

# NAVAL LAW REVIEW

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# HOW MUCH IS TOO MUCH *PRO PATRIA*?<sup>1</sup> ASSESSING THE LIMITS OF A CHAPLAIN'S ROLE AS ADVISER TO THE COMMAND

Rebecca Ahdoot\*

## I. Introduction

Religious sensibilities of Muslim global war on terror detainees in Guantanamo Bay, Cuba were used against them as an interrogation technique by U.S. authorities. This article discusses, analyzes, and critiques the role of U.S. military chaplains in supporting, opposing, or ignoring such interrogations. What was their legitimate role, what should it have been, and how does that analysis affect their noncombatant status?

One of seventeen Muslim chaplains in the military in 2001,<sup>2</sup> then-Navy Lieutenant (LT) Abuhena Saif-ul-Islam, was deployed to serve as the camp chaplain in January 2002, just two weeks after the detainees arrived in Guantanamo.<sup>3</sup> In that capacity he was to serve as an advisor to the command regarding religious matters and was also available for spiritual support to the detainees.<sup>4</sup> In a series of moves made to balance military security interests with the spiritual needs of the detainees, LT Saif-ul-Islam purportedly made such accommodations as reviewing the detainees' menus to make sure the food fit within religious dietary restrictions and advising camp authorities about fasting

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\* The author is an associate attorney in the New York office of Clausen Miller P.C. She gives special thanks to the Honorable Judge Evan Wallach, United States Court of Appeals for the Federal Circuit and Lieutenant Commander Charles E. Varsogea, Chaplain Corps, U.S. Navy for assisting with her research.

<sup>1</sup> The branch plaque for the U.S. Army Chaplain Corps reads: "*Pro Deo et Patria*," or "For God and Country." Major General Douglas L. Carver, *The Powerful Privilege and Responsibility of Sacred Communications*, ARMY CHAPLAINCY, Summer-Fall 2010, at 1, 1, 3, available at <http://www.chapnet.army.mil/pdf/pro-bulletin.pdf>.

<sup>2</sup> Tony Perry, *Response to Terror; Muslim Chaplains Play New Role*, L.A. TIMES, Oct. 2, 2001, at A3, available at <http://www.beliefnet.com/News/2001/10/Muslim-Chaplains-Play-Key-Role.aspx>.

<sup>3</sup> See Press Release, Laura J. Brown, Office of Int'l Info. Programs, U.S. Dep't of State, Muslim Chaplain Sees to Detainees' Needs at Guantanamo (14 Jan. 2002), available at <http://www.usembassy-israel.org.il/publish/peace/archives/2002/february/021502.html>.

<sup>4</sup> See *Call to Prayer Made for Detainees Held in Cuba*, CNN.COM (Jan. 25, 2002, 7:23 AM EST), [www.cnn.com/2002/WORLD/americas/01/24/detainees.cuba/index.html](http://www.cnn.com/2002/WORLD/americas/01/24/detainees.cuba/index.html) [hereinafter *Call to Prayer*].

periods.<sup>5</sup> According to one article, Saif-ul-Islam “successfully pleaded their [the detainees’] case for not being shaved again after they were shorn in Afghanistan.”<sup>6</sup> Despite this assertion, however, the practice of shaving off beards did not end until May 2007.<sup>7</sup>

It is not apparent how to explain the difference between LT Saif-ul-Islam’s statement and reality. What seems certain is that he advised guards that cutting of beards is offensive to Islam and that he later told the public it was not being done. This situation illustrates the tension that existed between the domestic chaplain’s role as both religious provider to detainees and as advisor to a detaining power. If his religious advice were to be used against a detainee, the chaplain would potentially be contravening the noncombatant role set out for him under international and domestic law.

This article explores the legal boundaries of how far a military chaplain can go in his role as an advisor to the command. It ultimately concludes that if a chaplain’s input, given as a command advisor, hurts a detainee, he may be held accountable for violations of both international and domestic laws. The article begins by explaining the role of and protections for chaplains throughout history. It then analyzes the role of a modern chaplain under international and domestic laws and relates this role to the chaplain’s noncombatant status. After this general background, the article discusses how religious entitlements of individuals, such as detainees, are affected by the status bestowed upon them by the Geneva Conventions and how the characterization of prisoners at Guantanamo as unlawful combatants rather than as prisoners of war makes possible a separation of the chaplain from his legal role. It discusses more specifically the role of a domestic chaplain under domestic bodies of law pertaining to advisement and liaison and performs a case study of the dual role of the domestic chaplain in Guantanamo. Finally, the article concludes that a chaplain owns his noncombatant status and this ownership must be protected with great vigilance. Even if authorized by executive direction, a chaplain should not stray from the guidelines set forth in the Geneva Conventions and remains first and foremost a religious provider uninvolved with command advisement regarding religion of detainees other than for humanitarian purposes. By failing to follow these guidelines, a chaplain may not only be violating his

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<sup>5</sup> Gerry J. Gilmore, *Navy Muslim Chaplain Finds His Calling in America*, DEFENSE.GOV (Sept. 15, 2006), <http://www.defense.gov/News/NewsArticle.aspx?id=930>; Carol Rosenberg, *Guantanamo Base Draws Media Swarm*, MIAMI HERALD, Feb. 25, 2002, at A8.

<sup>6</sup> Katharine Q. Seelye, *A Nation Challenged: The Detainees; As Trust Develops, Guards Still Maintain Full Alert*, N.Y. TIMES, Feb. 4, 2002, at A11, available at [www.nytimes.com/2002/02/04/us/nation-challenged-detainees-trust-develops-guards-still-maintain-full-alert.html](http://www.nytimes.com/2002/02/04/us/nation-challenged-detainees-trust-develops-guards-still-maintain-full-alert.html).

<sup>7</sup> Carol Rosenberg, *Terror Suspects’ Beards are Safe for Now*, MIAMI HERALD, Nov. 5, 2007, at A5, available at <http://www.miamiherald.com/2007/11/05/295969/terror-suspects-beards-are-safe.html#>.

role as set forth in the Geneva Conventions, but he may also be jeopardizing the protected status of American chaplains in the future.

## II. The Role of a Chaplain: Past and Present

### A. A Historical Look at the Chaplaincy

In Medieval Europe, much of what shaped the role of chaplain was determined by the notion of the just war. Just war was the principle that determined the legality of combat behavior and the right to even resort to war. The idea of a just war was comprised of two legal theories: *jus ad bellum*, the right to resort to war, and *jus in bello*, the rules governing conduct in the war.<sup>8</sup> Together these concepts dictated what was considered legal behavior in war. Therefore, whether a war was considered just determined the right of combatants to actually engage in the war.<sup>9</sup> Along the same line of reasoning, justness determined whether individuals engaging in the war would be protected by law. *Jus in bello* principles also informed the rules relating to combatant immunities, the treatment of prisoners, and mercy shown individuals captured in a lawful war.<sup>10</sup>

Religious individuals—“men of the cloth”—were generally entitled to immunity from acts of war under two policies: social function and privilege, working hand in hand, and the innocence principle. Privilege was grounded in the belief that public welfare could be promoted by granting special rights to certain individuals who served general interests of the community.<sup>11</sup> Because social function excluded these religious individuals from engaging in war, reciprocal considerations dictated that war not be waged against them.<sup>12</sup> The innocence principle, on the other hand, focused on the fact that men of the cloth were presumed innocent and, therefore, should not be killed.<sup>13</sup> Such presumption of innocence was rebuttable if the individual engaged in hostilities, as evidenced by King Henry V’s 1415 proclamation prohibiting violations against the person of priests unless they were armed.<sup>14</sup>

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<sup>8</sup> THEODOR MERON, HENRY’S WARS AND SHAKESPEARE’S LAWS: PERSPECTIVES ON THE LAW OF WAR IN THE LATER MIDDLE AGES 40 (1993).

<sup>9</sup> *Id.* at 42.

<sup>10</sup> *Id.* at 44.

<sup>11</sup> *Id.* at 91.

<sup>12</sup> *Id.* at 92. Note that canonical privilege was made official and incorporated into canonical law during the papacy of Gregory the Ninth in the thirteenth century. *Dei treuga et pace* (of Truces and Peace) listed categories of religious individuals such as clerics, monks, friars, and other religious pilgrims, who were given “full security against the ravages of war.” *Id.* at 91–92.

<sup>13</sup> *See id.* at 93.

<sup>14</sup> *See id.*

There were actually many instances in which the presumption of a religious individual's innocence was rebutted. Often, English kings, including Henry V, demanded military service from the Church.<sup>15</sup> There were even instances of clergy leading an army. In 1398, Bishop Spenser of Norwich commanded an army invading Flanders.<sup>16</sup> Clergymen also often assisted the regime by spying, so much so that King Edward III and Richard II ordered heads of monasteries to refuse alien clergy admission into the monasteries and even completely excluded non-resident clergy from the country.<sup>17</sup>

In a young United States, chaplains served actively in wars until the mid-to-late 1800s—and somewhat sporadically thereafter—when the military leadership of the Union and the Confederacy signed reciprocal orders releasing captured military chaplains.<sup>18</sup> Lincoln's issuance of General Order 100,<sup>19</sup> also known as the Lieber Code of 1863,<sup>20</sup> the order that became the general precursor to the Geneva Conventions and modern laws of war, fundamentally altered the image of the “fighting chaplain” into the noncombatant one it is today. The Code provided chaplains with a protected status,<sup>21</sup> just as the Geneva Conventions do, and further provided:

Enemy's chaplains . . . are not prisoners of war, unless the command has reasons to retain them. In this latter case, or if, at their own desire, they are allowed to remain with their captured companions, they are treated as prisoners of war, and may be exchanged if the commander sees fit.<sup>22</sup>

## **B. The Modern International Framework for Chaplains' Rights: The Geneva Conventions**

The four Geneva Conventions of 1949 set the modern legal standards in the international community for determining the treatment and status of individuals on the battlefield.<sup>23</sup> Common article 3 provides *de minimis*

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<sup>15</sup> *Id.* at 96.

<sup>16</sup> *Id.* at 97.

<sup>17</sup> *Id.* at 99.

<sup>18</sup> Jonathan G. Odom, *Beyond Arm Bands and Arms Banned: Chaplains, Armed Conflict, and the Law*, 49 NAVAL L. REV. 1, 7 (2002).

<sup>19</sup> President Abraham Lincoln, Gen. Order No. 100 (24 Apr. 1863), reprinted in THE LAWS OF ARMED CONFLICTS 3, 11 (Dietrich Schindler & Jiri Toman eds., 3d ed. 1988) [hereinafter Gen. Order No. 100].

<sup>20</sup> *The Lieber Code of 1863, Military Law, Air War College*, U.S. AIR FORCE AIR UNIV., <http://www.au.af.mil/au/awc/awcgate/law/liebercode.htm> (last visited 24 Apr. 2013).

<sup>21</sup> Gen. Order No. 100, *supra* note 19, art. 53.

<sup>22</sup> *Id.*

<sup>23</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I];



protections to detainees when non-international armed conflict takes place on the territory of the High Contracting Parties.<sup>24</sup> These protections include prohibitions against: committing acts of violence to the life and person of detainees, including murder, torture, and cruel treatment; outrages upon personal dignity; and the passing of sentences without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees recognized as indispensable by civilized persons.<sup>25</sup>

When applied, the Conventions determine the treatment and level of protection afforded to an individual both on the field and when captured, based upon that individual's classification. As an overall scheme, individuals on the field are categorized either as combatants or noncombatants. Combatants include members of the armed forces of a party to the conflict.<sup>26</sup> Combatants may legally take part in the conflict, which also makes them legally targetable. However, they are also offered certain protections by the Conventions and must be classified as prisoners of war.<sup>27</sup>

Under the Conventions, chaplains are not considered combatants, because they are unarmed and do not participate in activities directly related to the conflict,<sup>28</sup> although they are classified as members of the armed forces.<sup>29</sup>

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Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]. The general provisions that begin each Convention are very similar. These provide that the Conventions shall apply during declared war or armed conflicts that may arise between two or more contracting parties to the Convention. *See, e.g.*, Geneva Convention I, *supra*, art. 2. Even if one of the parties is not a signatory to the Convention, the party that is a signatory remains bound in its relations with other parties in the conflict who are bound:

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

*Id.*

<sup>24</sup> *E.g.*, Geneva Convention I, *supra* 23, art. 3.

<sup>25</sup> *Id.*

<sup>26</sup> Geneva Convention I, *supra* 23, art. 13; Geneva Convention III, *supra* 23, art. 4. Members of the armed forces are defined as "all organized armed forces, groups and units which are under a command responsible" to a party to the Conflict. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 43(1), 8 June 1997, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] (the United States has not ratified Additional Protocol I). That definition would include chaplains accompanying troops. *Id.* art. 43(2).

<sup>27</sup> *Id.* art. 44(1).

<sup>28</sup> COMMENTARY: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 218 (Jean S. Pictet ed., 1960) [hereinafter COMMENTARY: GENEVA CONVENTION III] ("The Conference

The First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field provides that chaplains have a respected and protected status.<sup>30</sup> The Third Geneva Convention Relative to the Treatment of Prisoners of War provides protections for chaplains in the field. Captured chaplains are not considered prisoners of war but “retained persons;” upon capture they are to be released unless they would like to stay along with their troops in their capacity as minister of religion.<sup>31</sup> They receive “at a minimum” the protections and benefits of the Conventions and must be provided with facilities necessary for providing religious care to the prisoners.<sup>32</sup> Chaplains who are retained, or remain with a view toward assisting prisoners of war, are allowed to minister freely.<sup>33</sup>

### C. What Can't a Chaplain Do?

The Conventions clearly indicate that a chaplain must refrain from participation—both active and passive—in military affairs; otherwise, he risks losing his protected status and the protections laid out for chaplains in the Conventions. This precaution is supported by the language chosen in the Conventions as well as reflected in both drafts and commentaries on the Conventions. The language of the *travaux préparatoires* is telling.<sup>34</sup> Chaplains can under “no circumstances renounce in part or in entirety the rights secured to

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thought it necessary to affirm the supra-national and quasi-neutral character of personnel whose duties placed them outside the conflict. By virtue of their neutral character alone, such personnel should be repatriated. . . .”). Pictet’s texts are not binding. *The Geneva Conventions of 12 August 1949, Military Legal Resources*, LIBR. OF CONGRESS, [http://www.loc.gov/tr/frd/Military\\_Law/Geneva\\_conventions-1949.html](http://www.loc.gov/tr/frd/Military_Law/Geneva_conventions-1949.html) (last visited 23 Apr. 2013) (providing that Pictet’s commentary “can prove relevant” in interpreting the provisions of the Geneva Conventions).

<sup>29</sup> In this way, chaplains are akin and grouped with medical personnel under the Conventions, who receive the same protections and respected status. See Geneva Convention I, *supra* note 23, art. 24.

<sup>30</sup> *Id.*

<sup>31</sup> Geneva Convention III, *supra* note 23, art. 33 (“Members of the medical personnel and chaplains while retained by the Detaining Power with a view to assisting prisoners of war, shall not be considered as prisoners of war. They shall, however, receive as a minimum the benefits and protection of the present Convention, and shall also be granted all facilities necessary to provide for the medical care of, and religious ministrations to, prisoners of war.”).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* art. 35.

<sup>34</sup> “*Travaux préparatoires*” is a term of art, meaning “preparatory works,” for the working papers associated with international agreements. Cf. *Travaux préparatoires of the Convention, Library of the Court*, EUR. CT. OF HUM. RTS., <http://www.echr.coe.int/library/colentravauxprep.html> (last visited 26 Apr. 2013) (providing, in reference to the European Convention on Human Rights, that “[t]he *travaux préparatoires* contain the various documents that were produced during the drafting of the Convention and its first Protocol, reports of discussions in the Assembly and its Committee on Legal and Administrative Questions and in the Committee of Ministers and certain of its committees of experts”).

them by the present Convention.”<sup>35</sup> The commentary on the Additional Protocols includes in the definition of “religious personnel” these limitations on the role of the chaplaincy; they are individuals “exclusively employed” in the ministry.<sup>36</sup> Retained personnel are not to be required to perform any work outside of their religious duties.<sup>37</sup> “[T]o enjoy immunity, not only must religious personnel refrain from obviously hostile acts, but they must naturally abstain from *any form of participation—even indirect—in hostile acts.*”<sup>38</sup>

<sup>35</sup> 2A FINAL RECORD OF THE DIPLOMATIC CONVENTION OF GENEVA OF 1949, at 222 (1949) [hereinafter FINAL RECORD] (reprinting the *travaux préparatoires*).

<sup>36</sup> CLAUDE PILLOUD, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 113 (1987). Notably, “religious personnel” are not always chaplains attached to the armed forces. *Id.*

“Religious personnel” means military or civilian persons, such as chaplains, who are exclusively engaged in the work of their ministry and attached: i) to the armed forces of a Party to the conflict; ii) to medical units or medical transports of a Party to the conflict; iii) to medical units or medical transports described in Article 9, paragraph 2; or iv) to civil defense organizations of a Party to the conflict. The attachment of religious personnel may be either permanent or temporary . . . .

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 8(d), *adopted* 8 June 1977, 1125 U.N.T.S. 3. However, the rules related to “religious personnel” apply equally if not with more force to chaplains of the armed forces. Religious personnel receive the same protection under the Conventions as armed forces chaplains as long as they are exclusively engaged in the act of ministry and attached to the armed forces. Stefan Luntze, *Serving God and Caesar: Religious Personnel and Their Protection in Armed Conflict*, 86 INT’L REV. RED CROSS 69, 74 (2004), available at [http://www.icrc.org/eng/assets/files/other/irrc\\_853\\_lunze.pdf](http://www.icrc.org/eng/assets/files/other/irrc_853_lunze.pdf).

<sup>37</sup> COMMENTARY: GENEVA CONVENTION III, *supra* note 28, at 222.

<sup>38</sup> COMMENTARY: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 221 (Jean S. Pictet ed., 1952) [hereinafter COMMENTARY: GENEVA CONVENTION I] (emphasis added). A fascinating example of a chaplain whose actions flew completely in the face of the Geneva Conventions’ directions to abstain from hostile acts is that of Chaplain Emmanuel Rukundo, a Roman Catholic chaplain in the Rwandan Armed Forces beginning in 1993. Prosecutor v. Rukundo, Case No. ICTR-01-70-T, Judgment, ¶ 4 (Feb. 27, 2009), <http://www.unict.org/Portals/0/Case/English/Rukundo/090227.pdf>. In 2009, the International Criminal Tribunal for Rwanda found Rukundo guilty of genocide, murder, and crimes against humanity and sentenced to twenty-five years in prison. *Id.* ¶¶ 591, 608. The conviction related to attacks, killings, and a rape he committed against Tutsi individuals in Rwanda in 1994. *Id.* ¶¶ 9–12. The Committee noted that the fact Rukundo was a chaplain was an “aggravating factor” in his sentencing:

The Chamber notes that it is well established in the ICTR and ICTY’s jurisprudence that the manner in which the accused exercised his command or the abuse of an accused’s personal position in the community may be considered as an aggravating factor. The Chamber considers Rukundo’s stature in Rwandan society to be an aggravating factor. As a military chaplain, Rukundo was a well-known priest within the community and in the Rwandan military. The Chamber considers it highly aggravating that Rukundo abused his moral authority and influence in order to promote the abduction and killing of Tutsi refugees and to sexually assault a Tutsi girl. The Chamber notes that Prosecution witnesses testified that because of Rukundo’s position as a

The *travaux* indicates a conflict on the issue of whether to provide for prisoner of war status to chaplains, highlighting the importance of a chaplain's neutrality and nonparticipation in conflict. This conflict is illustrated by one delegate who exclaimed: "A prisoner of war was a soldier who had laid down his arms and a [chaplain] carried no arms!"<sup>39</sup> Ultimately, the drafters agreed that chaplains "were noncombatant, which implied they could not be made prisoners of war."<sup>40</sup> As such, the drafters created the status of retained personnel and provided that these personnel should "benefit by all the provisions of the prisoner of war Convention, but that, as they were only retained in order to carry out their . . . [spiritual] duties, they should accorded in addition certain facilities for the charge of those duties."<sup>41</sup>

The Convention regards chaplains differently than ministers of religion, who are members of fighting units at the time of capture.<sup>42</sup> Unlike chaplains, ministers are considered prisoners of war, as they are not bound by the same principles under the Convention. Article 36 provides that ministers shall be at liberty, whatever their denomination, to minister freely to the members of their community. "*For this purpose*, they shall receive the same treatment as the chaplains retained by the Detaining Power. They shall not be obliged to do any other work."<sup>43</sup> Although ministers ultimately receive the same treatment as chaplains while in the service of ministry, the distinction is that this treatment is not a necessity, but rather is contingent on their providing ministerial services.<sup>44</sup>

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military chaplain, they trusted him and believed that he had a certain moral authority over the soldiers.

*Id.* ¶ 599.

<sup>39</sup> FINAL RECORD, *supra* note 35, at 69.

<sup>40</sup> *Id.* at 68. The discussion among the delegates refers to medical personnel; however, given the equivalent status of medical personnel and chaplains under the Conventions, it is equally applicable to chaplains. See Geneva Convention I, *supra* note 23, art. 24; COMMENTARY: GENEVA CONVENTION I, *supra* note 38, at 218–221.

<sup>41</sup> *Id.* at 124. Of course, there are other reasons for providing chaplains with a protected status, such as the unique nature of their duty in caring for prisoners of war. As one delegate observed, "Captivity often resulted in a more intense religious life, which enabled prisoners to endure their lack of freedom more easily." *Id.* at 260.

<sup>42</sup> *Id.* at 332.

<sup>43</sup> Geneva Convention III, *supra* note 23, art. 36 (emphasis added).

<sup>44</sup> The *travaux* explain:

It is provided that these ministers of religion may carry out their ministry amongst prisoners and that in such case they would be given the same status as chaplains. It appeared necessary to stipulate that ministers of religion who are prisoners of war and who carried out their duties might not be compelled to undertake any form of work. This meant that, although the Detaining Power cannot compel them to undertake any form of labour beyond the exercise of their ministry, they remain free to participate in some of the work of other prisoners.

2A FINAL RECORD, *supra* note 35, at 565. Prior versions provided a less clear and less stringent protection, granting "the same treatment, insofar as it may be necessary." 3 FINAL RECORD, *supra* note 35, at 69.

Thus, where ministers confine their activities to a strictly religious, noncombatant nature, they too receive benefits of protected status under the Conventions.

Regulations promulgated by the U.S. military provide that a chaplain may not take part in hostilities explicitly for the purpose of protecting their protected status under the Geneva Conventions. The applicable Navy Regulation provides:

While assigned to a combat area during a period of armed conflict, members of . . . Chaplain . . . Corps . . . shall be detailed or permitted to perform only such duties as are related to . . . religious service and the administration of . . . religious units and establishments. This restriction is necessary to protect the noncombatant status of these personnel under the Geneva Conventions of August 12, 1949.<sup>45</sup>

The service instructions go further, stating that chaplains may not bear arms.<sup>46</sup> Current Marine Corps doctrine states quite succinctly: “Chaplains are noncombatants and will not bear arms.”<sup>47</sup> Past Marine Corps doctrine, though more verbose, was quite emphatic and clear in stating:

Chaplains must never engage in combat. If they do, they lose their special protected status under the Geneva Conventions and become lawful objects of attack by the enemy . . . . Chaplains must avoid any appearance of being combatants in order to maintain their protected status . . . .<sup>48</sup>

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<sup>45</sup> U.S. DEP’T OF NAVY, REG. 1063, DETAIL OF PERSONS PERFORMING MEDICAL OR RELIGIOUS SERVICES (16 Sept. 1990).

<sup>46</sup> U.S. DEP’T OF AIR FORCE, INSTR. 52-104, CHAPLAIN CORPS READINESS para. 2.1.1 (30 Aug. 2012) [hereinafter AFI 52-104]; U.S. DEP’T OF ARMY, REG. 165-1, ARMY CHAPLAIN CORPS ACTIVITIES para. 3-1(f) (3 Dec. 2009) [hereinafter AR 165-1]; U.S. DEP’T OF NAVY, SEC’Y OF NAVY INSTR. 1730.7D, RELIGIOUS MINISTRY WITHIN THE DEPARTMENT OF THE NAVY para. 5(e)(4) (8 Aug. 2008) [hereinafter SECNAVINST 1730.7D] (providing instructions applicable to chaplains serving with the U.S. Navy and U.S. Marine Corps); U.S. DEP’T OF NAVY, CHIEF OF NAVAL OPERATIONS INSTR. 1730.1E, RELIGIOUS MINISTRY IN THE NAVY para. 5(e) (25 Apr. 2012) [hereinafter OPNAVINST 1730.1E] (providing instructions applicable to only those chaplains serving with the U.S. Navy).

<sup>47</sup> U.S. MARINE CORPS, MARINE CORPS REFERENCE PUB. 6-12A, RELIGIOUS MINISTRY TEAM HANDBOOK 1-7 (16 May 2003).

<sup>48</sup> U.S. MARINE CORPS, FLEET MARINE FORCE MANUAL 3-61, MINISTRY IN COMBAT para. 1004(e) (22 June 1992).

All these prohibitions are absolute and do not provide exceptions for exigent circumstances.<sup>49</sup>

While chaplains may hold positions of authority, they generally have no or limited command authority in that capacity. In the Army, a chaplain holds the position of a staff officer but may not take command.<sup>50</sup> Naval regulations authorize all officers to issue orders to subordinates, but the authority for chaplains to do so is limited strictly to “necessary authority,” assumedly religious, for the “performance of their duties.”<sup>51</sup> While taught a short course at chaplain school regarding the structures of the military, chaplain training has less emphasis on leadership, marksmanship, and tactics than their traditional officer counterparts.<sup>52</sup> Limiting chaplains’ authority to strictly religious matters, and making it outside the purview of decisions related to conflict, is key to maintaining their protected status as a “noncombatant” and ensuring their actions do not color that status. The duties of war fighting do not fit within chaplains’ authority as officers,<sup>53</sup> and the mere issuance of an order may put chaplains at odds with International Committee of the Red Cross interpretation

<sup>49</sup> AFI 52-104, *supra* note 46; AR 165-1, *supra* note 46; SECNAVINST 1730.7D, *supra* note 46; OPNAVINST 1730.1E, *supra* note 46. In contrast to the absolute prohibition on chaplains bearing arms, doctors are allowed to bear arms in limited circumstances. Geneva Convention I, *supra* note 23, art. 22 (“The following conditions shall not be considered as depriving a medical unit or establishment of the protection guaranteed by Article 19: That the personnel of the unit or establishment are armed, and that they use the arms in their own defense, or in that of the wounded and sick in their charge.”).

