intake procedures. The designated individuals or office division should be responsible for reaching initial charging decisions, subject to review and approval by the prosecutor.

The prosecutor should establish guidelines by which charging decisions may be implemented. For the one-person office this formulation process will provide consistency of operation and an incentive to develop and articulate specific policies. The same holds true for other size offices.

Some prosecution offices employ vertical prosecution with great success, making the use of guidelines important for consistent application.

For an analysis of civil liability issues in the charging function, see the commentary to Standard 42, Screening.

Appendix F. R.C.M. 306(b) & Discussion

R.C.M. 306(b)

of evidence or of misconduct which, either alone or in conjunction with all other available evidence, justifies confinement.

Discussion

See R.C.M. 304(b) concerning who may order confinement.

(m) Exceptions.

(1) *Operational necessity.* The Secretary of Defense may suspend application of subsections (e)(2) and (3), (f), (h)(2)(A) and (C), and (i) of this rule to specific units or in specified areas when operational requirements of such units or in such areas would make application of such provisions impracticable.

(2) *At sea.* Subsections (e)(2) and (3), (f), (h)(2)(C), and (i) of this rule shall not apply in the case of a person on board a vessel at sea. In such situations, confinement on board the vessel at sea may continue only until the person can be transferred to a confinement facility ashore. Such transfer shall be accomplished at the earliest opportunity permitted by the operational requirements and mission of the vessel. Upon such transfer the memorandum required by subsection (h)(2)(C) of this rule shall be transmitted to the reviewing officer under subsection (i) of this rule and shall include an explanation of any delay in the transfer.

Discussion

Under this subsection the standards for confinement remain the same (although the circumstances giving rise to the exception could bear on the application of those standards). Also, pretrial confinement remains subject to judicial review. The prisoner's commander still must determine whether confinement will continue under subsection (h)(2)(B) of this rule. The suspension of subsection (h)(2)(A) of this rule removes the 72-hour requirement since in a combat environment, the commander may not be available to comply with it. The commander must make the pretrial confinement decision as soon as reasonably possible, however. (This provision is not suspended under subsection (2) since the commander of a vessel is always available.)

Rule 306. Initial disposition

(a) *Who may dispose of offenses.* Each commander has discretion to dispose of offenses by members of that command. Ordinarily the immediate commander of a person accused or suspected of committing an offense triable by court-martial initially determines how to dispose of that offense. A superior com-

mander may withhold the authority to dispose of offenses in individual cases, types of cases, or generally. A superior commander may not limit the discretion of a subordinate commander to act on cases over which authority has not been withheld.

Discussion

Each commander in the chain of command has independent, yet overlapping discretion to dispose of offenses within the limits of that officer's authority. Normally, in keeping with the policy in subsection (b) of this rule, the initial disposition decision is made by the official at the lowest echelon with the power to make it. A decision by a commander ordinarily does not bar a different disposition by a superior authority. See R.C.M. 401(e), 601(f). Once charges are referred to a court-martial by a convening authority competent to do so, they may be withdrawn from that court-martial only in accordance with R.C.M. 604.

See Appendix 3 with respect to offenses for which coordination with the Department of Justice is required.

(b) *Policy.* Allegations of offenses should be disposed of in a timely manner at the lowest appropriate level of disposition listed in subsection (c) of this rule.

Discussion

The disposition decision is one of the most important and difficult decisions facing a commander. Many factors must be taken into consideration and balanced, including, to the extent practicable, the nature of the offense, any mitigating or extenuating circumstances, the character and military service of the accused, any recommendations made by subordinate commanders, the interest of justice, military exigencies, and the effect of the decision on the accused and the command. The goal should be a disposition that is warranted, appropriate, and fair.

In deciding how an offense should be disposed of, factors the commander should consider, to the extent they are known, include:

- (A) the character and military service of the accused,
- (B) the nature of and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense's effect on morale, health, safety, welfare, and discipline;
- (C) appropriateness of the authorized punishment to the particular accused or offense;
- (D) possible improper motives of the accused;
- (E) reluctance of the victim or others to testify;
- (F) cooperation of the accused in the apprehension or conviction of others;
- (G) availability and likelihood of prosecution of the same or similar and related charges against the accused by another jurisdiction;
- (H) availability and admissibility of evidence;
- (I) existence of jurisdiction over the accused and the offense; and

II-26

(7) likely issues.

(c) *How offenses may be disposed of.* Within the limits of the commander's authority, a commander may take the actions set forth in this subsection to initially dispose of a charge or suspected offense.

Discussion

Prompt disposition of charges is essential. See R.C.M. 707 (speedy trial requirements).

Before determining an appropriate disposition, a commander should ensure that a preliminary inquiry under R.C.M. 303 has been conducted. If charges have not already been preferred, the commander may, if appropriate, prefer them and dispose of them under this rule. But see R.C.M. 601 (c) regarding disqualification of an accuser.

If charges have been preferred, the commander should ensure that the accused has been notified in accordance with R.C.M. 308, and that charges are in proper form. See R.C.M. 307. Each commander who forwards or disposes of charges may make minor changes therein. See R.C.M. 603(a) and (b). If major changes are necessary, the affected charge should be preferred anew. See R.C.M. 603(d).

When charges are brought against two or more accused with a view to a joint or common trial, see R.C.M. 307(c)(5), 601(c)(3). If it appears that the accused may lack mental capacity to stand trial or may not have been mentally responsible at the times of the offenses, see R.C.M. 706, 909, 916(k).