<sup>50</sup> AR 165-1, *supra* note 46, para. 3-3(e).

<sup>51</sup> U.S. DEP’T OF NAVY, REG. 1021, DETAIL OF PERSONS PERFORMING MEDICAL OR RELIGIOUS SERVICES (16 Sept. 1990).

<sup>52</sup> Scott R. Borderud, *Pro Deo et Patria: Possible or Problematic?*, ARMY CHAPLAINCY, Summer 2008, at 94, 95; compare *Additional Information for Inbound Trainees, Officer Training School, Jeanne M. Holm Center for Officer Accessions & Citizen Development*, U.S. AIR FORCE AIR UNIV., <http://www.au.af.mil/au/holmcenter/OTS/COT-RCOT/additionalinfo.asp#a5> (last visited on 29 Apr. 2013) (stating that the Air Force’s Commissioned Officer Training—the initial training course for chaplains, judge advocates, and health care professionals—includes classes titled “Drill and Ceremonies,” “Health and Fitness,” “Communication Skills,” “Profession of Arms” (a military customs course), “Military Studies,” “International Security Studies,” and “Leadership Studies”), with Holm Center for Officer Accessions & Citizen Development, *Basic Officer Training*, U.S. AIR FORCE AIR UNIV. 14 (Mar. 2013), [http://www.au.af.mil/au/holmcenter/OTS/documents/AY\\_12\\_13\\_BOT\\_Syllabus\\_13\\_05.pdf](http://www.au.af.mil/au/holmcenter/OTS/documents/AY_12_13_BOT_Syllabus_13_05.pdf) (stating that the Air Force’s Basic Officer Training Course—the initial training course for officers other than chaplains, judge advocates, and health care professionals—includes segments on weapons, combat techniques, and military tactics). Army training for chaplains follows similar restrictions. The twelve-week long Chaplain Basic Officer Leadership Course includes courses in map reading, military customs and courtesies, operations in field conditions and combat survival, resident correspondence, and Army Chaplain specific duties. *Chaplain Basic Officer Leadership Course*, GOARMY.COM, [http://www.goarmy.com/chaplain/chaplain\\_officer\\_basic.jsp](http://www.goarmy.com/chaplain/chaplain_officer_basic.jsp) (last visited 29 Apr. 2013).

<sup>53</sup> Odom, *supra* note 18, at 25.

of the Conventions providing that chaplains must abstain from any form of participation—“even indirect”—in hostile acts.<sup>54</sup>

### III. Domestic Chaplains in Armed Conflicts and Detention Situations

While the Conventions discuss at length the duty of chaplains to their own soldiers both on the battlefield and when retained, they also conceive of situations, such as detention, in which chaplains may have to administer to enemy prisoners. A detaining power may appoint a chaplain at the request of the prisoners when they lack the assistance of their own chaplain.<sup>55</sup> Such appointments are made at the request of the prisoners concerned because of the risk that the detaining power might introduce chaplains among the prisoners who, while perhaps fully qualified religiously, might actually be propaganda agents.<sup>56</sup> In modern warfare, this prototype becomes increasingly relevant given the nature of the war on terror.

#### A. The Status of Prisoners and How That May Change Their Religious Entitlements

The level of treatment to which individuals are entitled under the Conventions depends upon their status as defined therein. There are three categories of detainees in the Conventions: prisoners of war;<sup>57</sup> retained persons,

<sup>54</sup> See COMMENTARY: GENEVA CONVENTION I, *supra* note 38, at 219–21.

<sup>55</sup> Geneva Convention III, *supra* note 23, art. 37 (“When prisoners of war have not the assistance of a retained chaplain or of a minister of their faith, a minister belonging to the prisoner’s or a similar denomination, or in his absence a qualified layman, if such a course is feasible from a confessional point of view, shall be appointed at the request of the prisoners concerned, to fill this office.”).

<sup>56</sup> COMMENTARY: GENEVA CONVENTION III, *supra* note 28, at 235 (“Several delegations considered, however, that there was a risk that this might give the Detaining power an opportunity of introducing among prisoners of war a person who, although fully qualified from the religious point of view, might actually be a propaganda agent. The Article therefore specifies that the appointment shall be made at the request of the prisoners concerned and shall be subject to the approval of the Detaining Power and, wherever necessary, of the local religious authorities.”).

<sup>57</sup> Geneva Convention III, *supra* note 23, art. 4, states:

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the hands of the enemy:

(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

such as chaplains and doctors;<sup>58</sup> and civilians interned for security reasons or because they have committed an offense against the detaining power.<sup>59</sup> As discussed earlier, combatants are members of the armed forces who may participate in the conflict.<sup>60</sup> The term “enemy combatant” does not appear in the Geneva Conventions, but it has found common usage in the American military.<sup>61</sup> The United States District Court for the District of Columbia, in habeas corpus proceedings, has defined “enemy combatant” as:

[A]n individual who was part of or supporting the Taliban or al Qaeda, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.<sup>62</sup>

The Court in defining it thus noted that this was the definition that had received “a blessing” from the Military Commission Act of 2006.<sup>63</sup>

In light of the global war on terror, the category of enemy combatant was split into “lawful enemy combatants”<sup>64</sup>—prisoners of war entitled to

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

<sup>58</sup> Geneva Convention III, *supra* note 23, art. 33.

<sup>59</sup> Geneva Convention IV, *supra* note 23, art. 4; JOINT CHIEFS OF STAFF, JOINT PUB. 3-63, DETAINEE OPERATIONS, at viii (30 May 2008) [hereinafter JOINT PUB. 3-63].

<sup>60</sup> *See supra* note 26.

<sup>61</sup> *See Ex Parte Quirin*, 317 U.S. 1, 30–31 (1942), noting that:

By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war . . . .

<sup>62</sup> *Boumediene v. Bush*, 583 F. Supp. 2d 133, 134 (D.D.C. 2008).

<sup>63</sup> *Id.* This definition is also the same that the Pentagon “put into effect on July 7, 2004, to guide the detention decisions to be made by Combatant Status Review Tribunals [CSRT]. More than 550 CSRT panels applied that definition, and fewer than 50 of them found that the prisoner involved was not an ‘enemy combatant.’” Lyle Denniston, *Defining a Wartime “Enemy,”* SCOTUSBLOG (Oct. 27, 2008, 2:13 PM EST), <http://www.scotusblog.com/2008/10/defining-a-wartime-enemy>.



protections under the Conventions—and “unlawful enemy combatants”<sup>65</sup>—persons generally not entitled to combatant immunity. The United States Government has included within this latter definition “an individual who is or was part of supporting Taliban or al Qaeda forces.”<sup>66</sup> As of 2009, the United States no longer uses the term “enemy combatant,” replacing it with the terms “unprivileged enemy belligerent”<sup>67</sup> and “privileged belligerent.”<sup>68</sup> This change was somewhat cosmetic in nature.

This paper focuses on the religious entitlements of prisoners of war and unclassified individuals. Under the Third Geneva Convention, the detaining power is to afford prisoners of war “complete latitude in the exercise of their religious duties, including attendance at the service of their faith.”<sup>69</sup> The

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<sup>64</sup> Under the Military Commissions Act of 2006 (“MCA”), 10 U.S.C. § 948a(2) (2006) (amended by the Military Commissions Act of 2009, 10 U.S.C. §§ 948a–950t (2006 & Supp. IV 2009)), the definition of a lawful combatant is:

- (A) a member of the regular forces of a State party engaged in hostilities against the United States;
- (B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or
- (C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.

10 U.S.C. § 948a(2) (2006).

<sup>65</sup> The definition of an unlawful combatant is:

- (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or
- (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

10 U.S.C. § 948a(1) (2006).

<sup>66</sup> 10 U.S.C. § 948a(1)(i) (2006); *see also* JOINT PUB. 3-63, *supra* note 59, at I-4 to I-5 (“Enemy combatants are personnel engaged in hostilities against the United States or its coalition partners during an armed conflict.”). The distinction between Taliban and al Qaeda classifications is important and will be discussed in more detail. *See infra* Part III.B.

<sup>67</sup> The Military Commissions Act of 2009 provides that an “unprivileged enemy belligerent” is “an individual (other than a privileged belligerent) who—(A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda.” Military Commissions Act of 2009 (MCA 2009), 10 U.S.C. § 948(a)(7) (2006 & Supp. IV 2009).

<sup>68</sup> 10 U.S.C. § 948(a)(6) (2006 & Supp. IV 2009) (providing that a “privileged belligerent” is “an individual belonging to the eight categories enumerated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War”).

<sup>69</sup> Geneva Convention III, *supra* note 23, art. 34. This is conditioned on the prisoner of war’s compliance with the disciplinary routine prescribed by the detaining power.

Conventions do not provide what these religious duties may be. The Conventions thus seem to assume that while the detaining power is not tasked with providing religious practice, it must provide reasonable accommodations for what a prisoner of war understands as a necessity of his faith.

An individual who fails to qualify as a prisoner of war, or whose status is yet undetermined, is still protected under the Conventions. The Conventions contemplate instances in which a detaining power may not classify an individual as a prisoner of war and still protect him from abuses of the detaining power. First, if the individual has taken part in the hostilities and there is “*any doubt*” as to whether the individual is entitled to prisoner of war status, he is entitled to have prisoner of war status and be protected under the Third Convention until such time as his status has been determined by a competent tribunal.<sup>70</sup> Furthermore, the individual is entitled to assert his entitlement to prisoner of war status before a judicial tribunal and have that question adjudicated.<sup>71</sup> Therefore, until this individual is judicially adjudicated<sup>72</sup> as a non-prisoner of war, he is entitled to the religious privileges—namely the wide latitude afforded for religious practice—given to prisoners of war. Even if he is then determined not to be a prisoner of war, the Third Convention entitles him to certain fundamental guarantees.<sup>73</sup> These guarantees include, at a minimum, humane treatment.<sup>74</sup>

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<sup>70</sup> *Id.* art. 5 (emphasis added); *see also* Additional Protocol I, *supra* note 26, art. 45(1) (“A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal.”).

<sup>71</sup> *Id.* art. 3(d) (providing that a detainee is protected against “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples”).

<sup>72</sup> What it means to be judicially adjudicated is in Additional Protocol I, *supra* note 26, art. 75(4). Note that the United States does not recognize Additional Protocol I as binding. Hans-Peter Gasser, *The United States Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 81 AM. J. INT'L L. 912, 912–13 (1987). However, Geneva Convention III articles 3 and 105 provide basic protections during a trial of a detainee. It may be worthwhile to note that the administration has stated that it will follow article 75 of Additional Protocol I as customary international law. Press Release, The White House, Fact Sheet: New Actions on Guantanamo and Detainee Policy (Mar. 7, 2011), *available at* [http://www.lawfareblog.com/wp-content/uploads/2011/03/Fact\\_Sheet\\_-\\_Guantanamo\\_and\\_Detainee\\_Policy.pdf](http://www.lawfareblog.com/wp-content/uploads/2011/03/Fact_Sheet_-_Guantanamo_and_Detainee_Policy.pdf). This does not apply in a non-international armed conflict, however. *See* Jack Goldsmith, *Why I Think the Obama Administration Did Not Extend Article 75 to Terrorists*, LAWFARE BLOG (Mar. 11, 2011, 5:09 AM), <http://www.lawfareblog.com/2011/03/why-i-think-the-obama-administration-did-not-extend-article-75-to-terrorists/>.

<sup>73</sup> Geneva Convention III, *supra* note 23, art. 3. Note that under Additional Protocol I, respect for religious practice is also a fundamental protection. *See* Additional Protocol I, *supra* note 26, art. 75(1).

<sup>74</sup> *Id.*

Furthermore, the detaining power is forbidden from committing actions such as violence, murder, torture, corporal punishment, mutilation, outrages upon personal dignity, indecent assault, and even threats to commit such acts.<sup>75</sup>

What does it mean to provide humane treatment and prevent outrages upon personal dignity, and does it at all pertain to religion? The language certainly is not as protective as that for prisoners of war. U.S. protocol provides that “U.S. forces must treat *all* detainees humanely and be prepared to properly control, maintain, protect, and account for detainees in accordance with (IAW) applicable U.S. law, the law of war, and applicable U.S. policy.”<sup>76</sup> Some applicable policy prohibits “cruel, inhuman or degrading treatment or punishment” of detainees.<sup>77</sup> The greatest protection of detainees is contained in the Department of Defense Directive covering the Detainee Program, which provides: “All persons subject to this Directive shall observe the requirements of the law of war, and shall apply, *without regard to a detainee’s legal status*, at a minimum the standards articulated in common article 3 to the Geneva Conventions of 1949 . . . .”<sup>78</sup>

### **B. How a Prisoner’s Geneva Classification Changes the Way the Detaining Power May Treat Him**

Even now, years after the establishment of Camp X-Ray at Guantanamo, the debate rages whether the detainees—both Taliban and al

<sup>75</sup> Geneva Convention III, *supra* note 23, art. 3(1)(a)–(d).

<sup>76</sup> JOINT PUB. 3-63, *supra* note 59, at I-1 (emphasis added).

<sup>77</sup> This includes the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003(a), (d), 119 Stat. 2680, 2739–2740; War Crimes Act of 1996, 18 U.S.C. § 2441(d)(1)(B) (2006). Torture is also prohibited. 18 U.S.C. § 2340A(a) (2006). Torture is defined as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering . . . .” 18 U.S.C. § 2340(1) (2006).

(2) “Severe mental pain or suffering” means the prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering; [or]

(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; the threat of imminent death; or the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality . . . .

*Id.* § 2340(2) (2006).

<sup>78</sup> U.S. DEP’T OF DEF., DIR. 2310.01E, THE DEPARTMENT OF DEFENSE DETAINEE PROGRAM para. 4.2 (Sept. 5, 2006) (emphasis added) [hereinafter DoDD 2310.01E].

Qaeda members—are prisoners of war.<sup>79</sup> Joint Task Force (JTF) 160 landed in Guantanamo in January 2002 with directions from the government that the Conventions would not technically apply to the mission.<sup>80</sup> The orders directed the force to act in a manner consistent with the Conventions but not feel bound by them—an order one staff sergeant called “shady.”<sup>81</sup> On 18 January 2002, President Bush announced two crucial policy decisions: that the prisoners would not be granted prisoner of war status and that the United States would not abide by processes outlined in the Third Geneva Convention.<sup>82</sup> In doing so, President Bush denied detainees the most basic protections afforded by the Third Geneva Convention.

Thereafter, a camp of thought emerged, under the false safety net of executive command, discounting the Geneva Conventions' applicability. As one judge advocate noted: “[T]he United States Government has already determined and announced that these terrorists are not entitled to prisoner of war status. In any event, the national leadership is responsible for making the ultimate decisions of status and will ensure that such decisions are disseminated down the chain of command.”<sup>83</sup> However, the idea that national command authority is responsible for making determinations of protected status runs contrary to the Geneva Conventions which direct a judicial determination of detainee status rather than allowing governments to simply declare who is and who is not a prisoner of war, whatever legal excuses they may have applied.<sup>84</sup> Tellingly, in exercising its power to detain individuals, the Obama administration has divorced itself from the Bush administration's executive authority doctrine and stresses rather that it has power to detain individuals under prevailing laws of war, including the Geneva Conventions and the Authorization for Use of Military Force (AUMF).<sup>85</sup>

The Supreme Court undermined President Bush's determination that the Geneva Conventions did not apply when it held in *Hamdan v. Rumsfeld*<sup>86</sup> that common article 3<sup>87</sup> to the Conventions applies to the prisoners in

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<sup>79</sup> As provided in the MCA 2009, the Taliban is no longer specifically specified as a category within the definition of “privileged enemy combatant.” 10 U.S.C. § 948(a)(6), (7) (2006 & Supp. IV 2009).

<sup>80</sup> Karen J. Greenberg, *When Gitmo was (Relatively) Good*, WASH. POST, Jan. 25, 2009, at B01.

<sup>81</sup> *Id.*

<sup>82</sup> Seelye, *supra* note 6.

<sup>83</sup> Odom, *supra* note 18, at 43 (internal footnote omitted).

<sup>84</sup> For a summary of some such justifications, see *id.* at 41.

<sup>85</sup> Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 1, *In re Guantanamo Bay Detainee Litigation*, No. 08-442 (D.D.C. Mar. 13, 2009), available at <http://www.justice.gov/opa/documents/memo-re-det-auth.pdf> [hereinafter Respondents' Memorandum].

<sup>86</sup> 548 U.S. 557 (2006).

<sup>87</sup> It is “common” because it is the same in each of the four conventions. *Id.* at 629.

Guantanamo.<sup>88</sup> While the Court thus provided some basic protections to these prisoners, it did not answer the question of whether they were entitled to prisoner of war status.

As article 5 of the Third Convention clearly denotes, and as discussed above,<sup>89</sup> if “*any doubt*” arises regarding whether or not a detainee is a prisoner of war, he should be treated as if he were one until a competent tribunal decides his status.<sup>90</sup> And certainly, there was and is doubt, at least concerning whether members of the Taliban qualify as prisoners of war.<sup>91</sup> “Any” is indeed a meager standard. It is, therefore, with a critical eye that one must view statements absolutely barring prisoner of war status, such as those by former U.S. Secretary of Defense Rumsfeld at a news conference in 2002, when he said: “[T]here isn’t any question in my mind—I’m not a lawyer, but there isn’t any question in my mind that they are not, they would not rise to the standard of a prisoner of war.”<sup>92</sup> As such, it is crucial for chaplains, even if their superiors tell them that prisoners are not entitled to protections or prisoner of war status, to proceed with caution and protect their noncombatant status by treating all prisoners alike, respecting their rights, and vigilantly refusing to implicate themselves in all aspects of the conflict.

### C. The Advisory Role of a Domestic Chaplain

#### 1. Joint Policy

The role of a chaplain in a detention facility is twofold: that of an advisor to the military command and that of a religious provider to qualified individuals. There are both joint and U.S. Navy regulations pertaining to the chaplain’s dual role.<sup>93</sup> Under joint doctrine, the chaplain provides religious

<sup>88</sup> *Id.* at 630.

<sup>89</sup> See *supra* notes 71–72 and accompanying text.

<sup>90</sup> Geneva Convention III, *supra* note 23, art. 5 (emphasis added).

<sup>91</sup> At least one commentator has argued that Taliban detainees, and potentially al Qaeda as well, are properly classifiable as prisoners of war. Evan J. Wallach, *Afghanistan, Quirin and Uchiyama: Does the Sauce Suit the Gander?*, ARMY LAW., Nov. 2003, at 18. Judge Wallach’s argument was cited in an *amicus curiae* brief in support of the petitioners in *Hamdi v. Rumsfeld*. Brief of *Amicus Curiae* Charles B. Gittings Jr. in Support of Petitioners at 10–11, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696), available at [http://supreme.lp.findlaw.com/supreme\\_court/briefs/03-6696/03-6696.mer.ami.gittings.pdf](http://supreme.lp.findlaw.com/supreme_court/briefs/03-6696/03-6696.mer.ami.gittings.pdf).

<sup>92</sup> Donald H. Rumsfeld, U.S. Sec’y of Def., Remarks on Ferry from Air Terminal to Main Base, Guantanamo Bay, Cuba (Jan. 27, 2002), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2338>.

<sup>93</sup> Joint policy is applicable to Navy chaplains operating in a joint environment.

In joint operations even though chaplains at different levels may come from different services, all chaplains follow the policies established for participation in a joint task force. There is indeed a publication, Joint

support and advises commanders on matters pertaining to religion and religious support in his capacity as an officer.<sup>94</sup> There has been a significant shift over time, however, in the boundaries of a chaplain's role as "religious provider,"<sup>95</sup> and these policy shifts are reflected in the 1996 version of Joint Publication (JP) 1-05 (1996 version),<sup>96</sup> the 2004 version of JP 1-05 (2004 version),<sup>97</sup> the current version of JP 1-05 published in 2009 (2009 version),<sup>98</sup> and the current version of JP 3-63 published in 2008.<sup>99</sup> The most significant changes are in the policy of providing direct religious support to detainees and in the weighing of detainee interests against security interests.

The differences in the JPs are highlighted by their sections describing chaplains' primary duties. The 1996 version is the most general, stating that the chaplain's primary duties are to advise the joint force commander on matters "of religion, morals, ethics, and morale"; to support the force by providing religious worship activities and pastoral care; and to coordinate a comprehensive religious ministry support plan.<sup>100</sup> The 2004 version provides that the chaplain has two primary tasks: to "provide and/or perform direct personal religious support, to include advising the commander and other staff members of moral and ethical decision making" and to "advise the commander . . . on the religious dynamics of the indigenous population in the operational area."<sup>101</sup> These tasks were more

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Publication 1-05, which specifically deals with the role of the chaplain and religious ministry support in a joint environment.

E-mail from Commander Brian L. Simpson, Chaplain Corps, U.S. Navy, Dir. of Training, Naval Chaplaincy School and Center, to author (19 Jan. 2010, 11:05 EST) (on file with author). However, the Navy has provided its own guidance, discussed *infra* III.C.2.

<sup>94</sup> Commander Robert T. Williams, Chaplain Corps, U.S. Navy, The Commander's Responsibilities for the Delivery of Religious Support to Detainees in the JOA 8-9 (23 Oct. 2006) (unpublished paper, Naval War College), <http://www.hsdl.org/?view&did=15559>.

<sup>95</sup> On 30 May 2008, the U.S. Joint Chiefs of Staff issued JP 3-63: Detainee Operations, which clarifies and profoundly changes the role of the chaplain in providing religious services to detainees. JOINT PUB. 3-63, *supra* note 59.

<sup>96</sup> JOINT CHIEFS OF STAFF, JOINT PUB. 1-05, RELIGIOUS MINISTRY SUPPORT IN JOINT OPERATIONS (26 Aug. 1996) [hereinafter JOINT PUB. 1-05 (26 Aug. 1996)].

<sup>97</sup> JOINT CHIEFS OF STAFF, JOINT PUB. 1-05, RELIGIOUS MINISTRY SUPPORT IN JOINT OPERATIONS (9 June 2004) [hereinafter JOINT PUB. 1-05 (9 June 2004)].

<sup>98</sup> JOINT CHIEFS OF STAFF, JOINT PUB. 1-05, RELIGIOUS AFFAIRS IN JOINT OPERATIONS (13 Nov. 2009) [hereinafter JOINT PUB. 1-05 (13 Nov. 2009)].

<sup>99</sup> JP 3-63 is narrowly focused on detainee operations, while JP 1-05 is more broadly applicable to the role of chaplains in joint operations. These documents are distinct publications and are not meant to supersede one another.

<sup>100</sup> JOINT PUB. 1-05 (26 Aug. 1996), *supra* note 96, at I-1 to I-2.

<sup>101</sup> JOINT PUB. 1-05 (9 June 2004), *supra* note 97, at I-1. The 2004 version includes additional policy explanation for the reform, describing the influence of religion and the pivotal role it plays in conflicts of the 21st century. This, in part, may explain the JP's newfound specificity for the role of a chaplain.

Wars and conflicts in the 21st century are increasingly nonconventional and ideologically motivated. Religion plays a pivotal role in the self-understanding of many people and has a significant effect on the goals,

focused in JP 3-63, which stated that the chaplain is to serve as chaplain *specifically* and more or less exclusively for detention facility personnel, as advisor on the religious needs and practices of detainees, and as moral and ethical advisor for the command.<sup>102</sup> The 2009 version of JP 1-05 introduces new language, specifically, the idea of “religious affairs,” to discuss the two major capabilities of a chaplain: the provision of religious support to a group not including to detainees<sup>103</sup> and religious advisement, “consistent” with the chaplain’s “noncombatant status.”<sup>104</sup>

From this overall outline it is evident that the joint policies became increasingly more specific regarding the advisory role. In the 1996 version, a chaplain’s role as advisor includes providing “ethical decision making and moral leadership recommendations to the commander” and advising on “matters of religion, morals, . . . and on the role and influence of indigenous religious customs and practices as they affect the command’s mission accomplishment.”<sup>105</sup> Aside from that, there is little to no policy guidance—thus allowing great discretion—on how a chaplain must act within his role as advisor. In the 2004 version, however, there is much more guidance, including a detailed table<sup>106</sup> of what it means to “provide relevant information on the religions of . . . the adversary, which includes issues of national, regional, and sect or group religious customs, traditions . . . symbols, facilities, and sensitivities.”<sup>107</sup> Chaplains further “advise the command leaders on the religious, moral, and ethical issues related to policies, programs, initiatives, plans . . . exercises[,] . . . morale, quality of life, and the impact of host nation (HN) religions upon the mission.”<sup>108</sup> Some purposes of the chaplain’s advice are to “influence current strategy and operations in order to achieve national security objectives,” in addition to planning and coordinating defense-wide religious support.<sup>109</sup>

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objectives, and structure of society. In some cases, religious self-understanding may play a determinative or regulating role on policy, strategy, or tactics. While it may not be the primary catalyst for war, religion can be a contributing factor.

*Id.* at I-2.

<sup>102</sup> See JOINT PUB. 3-63, *supra* note 59, at II-10.

<sup>103</sup> JOINT PUB. 1-05 (13 Nov. 2009), *supra* note 98, at II-2 to II-3.

<sup>104</sup> *Id.* at viii.

<sup>105</sup> JOINT PUB. 1-05 (26 Aug. 1996), *supra* note 96, at I-1 to I-2.

<sup>106</sup> JOINT PUB. 1-05 (9 June 2004), *supra* note 97, app. A fig.A-1. The table has two columns; one for areas of concern to the chaplain and another for specific information the chaplain must consider relative to each area of concern.

<sup>107</sup> *Id.* at II-2.

<sup>108</sup> *Id.* at II-3.

<sup>109</sup> *Id.* at II-5.

Although the 2004 version gives a more detailed view of the chaplain's role, it does not provide a framework for protecting a chaplain's noncombatant status in doing so. JP 3-63 is somewhat more successful at protecting a chaplain's noncombatant status, while leaving room for a "balancing" of interests. JP 3-63 provides that a chaplain must "advise on the religious needs and practices of detainees."<sup>110</sup> To the extent that chaplains provide such counsel, JP 3-63 clarifies that while the detention facility must not be such as to "hinder unjustifiably the observance of religious rites, . . . [c]ertain limitations may be necessary due to security concerns; however, a good faith balance should be struck between the detainee's obligation to comply with disciplinary rules and procedures and the detaining power's obligation to afford detainees the ability to meet their religious obligations . . . ."<sup>111</sup> This is the first time this balancing between religious needs and security interests is explicitly stated in the joint publications.

The 2009 version is the most protective of a chaplain's noncombatant status. Indeed, in discussing the JTF chaplain's role as a religious adviser, the 2009 version continually takes care to remind the reader that advisement must be provided "consistent with this noncombatant status." Religious advisement is defined in the 2009 version as the "practice of informing the commander on the impact of religion on joint operations."<sup>112</sup> Chaplains provide this advisement "consistent with their noncombatant status."<sup>113</sup> Furthermore, although operational-level chaplains provide guidance on how religious, moral, and ethical matters affect operations and the operational area, they do so subject to limitations.<sup>114</sup>

Chaplains may not advise on religious or cultural issues in the operational area where the law of armed conflict specifically restricts such activities. Chaplains must not function as intelligence collectors or propose combat target selection. However, chaplains can provide input as to what constitutes religious structures or monuments of antiquity in a particular

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<sup>110</sup> JP 3-63, *supra* note 59, at II-10.

<sup>111</sup> *Id.* at III-8.

<sup>112</sup> "Religious advisement" includes "the practice of informing the commander on the impact of religion on joint operations to include, but not limited to: worship, rituals, customs, and practices of US military personnel, international forces, and the indigenous population." JOINT PUB. 1-05 (13 Nov. 2009), *supra* note 98, at II-2.

<sup>113</sup> *Id.* at ix.

<sup>114</sup> Operational planning can include assisting the command with dynamics of religion and potential mission impacts across the range of military operations; religious, moral and ethical issues related to policies and operations; advising the command on religious matters affecting an operational area; and tactical religious support. *Id.* at II-4, II-9, II-11.



operation area, but do not advise on including or excluding specific structures on the no-strike list or target list.<sup>115</sup>

The 2009 version expands greatly upon the role of the chaplain as a liaison with religious leaders in military engagements at the strategic and operational echelons. The 2009 version finds that in many situations, clergy-to-clergy communication is preferred with indigenous leaders and that chaplains may liaise in support of military engagement.<sup>116</sup> However, such liaison is a “focused and narrow role” focused on the amelioration of suffering, promotion of peace, and benevolent expression of religion, “without employing religion to achieve a military advantage.”<sup>117</sup> Many parameters are set on the chaplain-liaisons. They must not compromise their noncombatant status, function as an intelligence collector, engage in manipulation, take lead in formal negotiations for command outcomes, or identify targets for combat operations.<sup>118</sup>

The policy of direct religious support to detainees has also been dynamic across the revisions to joint policy. The 1996 version provides that chaplains may have to give direct assistance, including ministry services, to enemy prisoners of war.<sup>119</sup> And chaplains did, in fact, do so.<sup>120</sup> The 2004 version, on the other hand, neither provides that chaplains may provide direct religious support to detainees nor forbids it.<sup>121</sup> The 1996 and 2004 versions recognize no distinct categories of detainees—prisoner of war, unlawful combatant, and so on—and as such include no discussion of whether a chaplain may or may not treat these individual detainees differently. Both the 2009 version and JP 3-63 provide significant changes to a chaplain’s role in relation to detainees.<sup>122</sup> JP 3-63 explicitly states that detainees “have no right to person-to-person support by military chaplains . . . . Accordingly, military chaplains do not generally provide direct religious support to detainees.”<sup>123</sup> In restricting

<sup>115</sup> *Id.* at I-2.

<sup>116</sup> *Id.* at III-4 to III-5.

<sup>117</sup> *Id.* at III-5.

<sup>118</sup> *Id.* (internal subdivisions omitted).

<sup>119</sup> JOINT PUB. 1-05 (26 Aug. 1996), *supra* note 96, at I-4 to I-5 (“In planning for the operations listed above, chaplains should be prepared to provide religious ministry support . . . enemy prisoners of war.”). *Id.* at I-2 (“Chaplains provide religious worship services, rites, sacraments, ordinances, and ministrations. The primary focus of this activity is to . . . minister to prisoners or prisoners of war.”).

<sup>120</sup> *See, e.g., Call to Prayer, supra* note 4 (describing LT Saif-ul-Islam’s making of a call to prayer in Guantanamo in 2002). More about LT Saif-ul-Islam’s role in Guantanamo will be described *infra* Part III.C.3.

<sup>121</sup> JOINT PUB. 1-05 (9 June 2004), *supra* note 97, at II-1 (stating that the joint force chaplain’s role includes providing direct religious support, such as “providing for and/or performing worship, religious needs and practices, [and] pastoral care,” and advising the commander on detainees’ religious needs).

<sup>122</sup> JOINT PUB. 3-63, *supra* note 59.

<sup>123</sup> *Id.* at III-9.

person-to-person ministry, JP 3-63 is largely concerned with the extent to which communications between a prisoner and chaplain may be privileged.<sup>124</sup> JP 3-63 also specifies the various detainee categories and states that rights under the Third Geneva Convention may or may not be afforded to detainees depending on their status.<sup>125</sup> Similarly, the 2009 version provides that “military chaplains do not generally provide religious support to detainees.” However, should they do so, the communications are “privileged to the extent provided by Military Rule of Evidence 503 and appropriate Military Department Policies.”<sup>126</sup>

Considering both the pivotal role a joint force chaplain fills in advising commanders regarding religion and a joint force chaplain's position as middleman between commander and detainee—albeit a much more restricted role after the 2008 JP 3-63—it is no surprise that the 2004 version, in a section regarding providing advice to commanders, advises chaplains to take “[e]xtreme care . . . to ensure that the chaplain's status as noncombatant is not compromised.”<sup>127</sup> As a result of this unique position, a chaplain may be asked to provide advice to the command that proves hurtful to a detainee, even though this would possibly, and in many cases probably, be unintentional. Doing so involves the chaplain in the conflict, which is forbidden under the Conventions, and could result in a loss of noncombatant status.<sup>128</sup> One way for the military to ensure that commanders receive similar guidance, while protecting the noncombatant status of chaplains, is to hire cultural anthropologists.<sup>129</sup>

<sup>124</sup> *Id.* (“Should the JFC [joint force commander] determine a requirement to provide direct military chaplain support to detainees, communications . . . will be privileged to the extent provided by Military Rule of Evidence 503 . . .”).

<sup>125</sup> *Id.* at I-3 to I-5.

<sup>126</sup> JOINT PUB. 1-05 (13 Nov. 2009), *supra* note 98, at III-2.

<sup>127</sup> JOINT PUB. 1-05 (9 June 2004), *supra* note 97, at II-4.

(2) Advise Regarding Religion and Religious Support. The JFCH should develop and maintain proficiency regarding the religious issues in the operational area and be prepared to provide relevant information on those issues. *Extreme care must be taken to ensure that the chaplain's status as a noncombatant is not compromised.* This proficiency may include the ability to provide:

(a) Information as to the historical perspective on the influence of religion in previous conflicts and cultural identity in the operational area.

(b) Information as to the religious perspective on the current situation.

(c) Information relevant to religious support and religion as required by the commander, in the planning and executing of theater security cooperation efforts in the operational area.

*Id.* at II-4 to II-5 (emphasis in original).

<sup>128</sup> COMMENTARY: GENEVA CONVENTION I, *supra* note 38, at 219–20.

<sup>129</sup> Cultural anthropologists were employed in Afghanistan for the stated purposes of “improv[ing] the performance of local government officials, persuad[ing] tribesmen to join the police, eas[ing] poverty, and protect[ing] villagers from the Taliban and criminals.” David Rohde, *U.S. Army Enlists*

## 2. Navy Policy

U.S. Navy instructions are more in line with the limitations in the Geneva Conventions and the 2009 version, as they are more specific in their limitations of the chaplain's advisory role. In a joint setting, Navy chaplains must follow joint policies,<sup>130</sup> which are also supplemented by the Navy's own more stringent instructions pertaining to detainee situations. As opposed to the broad standard of advisement found in the JPs, Navy policy specifically confines the chaplain's advisement duties to the religious and humanitarian status of the command's area of responsibility,<sup>131</sup> and thereafter specifies that "the chaplains' activities in this category are always to be directed toward the amelioration of suffering and the direct pursuit of humanitarian goals."<sup>132</sup> In situations in which the advisement has a religious impact on the command's military mission relative to the indigenous population or adversary, and where "the Laws of Armed Conflict apply,"<sup>133</sup> the instruction further states that chaplains shall "be permitted to perform only duties that will not jeopardize the noncombatant status ascribed to them . . .," including advising the commander "on the religious considerations in building and maintaining coalitions, the religious considerations of humanitarian assistance support, and the benevolent expression of religion within the AOR [area of responsibility]."<sup>134</sup> Note that contrasted with prior Naval instructions on advisement, the current instructions are much stricter.<sup>135</sup> For example, the 2003 Chief of Naval Operations Instruction (OPNAVINST) allowed chaplains to advise generally on "[c]ultural and religious issues (both internal and external to the command) related to unit operations."<sup>136</sup>

The Navy's guidance is clear on its advisement policy; it prohibits advisement that would be harmful to the adversary, both directly and indirectly. It specifically forbids advising the commander on the "identification of targets,

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*Anthropologists in War Zones*, N.Y. TIMES, Oct. 4, 2007, at A1. Some opponents of the employment of anthropologists called the practice "mercenary anthropology" being used for political gain. *Id.* Even if that is (or was) true, it is certainly a better alternative to asking military chaplains to provide the same level of advisement.

<sup>130</sup> E-mail from Commander Brian L. Simpson, Chaplain Corps, U.S. Navy, *supra* note 93.

<sup>131</sup> U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 1730.10, CHAPLAIN ADVISEMENT AND LIAISON para. 3(f) (23 Jan. 2009) [hereinafter SECNAVINST 1730.10].

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* This point will be addressed later in further detail, *infra* Part III.C.3.

<sup>134</sup> *Id.* para. 3(f)(1)–(2).

<sup>135</sup> Compare OPNAVINST 1730.1E, *supra* note 46, para. 4(e) ("RMT [Religious Ministry Team] support outside the command should be limited to basic support of human rights, human dignity, and religious needs consistent with pertinent cultural concerns."), with U.S. DEP'T OF NAVY, CHIEF OF NAVAL OPERATIONS INSTR. 1730.1D, RELIGIOUS MINISTRY IN THE NAVY para. 5(b)(1)(e) (6 May 2003) [hereinafter OPNAVINST 1730.1D] (a prior version of authority now supplanted by OPNAVINST 1730.1E).

<sup>136</sup> OPNAVINST 1730.1D, *supra* note 135, para. 5(b)(1)(e).

the use of religion as a weapon[,] . . . for psychological operations or military intelligence[,] . . . or target approval of any kind.”<sup>137</sup> Chaplains are also forbidden from contributing information about the adversary to their command's combat decision making process<sup>138</sup> and from “all hostile acts and any act, either direct or indirect, that would be harmful to the adversary.”<sup>139</sup> To solidify these prohibitions, the instructions also control commanders' behavior.<sup>140</sup> Commanders “will not employ the chaplain in such a way as to serve or even give the appearance that the chaplain is being employed as an intelligence operative,”<sup>141</sup> or assign chaplains duties that might compromise the chaplains' noncombatant status.<sup>142</sup>

The Navy instructions, like current joint policy, do not allow for direct pastoral care for prisoners of war. The chaplain can only perform “such duties as are related to religious service and the administration of religious units or establishments[,] . . . specifically to protect their noncombatant status.”<sup>143</sup> When authorized, chaplains may serve as a point of contact and liaison for local civilian military leaders.<sup>144</sup> Neither SECNAVINST 1730.10 nor OPNAVINST 1730.1E mentions direct administration of detainees or prisoners of war.<sup>145</sup>

There are several situations in which one may envision a chaplain, intentionally or not, pushing the boundaries of what may be legal conduct under the Conventions. The first is an intelligence-gathering situation in which a prisoner of war provides to a chaplain good intelligence that would be of great interest to a commander. An analogous historical example is when U.S. Army psychologists were used to gather intelligence from Nazis awaiting trial at Nuremberg.<sup>146</sup> Although not completely analogous, as it involves civilian rather than military clergy, the C.I.A. proposed using clergymen as intelligence agents.<sup>147</sup> This proposal led to an outcry by religious leaders, whose main

<sup>137</sup> SECNAVINST 1730.10, *supra* note 131, para. 3(f)(3).

<sup>138</sup> *Id.* para. 3(f)(4).

<sup>139</sup> *Id.* para. 3(h)(5).

<sup>140</sup> These directives include procedural protections, such as identification and validation of requirements for chaplain advisement and liaison on tactical, operational, and strategic levels by commanders, *id.* para. 4(c), as well as training and certification for chaplains for advisement and liaison, *id.* para. 4(d).

<sup>141</sup> *Id.* para. 3(h)(2).

<sup>142</sup> *Id.* para. 4(c).

<sup>143</sup> *Id.* para. 3(g)(1).

<sup>144</sup> *Id.* para. 3(g)(2).

<sup>145</sup> See SECNAVINST 1730.10, *supra* note 131; OPNAVINST 1730.1E, *supra* note 46. *But see* OPNAVINST 1730.1D, *supra* note 135, para. 5(b)(2)(j).

<sup>146</sup> Odom, *supra* note 18, at 55.

<sup>147</sup> In 1996, C.I.A. Director John Deutch announced to the public that he opposed making absolute a C.I.A. policy forbidding the use of clergy for covert intelligence-gathering purposes. *CIA's Use of Journalists and Clergy in Intelligence Operations: Hearing Before the S. Select Comm. on Intelligence*, 104th Cong. 6–7 (1996) (statement of the Hon. John M. Deutch, Director of Central

concern was that “[a]s long as there is any reason to suspect that religious workers may be agents of the U.S. Government, the lives and safety of these servants of the public good are in jeopardy.”<sup>148</sup> This kind of breach of trust issue is well dealt with in both the JPs and Navy instructions, which restrict one-to-one detainee-chaplain contact.<sup>149</sup>

Another similar problem in the external liaison situation involves perceptions of wrongdoing. If a chaplain goes to visit a detainee with a humanitarian or purely pastoral purpose in mind and the detainee becomes by mere happenstance a target of punishment, this may create the impression that the chaplain is a threat.<sup>150</sup> This problem, however, is also lessened by current Navy and joint policy that minimizes contact between chaplains and detainees.

A different kind of situation involves the utilization of a chaplain’s religious knowledge for a negative rather than a positive religious accommodation. As an example, consider a practice in Guantanamo. Detainees’ religious items were taken from them based on a score assigned to their disciplinary record.<sup>151</sup> A score of one meant full possession of religious objects.<sup>152</sup> At level two, the prayer mat was taken away; at level three, prayer beads and oils were taken; and at level four, all items were taken except for the Koran.<sup>153</sup> Imagine if to institute such a policy, a commander had asked a chaplain to rank the most important religious items that the detainees might have in their possession. If the chaplain advised the command and knew or should have known that this information would be used to harm detainees—for example, as a systematized and targeted deprivation of religious liberties—the chaplain has involved himself in harming detainees. Such behavior may violate standards set for a chaplain’s behavior in the Conventions, in that it forces the chaplain to become indirectly involved in the conflict, and he may forfeit his noncombatant status. Current Navy and joint policy are almost in sync with how they would treat such issues. Under prior joint publications, the danger to a chaplain of becoming mired in the conflict is perhaps exacerbated by the broad

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Intelligence). While Deutch claimed he had no intention of using clergy for intelligence purposes, he argued that he could “imagine circumstances” when a waiver might be necessary. *Id.*

<sup>148</sup> *CIA’s Use of Journalists and Clergy in Intelligence Operations: Hearing Before the S. Select Comm. on Intelligence*, 104th Cong. 34 (1996) (statement of Dr. Rodney Page, Deputy General Secretary, Church World Service and Witness Unit, National Council of Churches).

<sup>149</sup> See JOINT PUB. 3-63, *supra* note 59, at III-9; SECNAVINST 1730.10, *supra* note 131, para. 3(f).

<sup>150</sup> Telephone Interview with Lieutenant Commander Charles E. Varsogea, Chaplain Corps, U.S. Navy (15 Oct. 2009).

<sup>151</sup> Interview by Naseeb Vibes with Marc Falkoff, Attorney, Covington & Burling (Feb. 15, 2005), Available at <http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimonies-of-lawyers/playing-games-with-the-quran-religious-abuse-in-guantanamo> (last visited May 30, 2013).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

advisory outlines allowing for balancing of security interests and religious accommodations therein.<sup>154</sup> However, even if such religion-infused policies are instated, it is not within the purview of the chaplain's role to become involved in advisement for them. The 2009 version of JP 1-05 limits knowing behavior like that in the above example by providing that religious advisement, while allowed, must be consistent with a chaplain's noncombatant status.<sup>155</sup> Navy policies are even more specific than the 2009 version of JP 1-05 in that they outright prohibit a chaplain from indirectly harming a detainee.<sup>156</sup> Furthermore, advisement must be directed solely toward "the amelioration of suffering and the direct pursuit of humanitarian goals,"<sup>157</sup> and chaplains are also strictly forbidden from advising regarding the use of religion as a weapon.<sup>158</sup> In restricting advisement policies thusly, the Navy instructions are more specific in providing protection toward maintaining a chaplain's noncombatant status.

### 3. A Case Study: Camp X-Ray at Guantanamo

"It's not going to be a country club," Secretary of Defense Rumsfeld told America in 2002.<sup>159</sup> And certainly, Guantanamo was not. Some of the worst torture in the camp was conducted by the Behavioral Science Consultation Teams dubbed "Biscuits" by some groups of psychologists and physicians charged with interrogation of prisoners.<sup>160</sup> The Biscuit teams were highly knowledgeable about Muslim religious taboos<sup>161</sup> and used them vigorously to break prisoners in such ways as forcing detainees to stand naked in front of female interrogators, smearing fake menstrual blood on them, attacking them with dogs,<sup>162</sup> kicking the Koran, and forcing them to sit in the floor in a satanic circle.<sup>163</sup> As ex-Guantanamo Chaplain James Yee<sup>164</sup> put it, "Gitmo's secret

<sup>154</sup> JOINT PUB. 3-63, *supra* note 59, at III-8.

<sup>155</sup> JOINT PUB. 1-05 (13 Nov. 2009), *supra* note 98, at II-2.

<sup>156</sup> SECNAVINST 1730.10, *supra* note 131, para. 3(h)(5).

<sup>157</sup> *Id.* para. 3(f).

<sup>158</sup> *Id.* para. 3(f)(3).

<sup>159</sup> Michael Elliot, *Welcome to Camp X-Ray*, TIME (Jan. 20, 2002),

<http://www.time.com/time/magazine/article/0,9171,195299,00.html>.

<sup>160</sup> Joseph A. Palermo, *Bush's Shame: From "Biscuit" Teams to PTSD*, HUFFINGTON POST (Mar. 20, 2007, 5:03 AM), [www.huffingtonpost.com/joseph-a-palermo/bushs-shame-from-biscu\\_b\\_43830.html](http://www.huffingtonpost.com/joseph-a-palermo/bushs-shame-from-biscu_b_43830.html).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> James Yee, Remarks at Forum on Treatment of Prisoners at Guantanamo Bay Hosted by the Center for the Study of Human Rights in the Americas, University of California-Davis (May 5, 2006), [http://www.democracynow.org/2006/5/22/ex\\_guantanamo\\_chaplain\\_james\\_yee\\_on](http://www.democracynow.org/2006/5/22/ex_guantanamo_chaplain_james_yee_on) [hereinafter Yee Remarks].

<sup>164</sup> Yee, a former U.S. Army chaplain at Guantanamo Bay, was arrested and kept in solitary confinement for 76 days on charges of espionage, accused of acting as an operative between detainees in Guantanamo and al-Qaeda. Yee also faced charges of mishandling classified materials, adultery, storing pornography on his Army laptop, and lying to investigators. However, all charges were suddenly dropped against Yee and the incident was removed from his military record. Laura

weapon was the use of religion against the prisoners, whether to try and break them or frustrate them in the course of trying to glean information from them or in the course of detaining them.”<sup>165</sup>

Muslim chaplains were at hand, tending to their dual role as advisors to the command and as chaplains to the prisoners. They advised commanders about the prisoners’ religious routines and “how the religious practices of the prisoners affected the operation.”<sup>166</sup> Within this capacity, the chaplains allegedly instituted several religious accommodations, briefly mentioned in the introduction to this paper, such as advising authorities not to shave beards, establishing culturally sensitive funerals, obtaining prayer beads and Korans, and reviewing prisoners’ menus to make sure the food fit within *halal* dietary restrictions.<sup>167</sup> These initiatives served as accommodations balancing the religious interests of the detainees with the security interests of the detaining power.<sup>168</sup> At the time it was assumed that chaplains were balancing interests for individuals who were not entitled to protections under the Geneva Conventions.<sup>169</sup>

Later information appears to contradict the good faith of the above accommodations. Despite the chaplains’ prior assertions that they did not participate in intelligence initiatives, it was later assumed that they were at least supposed to be. Navy Chaplain Robert T. Williams indicated this in a Navy War College thesis, as follows:

If the JTF chaplain is to be the holy imam to Detainees, it must be assumed that in that relationship he will form special bonds with his followers . . . . This context would almost invariably result in a high degree of role conflict for [a] chaplain who must decide how to be loyal to his religious

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Parker, *The Ordeal of Chaplain Yee*, USA TODAY (May 16, 2004, 9:55 PM), [http://www.usatoday.com/news/nation/2004-05-16-yee-cover\\_x.htm](http://www.usatoday.com/news/nation/2004-05-16-yee-cover_x.htm).

<sup>165</sup> Yee Remarks, *supra* note 163.

<sup>166</sup> *Id.*

<sup>167</sup> Seelye, *supra* note 6; Odom, *supra* note 18, at 50.

<sup>168</sup> Odom, *supra* note 18, at 50.

<sup>169</sup> *Id.* at 50–51. Odom notes:

If detained personnel are not entitled to prisoner of war status, then the U.S. camp commander would not necessarily be required to follow the ‘letter of the law’ in appointing outside ministers. Instead, U.S. forces may apply a modified standard of treatment that adheres to the spirit and principles of LOAC. . . . [C]haplains may also be called upon to assume roles as substitute ministers, in addition to their roles as religious advisors. . . .

*Id.* Of course, balancing interests can be done lawfully. For example, if commanders believed that group prayer, which is only required on Friday evening observance, were harmful to the command, it could properly balance the need for group prayer and need for safety in the camps. See Five Pillars of Islam, <http://mbsoft.com/believe/txh/pillars.htm> (last visited Apr. 19, 2009).

responsibility as well as to remain loyal in support of the requirements of the command (*i.e. information collection*).<sup>170</sup>

Chaplains were aware that there were cameras in the prison wards,<sup>171</sup> which may discredit any assertions that their talks with prisoners were made in confidence. There are also inconsistencies suggesting one chaplain may have lied about certain reforms made. As noted in the introduction, Chaplain Saif-ul-Islam told the press that upon his advising, guards stopped shearing the prisoners' beards.<sup>172</sup> However, this practice continued until 2007.<sup>173</sup> Furthermore, even if some reforms were made—namely, the call to prayer—a prisoner's statement suggests that prisoners were confused about these measures. Asif Iqbal had been at Camp X-Ray for almost a week when the Americans brought on someone they referred to as "The Chaplain."

He started to read the prayers . . . . [N]obody knew what was going on and we were all uncertain as to whether we were allowed to participate. Nobody knew or trusted this individual . . . . This did not stop the Americans from filming him and suggesting that he was leading regular prayer groups.<sup>174</sup>

In light of these inconsistencies it is possible that chaplains at Guantanamo may have violated the noncombatant limitations of their role set out in the Conventions. If these chaplains did in fact contribute to intelligence-gathering or interrogation efforts and they knew or had reason to know that their

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<sup>170</sup> Williams, *supra* note 94, at 12 (emphasis added). Williams' thesis centers on the idea, reflected in JOINT PUB. 3-63, *supra* note 59, that chaplains should not be directly administering to prisoners but rather solely serve as advisors. *Id.* Williams concluded that the proper boundary of a chaplain's role should be "to provide religious support to authorized personnel and to advise the commanding officer on matters pertaining to religion and religious support." *Id.* at 16. In so concluding, he asks:

How would a chaplain deal with the issue of confidentiality versus the need to gather intelligence? Would one choose the intelligence value of the information (possible attack, harm to others) or the understanding of the religious role as God's representative (priest/penitent)? This is not a prudent place for policy or doctrine to place a chaplain.

*Id.* at 12–13. I should note that in his interview, ex-chaplain Yee denied being part of the intelligence at Guantanamo. See Yee Remarks, *supra* note 163.

<sup>171</sup> Interview by Juan Gonzalez with James Yee, in N.Y., N.Y. (July 10, 2005), <http://old.cageprisoners.com/articles.php?id=9901> (last visited May 31, 2013). The interviewer quotes Yee's book: "Cameras were installed along the ceiling and in the back section. . . . [G]uards watched detainees with dozens of monitors." *Id.* Note, however, that Yee was discussing cameras in the "Delta" psychological ward in this segment. *Id.*

<sup>172</sup> Seelye, *supra* note 6.

<sup>173</sup> Rosenberg, *supra* note 7.

<sup>174</sup> Statement of Asif Iqbal, Detention in Afghanistan and Guantanamo Bay: Statement of Shafiq Rasul, Asif Iqbal and Ruhel Ahmed 35 (26 July 2004), [http://humanrights.ucdavis.edu/resources/library/documents-and-reports/tipton\\_report.pdf](http://humanrights.ucdavis.edu/resources/library/documents-and-reports/tipton_report.pdf) (last visited May 31, 2013).



information would be used to harm the prisoners, these chaplains have potentially violated the Third Convention.<sup>175</sup>

Furthermore, chaplains cannot rest on a defense that higher authority—even that of the President—directed them to disregard the Third Geneva Convention respecting this group of prisoners.<sup>176</sup> Such defenses are deemed inadequate under Article 8 of the Nuremberg Charter<sup>177</sup> and may only be considered in sentencing.<sup>178</sup> Furthermore, if it were proven that a chaplain did lie, the legal maxim *falsus in uno, falsus in omnibus* may apply and the chaplain’s credibility may be considered in light of the lie.<sup>179</sup>

Chaplains must take care that their activities pertaining to command advisement do not color their noncombatant status, the very essence of why they are protected under the Third Geneva Convention.<sup>180</sup> Chaplains “own” their noncombatant status and becoming involved in conflict may result in its forfeiture.

#### IV. Conclusion

Current joint policy has gone a long way in bringing itself in line with the Geneva Conventions. The 2009 version sets areas on which a chaplain may advise the command and provides as an outer limit of the advisement that it must be carried out consistently with the chaplain’s noncombatant status.