(1) *No action.* A commander may decide to take no action on an offense. If charges have been preferred, they may be dismissed.

Discussion

A decision to take no action or dismissal of charges at this stage does not bar later disposition of the offenses under subsection (c)(2) through (5) of this rule.

See R.C.M. 401(a) concerning who may dismiss charges, and R.C.M. 401(c)(1) concerning dismissal of charges.

When a decision is made to take no action, the accused should be informed.

(2) *Administrative action.* A commander may take or initiate administrative action, in addition to or instead of other action taken under this rule, subject to regulations of the Secretary concerned. Administrative actions include corrective measures such as counseling, admonition, reprimand, exhortation, disapproval, criticism, censure, reproach, rebuke, extra military instruction, or the administrative withholding of privileges, or any combination of the above.

Discussion

Other administrative measures, which are subject to regulations of the Secretary concerned, include matters related to efficiency reports, academic reports, and other ratings; rehabilitation and assignment; career field reclassification; administrative reduction for inefficiency; bar to reenlistment; personnel reliability program reclassification; security classification changes; pecuniary liability for negligence or misconduct; and administrative separation.

(3) *Nonjudicial punishment.* A commander may consider the matter pursuant to Article 15, nonjudicial punishment. See Part V.

(4) *Disposition of charges.* Charges may be disposed of in accordance with R.C.M. 401.

Discussion

If charges have not been preferred, they may be preferred. See R.C.M. 307 concerning preferal of charges. However, see R.C.M. 601(c) concerning disqualification of an accuser.

Charges may be disposed of by dismissing them, forwarding them to another commander for disposition, or referring them to a summary, special, or general court-martial. Before charges may be referred to a general court-martial, compliance with R.C.M. 405 and 406 is necessary. Therefore, if appropriate, an investigation under R.C.M. 405 may be directed. Additional guidance on these matters is found in R.C.M. 401-407.

(5) *Forwarding for disposition.* A commander may forward a matter concerning an offense, or charges, to a superior or subordinate authority for disposition.

Discussion

The immediate commander may lack authority to take action which that commander believes is an appropriate disposition. In such cases, the matter should be forwarded to a superior officer with a recommendation as to disposition. See also R.C.M. 401(c)(2) concerning forwarding charges. If allegations are forwarded to a higher authority for disposition, because of lack of authority or otherwise, the disposition decision becomes a matter within the discretion of the higher authority.

A matter may be forwarded for other reasons, such as for investigation of allegations and preferal of charges, if warranted (see R.C.M. 303, 307), or so that a subordinate can dispose of the matter.

(d) *National security matters.* If a commander not authorized to convene general courts-martial finds that an offense warrants trial by court-martial, but believes that trial would be detrimental to the prosecution of a war or harmful to national security, the

Appendix G. MCM, Appendix 21, Analysis of R.C.M. 306(b)

(b) *Policy.* This subsection is based on paragraph 30 *g* of MCM, 1969 (Rev.). Although it is guidance only, it is sufficiently important to warrant inclusion in the rules as a presidential statement.

The second paragraph of the discussion provides guidelines for the exercise of the discretion to dispose of offenses. Guideline (A) is based on paragraph 33 *h* of MCM, 1969 (Rev.). Guidelines (B) through (G) are based on *ABA Standards, Prosecution Function* § 3-3.9(b) (1979). The other guidelines in § 3-3.9 are not needed here: § 3-3.9(a) (probable cause) is followed in the rule; § 3-3.9(b)(i) is inconsistent with the convening authority's judicial function; §§ 3-3.9(c) and (d) are unnecessary in military practice; and § 3-3.9(e) is implicit in § 3-3.9(a) and in the rule requiring probable cause. Guidelines (H), (I), and (J) were added to acknowledge other practical considerations.

(c) *How offenses may be disposed of.* This subsection is based generally on Articles 15, 22-24, and 30, and paragraphs 32-35, and 128 of MCM, 1969 (Rev.). The discussion provides additional guidance on the disposition options.

Appendix H. ABA Standard 3-3.9 – Charging Decision

Standard 3-3.9 Discretion in the Charging Decision

(a) A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.

(b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are:

- (i) the prosecutor's reasonable doubt that the accused is in fact guilty;
- (ii) the extent of the harm caused by the offense;
- (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender
- (iv) possible improper motives of a complainant
- (v) reluctance of the victim to testify
- (vi) cooperation of the accused in the apprehension or conviction of others; and
- (vii) availability and likelihood of prosecution by another jurisdiction.

(c) A prosecutor should not, be compelled by his or her supervisor to prosecute a case in which he or she has reasonable doubt about the guilt of the accused.

(d) In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or

to a desire to enhance his or her record of convictions.

(e) In cases which involve a serious threat to the community, the prosecutor should not be deterred from prosecution by the fact that in the jurisdiction juries have tended to acquit persons accused of the particular kind of criminal act in question.

(f) The prosecutor should not bring or seek charges greater in number or degree than can reasonably be supported with evidence at trial or than are necessary to fairly reflect the gravity of the offense.

(g) The prosecutor should not condition a dismissal of charges, nolle prosequi, or similar action on the accused's relinquishment of the right to seek civil redress unless the accused has agreed to the action knowingly and intelligently, freely and voluntarily, and where such waiver is approved by the court.