Similarly, Navy instructions protect a chaplain’s status as a noncombatant. However, they should be brought more in line with Article 8 of

<sup>175</sup> It is also possible that religious reforms were made more as “sticks and carrots,” with these benefits given in exchange for information. Even in these situations, where there is no direct harm to the detainees (physical or emotional) as there are with “Biscuit” torture situations, any information provided by the chaplain would still constitute intelligence and the chaplain would, therefore, be out of sync with the Third Geneva Convention.

<sup>176</sup> The Obama Administration asserts that it has detention power under Laws of War rather than as a product of the power of the executive. Respondents’ Memorandum, *supra* note 85, at 2.

<sup>177</sup> Article 8 provides: “The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.” Charter of the International Military Tribunal art. 8, Aug. 8, 1945, 59 Stat. 1544, 3 Bevans 1238.

<sup>178</sup> Stuart E. Hendin, *Command Responsibility and Superior Orders in the Twentieth Century—A Century of Evolution*, 10 MURDOCH UNIV. ELECTRONIC J.L. para. 46 (Mar. 2003), <http://www.murdoch.edu.au/elaw/issues/v10n1/hendin101.html>.

<sup>179</sup> Often drawn upon in criminal cases, the maxim *falsus in uno, falsus in omnibus*, or “lie in one thing, lie in everything,” is a jury instruction wherein a jury is mandatorily instructed that if they believe a witness has willfully testified falsely about any material matter in their testimony that they should or may disregard the witness’ entire testimony unless it is corroborated. W.W. Allen, Annotation, *Modern View as to Propriety and Correctness of Instructions Referable to Maxim “Falsus in Uno, Falsus in Omnibus,”* 4 A.L.R.2d 1077 (2012).

<sup>180</sup> COMMENTARY: GENEVA CONVENTION I, *supra* note 38, at 219–20.

the Nuremberg Charter<sup>181</sup> so as to provide greater protection to chaplains. The instruction's limitations on advisement apply in situations "in which the Laws of Armed Conflict apply."<sup>182</sup> However, chaplains must take care to remember that they should not simply accept determinations, even by the President, that the Geneva Conventions do not apply to certain circumstances. Reliance on such statements, if they prove legally incorrect, will not shield chaplains from responsibility. Thus, joint and Navy policy should change their advisory sections to read that *whenever* a chaplain is in the position of advising a commander, he must follow the instructions and limitations of that role.

Chaplains must take care that their activities pertaining to command advisement do not color their noncombatant status, the very essence of why they are protected under the Third Geneva Convention.<sup>183</sup> Chaplains own their noncombatant status and becoming involved in conflict through unchecked or naive advisement may result in its forfeiture. Chaplains must therefore remain vigilant in the preservation of their noncombatant status or risk violating the Geneva Conventions and military regulations<sup>184</sup> and risk their actions having an effect on the status of American chaplains on a more global scale. In violating basic tenets of the Geneva Conventions, these chaplains could put *all* chaplains in danger of being viewed as potential intelligence gatherers, compromising their noncombatant statuses and stripping them of protections therein.

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<sup>181</sup> Charter of the International Military Tribunal, *supra* note 177, art. 8.

<sup>182</sup> See SECNAVINST 1730.10, *supra* note 131, para. 3(f).

<sup>183</sup> COMMENTARY: GENEVA CONVENTION I, *supra* note 38, at 219–20.

<sup>184</sup> See JOINT PUB. 3-63, *supra* note 59; JOINT PUB. 1-05 (13 Nov. 2009), *supra* note 98; SECNAVINST 1730.10, *supra* note 131.

# SELF-DETERMINATION AND TERRORISM: CREATING A NEW PARADIGM OF DIFFERENTIATION

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Semantic instability, irreducible trouble spots on the borders between concepts, indecision in the very concept of the border: all this must not only be analyzed as a speculative disorder, a conceptual chaos or zone of passing turbulence in public or political language. We must also recognize here strategies and relations of force. The dominant power is the one that manages to impose and, thus, to legitimate, indeed to legalize (for it is always a question of law) on a national or world stage, the terminology and thus the interpretation that best suits it in a given situation.<sup>1</sup>

## I. Introduction

The term “terrorism” is a part of the global vernacular. Our airwaves and newsprint are saturated with reports of a myriad of terrorisms: state terrorism, Islamic terrorism, electronic terrorism, eco-terrorism, and plain old run-of-the-mill terrorism to name a few. This proliferation of linguistic options for labeling terrorism derives in part from the deep seeded negativity attached to the term; naming your opponent a “terrorist” inevitably gains the moral high ground. While savvy from a public relations standpoint, this creates a disconnect between the public understanding and legal definition of terrorism. In short, the ubiquity of the term “terrorist” within the media’s lexicon has bred a level of wide-spread familiarity, which, in turn, has allowed for its popular use without an agreed-upon international definition.

On the surface, the lack of a clear international legal definition of terrorism appears to be merely academic. If everyone knows what terrorism is,

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<sup>1</sup> GIOVANNA BORRADORI, PHILOSOPHY IN A TIME OF TERROR: DIALOGUES WITH JURGEN HABERMAS AND JACQUES DERRIDA 105 (2003) (quoting Jacques Derrida).

why should it matter that the international lawyers cannot agree? Clearly, the average man on the street is not losing sleep over the lack of international definition of terrorism; he knows what terrorism is and has no need for a legal definition. It is clear, however, that being labeled a terrorist has distinct moral consequences. For no groups is this truer than the self-determination movements.

It has become cliché to argue that one man's terrorist is another's freedom fighter, yet the proliferation of the label of terrorism in conjunction with its inexact definition continues to exacerbate this problem. Thus far, international law has been woefully inadequate in separating the legally acceptable forms of resistance—national liberation movements or NLMs—from legally unacceptable forms of resistance—terrorism. To some extent, this is a direct result of the inability of the international community to agree upon an international definition for terrorism. While this definition would make separating NLMs from terrorism easier, it is not a *sine qua non*. Instead, the distinction can and should be based upon a definition of self-determination that excludes the application of terrorism; as long as NLMs follow a given set of rules, they protect themselves from being labeled as terrorists. This study begins by outlining a clear definition of self-determination, after which it examines how this definition should interact with the legal/political concept of terrorism.

Before attempting any analysis, however, it is necessary to have a basic understanding of the underlying legal principles. These are divided into three broad categories: (1) self-determination; (2) terrorism; and (3) international humanitarian law (IHL). These explanations are not intended to be comprehensive, as that would not be feasible in a study of this size. Instead, they will provide the background necessary for understanding how they interact with each other for the purpose of differentiating self-determination and terrorism.

## II. Self-Determination

Although self-determination is a founding purpose of the United Nations (U.N.),<sup>2</sup> the actual scope of this principle has been oft debated. The debates have centered around three main areas of dispute. First, who may claim the right of self-determination?<sup>3</sup> Construe the right too broadly and the international legal order runs the risk of being deconstructed into increasingly smaller self-defining units.<sup>4</sup> Construe the right too narrowly and the rights of

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<sup>2</sup> U.N. Charter art. 1, para. 2.

<sup>3</sup> Subrata Chowdhury, *The Status and Norms of Self-Determination in Contemporary International Law*, in *THIRD WORLD ATTITUDES TOWARD INTERNATIONAL LAW* 87, 88–93 (1987).

<sup>4</sup> *See id.* at 89–90.

minorities are trampled by the hegemon.<sup>5</sup> Second, when does the right apply?<sup>6</sup> Even if the people who are claiming the right have the right to do so, they may not have the right under the given circumstances.<sup>7</sup> Third, by what means may a people enforce their right?<sup>8</sup> Should it be enforced through political, legal, military, or some other means? This study begins by laying out the historical process through which self-determination transformed from a political principle into a legal right and subsequently deals with each separate debate in turn.

## A. Development of Self-Determination

### 1. Theoretical Bases

While the first full-fledged conceptualizations of self-determination begin with U.S. President Woodrow Wilson, the seeds for this right were planted much earlier.<sup>9</sup> The American and French Revolutions were founded on the principle that the government was to be representative of the people.<sup>10</sup> The government's failure to fulfill this duty was subsequently believed to give rise to a right of the people to rise up against the offending government.<sup>11</sup> While never couched in terms of a right to self-determination *per se*, both the American and French Revolutions provided the theoretical grounding for future claims of self-determination.

On January 8, 1918, President Woodrow Wilson enumerated his Fourteen Points before a joint session of Congress; they eventually became the basis for the Treaty of Versailles peace process. While the Fourteen Points never specifically mention the term "self-determination," six of the fourteen points implicitly deal with the issue.<sup>12</sup> Wilson's theory of self-determination was based upon democratic thought. His goal was the creation of world peace through guaranteeing the well-being of each individual.<sup>13</sup> He thought this could only be achieved in a democratic government that was able to respond to the needs of the governed.<sup>14</sup> For Wilson, the governing entity could only be successful in this project when minorities were free from oppression.

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<sup>5</sup> *See id.* at 87.

<sup>6</sup> *See id.* at 93–94.

<sup>7</sup> *See id.*

<sup>8</sup> *See id.* at 95–96.

<sup>9</sup> DAVID RAIC, STATEHOOD AND THE LAW OF SELF-DETERMINATION 172–75 (2002); *see also* LEE C. BUCHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION 3 (1978).

<sup>10</sup> *See* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES 11 (1995); *see also* RAIC, *supra* note 9.

<sup>11</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>12</sup> *See* RAIC, *supra* note 9, at 181 (discussing Wilson's Points V & IX–XIII).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

In contrast to Wilson's democratic project of self-determination, Vladimir Lenin saw self-determination as the last resort of the oppressed to throw off an alien oppressor.<sup>15</sup> For Lenin, self-determination was synonymous with secession and, as such, only applied where, "national oppression and national friction make joint life absolutely intolerable."<sup>16</sup> In this sense, Lenin saw self-determination as a temporary solution to the ills of capitalism that would be rendered obsolete with the eventual creation of the single, integrated socialist state.<sup>17</sup>

## 2. Difference Between Internal and External Self-Determination

This historical cleavage between Wilsonian and Leninist concepts of self-determination has, over time, split self-determination into the broader categories of internal and external self-determination as well. The former deals with the right of self-determination between a people and its government. The latter deals with the right of self-determination between a people and an outside influence. For example, the right of a people of an existing state to determine freely their status without outside interference, the right a people subjugated by foreign occupation or domination to free itself, and the right of a people to secede from a state to create a state or join another state are all examples of external self-determination. The rights of a people to determine its constitution and to govern itself, on the other hand, are examples of internal self-determination.<sup>18</sup>

## 3. U.N. Charter

Despite growing theoretical support for the concept of self-determination, it was far from clear that it would be included in the U.N. Charter. Although the United States and United Kingdom had already proclaimed their support of self-determination in the Atlantic Charter,<sup>19</sup> the term was not included in the original draft.<sup>20</sup> In fact, it was only at the insistence of the Soviet delegation that the principle of self-determination was included in the Charter at all.<sup>21</sup>

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<sup>15</sup> *Id.* at 185.

<sup>16</sup> VLADIMIR LENIN, *The Right of Nations to Self-Determination*, in COLLECTED WORKS 393, 423 (1964).

<sup>17</sup> See CASSESE, *supra* note 10, at 17.

<sup>18</sup> Allan Rosas, *Internal Self-Determination*, in MODERN LAW OF SELF-DETERMINATION 225, 230 (1993).

<sup>19</sup> Atlantic Charter, U.S.-U.K., Aug. 14, 1941, 55 U.S.T. 1603, *reprinted in* PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT (1938-1950), at 314 (1950).

<sup>20</sup> CASSESE, *supra* note 10, at 38.

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

The committee that drafted the relevant provision agreed on four principles. First, self-determination corresponds to the “will and desires” of people everywhere and, therefore, should be included in the U.N. Charter.<sup>22</sup> Second, the principle applied to the right of self-government and not to the right of secession.<sup>23</sup> Third, the right is not limited to single nationalities if multiple nationalities wish to claim it together.<sup>24</sup> Finally, the right must be a free and genuine expression of the will of the people and not an alleged expression of the popular will.<sup>25</sup> These principles, however, were included in the committee’s comments on the drafting of the Charter and not in the charter itself, thus limiting their precedential value.<sup>26</sup>

While the committee may have had an idea of what they thought constituted self-determination, the countries that signed the Charter did not.<sup>27</sup> As such, the term is in the Charter but undefined, and future generations are left to flesh out the contours of the concept of self-determination.<sup>28</sup>

#### 4. Primary and Secondary Treaty Law

The first post-Charter international instruments to deal with self-determination were General Assembly Resolutions 1514 and 1541 passed on December 14 and 15, 1960, respectively. Resolution 1514, entitled “Declaration on Decolonization,” declares that the subjugation of peoples to alien domination is a violation of human rights.<sup>29</sup> It goes on to ensure all peoples the right to self-determination and, by virtue of that right, the ability to freely determine their political status.<sup>30</sup> Furthermore, it states all armed action or repressive measures directed against dependent people are to cease.<sup>31</sup> Additionally, General Assembly Resolution 1541 provides three possible conditions by which a non-self-governing territory can reach full measure of self-government: its emergence as a sovereign state; its free association with an independent State; or its integration with an independent state.<sup>32</sup> While both of

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<sup>22</sup> *Id.* at 40.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> See Vienna Convention on the Law of Treaties arts. 31–32, May 22, 1969, 1155 U.N.T.S. 331 (providing context for treaty interpretation via, *inter alia*, additional agreements and preparatory works, or *travaux préparatoires*).

<sup>27</sup> RAIC, *supra* note 9, at 201.

<sup>28</sup> U.N. Charter art. 1, para. 2.

<sup>29</sup> Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), para. 1, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684, at 66 (Dec. 14, 1960).

<sup>30</sup> *Id.* para. 2.

<sup>31</sup> *Id.* para. 4.

<sup>32</sup> G.A. Res. 1541 (XV), Annex, princ. VI, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684, at 29 (Dec. 15, 1960).

these resolutions were passed specifically in response to colonialism, neither of them limits its language only to people specifically under the yoke of colonialism.<sup>33</sup>

The next international instruments to deal with self-determination were the International Covenants on Human Rights which were done in 1966 and came into force in 1976.<sup>34</sup> Both the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) guarantee self-determination as a human right.<sup>35</sup> Furthermore, the right was considered so fundamental that each treaty states: “[A]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>36</sup> Part I, article 3 includes a specific assertion to the right of self-determination for Non-Self-Governing and Trust Territories:

The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.<sup>37</sup>

It is important to note that, while part I, article 3 speaks of self-determination in terms of colonialism, part I, article 1 uses broad language applicable to non-colonial situations as well.

The final major international instrument to deal directly with self-determination was the Friendly Relations Declaration in 1970.<sup>38</sup> Paragraph 7 of principle V in the Friendly Relations Declaration states:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would

<sup>33</sup> See G.A. Res. 1514, *supra* note 29; G.A. Res. 1541, *supra* note 32.

<sup>34</sup> International Covenant on Economic, Social and Cultural Rights art. 1, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; International Covenant on Civil and Political Rights art. 1, *done* Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>35</sup> ICESCR, *supra* note 34, art. 1; ICCPR, *supra* note 34, art. 1.

<sup>36</sup> ICESCR, *supra* note 34, art. 1; ICCPR, *supra* note 34, art. 1.

<sup>37</sup> ICESCR, *supra* note 34, art. 1; ICCPR, *supra* note 34, art. 1.

<sup>38</sup> Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), Annex, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028, at 121 (Oct. 24, 1970) [hereinafter Friendly Relations Declaration]. Though the Friendly Relations Declaration does not number the principles states, they are referred to herein by number based the order in which they appear.



dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination as described above *and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or colour.*<sup>39</sup>

In short, the guarantee of territorial sovereignty applies only so long as the state in question abides by the requirement that the government respects the principle of self-determination by representing the whole people belonging to the territory. The inverse of this seems to imply that where a government does not represent without distinction to race, creed or color, the offended minority may impair the territorial integrity or political unity of the sovereign.<sup>40</sup>

### 5. Self-Determination as Customary International Law

The language used in Resolution 1514 quoted above appears to support the existence of a prior customary international law (CIL) norm.<sup>41</sup> This language speaks of self-determination in the mandatory language of an existing right,<sup>42</sup> contrasting strongly with the earlier language used for self-determination that was couched in the optional terms of “promotion.”<sup>43</sup> Furthermore, prior to the promulgation of Resolution 1514, thirty non-self-governing and trust territories achieved independence, further supporting that the right to self-determination existed already.<sup>44</sup>

Two cases of the International Court of Justice (ICJ) also support the premise that self-determination exists under CIL. The *Namibia* case, decided by the ICJ in 1971, helped to clarify the character of self-determination in international law. In *Namibia*, the court held:

[T]he last fifty years, as indicated above, have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the

<sup>39</sup> *Id.* princ. V (emphasis added).

<sup>40</sup> RAIC, *supra* note 9, at 247.

<sup>41</sup> *Id.* at 215–16.

<sup>42</sup> See generally G.A. Res 1514, *supra* note 29, at 67 (declaring that the General Assembly is “convinced that all peoples have an inalienable to complete freedom, the exercise of their sovereignty, and the integrity of their national territory”).

<sup>43</sup> See Recommendations Concerning International Respect for the Right of Peoples and Nations to Self-Determination, G.A. Res. 1188 (XII), para. 1.b, U.N. Doc. A/Res/1188 (XII) (Dec 11, 1957) (requiring member states to “promote the realization and facilitate the exercise this right [of self-determination]”).

<sup>44</sup> RAIC, *supra* note 9, at 217.

self-determination and independence of the peoples concerned. In this domain; as elsewhere, the *corpus iuris gentium* has been considerably enriched, and this Court, if it is faithfully to discharge its functions, may not ignore.<sup>45</sup>

It appears that the ICJ is stating that the concept of self-determination as a right exists as part of CIL and is informed by the actions of states over the period of decolonialization.

This conclusion is further supported by Judge Dillard's separate opinion in the *Western Sahara* case. Judge Dillard concluded: "[T]he pronouncements of the Court thus indicate that a norm of international law has emerged applicable to the decolonization of those non-self governing territories which are under the aegis of the U.N."<sup>46</sup> While this does not constitute a clearly sweeping acceptance of self-determination as a right in all situations, it does provide unequivocal proof that the right does exist in CIL for, at the very least, purposes of decolonization. As will be shown below, the right has since been broadened to apply in non-colonial situations as well.<sup>47</sup>

## B. To Whom the Right Applies

Because self-determination is a right guaranteed to "peoples," it is necessary to define which peoples may claim this right. On the surface, the most obvious answer is that it only applies to all people under colonial rule. This interpretation, however, would be unnecessarily narrow. Instead, decolonization should be seen as the application of a general rule to a specific context, not a limitation of its applicability *per se*.<sup>48</sup> As such, scholars divide possible definitions of "peoples" into three other main categories: (1) the entire population of existing States; (2) peoples as ethnic groups within a State; and (3) "minorities."<sup>49</sup>

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<sup>45</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16, 31–32 (June 11).

<sup>46</sup> *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, 121 (Oct. 16) (opinion of Dillard, J.).

<sup>47</sup> See *infra* Part II.B–C.

<sup>48</sup> RAIC, *supra* note 9, at 243; see also CHRISTOPHER O. QUAYE, *LIBERATION STRUGGLES IN INTERNATIONAL LAW* 7–11 (1991).

<sup>49</sup> RAIC, *supra* note 9, at 243; see also CASSESE, *supra* note 10, at 59.

## 1. Entire Population of Existing State

Under this concept, “peoples” is defined as all peoples living within a specific geographical territory.<sup>50</sup> This definition of “peoples” has no relation to the ethnicity or background of the individuals in question. Instead, it relies solely upon the geographical placement of the individuals. This sub-set of “peoples” is guaranteed the right of internal self-determination; that is, the right of those people to determine the form of government under which they are to be governed.<sup>51</sup> While this may have applicability to internal self-determination, it is hard to see how it could apply to external self-determination. To say that an existing state has the right to define itself as a state is a truism. This group must, therefore have the right of self-determination by definition, but the right is not limited only to this group.

## 2. Ethnic Definition

The ethnic definition is based on the idea that an ethnic minority constitutes a “people” for the purposes of self-determination. The difficulties with the ethnic definition are twofold. First, one must prove that modern law of self-determination recognizes ethnic groups as a “people” for the purposes of exercising the right. Second, one must define which ethnic groups qualify.

### a. Ethnic Groups as People

While some scholars argue that ethnic groups do not qualify for the right of self-determination,<sup>52</sup> this view does not appear to hold up under scrutiny.

First, the applicability of self-determination to ethnic subgroups is a necessary consequence of the *raison d'être* of self-determination.<sup>53</sup> That is, if one of the reasons for the existence of the right of self-determination is the protection of the identity of a “people,”<sup>54</sup> to limit the definition of people to only a territorial identity would defeat the purpose of the right itself.

Second, a close reading of the Friendly Relations Declaration demonstrates that the modern law of self-determination does recognize ethnic groups as “people.” The Friendly Relations Declaration appears to give ethnic

<sup>50</sup> Rosalyn Higgins, *International Trade Law and the Avoidance, Containment and Resolution of Disputes*, 230 RECUEIL DES COURS DE L'ACADEMIE DE LA HAYE 9, 170 (1991).

<sup>51</sup> See RAIC, *supra* note 9, at 245–46.

<sup>52</sup> See, e.g., James Crawford, *Outside the Colonial Context*, in SELF-DETERMINATION IN THE COMMONWEALTH 1, 13 (1988).

<sup>53</sup> RAIC, *supra* note 9, at 248.

<sup>54</sup> See *infra* Part II.A.1 (discussing the Wilsonian conception of self-determination).

groups the right to participate in the decision-making of the State through guaranteeing territorial integrity.<sup>55</sup> It would not be necessary to guarantee territorial integrity if certain subgroups within the state did not have the right to claim self-determination. Put another way, if ethnic groups were not given the right of self-determination, the only entity that could claim that right would be the entire population of the given State, which, by definition, could not endanger the territorial integrity of the State.<sup>56</sup>

### b. Which Ethnic Groups Qualify

Once it is clear that subgroups have the right of self-determination, the next question is which subgroups qualify. The Friendly Relations Declaration requires that no distinction be made with relation to “race, creed or color,”<sup>57</sup> but nowhere does it define these terms. Cassese, in his influential book on self-determination, provides a textual analysis of the clause in which he begins by reducing race and color to the same term.<sup>58</sup> He continues on to argue that creed could not possibly apply to any concept more broad than religion, as to do so would put governments in the untenable position of not being allowed to exclude opposing political views.<sup>59</sup> For him, therefore, the subgroups who may claim the right of self-determination are limited to only racial and religious groups which are denied access to the political decision-making process.<sup>60</sup>

This argument, however, has several flaws in reasoning.<sup>61</sup> First, while the Friendly Relations Declaration does not define race, the International Convention on the Elimination of all Forms of Racial Discrimination does provide an international definition of racial discrimination.<sup>62</sup> According to this Convention, “racial discrimination” includes “any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin” which infringes on certain human rights and fundamental freedoms.<sup>63</sup> Cassese’s limited criteria of race, therefore, are not supported by the accepted international definition. Instead, race, when used in the context of racial discrimination, includes national and ethnic groups as well as purely racial groups. Secondly, the *travaux préparatoires* to the Friendly Relations Declaration show that paragraph 7 of principle V was not intended to apply only

<sup>55</sup> See Friendly Relations Declaration, *supra* note 38, para. 1, princ. V.

<sup>56</sup> See RAIC, *supra* note 9, at 248.

<sup>57</sup> See Friendly Relations Declaration, *supra* note 38, para. 1, princ. V.

<sup>58</sup> CASSESE, *supra* note 10, at 113.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 114.

<sup>61</sup> See RAIC, *supra* note 9, at 249–53.

<sup>62</sup> International Convention on the Elimination of All Forms of Racial Discrimination, *done* Dec. 21 1965, S. TREATY DOC. NO. 95-18, 660 U.N.T.S. 195.

<sup>63</sup> *Id.* art. 1.

to racial discrimination.<sup>64</sup> Furthermore, the failure of Cassese's argument appears to be borne out in subsequent treaty documents. For example, the 1993 Vienna Declaration uses the same opening language as the Friendly Relations Declaration, but instead of the terms "race, creed and color," it uses the phrase "without distinction of any kind."<sup>65</sup>

While a subgroup can be based on a distinct racial, national, or ethnic group, it is still very difficult to define who qualifies as one of these groups. In 1989, UNESCO convened an international panel on the rights of peoples.<sup>66</sup> This panel, while it did not define what made a "people" *per se*, created the groundwork for a usable definition. The panel held that for a group to constitute a people it must enjoy most or all of the following features: (1) a common historical tradition; (2) a common racial or ethnic identity; (3) cultural homogeneity; (4) linguistic unity; (5) religious or ideological affinity; (6) territorial connection; and (7) common economic life.<sup>67</sup> Implicit within the requirement of a territorial connection is that the subgroup, while a minority in relation to the rest of the population, must have a numerical majority within a specific coherent territory.<sup>68</sup> In addition to these objective criteria, the panel also included the subjective requirement that "the group as a whole must have the will to be identified as a people or the consciousness of being a people."<sup>69</sup> While far from being an exact science, this framework combines the objective and subjective to distinguish a subgroup from any other social or political group.

To recap, the ethnic definition begins with the assertion that subgroups within a state should be given the right to self-definition. In fact, in order for the Friendly Relations Declaration to have any logical linguistic consistency, subgroups must be included within the definition of "people." Once it is accepted that subgroups have a right to self-determination, the next question is how to define the subgroups. While Cassese would limit the subgroups to racial and religious groups, his textual analysis ignores the international definition of racial discrimination as well as the historical understanding of the signatories of the Friendly Relations Declaration. The subgroups, therefore, include racial, religious, national, and ethnic subgroups. In order to qualify as one of these, a subgroup should exhibit most if not all of the objective criteria outlined in the

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<sup>64</sup> RAIC, *supra* note 9, at 253.

<sup>65</sup> World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 2, U.N. Doc. A/CONF.157/23 (July 12, 1993).

<sup>66</sup> U.N. Educ., Scientific & Cultural Org. International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, Paris, Fr., Nov. 27–30, 1989, *Final Report and Recommendations*, SHS-89/CONF.602/7 (Feb. 22, 1990) [hereinafter *Rights of Peoples*].

<sup>67</sup> *Id.* para. 22.

<sup>68</sup> RAIC, *supra* note 9, at 366.

<sup>69</sup> *Rights of Peoples*, *supra* note 66, para. 22.2.

UNESCO report, as well as have the subjective belief that it is a distinct subgroup.

### 3. Minorities

The term “minority” is, as yet, undefined in international law. While an in depth discussion of minority rights does not fall within the scope of this study, it is necessary to clarify the distinction between “minorities” and “peoples” under international law. A minority is distinct because it defines itself by relating to communities beyond the external borders of the State.<sup>70</sup> A minority remains a minority even when there is a large population outside the state that shares the same characteristics.<sup>71</sup> A “people,” on the other hand, is defined by its collective individuality.<sup>72</sup> For example, if an ethnic group lived in state A while the majority of that ethnic group resided in state B, this ethnic group will invariably be characterized as a minority because it cannot have a collective individuality separate from its compatriots in state B. Furthermore, while a “minority” has some rights under international law, these do not extend to self-determination, which may only be claimed by a “people.”<sup>73</sup>

#### C. When the Right Applies

Now that it has been established which “peoples” are guaranteed the right to self-determination under international law, it becomes necessary to establish when those “peoples” may ensure that right. A subgroup may qualify as a people under both the objective and subjective standards listed above, but this does not necessarily mean that they will have a claim to the right of self-determination as applied in their specific case.

Again we must turn to the Friendly Relations Declaration which specifies two different situations to which self-determination was intended to apply: (1) colonialism and (2) the “subjection of peoples to alien subjugation, domination and exploitation.”<sup>74</sup> In the case of the former, it is clear that the right of self-determination applies to all groups within the context of colonialism.<sup>75</sup> To limit the right of self-determination to only the colonial context, however, would be to misread the Friendly Relations Declaration. While all people living under colonialism are living under alien “subjugation, domination and exploitation,” many people not living under colonialism are as well. There has been a growing acceptance of this argument in the international

<sup>70</sup> See RAIC, *supra* note 9, at 267.

<sup>71</sup> See *id.*

<sup>72</sup> See *id.* at 269.

<sup>73</sup> See *id.* at 270.

<sup>74</sup> Friendly Relations Declaration, *supra* note 38, pmbl.

<sup>75</sup> CASSESE, *supra* note 10, at 90.

community.<sup>76</sup> For instance, the 1988 International Law Commission report held the right of self-determination was universal and not limited to colonialism.<sup>77</sup>

In defining the “subjection of peoples to alien subjugation, domination and exploitation,”<sup>78</sup> Cassese again makes an unnecessarily strict argument that does not hold up under scrutiny. For Cassese, alien domination exists when any one Power “dominates the people of a foreign territory by recourse to force.”<sup>79</sup> In support for his argument, Cassese makes reference to Additional Protocol I to the Geneva Conventions, which gives international character to any conflict against colonial occupation, alien occupation, or a racist regime.<sup>80</sup> For him, the requirement of “alien occupation” entails the use of force.<sup>81</sup>

This argument has two main faults. First, he relies upon Additional Protocol I for the language defining when self-determination applies. The Friendly Relations Declaration, not Additional Protocol I, has been characterized as the “most authoritative statement of the principles of international law relevant to the questions of self-determination and territorial integrity.”<sup>82</sup> Furthermore, the language of Additional Protocol I, after applying itself to situations of “alien occupation” reads, “[A]s enshrined in . . . the Declaration on Principles of International Law concerning Friendly Relations.”<sup>83</sup> Cassese uses the language of Additional Protocol I to limit the language of the Friendly Relations Declaration, but this is backwards; Additional Protocol I was written within the parameters of the language of the Friendly Relations Declaration. Second, Cassese relies heavily upon the preparatory materials of Additional Protocol I. According to the Vienna Convention on the Law of Treaties, a treaty is to be interpreted in accordance with the “ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>84</sup> It is only when this original term is ambiguous that the interpreter may delve into the historical background of the treaty.<sup>85</sup> In this case,

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<sup>76</sup> *Id.* at 90–91.

<sup>77</sup> *Report of the International Law Commission to the General Assembly on the Work of its Fortieth Session*, 43 U.N. GAOR Supp. 10, U.N. Doc. A/43/10 (1988), *reprinted in* [1988] 2(2) Y.B. Int'l L. Comm'n 64, U.N. Doc. A/CN.4/SER.A/1988/Add.1 (Part 2).

<sup>78</sup> Friendly Relations Declaration, *supra* note 38, at 122.

<sup>79</sup> CASSESE, *supra* note 10, at 99.

<sup>80</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 1, para. 4, *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

<sup>81</sup> CASSESE, *supra* note 10, at 93.

<sup>82</sup> International Commission of Jurists, *East Pakistan Staff Study*, 8 Int'l Commission Jurists Rev. 23, 44 (1972), *available at* <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/07/ICJ-Review-8-1972-eng.pdf>.

<sup>83</sup> Additional Protocol I, *supra* note 80, art. 1, para. 4.

<sup>84</sup> Vienna Convention on the Law of Treaties, *supra* note 27, art. 31.

<sup>85</sup> *Id.* art. 32.

alien domination does not, on a good faith reading, inherently include the use of force and there is no cause to move past a good faith reading of the text.

In sum, the right of self-determination applies to all peoples, including subgroups as specified above, in cases where there is alien subjugation. Alien subjugation, in turn, does not imply foreign occupation. Instead, it applies in all cases in which an entity not of the same subgroup as the “people” has subjugated the rights of said “people.” Admittedly, this appears to be a large group for which the right of self-determination applies. This is why the right to self-determination manifests itself differently for each subgroup, depending on the type of “subjugation” in which the “alien” engages.

#### **D. How the Right Applies**

For the purposes of this study, use of force to enforce external self-determination is the important manifestation of the right to self-determination. This specific aspect of self-determination, however, is the extreme. For the vast majority of peoples who both qualify as a people under international law and are under alien subjugation, the right manifests itself as an internal right to self-determination; that is, a right to participation in the government. In order for the internal right of self-determination to advance beyond this internal right and into an external right to self-determination, a series of criteria must be met, including: (1) a territorial bond, (2) a direct or indirect violation of internal self-determination, and (3) an exhaustion of all effective judicial and political remedies.<sup>86</sup>

##### **1. Territorial Bond**

In order for a subgroup to be conferred the right of external self-determination it necessarily must have a strong tie to a specific geographical space.<sup>87</sup> Because the right of external self-determination entails the forcible creation of a new territorial state, there must exist an attachment to a distinct territory. When the people are geographically separate, their claim to external self-determination falters in that the “people” are only a minority not a subgroup.

##### **2. Direct or Indirect Violation of Right to Internal Self-Determination**

The right to internal self-determination may be violated either directly or indirectly. The former consists of a formal legal denial of a people’s right to

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<sup>86</sup> See RAIC, *supra* note 9, at 367–72.

<sup>87</sup> *Id.* at 367.



internal self-determination,<sup>88</sup> such as when the Bangladeshi Government suspended the first session of the National Assembly in 1971.<sup>89</sup> General legal principles demand that the suspension of rights must be sustained in nature and not merely transitory.<sup>90</sup> A single, minor deprivation of rights does not give rise to the right of self-determination until it is clear that the deprivation of rights is indefinite. An indirect deprivation of internal self-determination includes any situation in which a people is formally granted internal self-determination but not given it in practice. Clearly, however, the discrimination must be of a high quantity and quality. For example, that discrimination must be egregious enough to constitute a threat to the collective identity of the people itself.<sup>91</sup>

### 3. Exhaustion of Judicial and Political Remedies

Given that the right to self-determination is continually balanced against territorial sovereignty in international instruments,<sup>92</sup> it logically follows that the territorial integrity of a state should be protected where possible. This seems to imply that a state must exhaust all other possible remedies before resorting to external self-determination. This was the argument adopted by the Supreme Court of Canada in *Reference re Secession of Quebec*.<sup>93</sup> According to the Supreme Court of Canada, the people of Quebec do not have the right to secede from Canada precisely because they have access to political remedies.<sup>94</sup> Implicit in the Supreme Court's argument is the belief that because the people of Quebec could alter their position through the political means at their fingertips, recourse to secession was premature.<sup>95</sup> Similar to the international legal concept of subsidiarity, this case requires that subjugated peoples try all local and international peaceful options before recourse to external self-determination may be had.

### 4. Use of Force

The final issue in dealing with how the right to self-determination applies is the question of the use of force. While certain subgroups, when under alien subjugation, may make recourse to external self-determination, the question remains whether that right may involve the use of force. Article 2(4) of

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<sup>88</sup> *Id.* at 368.

<sup>89</sup> *Id.* at 335–38.

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

<sup>91</sup> *Id.* at 369.

<sup>92</sup> *See, e.g.*, Friendly Relations Declaration, *supra* note 38, para. 1, princ. V; Additional Protocol I, *supra* note 80, art. 1.

<sup>93</sup> *See In re Secession of Quebec*, [1998] 2 S.C.R. 217, 284–88 (Can.).

<sup>94</sup> *Id.* ¶ 138.

<sup>95</sup> *See id.*

the U.N. Charter explicitly forbids the threat or use of force.<sup>96</sup> The only exception to this rule appears to be recourse to self-defense.<sup>97</sup> This, therefore, is the claim that most national liberation movements (NLMs) make when arguing for their right to forcibly exercise their right to external self-determination. For them, their use of force is not primary but is a response to the alien subjugation. This argument, however, has not been fully accepted by the international community. Instead, NLMs occupy a legal middle ground; they have a “legal entitlement” that is less than a proper right but more than the absence of any authorization at all.<sup>98</sup> In a practical sense, this means that NLMs do not incur international responsibility for engaging in the use of force even though it is not legal *per se*.

### E. Conclusion

Much of the literature dealing with self-determination provides a cautionary tale of what will happen when the right to self-determination is defined too broadly. As a result, it makes it appear as though the only solution is to narrow the scope of self-determination almost to the point of disappearance. Some even go so far as to argue that self-determination should apply only in the context of colonialism in order to protect territorial integrity.<sup>99</sup> Such interpretations, however, defeat the *raison d'être* for the existence of self-determination. In order to stay true to the purpose of self-determination, without opening a deconstructive Pandora's box, the following guidelines should limit the number of valid claims for the right of self determination.

In order for a people to qualify for the right of self-determination they must exhibit both objective and subjective characteristics of a distinct ethnic group. This group must be more than a minority that identifies itself as a small part of a larger group outside the state. This subgroup must be under alien subjugation. While this does not require that they are forcibly occupied, someone other than a member of their subgroup must be actively discriminating against the subgroup. Furthermore, in order to claim the right to use force in pursuit of external self-determination, the group must have a distinct territory, be either directly or indirectly denied its right to internal self-determination, and have no further recourse to either a judicial or political solution. These criteria will allow the concept of self-determination to be used only in the most dire cases, protecting territorial sovereignty in all other cases.

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<sup>96</sup> U.N. Charter art. 2, para. 4.

<sup>97</sup> U.N. Charter art. 51.

<sup>98</sup> CASSESE, *supra* note 10, at 153.

<sup>99</sup> See, e.g., HÉCTOR GROS ESPIEL, U.N. COMM'N ON HUMAN RIGHTS, THE RIGHT TO SELF-DETERMINATION: IMPLEMENTATION OF UN RESOLUTIONS, UN Doc. E/CN.4/Sub.2/405/Rev.1, U.N. Sales No. E.79.XIV.5 (1980).

### III. Terrorism

In perhaps the best single-sentence summation of an entire body of international law, Judge Higgins stated: “[T]he term ‘terrorism’ has no specific legal meaning.”<sup>100</sup> The word “terrorism,” despite being an area given much international attention, has continued to elude international definition. In part, this lack of definition has led to the difficulties with its relation to self-determination. It is not within the ambit of this study to provide a definition of terrorism, but in order to understand how it interacts with the concept of self-determination, it is necessary to understand some of the difficulties surrounding why it has not yet been defined.

#### A. Defining Terrorism

There are four possible fault lines upon which the definition of terrorism could possibly rest.<sup>101</sup> First is the type of action taken.<sup>102</sup> Second is what classifies as a prohibited target.<sup>103</sup> Third is the purpose of the action.<sup>104</sup> Last is use of prohibited means and methods.<sup>105</sup> Each of these fault lines deals with an issue that potentially affects the ability of a NLM to differentiate itself from a terrorist. As such, it is necessary to identify to what extent, if at all, each bears upon the unstated definition of terrorism. Before dealing with each of these fault lines, however, it is necessary to provide some background on how terrorism has been legally defined in the international community.

#### 1. Background: Should We Define Terrorism?

Lord Carlisle, in his report on international terrorism, posed the question of whether we should be defining terrorism at all.<sup>106</sup> As such, he identified three possible options for defining international terrorism. First, there could be no definition at all.<sup>107</sup> Second, there could be a definition that would only apply at the sentencing phase of a criminal proceeding.<sup>108</sup> Finally, there

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<sup>100</sup> Rosalyn Higgins, *The General International Law of Terrorism*, in *TERRORISM AND INTERNATIONAL LAW* 13, 27 (1997).

<sup>101</sup> *Id.* at 14–19; BEN SAUL, *DEFINING TERRORISM IN INTERNATIONAL LAW* 59–60 (2006).

<sup>102</sup> Higgins, *supra* note 100, at 14–19.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> SAUL, *supra* note 101, at 59–60.

<sup>106</sup> See LORD CARLILE OF BERRIEW Q.C., HOME DEPARTMENT, *THE DEFINITION OF TERRORISM*, 2007, Cm. 7052 (U.K.), available at <http://www.official-documents.gov.uk/document/cm70/7052/7052.pdf>.

<sup>107</sup> *Id.* at 19.

<sup>108</sup> *Id.*

could be a definition that creates a separate crime.<sup>109</sup> For now, the international community has *de facto* chosen the first option. Instead of presenting one coherent definition of terrorism, the international community has ratified a number of *ad hoc* treaties to deal with specific aspects of terrorism.<sup>110</sup> Although each of these treaties deals directly with terrorism, none of them attempts to define it comprehensively. Whether or not we have an international definition of terrorism, the international legal community will continue to deal with each aspect of terrorism separately as it comes up. For the purposes of this study, no convention on terrorism, as yet, looks directly at the line between terrorism and self-determination.

## 2. Type of Action Taken

The first debate over terrorism centers on the action taken. This concept of terrorism emerged when the U.N. General Assembly first established an Ad Hoc Committee on Terrorism.<sup>111</sup> In the beginning, many regarded terrorism to be related to the specific action taken by the actors.<sup>112</sup> For example, anyone who engaged in actions such as hijacking, assassination, or mass bombings would be considered a terrorist. Over time, however, it became clear that mere reference to action was not enough. While some mass bombings are terrorism, those committed by the military, for example, do not qualify. The type of action, while still relevant to whether or not it is terrorism, is not singly dispositive to defining terrorism.

## 3. Prohibited Targets

Another possible definition of terrorism pertains to whether the target is a prohibited target. Certain targets, civilian airplanes for example, have become

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<sup>109</sup> *Id.* It should be noted that Lord Carlisle separated this third group into two more specific groups in his report, but that has no bearing on this analysis.

<sup>110</sup> In chronological order, starting with the earliest, the treaties are as follows: Convention on Offences and Certain Other Acts Committed on Board Aircraft, *done* Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 220; Convention for the Suppression of Unlawful Seizure of Aircraft, *done* Dec 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *done* Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 178; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *done* Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167; International Convention Against the Taking of Hostages, *done* Dec. 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *done* Mar. 10, 1988, S. TREATY DOC. NO. 101-1, 1678 U.N.T.S. 221; International Convention for the Suppression of Terrorist Bombings, *adopted* Dec. 15, 1997, S. TREATY DOC. NO. 106-6, 2149 U.N.T.S. 256; International Convention for the Suppression of the Financing of Terrorism, *done* Dec. 9, 1999, T.I.A.S. No. 13,075, 2178 U.N.T.S. 197; International Convention for the Suppression of Acts of Nuclear Terrorism, *adopted* Apr. 13, 2005, 2445 U.N.T.S. 89.

<sup>111</sup> Higgins, *supra* note 100, at 15.

<sup>112</sup> *Id.*

part of our shared perception of a terrorist target.<sup>113</sup> Reliance on a target alone, however, cannot solely define terrorism. For example, the bombing of Dresden, while a violation of the laws of war, would not be considered terrorism by most. The target, therefore, is one aspect, but not the defining aspect of terrorism.

#### 4. Prohibited Actors

Many possible definitions of terrorism look to who is acting as part of the definition.<sup>114</sup> For example, a person who bombs another state is a terrorist, while a state that bombs another state may be in violation of the laws of war but is not a terrorist. The use of force by one state against another state is fully regulated by the applicable laws of war. Put more specifically, *jus ad bellum* is the *lex specialis* applying wherever it overlaps with terrorism. It is, therefore, only non-state entities that can be included under a definition of terrorism.

#### 5. Prohibited Means and Methods

If one conceptualizes terrorism as an infringement of human rights, then one aspect of the definition must be serious violence.<sup>115</sup> That is, if terrorism is merely the serious deprivation of fundamental human rights, such as the right to life and security of person, then one aspect of the definition must include serious violence.<sup>116</sup> As a corollary to this, terrorism would have to include any attacks on essential utilities and public infrastructure that is necessary to the public health of the people.<sup>117</sup>

On its own, however, serious violence does not always constitute terrorism. A serial killer who has killed 40 people is not a terrorist, because he lacks the necessary *mens rea*. Furthermore, a suicide bomber who kills only one person could still be a terrorist. Once again, while prohibited means and methods constitute one aspect of the definition of terrorism, it cannot be the sole defining characteristic.

#### 6. Purpose

It is the purpose or motive of terroristic activities that is the key element in understanding what differentiates them from any other criminal action. A terrorist act is an act that is done for the purpose of influencing a state, an international organization, or the population itself. The United States'

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<sup>113</sup> *Id.*

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

<sup>115</sup> SAUL, *supra* note 101, at 59.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

definition of international terrorism, for example, requires that the act be intended to “(1) intimidate or coerce a civilian population; (2) influence the policy of a government by intimidation or coercion; or (3) affect the conduct of a government by mass destruction, assassination, or kidnapping.”<sup>118</sup> Without this *mens rea* requirement, terrorism could not be differentiated from any other criminal act.

That said, the purpose or motive is often not enough in itself. For example, prior to the 1991 war in Iraq, the Allied Forces warned Sadaam Hussein that if he did not leave Kuwait they would forcibly remove him.<sup>119</sup> The Allied Forces engaged in threats for the express purpose of influencing the policy of a government by coercion, yet no one (besides perhaps Sadaam himself) would have called the Allied action terrorism. In fact, states continually engage in a system of intimidation and coercion with each other under the aegis of diplomacy. Furthermore, individuals often coerce governments into following a certain political path through monetary donations with strings attached. Nobody, however, would characterize political contributions as terrorism either. Terrorism, while very much tied to the concept of “purpose,” cannot be totally defined by it.

## 7. Conclusion

While none of the above fault lines for defining terrorism is singly dispositive, they each play a part in the concept of defining the international perception of terrorism. A terrorist must intend coercion but this coercion must be accompanied by at least one of the other characteristics: a prohibited act, a prohibited target, or prohibited means and methods. As pertains to NLMs, it is clear that they will always have the intent to coerce the existing government into granting them autonomy. This is, in part, why it is so common for NLMs to be labeled as terrorist groups. As has been shown above, however, this purpose is not dispositive, but must be accompanied by a prohibited act, prohibited target, or prohibited means and methods.

## B. Exceptions to Terrorism

### 1. Introduction

Asserting that all forms of terrorism are unjustifiable does not necessarily preclude the possibility that some forms of terrorism are excusable. Where terrorism is defined narrowly, the need for exceptions is not prevalent. If, however, terrorism is defined broadly, the need for exceptions grows. To be

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<sup>118</sup> 18 U.S.C. § 2331(1)(B) (2006).

<sup>119</sup> Higgins, *supra* note 100, at 15.

clear, the “inner core” of terrorism, for example targeting civilians, would always be illegal.<sup>120</sup> It is the “outer core” of terrorism, for example acts that would not be contrary to IHL if committed by state forces in armed conflict, which could be justified.<sup>121</sup>

That said, one must be careful not to create overly broad exceptions to terrorism through which any terrorist could excuse their actions. As Derrida warns: “Every terrorist in the world claims to be responding in self-defense to a prior terrorism on the part of the state, one that simply went by other names and covered itself with all sorts of more or less credible justifications.”<sup>122</sup> Below is a discussion of the viability of two of the most common excuses used by NLMs.

## 2. Self-Determination and *Jus ad Bellum*

As has been discussed in the above section on self-determination, NLMs occupy a unique position in international law. The Friendly Relations Declaration reflects a compromise between the prohibition on the use of force and the rights of oppressed people to resist their oppressors.<sup>123</sup> On the one hand, the U.N. Charter has outlawed the use of force by states when not in self-defense. On the other hand, states must refrain from forcibly denying internal self-determination.<sup>124</sup> Failure to do so, while not conferring a right to the subgroup to resist with force, does give the NLM immunity from international repercussions.<sup>125</sup>

Recourse to force by a self-determination movement is different in nature from the use of force in a civil war.<sup>126</sup> Use of force by a self-determination movement is considered to be an international conflict and is, therefore, governed by the laws of war. A civil war, however, is not regulated by international law. Where use of force is permitted to a self-determination movement, it would be illogical to allow the national law of the given state to criminalize their actions.<sup>127</sup> Such an allowance would allow any municipal jurisdiction to trump international law. Any international crime of terrorism must, therefore, exclude lawful uses of force.

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<sup>120</sup> *Id.* at 69.

<sup>121</sup> Christopher Greenwood, *Terrorism and Humanitarian Law: The Debate over Additional Protocol I*, 19 ISR. Y.B. HUM. RTS. 187, 189 (1989) (categorizing these acts as terroristic due to the perpetrator’s identity).

<sup>122</sup> BORRADORI, *supra* note 1, at 103 (quoting Jacques Derrida).

<sup>123</sup> Friendly Relations Declaration, *supra* note 38, pmbl.

<sup>124</sup> See CASSESE, *supra* note 10, at 199–200.

<sup>125</sup> *Id.* at 151.

<sup>126</sup> See *infra* Part IV.B.

<sup>127</sup> INGRID DETTER, *THE LAW OF WAR* 102 (2d ed. 2000).

### 3. Self-Determination and *Jus in Bello*

As has been shown, self-determination movements are allowed to use force. This license, however, does not come without responsibilities. Because Additional Protocol I gives international character to a conflict engaged in by a self-determination movement,<sup>128</sup> the self-determination movement is required to abide by the rules of and regulations of IHL. One possible exception to an international definition of terrorism, therefore, would have to be given for any actions by a self-determination movement that are within the accepted actions of IHL.<sup>129</sup> The interaction between IHL and terrorism is a complex one, made more complex by the unique position of NLMs in IHL. It is necessary, therefore, to look more in depth at the legal regime that applies to different types of force under international law

### 4. Conclusion

This study does not presume to solve the definitional issues that plague terrorism under international law. Instead, it aims only to show where the international definition for terrorism should not overlap with the rights of self-determination. That said, it can be concluded that any international definition must involve at least some *mens rea* requirement accompanied by at least one of the following elements: a prohibited action, a prohibited target, or a prohibited means or method. The two possible excuses outlined here rely upon those definitional elements. For *jus ad bellum*, the laws of war are the *lex specialis* and prevent any criminal charges against an actor that is contemplated under those laws. For *jus in bello*, the self-determination movement as a combatant in an international conflict must act within laws of IHL. While there is no international definition of terrorism, it seems likely that any definition would have to deal with these possible exclusions. It is precisely these definitional difficulties that make it necessary to differentiate terrorism and self-determination not through a definition of terrorism but through greater definitional clarity of self-determination.

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<sup>128</sup> Additional Protocol I, *supra* note 80, art. 1(4).

<sup>129</sup> ELIZABETH CHADWICK, SELF-DETERMINATION, TERRORISM AND THE INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT 204–06 (1996).



#### IV. Laws of War

##### A. Background

Traditionally, international law distinguished between three types of armed conflict: war, civil war, and use of force short of war.<sup>130</sup> When a war was declared, the laws of war would apply.<sup>131</sup> Civil wars, however, were internal affairs unregulated by the international community, unless the state recognized the rebels as belligerents.<sup>132</sup> Use of force short of war had neither the intent nor the extent of war and, therefore, was not regulated under international law at all.<sup>133</sup>

The traditional concept of the laws of war began to change with the end of World War I. The Pact of Paris, or Kellogg-Briand Pact of 1928, condemned “recourse to war for the solution of international controversies.”<sup>134</sup> To be clear, this only outlawed war as an international instrument but did not affect the use of force up to the declaration of war. This distinction, however, changed with the creation of the U.N. Charter. Article 2(4) of the Charter holds: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>135</sup> This article applies not only to declarations of war but also to any use of force, destroying the old distinction between actions that were classified as part of a declared war and actions that were merely a use of force.

Instead of the original three categories of conflict used in classical international law, a new tripartite system has emerged.<sup>136</sup> First, there are conflicts that are international in character. International conflicts are regulated by the U.N. Charter and Hague and Geneva Conventions.<sup>137</sup> Second, there are internal armed conflicts.<sup>138</sup> Internal armed conflicts are only regulated by common article 3 and Additional Protocol II.<sup>139</sup> NLMs straddle the difference

<sup>130</sup> Dietrich Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, 163 RECUEIL DES COURS DE L'ACADEMIE DE LA HAYE 117, 125 (1979).

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

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy art. I, Aug 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

<sup>135</sup> U.N. Charter art. 2(4).

<sup>136</sup> See Schindler, *supra* note 130, at 126.

<sup>137</sup> See *id.* at 128–32.

<sup>138</sup> *Id.* at 126.

<sup>139</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members

between these two categories, creating a hybrid category of its own,<sup>140</sup> which was originally internal in character but has since become international.<sup>141</sup>

## B. International Armed Conflict

### 1. Prior to Additional Protocol I

International armed conflict is protected by the full force of the laws of war. Any international armed conflict is subject to the application of the Hague and Geneva Conventions. The distinction between the two bodies of law, generally referred to as Hague Law and IHL, respectively, is that the former generally deals with prohibited actions of armies in time of war,<sup>142</sup> while the latter generally deals with protected persons in times of war.<sup>143</sup> However, there is some overlap between the two. Common article 2(1) of the Geneva Conventions specifies that all four Geneva Conventions apply in all conflicts where two member States are engaged in a conflict, even if that conflict is only recognized by one party or is undeclared.<sup>144</sup> As almost every country in the

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of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II]; see Schindler, *supra* note 130, at 145–52. As article 3 is common to Geneva Conventions I through IV, it is commonly referred to as “common article 3.”

<sup>140</sup> Schindler, *supra* note 130, at 126.

<sup>141</sup> See *id.* at 133–44.

<sup>142</sup> In chronological order, starting with the earliest, the Hague Conventions are as follows: Declaration to Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of Similar Nature, July 29, 1899, 32 Stat. 1839; Convention for the Pacific Settlements of International Disputes, Oct. 18, 1907, 36 Stat. 2199; Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, Oct. 18, 1907, 36 Stat. 2241; Convention Relative to the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259; Convention Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague IV]; Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310; Convention Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, Oct. 18, 1907, 205 Consol. T.S. 305; Convention Relating to the Conversion of Merchant Ships into War-Ships, Oct. 18, 1907, 205 Consol. T.S. 319; Convention Relative to the Laying of Automatic Submarine Contact Mines, Oct. 18, 1907, 36 Stat. 2332; Convention Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, 36 Stat. 2351; Convention for the Adaptation to Maritime War the Principles of the Geneva Convention, Oct. 18, 1907, 205 Consol. T.S. 359; Convention Relative to Certain Restrictions With Regard to the Exercise of the Right of Capture in Naval War, Oct. 18, 1907, 36 Stat. 2396; Convention Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415.

<sup>143</sup> Geneva Convention I, *supra* note 139; Geneva Convention II, *supra* note 139; Geneva Convention III, *supra* note 139; Geneva Convention IV, *supra* note 139.

<sup>144</sup> Geneva Convention I, *supra* note 143, art. 2.

world is a member of the Geneva Conventions,<sup>145</sup> they effectively apply to any armed conflict between states. Between the two sets of Conventions, there is intended to be a comprehensive regulation of international conflicts.

## 2. Additional Protocol I

By 1977, however, the comprehensive system regulating the law of armed conflict was showing some cracks. As a result, the international community passed the Additional Protocol I to the Geneva Convention.<sup>146</sup> This Additional Protocol was intended to fill in some of the gaps left by the Hague and Geneva systems. For example, Additional Protocol I contains stricter provisions regarding new weaponry,<sup>147</sup> proportionality,<sup>148</sup> military necessity,<sup>149</sup> and the identification of combatants.<sup>150</sup> In sum, Additional Protocol I supplements and expands on the protections provided by the Hague and Geneva Conventions. That said, Additional Protocol I has only been ratified by 172 states.<sup>151</sup> Those states that have not ratified it still apply both the Hague and Geneva Conventions but not Additional Protocol I.

## C. Non-International Armed Conflict

### 1. Differentiating International and Non-International Armed Conflict

There is a diverse literature that delves into the question of what makes one conflict international and another non-international.<sup>152</sup> NLMs, however, occupy a unique position in international law that straddles the divide between international and non-international conflict. It is, therefore, not necessary to identify with certainty for this study what makes one conflict international and another not.

### 2. Common Article 3 of the Geneva Conventions

While the full weight of the Hague and Geneva Conventions are brought only in cases of international conflict, non-international armed conflicts

<sup>145</sup> Presently, 194 countries are signatories. INT'L COMM. OF THE RED CROSS [ICRC], STATES PARTY TO THE FOLLOWING INTERNATIONAL HUMANITARIAN LAW AND OTHER RELATED TREATIES AS OF 15-NOV-2012, at 6, [http://www.icrc.org/IHL.nsf/\(SPF\)/party\\_main\\_treaties/\\$File/IHL\\_and\\_other\\_related\\_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf).

<sup>146</sup> Additional Protocol I, *supra* note 80.

<sup>147</sup> *Id.* arts. 35–42, 51(7).

<sup>148</sup> *Id.* arts. 35(2), 51(5), 56, 57(2).

<sup>149</sup> *Id.* arts. 54(5), 62(1), 67(4), 71(3).

<sup>150</sup> *Id.* arts. 43, 44, 45(1).

<sup>151</sup> ICRC, *supra* note 145, at 6.

<sup>152</sup> See, e.g., IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 26–40 (1963).

are not totally without regulation. Article 3, common to all four Geneva Conventions, is the only article to apply in cases of non-international armed conflict, providing a baseline of conduct required for all conflicts.<sup>153</sup> Common article 3 states:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) Taking of hostages;

(c) Outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2. The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

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<sup>153</sup> See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 218 (June 27).

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.<sup>154</sup>

This common article therefore exists to impose the underlying humanitarian principles of the Geneva Conventions to non-international armed conflicts.<sup>155</sup>

To be clear, common article 3 provides a binding baseline to any party to a conflict. This “undisputed[ly]”<sup>156</sup> includes binding insurgents, even though they were not party to the Conventions. The most convincing argument for this counterintuitive assertion is that insurgents are bound by customary international law. Many international legal commentators consider common article 3 as merely a codification of the existing customary international law rule providing a base line of protection in conflicts.<sup>157</sup> This customary international law is then applied directly to individuals, which “in keeping with other developments in modern international law, [treat] persons and entities other than States as subjects of international rights and duties.”<sup>158</sup>

### 3. Additional Protocol II

Additional Protocol II to the Geneva Conventions was developed by the International Committee of the Red Cross to expand the protections of common article 3.<sup>159</sup> Additional Protocol II provides much greater humanitarian protections than common article 3.<sup>160</sup> That said, the scope of application for Additional Protocol II is more narrow and restrictive than that of common article 3.<sup>161</sup> As a result, three types of non-international conflict are possible. First, if a conflict is an internal disturbance, “such as riots, isolated or sporadic acts of violence” or other similar acts, it has not reached a level to engage either common article 3 or Additional Protocol II.<sup>162</sup> Second, if a conflict is more than an internal disturbance but has not met the strict application requirements of Additional Protocol II, common article 3 will apply. Third, if a conflict

<sup>154</sup> Geneva Convention I, *supra* note 143, art. 3; Geneva Convention II, *supra* note 143, art. 3; Geneva Convention III, *supra* note 143, art. 3; Geneva Convention IV, *supra* note 143, art. 3.

<sup>155</sup> LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* 31 (2002).

<sup>156</sup> Antonio Cassese, *The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed Conflicts*, 30 INT’L & COMP. L.Q. 416, 424 (1981).

<sup>157</sup> MOIR, *supra* note 155, at 56.

<sup>158</sup> 2 LASSA OPPENHEIM, *INTERNATIONAL LAW* 211 (8th ed. 1958).

<sup>159</sup> Additional Protocol II, *supra* note 139.

<sup>160</sup> See MOIR, *supra* note 155, at 100.

<sup>161</sup> Additional Protocol II, *supra* note 139, arts. 1–3.

<sup>162</sup> *Id.* art. 1(2).

complies with strict criteria of Additional Protocol II, it will apply along with common article 3. When Additional Protocol II does apply, it is complementary to common article 3 and does not replace it.<sup>163</sup> Common article 3 is, therefore, the baseline with which all non-international conflict must comply.

#### **D. National Liberation Movements**

Prior to the existence of Additional Protocol I, NLMs were considered to be non-international in character. This began to change with the passage of General Assembly Resolution 1514 in 1960.<sup>164</sup> As shown above, Resolution 1514 demanded an end to colonization and ordered all use of force preventing oppressed people from gaining their freedom to stop.<sup>165</sup> This was eventually followed by General Assembly Resolution 3101, which proclaimed that all armed conflicts involving a struggle against “colonial and alien domination and racist regimes” are international in character.<sup>166</sup> As a General Assembly resolution, however, this document is of limited precedential value.

Additional Protocol I makes self-determination movements international in character through an internationally binding treaty. As shown above, article 1(4) makes any armed conflict against alien subjugation international in character, even where there are no international elements to the conflict,<sup>167</sup> thus creating the unique position NLMs occupy in international law.

Additional Protocol I, however, has only been ratified by 172 States.<sup>168</sup> Of those that have not ratified, the most notable is the United States. The lack of universal ratification means that it would be possible for a NLM to exist in a state that has not ratified the treaty. In this case, there would be two possible options. First, the state, as a non-member to the treaty, could not be held to the requirements of the treaty. The conflict with the NLM in the non-party state would, therefore, legally be considered to be of a non-international character. Alternatively, acceptance of the premises of article 1(4) of Additional Protocol I may have reached the level of customary international law and would then be applied to states whether or not they are members of the treaty.

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<sup>163</sup> See MOIR, *supra* note 155, at 102.

<sup>164</sup> See G.A. Res. 1514, *supra* note 29.

<sup>165</sup> *Id.* para. 4.

<sup>166</sup> Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Régimes, G.A. Res. 3103 (XXVIII), para. 3, U.N. Doc. A/Res/3103 (XXVII) (Dec. 12, 1973).

<sup>167</sup> Additional Protocol I, *supra* note 80, art. 1(4).

<sup>168</sup> ICRC, *supra* note 145, at 6.

While this issue has been much debated,<sup>169</sup> the argument in favor of article 1(4) becoming part of customary international law has better weathered the test of time. In 1974, at the first Geneva Diplomatic Conference, third world countries made an attempt to include a provision equating wars of national liberation with international conflicts.<sup>170</sup> Almost all Western states cast their votes against this provision.<sup>171</sup> Yet, when the final vote was taken on the provision in 1977, there was only one negative vote—Israel's.<sup>172</sup> This movement from being against the provision to tacit acceptance of it appears to show that the rule represented “a new law of the international community.”<sup>173</sup> While Israel retains the right not to be bound by the new rule as a persistent objector, the other states that either voted for or abstained on the provision appear to have forfeited that right. Furthermore, the arguments against article 1(4) as a part of customary international law most often rested on issues of state practice that are no longer relevant to modern international law.<sup>174</sup> Conflicts with NLMs, therefore, are international in character as part of customary international law, whether or not the state is a member of Additional Protocol I.<sup>175</sup>

### E. Conclusion

Modern international law has devised a tripartite system for classifying armed conflict. Conflicts are either international or non-international in character. Conflicts with a liberation movement—a third category—possess a unique position in that they are characterized as international conflicts without having to demonstrate any international character. As a result of this international character, conflicts with a NLM are governed by the full force of both the Hague and Geneva Conventions, the baseline of which is common article 3 of the Geneva Conventions.

<sup>169</sup> Compare Antonio Cassese, *Geneva Protocols of 1977*, 3 UCLA PAC. BASIN L.J. 55, 68–71 (1984), with Christopher Greenwood, *Customary Law Status of the 1977 Geneva Protocols*, in HUMANITARIAN LAW OF ARMED CONFLICT 93, 111–12 (1991), and Sandesh Sivakumaran, *Binding Armed Opposition Groups*, 55 INT'L & COMP. L.Q. 369, 381–93 (2006).

<sup>170</sup> See generally 1 Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/RC-records\\_Vol-1.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/RC-records_Vol-1.pdf).

<sup>171</sup> *Id.* at 102.

<sup>172</sup> *Id.* at 41.

<sup>173</sup> Cassese, *supra* note 169, at 70.

<sup>174</sup> See Greenwood, *supra* note 169, at 112 (arguing that the state practice of South Africa in relation to the ANC proves that article 1(4) is not part of customary international law).

<sup>175</sup> This is with the exception of Israel, which has maintained a persistent objector stance from the signing of the treaty through present day and, as such, is excluded from the analysis of this study.

## V. Distinguishing Between Terrorism and Self-Determination

The line between terrorism and self-determination is a thin one; go too far in either direction and a founding principle of the U.N. Charter will be destroyed. On one hand, if all action against the state is inherently terrorist in nature, self-determination is stripped of all substantive meaning. On the other hand, if all actions against an “oppressive” state are protected as self-determination, almost any use of force could be justified, undermining the exact purpose for which the Charter was created. We can all agree that certain actions are outside the bounds of legal acceptability—terrorism—but at the same time, any people who have been systematically deprived of their right to self-determination deserve the chance to win it back. The difficulty lies in finding a middle ground that protects both territorial sovereignty and the right to self-determination.

### A. Background: Differences Between Types of Criminality

As has been discussed above, IHL is the *lex specialis* when engaged in an armed conflict. The whole system of Hague and Geneva Conventions exists to identify when individuals may participate in war and, thereby, kill another human being in a manner that is accepted by the international community. To allow states to capture enemy combatants engaged in a legitimate international armed conflict and try them as terrorists would be to undermine the purpose for the existence of IHL. IHL, therefore, provides both prohibitions and protections to the soldiers in the field. On the one hand, the Hague Conventions place restrictions on unlimited methods of warfare for example the ability to cause unnecessary suffering,<sup>176</sup> but on the other, they provide reciprocal protection.<sup>177</sup>

IHL has its own means and methods for punishing those deemed to have acted criminally. International practice has created many different criminal tribunals to deal with “grave breaches” of the Geneva Conventions and war crimes.<sup>178</sup> The most recent of these tribunals, the International Criminal Court, has been given jurisdiction over genocide,<sup>179</sup> crimes against humanity,<sup>180</sup> and

<sup>176</sup> Hague Convention IV, *supra* note 142, art. 23.

<sup>177</sup> See, e.g., *id.* art. 4 (noting that prisoners are “in the power of the hostile Government but not of the individuals or corps who capture them” and are to be “humanely treated”).

<sup>178</sup> See, e.g., S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) (establishing an international tribunal to prosecute serious violations of IHL in the territory of the former Yugoslavia); S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (establishing an international tribunal to prosecute serious violations of IHL in Rwanda).

<sup>179</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, It., 15 June–17 July 1998, *Rome Statute of the International Criminal Court*, art. 6, U.N. Doc. A/CONF.183/9 (17 July 1998).

<sup>180</sup> *Id.* art. 7.



war crimes.<sup>181</sup> Any breach, therefore, of the rules outlined in the Hague or Geneva Conventions will be dealt with not as terrorism but as a genocide, crime against humanity, or, most likely, war crime.

## **B. Option 1: All Liberation Struggles Governed by IHL**

### **1. Argument in Favor**

The first possible relationship between NLMs and terrorism is one in which NLMs are governed entirely by IHL and terrorism does not play a factor at all. The prosecution of “grave breaches” of the Geneva Conventions is a universal duty.<sup>182</sup> As such, allowing the prosecution of NLMs under terrorism laws would be inherently redundant. Any transgression by a NLM would already be covered under IHL. This system would allow NLMs the protections built into the Geneva Conventions while simultaneously protecting the state from any action by the NLM that is not in compliance with the Hague or Geneva Conventions.

Furthermore, applying IHL to NLMs creates incentive for the NLMs to abide by the rule of law. By offering NLMs the protections provided by the full weight of the Hague and Geneva Conventions, they will have to abide by the restrictions as well. This, in turn, limits any unnecessary suffering in the conflict, which was the reason for the creation of the Hague and Geneva Conventions.

### **2. Argument Against**

The first problem with this construction is the difficulty of translating these international crimes into domestic penal codes.<sup>183</sup> The concepts of “grave breaches” and “war crime” do not translate well into municipal law. Even where a state has no “war crime” offense in its municipal legislation, the mandatory nature of IHL means that the “grave breach” is totally independent of the state characterization.<sup>184</sup> For example, the universality of war crimes jurisdiction is premised upon two prongs: (1) existence of an international rule obligating the State to exercise jurisdiction over any alleged war criminals and (2) recognition that the alleged act is a crime under international law, thereby, creating subject matter jurisdiction.<sup>185</sup> These prongs, in turn, rest upon the

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<sup>181</sup> *Id.* art. 8.

<sup>182</sup> CHADWICK, *supra* note 129, at 153.

<sup>183</sup> *Id.* at 154.

<sup>184</sup> *Id.* at 181.

<sup>185</sup> *Id.* at 181–82.

premise that IHL is supreme over rules of municipal law.<sup>186</sup> It is theoretically problematic for a system to incorporate a rule that is based on the rule being hierarchically superior to the system in which it is being incorporated.

Secondly, the idea of a NLM being treated as if it is a state for the purposes of the Hague and Geneva Conventions also creates both theoretical and practical problems. As argued earlier,<sup>187</sup> self-determination movements do not have the “right” to use force; instead, they have merely a “license” to do so.<sup>188</sup> If, however, this statement is to have any substantive import, there must be different legal ramifications between a “right” and a “license.” Allowing NLMs the full protection of the Hague Conventions when they do not have the right to initiate conflict under the U.N. Charter would essentially render the distinction between a “right” to use force and a “license” to use force meaningless.

### **C. Option 2: Creating a New Paradigm of Differentiation**

#### **1. Differentiating NLMs and States**

The current system of Hague and Geneva law protects states as the primary actors in international law. NLMs, however, are not states and should not be treated as such. If NLMs were states, their role in the international community would be different in two ways: (1) they would have the ‘right’ to use force under the restrictions outlined in the U.N. Charter and (2) any action in which they engaged would be international in character without being conferred by treaty or CIL. To apply all of IHL to NLMs would be to give them *de facto* status as states. In order to avoid this, there must be some substantive differentiation between the treatment of NLMs and states when applying IHL.

That said, any new paradigm would have to remain true to the original purpose of IHL: creating a system that legalizes murder while preventing unnecessary suffering and deaths to non-combatants. A new paradigm that either encourages or allows for the NLM or the state against which it is struggling to ignore the protections of IHL is regressive. Instead, there must be a differentiation between the rights of the state and the rights of the NLM, while simultaneously protecting the underlying goals of IHL.

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

<sup>187</sup> See *supra* Part II.D.

<sup>188</sup> CASSESE, *supra* note 10, at 153.

## 2. The New Paradigm

As shown above, common article 3 of the Geneva Conventions represents the “minimum yardstick”<sup>189</sup> of action with which any conflict must be conducted. Violation of common article 3 in a normal case of international conflict would be considered a “grave breach” and would be punished within the IHL system.<sup>190</sup> In order to differentiate between an NLM and a state, however, common article 3 provides a readymade cutoff point. That is, if an NLM chooses to break the basic rules of common article 3, the conflict with the NLM should cease to be classified as an international conflict.

Those NLMs that expect to be given preferred status in the international system must abide by the basic rules of international law. Once the conflict with the NLM is no longer classified as international in character, the NLM loses the protections afforded it by the Hague and Geneva Conventions. This means that any NLM action that falls under the municipal definition of terrorism within the state in which the NLM operates could be tried as such.

The use of common article 3 as opposed to any breach of either the Hague or Geneva Conventions is to prevent states from using minor breaches as a justification for labeling NLMs as terrorists. For example, a NLM that displays the distinctive emblem of a medical transport on the upper and lower surfaces, forgetting the lateral surface,<sup>191</sup> should not be unduly punished for doing so. Furthermore, any minor breaches, or even major breaches up to but not including common article 3, will always continue to be punishable within the system of IHL.

## 3. Benefits of the New Paradigm

This new paradigm has several benefits, the first of which is the differentiation between states and NLMs. The two would not have to be treated the same; instead, each would incur benefits commensurate with its hierarchical position within the international legal system. Second, the new paradigm would make it easier for the worst violators of IHL to be punished. Although the international community has made great strides towards universal prosecution for breaches of IHL, it has a long way to go.<sup>192</sup> By stripping NLMs of their protection under both the Hague and Geneva Conventions, they will no longer be legally protected in their use of force, even against combatants. The

<sup>189</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 218 (June 27).

<sup>190</sup> Geneva Convention IV, *supra* note 143, arts. 146–47.

<sup>191</sup> Geneva Convention I, *supra* note 143, art. 36.

<sup>192</sup> Dieter Fleck, *International Accountability for Violations of the Jus In Bello*, 11 J. CONFLICT & SECURITY L. 179, 179 (2006) (citing the ICRC study on application of IHL).

prosecution of these individuals, therefore, becomes a municipal matter and is to be dealt with municipal criminal system of the State. It is much more likely that a state applying its own municipal law will successfully prosecute than the international system applying IHL.<sup>193</sup>

Furthermore, the new paradigm incentivizes NLMs not to breach common article 3 of the Geneva Conventions. If legal immunity from municipal criminal prosecution rests upon application of common article 3 of the Geneva Convention, NLMs will be much less likely to breach the article. Although it may be unrealistic to expect a NLM fighting in a remote jungle to be cognizant of the intricacies of IHL, that does not mean that the law should not attempt to create incentives. Perhaps, with time and application, the message will become part of the international consciousness.

## VI. Conclusion

The term “terrorism” will continue to be used as a political and moral weapon by politicians around the world until it has a strict definition under international law. As that day does not appear to be near, the problem of differentiating self-determination movements and terrorism is best approached from the opposite direction. Without a clear definition of terrorism, there should be a clear definition of self-determination movements to prevent the two categories from bleeding into each other. This study has attempted to do just that.

Self-determination is guaranteed as a right to the “peoples” of the world.<sup>194</sup> While the term “peoples” clearly applies to the entire population of an existing state, it is not so limited. “Peoples” also applies to ethnic, religious, national, and racial subgroups. In order to qualify as one of these subgroups, the “people” must demonstrate that they have most, if not all, of the objective requirements of a subgroup as outlined by the U.N. Study on the Rights of People,<sup>195</sup> as well as a subjective belief that they are a distinct subgroup.

Once it is determined that the subgroup qualifies as a “people,” it still must be determined if this particular subgroup has the right to self-determination. In order for them to have this right, they must be subject to “alien subjugation, domination and exploitation.”<sup>196</sup> This does not mean that they must be under foreign occupation; instead, it requires that a power that is

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<sup>193</sup> See CHADWICK, *supra* note 129, at 179–203.

<sup>194</sup> U.N. Charter art. 1(2).

<sup>195</sup> See Rights of Peoples, *supra* note 66.

<sup>196</sup> Friendly Relations Declaration, *supra* note 38, pmbl.

alien to the given subgroup has complete control over their political and social lives.

Finally, even if the given subgroup is a “people” and are under alien subjugation, the right to self-determination still manifests in different ways given different situations. In order to have the license to recourse to force, a subgroup must meet three criteria: (1) it must have a territorial bond, (2) it must have been directly or indirectly deprived of internal self-determination, and (3) it must have exhausted all political and judicial remedies. Only if these three criteria have been met may a self-determination movement be eligible to claim external self-determination through the use of force. Where any of these three categories cannot or has not been met, the subgroup may only claim a right of internal self-determination.

In the very rare case in which each and every one of these criteria has been met, the subgroup may be classified as a NLM and, as such, may claim the protections of IHL as a participant in an international conflict. To simply allow a NLM to claim the full protections of IHL as the *lex specialis*, however, would be to treat the NLM the as a state, something international law has never done.

The compromise answer, therefore, is to treat NLMs as a state, with the commensurate protections of IHL, until such time as the NLM breaches common article 3 of the Geneva Conventions. Common article 3 represents the most basic protections under international law that are to apply in all armed conflict, whether international or non-international in character. When a NLM breaches common article 3, it demonstrates a level of disregard of international law bordering on contempt. In such a case, the protections of IHL should be revoked opening the NLM to municipal prosecution on charges of terrorism.

This new paradigm has several advantages. First, it prevents NLMs from being treated the same as states under international law. Second, given the greater success rate of prosecution under municipal systems over international tribunals, it raises the likelihood that the most blatant offenders of common article 3 will be successfully prosecuted. Finally, by making the consequences of breaching common article 3 so dire, it greatly increases the likelihood that NLMs will avoid such breaches as a pure matter of self-preservation. This, in turn, will lead to less unnecessary suffering and fewer civilian deaths in armed conflicts with NLMs.

Admittedly, the new paradigm is far from perfect. That said, it does represent a significant improvement over the current system of labeling terrorism based on political caprice. International law should outline clear rules wherever possible to prevent its application from appearing to be *post hoc*

political posturing. This new paradigm will cut down on legal ambiguity while helping to ensure a greater respect for the fundamental rights of both soldiers and civilians in times of armed conflict.

**A PROPOSAL TO CONFORM MILITARY  
RULE OF EVIDENCE 305 IN LIGHT OF  
THE SUPREME COURT’S HOLDINGS IN  
*MARYLAND V. SHATZER* AND  
*BERGHUIS V. THOMPKINS***

**Commander Robert P. Monahan, Jr., JAGC, USN\***

**I. Introduction**

In its 2009 term, the United States Supreme Court decided two cases that bear on the interrogation of criminal suspects whose holdings should cause a review of Military Rule of Evidence (MRE) 305<sup>1</sup> and result in a partial revision of that rule. In *Maryland v. Shatzer*, the Court established an endpoint to the rule enunciated in *Edwards v. Arizona* that:

[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. . . . [H]e is not subject to further interrogation by the authorities until counsel has been made

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<sup>1</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 305 (2012) (C1, 15 May 2013). These changes were part of a reissuance of the MRE published as part of 2013 Amendments to the Manual for Courts-Martial, United States, Exec. Order No. 13,643, 78 Fed. Reg. 29,559 (May 15, 2013). These changes do not address the issues discussed herein. All references in this work to the MRE shall be to the 2013 version, unless clearly stated otherwise.

available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.<sup>2</sup>

The *Shatzer* Court held that a fourteen-day break in custody will end the *Edwards* presumption that police-initiated custodial interrogation after a suspect invoked his right to counsel is involuntary.<sup>3</sup> The *Shatzer* Court also held that when an interrogated suspect who is being held in incarceration due to a prior conviction is released back to the general prison population, this constitutes a break in custody with regard to the termination of the *Edwards* protection discussed above.<sup>4</sup> Together, the holdings of the *Shatzer* case should be applied to revise MRE 305(e)(3)(A), which sets forth the military rule for interrogation of an accused or suspect who requests counsel and who is in custody, could reasonably believe himself or herself to be in custody, or is otherwise deprived of his or her freedom in any way.

In *Berghuis v. Thompkins*, the Supreme Court held that a suspect who has properly received and understood the *Miranda*<sup>5</sup> warnings waives the right to remain silent by making an uncoerced statement to the police without invoking the *Miranda* rights.<sup>6</sup> Moreover, the *Thompkins* Court held that the police are not required to obtain a waiver from a suspect of his or her right to remain silent before commencing interrogation.<sup>7</sup> Applying the holdings of the *Thompkins* case, MRE 305(c)(4), that states the military rule concerning the exercise of the privilege against self-incrimination and the right to counsel, as well as MRE 305(e), that provides the military rule regarding an accused's or suspect's waiver of the rights provided under MRE 301 and MRE 305, should be revised.

## II. *Maryland v. Shatzer*

### A. Factual and Procedural Background

In August 2003, a social worker affiliated with the Hagerstown, Maryland Police Department referred allegations to the department that Michael Shatzer, Sr. had sexually abused his three-year-old son.<sup>8</sup> At the time these allegations were brought, Shatzer was serving a sentence in a Maryland prison for an unrelated child sexual-abuse conviction.<sup>9</sup> Detective Shane Blankenship

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<sup>2</sup> 559 U.S. 98, 104 (2010) (quoting *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981)).

<sup>3</sup> *Id.* at 110.

<sup>4</sup> *Id.* at 113–17.

<sup>5</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>6</sup> *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2264 (2010).

<sup>7</sup> *Id.*

<sup>8</sup> *Shatzer*, 559 U.S. at 100.

<sup>9</sup> *Id.* at 100–01.



interviewed Shatzer at the prison on 7 August 2003.<sup>10</sup> Prior to asking him any questions, Detective Blankenship advised Shatzer of his *Miranda* warnings and obtained a written waiver of those rights.<sup>11</sup> When Detective Blankenship informed Shatzer that he was there to ask him questions about sexually abusing his son, Shatzer indicated that he was confused and that he had thought the detective was an attorney who had come to discuss the other offense for which he had been convicted and subsequently incarcerated.<sup>12</sup> Detective Blankenship clarified why he was there and Shatzer then refused to speak without an attorney.<sup>13</sup> At that point, Detective Blankenship terminated the interview and Shatzer was returned back to the general prison population. A short time later, Detective Blankenship closed the investigation.<sup>14</sup>

Approximately two years and six months later, the same social worker referred more specific allegations to the Hagerstown Police Department regarding the same incident between Shatzer and his son.<sup>15</sup> This time, Detective Paul Hoover was assigned to the investigation.<sup>16</sup> He and the social worker interviewed Shatzer's now eight-year-old son, who described the incident in more detail.<sup>17</sup> On 2 March 2006, Detective Hoover and the social worker went to another Maryland prison where Shatzer had been transferred.<sup>18</sup> When Detective Hoover informed Shatzer that he wanted to ask questions about the allegation that he had sexually abused his son, Shatzer indicated that he was surprised because he believed that investigation had been closed.<sup>19</sup> In response, Detective Hoover explained that a new file had been opened.<sup>20</sup> He then read Shatzer his *Miranda* rights and obtained a written waiver on a standard department form.<sup>21</sup> Detective Hoover then interrogated Shatzer for approximately thirty minutes, during which Shatzer denied telling his son to perform fellatio upon him but admitted to masturbating in front of his son from a distance of less than three feet.<sup>22</sup> Before the interview ended, Shatzer agreed to Detective Hoover's request to take a polygraph examination.<sup>23</sup> At no time

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<sup>10</sup> *Id.* at 101.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

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

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

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

<sup>20</sup> *Id.* at 101–02.

<sup>21</sup> *Id.* at 102.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

during the interrogation did Shatzer request to speak with an attorney or make any reference to his prior refusal to answer questions without one.<sup>24</sup>

On 6 March 2006, less than a week later, Detective Hoover and another detective met with Shatzer at the prison to administer the polygraph examination.<sup>25</sup> After administering *Miranda* warnings and obtaining a written waiver from Shatzer, the other detective administered the polygraph examination and Shatzer failed.<sup>26</sup> The detectives then questioned Shatzer, who became upset and made the incriminating statement, “I didn’t force him. I didn’t force him.”<sup>27</sup>

Shatzer was subsequently charged with various sexual offenses for the incident involving his son.<sup>28</sup> He moved to suppress his March 2006 statements as violating the holding of *Edwards v. Arizona*.<sup>29</sup> The trial court denied Shatzer’s motion to suppress, finding that Shatzer had experienced a break in custody for *Miranda* purposes between the 2003 and 2006 interrogations.<sup>30</sup> After a bench trial, Shatzer was found guilty of the sexual abuse of his son.<sup>31</sup>

A divided Court of Appeals of Maryland reversed the conviction, holding “the passage of time alone is insufficient to [end] the protections afforded by *Edwards*.”<sup>32</sup> Assuming, for the sake of argument, that a break-in-custody exception to *Edwards* existed, the court held that Shatzer’s return to the general prison population between interrogations did not constitute a break in custody.<sup>33</sup> The United States Supreme Court granted certiorari.<sup>34</sup>

## B. Opinion of the Court

Justice Scalia delivered the majority opinion and was joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, Alito, and Sotomayor.<sup>35</sup> Justice Thomas, who concurred in the judgment along with Justice Stevens, joined part III of the majority opinion, which held that an

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 102–03.

<sup>32</sup> *Shatzer v. State*, 954 A.2d 1118, 1131 (Md. 2008), *rev’d*, 559 U.S. 98.

<sup>33</sup> *Id.*

<sup>34</sup> *Shatzer*, 559 U.S. at 103.

<sup>35</sup> *Id.* at 99.

individual's release back into the general prison population constitutes a break in custody for *Miranda* purposes.<sup>36</sup>

After a presentation of the case's factual and procedural history,<sup>37</sup> the Court launched into a review of the *Miranda* doctrine.<sup>38</sup> The Court explained that *Miranda* sought to put into place protective warnings to dispel compulsion that was inherent in custodial interrogation.<sup>39</sup> Among these warnings, a suspect has the right for an attorney to be present during interrogation.<sup>40</sup> If the suspect states that he or she wants an attorney present, the interrogation must then cease until an attorney is present.<sup>41</sup>

These rights, however, can be waived by the suspect.<sup>42</sup> To establish a valid waiver, the government must show that the waiver was made knowingly, intelligently, and voluntarily.<sup>43</sup>

The majority opinion then explained that in *Edwards v. Arizona* the Court determined that the traditional standard for waiver was insufficient to protect a suspect's right to have counsel present at a subsequent interrogation if he had requested counsel in a previous interrogation.<sup>44</sup> Thus, the *Edwards* Court held:

[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. . . . [H]e is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.<sup>45</sup>

The *Shatzer* Court articulated that the *Edwards* rationale means that once a suspect invokes his right to counsel, "any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the 'inherently compelling pressures' and not the purely voluntary

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<sup>36</sup> *Id.*

<sup>37</sup> See *supra* Part II.A.

<sup>38</sup> *Shatzer*, 559 U.S. at 103–04.

<sup>39</sup> *Id.* at 103.

<sup>40</sup> *Id.* at 104.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* (quoting *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981)).

choice of the suspect.”<sup>46</sup> The *Shatzer* Court then explained that the implicit assumption within *Edwards* and its progeny is that after a suspect has invoked his right to counsel, subsequent requests for interrogation pose a significantly greater risk of coercion.<sup>47</sup> The increased risk is said to arise from the police’s persistence in trying to get the suspect to talk<sup>48</sup> and the continued pressure that begins when an individual is taken into custody as a suspect and sought to be interrogated.<sup>49</sup> This pressure is likely to “increase as custody is prolonged.”<sup>50</sup> Thus, the *Shatzer* Court said that the *Edwards* presumption of involuntariness aims at prohibiting the police from taking advantage of the increased coercive pressure of prolonged police custody by repeatedly attempting to interrogate a suspect who previously requested counsel until he or she submits.<sup>51</sup>

The *Shatzer* Court then shifted its focus by discussing how the rule in *Edwards* is not constitutionally required, but rather is a judicially created prophylaxis.<sup>52</sup> The Court observed that lower courts have uniformly held that a break in custody terminates the *Edwards* presumption and acknowledged that the Supreme Court had previously addressed the issue only in dicta.<sup>53</sup> The *Shatzer* Court stated that a judicially created rule is “justified only by reference to its prophylactic purpose”<sup>54</sup> and that such a rule applies only when its benefits outweigh the costs.<sup>55</sup> Assessing the benefits of the *Edwards* rule, the Court reasoned that its fundamental purpose is “to preserve the integrity of an accused’s choice to communicate with the police only through counsel,”<sup>56</sup> by “prevent[ing] police from badgering a defendant into waiving his previously asserted *Miranda* rights.”<sup>57</sup> The Court also recognized the *Edwards* rule has an incidental effect of achieving judicial economy by reducing the time that would otherwise be spent resolving complex voluntariness issues.<sup>58</sup> Ultimately, the Court summarized that the benefits of the *Edwards* rule “are measured by the number of coerced confessions it suppresses that otherwise would have been admitted.”<sup>59</sup>

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<sup>46</sup> *Id.* at 104–05 (quoting *Arizona v. Roberson*, 486 U.S. 675, 681 (1988)).

<sup>47</sup> *Id.* at 105.

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

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* (quoting *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990)).

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

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 106 (quoting *Davis v. United States*, 512 U.S. 452, 458 (1994)).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* (quoting *Patterson v. Illinois*, 487 U.S. 285, 291 (1988)).

<sup>57</sup> *Id.* (quoting *Michigan v. Harvey*, 494 U.S. 344, 349 (1990)).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

The Court then analyzed the custodial circumstances in which the suspects in the “paradigm” *Edwards* case and its progeny found themselves that would lead to the conclusion that the suspect may be coerced or badgered into abandoning an earlier refusal to be questioned without counsel.<sup>60</sup> Such circumstances occur when the “suspect has been arrested for a particular crime and is held in pretrial custody while that crime is being actively investigated.”<sup>61</sup> Further, the suspect remains “cut off from his normal life” and companions from the period of time after the first investigation through the second interrogation and is “‘thrust into’ an ‘unfamiliar,’ ‘police-dominated atmosphere,’<sup>62</sup> where he is isolated and his captors ‘appear to control [his] fate.’<sup>63</sup> The Court reasoned that in these types of “paradigm,” *Edwards* rule cases, none of the suspects “regained a sense of control or normalcy after they were initially taken into custody for the crime under investigation.”<sup>64</sup>

Conversely, the Court articulated that where a suspect has been released from pretrial custody and returned to his normal life for a period of time before a subsequent attempted interrogation, there is little reason to conclude that his agreement to speak to the police without the presence of counsel was coerced or the product of police badgering.<sup>65</sup> This is because he has no longer been isolated; has been able to seek advice from an attorney, family, and friends; knows from his previous experience that he must merely demand counsel to halt custodial interrogation; and knows that “investigative custody” does not last indefinitely.<sup>66</sup> As such, the Court said, “Uncritical extension of *Edwards* to this situation would not significantly increase the number of genuinely coerced confessions excluded.”<sup>67</sup>

The *Shatzer* Court then explained that extending the *Edwards* rule extends its costs.<sup>68</sup> Specifically, the Court reasoned that an extension of the rule would increase the exclusion of confessions that were in fact voluntary and would deter law enforcement from seeking voluntary confessions.<sup>69</sup> As a result, public policy would not be served as voluntary confessions are “an unmitigated

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* (quoting *Miranda v. Arizona*, 384 U.S. 436, 456–57 (1966)).

<sup>63</sup> *Id.* (quoting *Illinois v. Perkins*, 496 U.S. 292, 297 (1990)).

<sup>64</sup> *Id.* at 107.

<sup>65</sup> *Id.* at 107–08.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 108.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

good essential to society's compelling interest in finding, convicting, and punishing those who violate the law."<sup>70</sup>

The Court reasoned that the *Edwards* rule must logically end upon "termination of 'Miranda custody' and any of its lingering effects."<sup>71</sup> Without such a limitation and a "purely arbitrary time-limit" every *Edwards* prohibition of subsequent custodial interrogation after a request for counsel would last forever.<sup>72</sup> The Court warned that the price of an eternal extension of the *Edwards* prohibition would be quite high as the rule applies when the subsequent interrogation pertains to a different crime, when it is conducted by a different law enforcement authority, and even when a suspect has met with an attorney after the first interrogation.<sup>73</sup> Thus, the Court declined to extend the *Edwards* rule any further, stating:

The protections offered by *Miranda*, which we have deemed sufficient to ensure that the police respect the suspect's desire to have an attorney present the first time police interrogate him, adequately ensure that result when a suspect who initially requested counsel is reinterrogated after a break in custody that is of sufficient duration to dissipate its coercive effects.<sup>74</sup>

Declining to leave undefined the period of time required to constitute a sufficient break in custody to terminate the *Edwards* rule, the *Shatzer* Court held that fourteen days should be the standard.<sup>75</sup> The Court reasoned that this length of time provides a suspect ample time "to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody."<sup>76</sup> In establishing a fourteen-day break in custody endpoint of the *Edwards* rule, the Court dismissed the argument that such a limitation would facilitate police abuse.<sup>77</sup> Furthermore, the Court noted that a defendant who experiences a fourteen-day break in custody after invoking his *Miranda* right to counsel is not left without protection.<sup>78</sup> Rather, the Court explained that the *Edwards* rule establishes a presumption that a suspect's waiver of *Miranda*

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<sup>70</sup> *Id.* (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991)).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 108–09.

<sup>73</sup> *Id.* at 109.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 110.

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

<sup>77</sup> *Id.* at 110–11.

<sup>78</sup> *Id.* at 111 n.7.

rights is involuntary and that a defendant is free to argue that his waiver of *Miranda* rights was in fact involuntary.<sup>79</sup>

The Court then dismissed Shatzer's argument that terminating *Edwards* protection after a break in custody would undercut *Edwards*' goal of conserving judicial resources.<sup>80</sup> The Court said that "a break-in-custody exception will dim only marginally, if at all, the bright-line nature of *Edwards*."<sup>81</sup> The Court explained that in every case where the defense seeks to suppress a statement under *Edwards*, a trial court has to determine whether the suspect was in custody at the time when he invoked counsel and at the time that he made statements that he seeks to suppress.<sup>82</sup> The *Shatzer* Court enunciated that under a modified rule, where an alleged break-in-custody has occurred, the trial court "simply [has] to repeat the inquiry for the time between the initial invocation and reinterrogation. In most cases that determination will be easy."<sup>83</sup> Moreover, the Court reasoned, "And when it is determined that the defendant pleading *Edwards* has been out of custody for two weeks before the contested interrogation, the court is spared the fact-intensive inquiry into whether he ever, anywhere, asserted his *Miranda* rights."<sup>84</sup>

After establishing a fourteen-day break-in-custody exception, the *Shatzer* Court addressed the issue of whether the release back into the general prison population of a prisoner who invoked his right to counsel at a first police interview constitutes a break in "*Miranda* custody."<sup>85</sup> At the outset of its discussion, the Court reasoned that whether or not incarceration constituted custody for *Miranda* purposes depends on whether it exerts the coercive pressure that *Miranda* seeks to protect against.<sup>86</sup> The Court acknowledged that to determine whether a suspect was in *Miranda* custody, it has asked whether "there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."<sup>87</sup> While the Court acknowledged that all forms of incarceration meet this test, it went on to say that the freedom-of-movement test is a necessary but not sufficient condition for *Miranda* custody and pointed to temporary detentions such as a brief traffic stop or a *Terry* stop as examples of situations that do not constitute *Miranda* custody.<sup>88</sup>

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 111.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 111–12.

<sup>85</sup> *Id.* at 112.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* (quoting *New York v. Quarles*, 467 U.S. 649, 655 (1984)).

<sup>88</sup> *Id.* at 112–13.

The Court then held that when a suspect is held in incarceration for an interim period during which he is not interrogated and is subject to a “baseline set of restraints imposed pursuant to a prior conviction,” this does not give rise to the “coercive pressures identified in *Miranda*.”<sup>89</sup> The Court expressed such a conclusion was warranted, because when such suspects are released back into the general prison population, “they return to their accustomed surroundings and daily routine.”<sup>90</sup> Additionally, the Court reasoned that an incarcerated prisoner’s detention is “relatively disconnected from their prior unwillingness to cooperate in an investigation. The former interrogator has no power to increase the duration of the incarceration which was determined at sentencing.”<sup>91</sup>

However, the Court distinguished a situation in which a prisoner who is already serving a sentence is removed from the general prison population and taken to a separate location.<sup>92</sup> The Court reasoned that the duration of that separation from the general prison population is dependent on the interrogators.<sup>93</sup> Therefore, once a prisoner in that situation refuses to speak without the assistance of counsel, the police are prevented under *Edwards* from trying to get him to change his mind while he is in such custody.<sup>94</sup>

### III. *Berghuis v. Thompkins*

#### A. Factual and Procedural Background

On 10 January 2000, a shooting occurred outside a mall in Southfield, Michigan, killing one man and injuring another.<sup>95</sup> Van Chester Thompkins was a suspect in the shootings and was arrested about a year later when he was found in Ohio.<sup>96</sup> While Thompkins was awaiting transfer back to Michigan, two police officers from Southfield traveled to interrogate him.<sup>97</sup> The interrogation occurred in the middle of the day and lasted about three hours.<sup>98</sup> At the beginning of the interrogation, one of the police officers, Detective Helgert, presented Thompkins a form that delineated his *Miranda* rights as broken down into five numbered sections.<sup>99</sup> Detective Helgert asked Thompkins to read the

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<sup>89</sup> *Id.* at 113.

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

<sup>91</sup> *Id.* at 113–14.

<sup>92</sup> *Id.* at 113 n.8.

<sup>93</sup> *Id.*

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

<sup>95</sup> *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2256 (2010).

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

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*



fifth warning aloud and Thompkins did as directed.<sup>100</sup> The detective later said that he asked Thompkins to do this so that he could be sure that Thompkins understood the English language.<sup>101</sup> Detective Helgert then read the other four *Miranda* warnings to Thompkins and asked him to sign the form to demonstrate that he understood his rights.<sup>102</sup> However, Thompkins refused to sign the form. The record contained conflicting evidence as to whether Thompkins verbally acknowledged that he understood his rights.<sup>103</sup>

The officers then began to interrogate Thompkins.<sup>104</sup> At no point during the interrogation did he state that he wanted to remain silent, that he did not want to talk to the police officers, or that he wanted an attorney.<sup>105</sup> Thompkins was “largely” silent during the interrogation but did make a few limited verbal responses such as “yeah,” “no,” or “I don’t know.”<sup>106</sup> He occasionally communicated to the officers by nodding his head and at other times communicated verbally by saying that he “didn’t want a peppermint” that was offered by the officers and that the chair in which he was “sitting in was hard.”<sup>107</sup> About 2 hours and 45 minutes into the interrogation, Detective Helgert asked Thompkins if he believed in God.<sup>108</sup> Thompkins made eye contact with the police officer and said, “Yes,” as his eyes became teary.<sup>109</sup> Next, Detective Helgert asked Thompkins, “Do you pray to God to forgive you for shooting that boy down?”<sup>110</sup> Thompkins replied, “Yes,” and looked away.<sup>111</sup> He subsequently refused to make a written confession and the interrogation ended about 15 minutes later.<sup>112</sup>

Thompkins was charged with first-degree murder, assault with intent to commit murder, and a number of firearm-related offenses.<sup>113</sup> At trial, he moved to suppress his statements made to the police during his interrogation arguing that he had invoked his Fifth Amendment right to remain silent, that he had not waived his right to remain silent, and that his inculpatory statements were not voluntary.<sup>114</sup> The trial court denied the motion, and after a trial on the merits,

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

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

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

<sup>107</sup> *Id.* at 2257.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

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

the jury found Thompkins guilty on all counts.<sup>115</sup> He was sentenced to life in prison without parole.<sup>116</sup>

Thompkins then appealed the trial court's denial of his motion to suppress his statements under *Miranda* as well as an unrelated claim of ineffective assistance of counsel that pertained to his trial defense counsel's failure to seek a limiting instruction regarding evidence of the outcome of a co-accused's trial.<sup>117</sup> The Michigan Court of Appeals rejected both of Thompkins' claims.<sup>118</sup> With regard to his *Miranda* claim, it ruled that Thompkins had not invoked his right to remain silent and had waived it.<sup>119</sup> The Michigan Supreme Court exercised its discretion to refuse to review the case.<sup>120</sup>

Thompkins then filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan.<sup>121</sup> The district court rejected both his *Miranda* and ineffective assistance of counsel claims.<sup>122</sup> Addressing the *Miranda* claim, it said that Thompkins did not invoke his right to remain silent and was not coerced into making statements during the interrogation.<sup>123</sup> Additionally, the district court held that the Michigan Court of Appeals was not unreasonable in making the determination that Thompkins had waived his right to remain silent.<sup>124</sup> The United States Court of Appeals for the Sixth Circuit reversed, finding for Thompkins on both his *Miranda* and ineffective assistance of counsel claims. The federal court of appeals ruled that the state court had unreasonably applied clearly established federal law and based its decision on an unreasonable determination of the facts when it rejected Thompkins' *Miranda* claim.<sup>125</sup> Specifically, the federal court of appeals held that the state court was unreasonable in its finding that he had made an implied waiver of his *Miranda* right to remain silent under the circumstances, as Thompkins was silent for 2 hours and 45 minutes.<sup>126</sup> The federal court of appeals reasoned that Thompkins' "persistent silence for nearly three hours in response to questioning and repeated invitations to tell his side of the story offered a clear and unequivocal message to the officers: Thompkins did not

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 2258.

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

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

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

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

wish to waive his rights.”<sup>127</sup> The United States Supreme Court granted certiorari.<sup>128</sup>

## B. Opinion of the Court

Justice Kennedy delivered the majority opinion that was joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito.<sup>129</sup> Justice Sotomayor filed a dissenting opinion that Justices Stevens, Ginsburg, and Breyer joined.<sup>130</sup> After a presentation of the case’s factual and procedural history,<sup>131</sup> the Court identified that the *Miranda* issue in this case centered on the suspect’s response or non-response to the *Miranda* warnings.<sup>132</sup>

The Court first addressed Thompkins’ contention that he had invoked his right to remain silent by not saying anything for long enough of a period that the interrogation should have “cease[d] before he made his inculpatory statements.”<sup>133</sup> The Court rejected this argument as unpersuasive, highlighting that in the context of invoking the *Miranda* right to counsel a suspect must do so unambiguously.<sup>134</sup> The Court stated that it had not yet established whether invocation of the right to remain silent could be ambiguous or equivocal and reasoned that “there is no principled reason to adopt different standards when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel.”<sup>135</sup> Rather, the Court said that there was good reason to require a suspect to unambiguously invoke his right to remain silent.<sup>136</sup> Specifically, the Court indicated that such a rule would avoid difficulties of proof that arise when a suspect claims he invoked his *Miranda* right to remain silent.<sup>137</sup> Likewise the Court said that the requirement for a suspect to make an unambiguous invocation of his right to remain silent would provide guidance to police officers on what to do “in the face of ambiguity.”<sup>138</sup>

The Court expressed that it would place a significant burden on society’s interest in prosecuting crimes if a voluntary confession were suppressed because of ambiguous act, omission, or statement by the accused.<sup>139</sup>

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<sup>127</sup> *Id.* at 2258–59.

<sup>128</sup> *Id.* at 2259.

<sup>129</sup> *Id.* at 2255.

<sup>130</sup> *Id.*

<sup>131</sup> *See supra* Part III.A.

<sup>132</sup> *Thompkins*, 130 S. Ct. at 2259.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 2260.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

The Court also acknowledged that allowing an ambiguous or equivocal act, omission, or statement to qualify as an invocation of *Miranda* rights “might add marginally to *Miranda*’s goal of dispelling the compulsion interest in custodial interrogation.”<sup>140</sup> However, the Court reiterated that “full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process.”<sup>141</sup>

The Court found that “Thompkins did not say he wanted to remain silent or that he did not want to talk with the police” and that had he done so, the police would have had to cease questioning him.<sup>142</sup> However, as Thompkins did neither, the Court found that he had not invoked his right to remain silent.<sup>143</sup>

The Court next took up the issue of whether Thompkins had waived his right to remain silent.<sup>144</sup> Reviewing the law of waiver of the right to remain silent during a custodial interrogation, the Court said that even if a suspect fails to invoke his right to remain silent, any statement made during a custodial interrogation is inadmissible against him at trial unless the prosecution can establish that he “in fact knowingly and voluntarily waived [*Miranda*] rights” when he made the statement.<sup>145</sup> The Court reiterated that waiver must be “voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception” and “made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.”<sup>146</sup>

The Court acknowledged that some language in *Miranda* could be read to support the conclusion that waivers are difficult to establish in the absence of an explicit waiver or a formal, express oral statement.<sup>147</sup> Among other things, the *Miranda* Court had said, “[A] heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.”<sup>148</sup> However, the *Thompkins* Court observed that cases since *Miranda* have held that waivers can be established even without “formal or express statements of waiver that would be expected in . . . a judicial hearing to determine if a guilty plea had been properly entered.”<sup>149</sup> Specifically, the *Thompkins* Court

<sup>140</sup> *Id.* (quoting *Moran v. Burbine*, 475 U.S. 412, 425 (1986)).

<sup>141</sup> *Id.* (quoting *Burbine*, 475 U.S. at 427).

<sup>142</sup> *Id.* at 2260.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* (quoting *North Carolina v. Butler*, 441 U.S. 369, 373 (1979)).

<sup>146</sup> *Id.* (quoting *Burbine*, 475 U.S. at 421).

<sup>147</sup> *Id.* at 2260–61.

<sup>148</sup> *Id.* at 2261 (quoting *Miranda v. Arizona*, 384 U.S. 436, 475 (1966)).

<sup>149</sup> *Id.* at 2261.

highlighted the holdings of *North Carolina v. Butler* and *Colorado v. Connelly*.<sup>150</sup> In *Butler*, the Court held that the “heavy burden” language that *Miranda* said would be required to demonstrate waiver could be accomplished with the usual principles of waiver, which could include waiver implied from all the circumstances.<sup>151</sup> Likewise, in *Connelly* the Court stated that the *Miranda* “heavy burden” is not more than the burden to establish waiver by a preponderance of the evidence.<sup>152</sup>

Based on these principles, the *Thompkins* Court enunciated that the prosecution is not required to show an express waiver of the *Miranda* right to silence.<sup>153</sup> Rather, the Court articulated that if the government can show an implicit waiver, then a statement can be received into evidence.<sup>154</sup> To establish a valid waiver, the government must prove that *Miranda* warnings were given, that the accused understood these rights, and that the accused made an uncoerced statement.<sup>155</sup> Thus, the Court held that “[w]here the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused’s uncoerced statement *establishes* an implied waiver of the right to remain silent.”<sup>156</sup>

In support of its holding that *Miranda* warnings may be implicitly waived, the Court pointed out that *Miranda* does not require a formalistic waiver procedure that a suspect must follow to give up his rights.<sup>157</sup> Indeed, the Court said, “as a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford.”<sup>158</sup> As such, the Court articulated that *Miranda* rights can be waived through less formal means than waiver of the right against self-incrimination occurs in a courtroom, “given the practical constraints and necessities of interrogation and the fact that *Miranda*’s main protection lies in advising defendants of their rights.”<sup>159</sup>

Applying the rule that a suspect can implicitly waive his *Miranda* right to silence to the case at hand, the Court held that *Thompkins* had in fact done

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

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

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

<sup>156</sup> *Id.* at 2262 (emphasis added).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

so.<sup>160</sup> The Court found that there was no basis to conclude that he did not understand his rights.<sup>161</sup> Moreover, the Court found that Thompkins had not invoked or otherwise relied on his right to remain silent.<sup>162</sup> The Court found that Thompkins' response to the detective's asking whether he prayed for forgiveness for shooting the victim was a "course of conduct indicating waiver of the right to remain silent."<sup>163</sup> Specifically, the Court stated, "If Thompkins wanted to remain silent, he could have said nothing in response to Helgert's questions, or he could have unambiguously invoked his *Miranda* rights and ended the interrogation."<sup>164</sup> Additionally, the Court found that there was no evidence to conclude that Thompkins' statement was coerced.<sup>165</sup> Thus, the Court held, "In these circumstances, Thompkins knowingly and voluntarily made a statement to the police, so he waived his right to remain silent."<sup>166</sup>

The Court then proceeded to address Thompkins' final argument in support of his *Miranda* violation claim.<sup>167</sup> Thompkins had argued that even if his response to the detective constituted a waiver of his right to remain silent, the police were not allowed to interrogate him until they first obtained a waiver from him.<sup>168</sup> The Court rejected this argument, reasoning that it would be inconsistent with *Butler*, which had rejected a rule by which the police would have to obtain an express waiver of *Miranda* rights before commencing custodial interrogation.<sup>169</sup> Furthermore, the *Thompkins* Court said:

The *Miranda* rule and its requirements are met if a suspect receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions. Any waiver, express or implied, may be contradicted by an invocation at any time. If the right to counsel or the right to remain silent is invoked at any point during questioning, further interrogation must cease.<sup>170</sup>

The Court also articulated, "[A]fter giving a *Miranda* warning, police may interrogate a suspect who has neither invoked nor waived his or her *Miranda*

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 2263 (quoting *North Carolina v. Butler*, 441 U.S. 369, 373 (1979)).

<sup>164</sup> *Id.* at 2263.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

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

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 2263–64.

rights.”<sup>171</sup> Thus, the Court held that because the police administered *Miranda* warnings to Thompkins, they were not required to obtain a waiver of his right to remain silent from him before interrogating him.<sup>172</sup>

#### IV. Current State of Military Law with Regard to Self-Incrimination Issues Raised in *Maryland v. Shatzer* and *Berghuis v. Thompkins*

##### A. Hierarchy of Military Legal Authority

There are several sources of legal authority that establish a hierarchy governing the administration of military justice.<sup>173</sup> At the top of this hierarchy is the U.S. Constitution, followed by the Uniform Code of Military Justice (UCMJ), followed by the *Manual for Courts-Martial (MCM)*.<sup>174</sup> A subordinate source of military justice law *may* grant more rights than are *required* by greater legal authority, so long as the higher legal authority does not preempt that area of the law.<sup>175</sup>

The *MCM* is promulgated by the President by executive order and is given force of law by Article 36, UCMJ.<sup>176</sup> The *MCM* consists of two primary sets of rules, the MRE and the Rules for Courts-Martial (RCM).<sup>177</sup> Among the areas covered by the MRE are rules governing interrogations, warnings, and the exercise and waiver of rights with regard to privilege against self-incrimination and the right to counsel during interrogation.<sup>178</sup>

##### B. Current State of Military Self-Incrimination Law on Re-Initiation of Interrogation by Law Enforcement after an Initial Invocation of the Right to Counsel

MRE 305(e)(3)(A) articulates the current requirements of military law with regard to restrictions upon subsequent custodial interrogations when an accused or suspect requests counsel. Specifically, MRE 305(e)(3)(A) provides:

(A) *Fifth Amendment Right to Counsel.* If an accused or suspect subjected to custodial interrogation requests

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<sup>171</sup> *Id.* at 2264.

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

<sup>173</sup> FRANCIS GILLIGAN & FREDRIC LEDERER, COURT-MARTIAL PROCEDURE § 1-51.00 (3rd ed. 2006).

<sup>174</sup> *Id.*

<sup>175</sup> *United States v. Davis*, 47 M.J. 484, 487 n.1 (C.A.A.F. 1998); GILLIGAN & LEDERER, *supra* note 173, § 1-51.00.

<sup>176</sup> UCMJ art. 36 (2012); GILLIGAN & LEDERER, *supra* note 173, § 1-54.00.

<sup>177</sup> GILLIGAN & LEDERER, *supra* note 173, § 1-54.00.

<sup>178</sup> MCM, *supra* note 1, MIL. R. EVID. 305.

counsel, any subsequent waiver of the right to counsel obtained during a custodial interrogation concerning the same or different offenses is invalid unless the prosecution can demonstrate by a preponderance of the evidence that:

(i) the accused or suspect initiated the communication leading to the waiver; or

(ii) the accused or suspect has not continuously had his or her freedom restricted by confinement, or other means, during the period between the request for counsel and the subsequent waiver.

As such, MRE 305(e)(3)(A) establishes a rule that, in the absence of the accused or suspect initiating the communication leading to waiver of the right to counsel, the prosecution can only obtain a valid waiver by demonstrating that the accused has not been in continuous custody since the request for counsel and the subsequent waiver.<sup>179</sup> However, the rule in its current form deviates from the holding of *Maryland v. Shatzer*, which establishes a fourteen-day break-in-custody period, only after which law enforcement may again attempt to interrogate an accused or suspect who had previously invoked his right to counsel.<sup>180</sup>

In its current form, MRE 305(e)(3)(A) also fails to address that a military suspect or accused who is already serving a sentence in confinement for a different offense than the one that law enforcement seeks to interrogate him or her is not in “custody” for the purposes of starting the fourteen-day clock, after which law enforcement can make another attempt to interrogate after an initial invocation of the right to counsel. Thus, in its present state, military law does not conform to Supreme Court case law.<sup>181</sup>

### **C. Current State of Military Law on the Issues of Invocation and Waiver of Privilege Against Self-Incrimination and Right to Counsel**

MRE 305(c)(4) and MRE 305(e)(1) articulate the current requirements of military law with regard to invocation and waiver of the privilege against self-incrimination and the right to counsel. On the issue of invocation, MRE 305(c)(4) is entitled “Exercise of Rights.” MRE 305(c)(4) addresses the privilege against self-incrimination, providing in pertinent part: “If a person chooses to exercise the privilege against self-incrimination, questioning must

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<sup>179</sup> Case law also imposes the additional requirement that the accused have a reasonable or real opportunity to obtain counsel during that break in custody. *See, e.g.,* *United States v. Mosley*, 52 M.J. 679, 685 (A. Ct. Crim. App. 2000).

<sup>180</sup> *Maryland v. Shatzer*, 559 U.S. 98, 110 (2010).

<sup>181</sup> *See id.* at 110–11.



cease immediately.” The United States Court of Appeals for the Armed Forces has held that although no particular words or actions are required for a service member to exercise his or her right to silence, its invocation must be unequivocal before all questioning must stop.<sup>182</sup>

With regard to invocation of the right to counsel, MRE 305(c)(4) provides: “If a person subjected to interrogation under the circumstances described in subdivision (c)(2) or (c)(3) of this rule [custodial interrogation or interrogation subsequent to the prefferal of charges] chooses to exercise the right to counsel, questioning must cease until counsel is present.” An ambiguous comment or request, however, does not require the interrogation to cease.<sup>183</sup>

A request for counsel must be articulated “sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.” If the mention of an attorney “fails to meet the requisite level of clarity,” questioning may continue. “If the suspect’s statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.”<sup>184</sup>

With regard to the general rule of waiver of the privilege against self-incrimination and the right to counsel, MRE 305(e)(1) provides:

(1) *Waiver of the Privilege Against Self-Incrimination.* After receiving applicable warnings under this rule, a person may waive the rights described therein and in Mil. R. Evid. 301 and make a statement. The waiver must be made freely, knowingly, and intelligently. A written waiver is not required. The accused or suspect must affirmatively acknowledge that he or she understands the rights involved, affirmatively decline the right to counsel, and affirmatively consent to making a statement.

MRE 305(e)(2) addresses the issue of implicit waiver of the right to counsel and provides, “If the right to counsel is applicable under this rule and the accused or suspect does not affirmatively decline the right to counsel, the prosecution must demonstrate by a preponderance of the evidence that the individual waived the right to counsel.”

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<sup>182</sup> United States v. Traum, 60 M.J. 226, 230 (C.A.A.F. 2004); United States v. Sager, 36 M.J. 137, 145 (C.M.A. 1992).

<sup>183</sup> United States v. Ford, 51 M.J. 445, 451 (C.A.A.F. 1999).

<sup>184</sup> *Id.* (quoting Davis v. United States, 512 U.S. 452, 459, 461–62 (1994)).

In *United States v. Vangelisti*, the United States Court of Military Appeals conducted a very informative analysis of the terminology and statutory construction employed by the drafters of MRE 305(e).<sup>185</sup> Although MRE 305(e) has since been modified,<sup>186</sup> the court's analysis is still applicable as the substance of MRE 305(e) remains unchanged. First, the *Vangelisti* court reiterated the analysis for MRE 305(g) contained in the 1984 *MCM*. That *MCM*'s analysis stated that MRE 305(g)(1), current MRE 305(e)(1), requires an affirmative acknowledgment of the right before waiver may be found.<sup>187</sup> However, the reprinted analysis from the 1984 *MCM* pointed out that MRE 305(g)(2), current MRE 305(e)(2)–(3), follows the holding of *North Carolina v. Butler*<sup>188</sup> and “recognizes that the right to counsel, and only the right to counsel, may be waived even absent an affirmative declaration.”<sup>189</sup>

The *Vangelisti* court then compared the drafter's chosen terminology and that of the Supreme Court in *Butler* with regard to waiver.<sup>190</sup> Specifically, the *Vangelisti* court articulated that the Supreme Court had made a distinction between an express written or oral statement of waiver and a waiver clearly inferred from the actions or words of the person interrogated.<sup>191</sup> Yet, the Supreme Court had found that both types of waiver were sufficient for the purpose of waiver of the right to counsel after appropriate warnings had been given.<sup>192</sup> In contrast, the *Vangelisti* court said that the drafters of MRE 305

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<sup>185</sup> 30 M.J. 234, 238–39 (C.M.A. 1990). The United States Court of Military Appeals is the former name of the United Court of Appeals for the Armed Forces.

<sup>186</sup> Among other changes, the 2013 Amendments to the Manual for Courts-Martial, United States, Exec. Order No. 13,643, 78 Fed. Reg. 29,559 (May 15, 2013), reordered MRE 305 so that former MRE 305(g) is labeled 305(e) in the current MRE. The version of MRE 305(g)(2) discussed by the *Vangelisti* court is as follows:

(2) *Counsel*. If the right to counsel in subdivision (d) [fifth and sixth amendment rights to counsel, under the current MRE 305 (c)(2)–(3) and 305 (d)] is applicable and the accused or suspect does not decline affirmatively the right to counsel, the prosecution must demonstrate by a preponderance of the evidence that the individual waived the right to counsel. In addition, if the notice to counsel in subdivision (e) [presence of counsel at any custodial or post-preferred interrogation, under the current MRE 305 (c)(2)–(3)] is applicable, a waiver of the right to counsel is not effective unless the prosecution demonstrates by a preponderance of the evidence that reasonable efforts to notify the counsel were unavailing or that the counsel did not attend an interrogation scheduled with a reasonable period of time after the required notice was given.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 305(g)(2) (1984) [hereinafter 1984 *MCM*].

<sup>187</sup> *Vangelisti*, 30 M.J. at 238.

<sup>188</sup> 441 U.S. 369 (1979).

<sup>189</sup> *Vangelisti*, 30 M.J. at 238.

<sup>190</sup> *Id.* at 238–39.

<sup>191</sup> *Id.* at 239.

<sup>192</sup> *Id.*

“departed from the express/implied terminology used in that [*Butler*] decision when they wrote [MRE 305(e)] and substituted the term affirmative waiver/waiver phraseology.”<sup>193</sup>

The *Vangelisti* court then criticized the imprecision of the drafters in constructing the rule in this manner.<sup>194</sup> It reasoned that the distinction between “affirmative waiver” and “waiver” as used by the drafters of the *Manual* and of MRE 305 is not as clear as that used by the Supreme Court in *Butler*.<sup>195</sup> It also stated that the “use of the categorical ‘must’ in [current MRE 305(e)(1)] coupled with the use of unspecific ‘waiver’ in [current MRE 305(e)(2)–(3)] creates further confusion.”<sup>196</sup> Thus, the Court of Military Appeals in *Vangelisti* found that the choice of terminology used by the drafters of MRE 305(e) gives rise to a “legitimate question . . . as to the type of waiver of counsel which is legally sufficient to support admission of a confession at a court-martial.”<sup>197</sup>

Thus, in its present state, military law on the issues of invocation and waiver of the privilege against self-incrimination and the right to counsel is both confusing and lagging behind Supreme Court precedent. As identified by the *Vangelisti* court over 20 years ago, MRE 305 uses both terminology and a construction that injects doubt as to what is legally required to constitute waiver of the right to counsel by an accused or suspect.<sup>198</sup> Moreover, by not yet integrating the holding of *Berghuis v. Thompkins*, military law fails to reflect the current state of Supreme Court *Miranda* jurisprudence. Specifically, military law has not yet adopted the *Thompkins* Court’s holding that an accused or suspect must unambiguously invoke his right to silence<sup>199</sup> or its holding that an accused or suspect can waive his right to silence implicitly upon a showing that *Miranda* warnings were given, were understood, and that afterwards an uncoerced statement was made.<sup>200</sup>

## V. A Proposal to Revise MRE 305

### A. Proposed Revision of MRE 305(e)(3)(A) in Light of *Maryland v. Shatzer*

On its face, MRE 305(e)(3)(A) provides that so long as an accused or suspect has not been held in confinement, or otherwise had his or her liberty

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<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *See id.* at 239.

<sup>199</sup> *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260 (2010).

<sup>200</sup> *Id.* at 2261.

restricted *continuously*, then a subsequent waiver of the right to counsel can be considered valid. However, the current construction of the rule would allow law enforcement to reinitiate interrogation of the accused or suspect within the fourteen-day break-in-custody, cooling-off period required by the holding of *Shatzer*. In establishing the fourteen-day break-in-custody period during which law enforcement is forbidden from reinitiating interrogation, the *Shatzer* Court emphasized that it provides a suspect who initially invoked his or her their right to counsel ample time “to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.”<sup>201</sup> Therefore, to meet the new fourteen-day break-in-custody requirement established by the *Shatzer* Court, MRE 305(e)(3)(A) should be modified.

In the situation where a military accused or suspect is already in confinement serving an adjudged sentence for another offense when he or she initially invokes his or her right to counsel in response to pre-interrogation rights advisement, the fourteen-day break-in-custody clock should start as soon as he or she is returned to the general population of the confinement facility. Such a rule would echo the *Shatzer* Court’s reasoning that when a suspect is incarcerated for an interim period without interrogation but with a “baseline set of restraints imposed pursuant to a prior conviction,” these circumstances do not give rise to the “coercive pressures identified in *Miranda*.”<sup>202</sup>

Taking all of these considerations into account, I propose modifying MRE 305(e)(3)(A) as follows:<sup>203</sup>

(A) *Fifth Amendment Right to Counsel*. If an accused or suspect subjected to custodial interrogation requests counsel, any subsequent waiver of the right to counsel obtained during a custodial interrogation concerning the same or different offenses is invalid unless the prosecution can demonstrate by a preponderance of the evidence that:

(i) the accused or suspect initiated the communication leading to the waiver; or

(ii) the accused or suspect has not continuously had his or her freedom restricted by confinement, or other means, during the request for counsel and the subsequent waiver and that at least 14 days have elapsed since the termination of such initial confinement or other means of restriction upon his or her freedom. For the purpose of this

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<sup>201</sup> *Id.* at 110.

<sup>202</sup> *Id.* at 113.

<sup>203</sup> Proposed modifications to the current rule appear as underlined text.

subdivision, in any case in which the accused or suspect is, at the time he or she is interrogated, serving a sentence of confinement pursuant to the judgment of a court-martial or a civilian court, the 14-day period shall run from when he or she is returned to the general prisoner population or equivalent of the confinement facility in which he or she is being held.

**B. Proposed Revision of MRE 305(c)(4) and (e) in Light of *Berghuis v. Thompkins***

Supreme Court case law uses the term “invocation” when it discusses the action by a suspect to expressly trigger his or her rights under *Miranda*.<sup>204</sup> However, military law as codified under MRE 305(c)(4) currently uses the term “exercise” as a synonym for “invocation” to describe what must occur when an accused or suspect expressly triggers the privilege against self-incrimination and/or the right to counsel. Because there is no clear rationale that supports the use of different terminology than the Supreme Court in this area, I propose modification of MRE 305(c)(4) in favor of the terms “invocation” and “invoke” over the current term “exercise.”

More importantly, because the Supreme Court case law has required unambiguous invocation of the right to counsel since *Davis v. United States*<sup>205</sup> and extended the requirement for an unambiguous invocation of the right to remain silent in *Thompkins*, I also recommend modification of MRE 305(c)(4) to incorporate those requirements.<sup>206</sup> Therefore, I propose conforming MRE 305(c)(4) as follows:<sup>207</sup>

(4) *Invocation of rights.* If a person unambiguously invokes the privilege against self-incrimination, questioning must cease immediately. If a person subjected to interrogation under the circumstances described in subdivision (c)(2) or (c)(3) of this rule unambiguously invokes the right to counsel, questioning must cease until counsel is present.

With regard to waiver of the privilege against self-incrimination and the right to counsel, I recommend changes to MRE 305(e) in light of the Supreme Court’s holding in *Thompkins* and the Court of Military Appeals observations in *Vangelisti*. First, the *Vangelisti* Court correctly observed that the *MCM*’s drafters’ departure from Supreme Court case law’s terminology of

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<sup>204</sup> See, e.g., *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2259–60 (2010).

<sup>205</sup> 512 U.S. 452, 459 (1994).

<sup>206</sup> See *Thompkins*, 130 S. Ct. at 2260.

<sup>207</sup> Proposed modifications to the current rule appear as underlined text.

“express/implied” waiver in favor of “affirmative waiver/waiver” phraseology in the construction MRE 305(e), vis-à-vis an interrogated person’s rights, has caused unnecessary confusion.<sup>208</sup> Therefore, I propose revising MRE 305 (e) by adopting the terminology of the *Thompkins* Court, whose holding would allow either “express” or “implicit” waiver of one’s *Miranda* rights.<sup>209</sup>

Substantively, I propose conforming MRE 305(e)(1) and 305(e)(2) by adopting the *Thompkins* Court’s holding that the right to remain silent may be implicitly waived where the applicable rights are given to a suspect, the suspect understood those rights, and the suspect subsequently makes an uncoerced statement.<sup>210</sup> By adopting such modifications, the presiding military judge at a court-martial would analyze a military accused’s claim that he or she did not waive the privilege against self-incrimination using the same approach as a federal judge in district court. Under this regime, military prosecutors would no longer be required to prove that an accused “affirmatively consent[ed] to making a statement.”<sup>211</sup> As such, a military accused would be afforded no more or less rights in this area of the law than a defendant prosecuted in federal district court.

Taking all of these considerations into account, I propose conforming MRE 305(e)(1) and (e)(2) as follows:<sup>212</sup>

(1) *Waiver of the Privilege Against Self-Incrimination.*

(A) After receiving applicable warnings under this rule, a person may waive the rights described therein and in Mil. R. Evid. 301 and make a statement. The waiver must be made freely, knowingly, and intelligently. A written waiver is not required. The accused or suspect may waive his privilege against self-incrimination and/or his right to counsel either explicitly or implicitly.

(B) If the accused or suspect does not explicitly waive his privilege against self-incrimination, the prosecution must establish that the person implicitly waived the privilege against self-incrimination by demonstrating by a preponderance of the evidence that:

(i) applicable warnings under this rule and in Mil. R. 301 were given to the accused or suspect;

<sup>208</sup> See *United States v. Vangelisti*, 30 M.J. 234, 238–39 (C.M.A. 1990).

<sup>209</sup> See *Thompkins*, 130 S. Ct. at 2260.

<sup>210</sup> See *id.* at 2261–62.

<sup>211</sup> MCM, *supra* note 1, MIL. R. EVID. 305(e)(1).

<sup>212</sup> Proposed modifications to the current rule appear as underlined text.

(ii) the accused or suspect understood those rights; and  
(iii) the accused or suspect made an uncoerced statement.

(2) *Waiver of the Right to Counsel.* If the right to counsel is applicable under this rule and the accused or suspect does not explicitly decline the right to counsel, the prosecution must demonstrate by a preponderance of the evidence that the individual implicitly waived the right to counsel.

## VI. Conclusion

In the wake of the Supreme Court's holdings in *Shatzer* and *Thompkins*, MRE 305 should be revised. Specifically, MRE 305(e)(3)(A) should be modified to ensure military law mirrors the fourteen-day break-in-custody rule, enunciated by the *Shatzer* Court, after which law enforcement may attempt to again attempt to interrogate an accused or suspect who had previously invoked his right to counsel. The revised MRE 305(e)(3)(A) should also be written to start the fourteen-day break-in-custody clock as soon as a military suspect or accused, who is already serving a sentence in confinement for a different offense than the one for which law enforcement seeks to interrogate, is returned to the general prison population after invoking his or her right to counsel.

With regard to the terminology used in *Thompkins* and the Court of Military Appeals' criticism of the current version of the rule in *Vangelisti*, MRE 305(e)(1) and (2) should be revised to adopt the Supreme Court case law's terminology of "express/implied" waiver. Finally, MRE 305(e)(1) and 305(e)(2) should be revised by adopting *Thompkins*' holding that the right to remain silent may be implicitly waived where the applicable rights are given to a suspect, the suspect understood those rights, and the suspect subsequently makes an uncoerced statement.

## FUNDAMENTAL CONCERNS: WHY THE U.S. GOVERNMENT SHOULD NOT ACCEDE TO THE ROME STATUTE

Joseph A. Rutigliano, Jr.\*

### I. Introduction

*“In signing, however, we are not abandoning our concerns about significant flaws in the treaty.”<sup>1</sup>*

The Rome Statute of the International Criminal Court (Rome Statute)<sup>2</sup> entered into force on 1 July 2002. Despite its strong support for the idea of establishing a tribunal to try perpetrators of genocide, crimes against humanity and war crimes, the United States was one of seven States that voted against the final product drafted by the delegates to the Rome Conference.<sup>3</sup> That decision was met with much derision both internationally and domestically. Many attributed the negative vote to a developing unilateralist position of the lone superpower, while others viewed the negative vote as a glimpse into American “exceptionalism,”<sup>4</sup> in that the United States would only support the International

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<sup>1</sup> See Statement on the Rome Treaty on the International Criminal Court, 2000 PUB. PAPERS 2816 (Dec. 31, 2000), available at <http://www.gpo.gov/fdsys/pkg/PPP-2000-book3/pdf/PPP-2000-book3-doc-pg2816-2.pdf>.

<sup>2</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an Int'l Criminal Court, July 17, 1998, Rome Statute of the International Criminal Court, U.N. DOC. A/CONF.183/9 (1998) (as corrected by *process-verbeaux* of Nov. 10, 1998, July 12, 1999, Nov. 30, 1999, May 8, 2000, Jan. 17, 2001 and Jan. 16 2002, and amended by U.N. Depositary Notifications C.N.651.2010.Treaties-6 and C.N.651.2010.Treaties-8) [hereinafter Rome Statute].

<sup>3</sup> China, Iraq, Israel, Libya, Qatar, the United States, and Yemen all voted against the Rome Statute. Another 21 States abstained from the vote. See William K. Lietzau, *International Criminal Law After Rome: Concerns from a U.S. Military Perspective*, 64 LAW & CONTEMP. PROBS. 119, 120 n.4 (2001), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1202&context=lcp>.

<sup>4</sup> See DAVID J. SCHEFFER, ALL THE MISSING SOULS 165 (2012) (“By ‘exceptionalism’ in the realm of international law, I mean the United States has a tradition of leading other nations in global treaty-making endeavors to create a more law-abiding international community, only to seek exceptions to the new rules for the United States because of its constitutional heritage of defending individual rights, its military responsibilities worldwide requiring freedom to act in times of war, its superior economy demanding free trade one day and labor protection and environmental concessions the next day, or just stark nativist insularity.”).



Criminal Court (ICC) as long as it could not exercise jurisdiction over U.S. service members or U.S. Government (USG) officials. But what many overlook is that the United States has legitimate principled concerns with the Rome Statute and that it should not even consider acceding to it until those objections have been adequately addressed.

The title of this article is taken from the statement President William J. Clinton released on 31 December 2000, after he had directed Ambassador David J. Scheffer<sup>5</sup> to sign the Rome Statute.<sup>6</sup> President Clinton signed the Rome Statute with the expectation that discussions with other governments would lead to the USG's fundamental concerns being addressed. To date, this has not been the case. This article will review the major USG objections to the Rome Statute as expressed by its principal negotiator, Ambassador Scheffer. It will explore the validity of those objections and propose that the United States remain outside the ICC unless and until a compelling national security interest arises that overrides the USG's fundamental concerns, the loss of sovereignty, and the abdication of constitutional rights for our service members that would result with accession to the Rome Statute. Absent such compelling national security interests, both the ICC opponents and supporters should mutually respect each other's point of view and simply agree to disagree.

## II. The U.S. Objections

***"I won't say we gave birth to a monster, but the baby has some defects."***

***—Dutch Delegate to Rome Statute Negotiations<sup>7</sup>***

Shortly after the vote on the Rome Statute, the principal negotiator for the United States, the Honorable David J. Scheffer, then the U.S. Ambassador-At-Large for War Crimes Issues, testified before the Senate Committee on Foreign Relations' Subcommittee on International Operations and set forth the primary objections of the USG to the Rome Statute.<sup>8</sup> The objections can be summarized

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<sup>5</sup> David J. Scheffer, at the time, was the first U.S. Ambassador-at-Large for War Crimes Issues and was the principal negotiator for the United States during the proceedings in Rome. See *id.* at 3; Lietzau, *supra* note 3, at 124.

<sup>6</sup> "Given these concerns, I will not, and do not recommend that my successor submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied." Statement on the Rome Treaty on the International Criminal Court, *supra* note 1, at 2817.

<sup>7</sup> *Is a U.N. International Criminal Court in the U.S. National Interest? Hearing Before the Subcomm. on Int'l Operations of the S. Comm. on Foreign Relations*, 105th Cong. 2 (1998) [hereinafter *Hearing*] (statement of Sen. Rod Grams, Chairman, Subcomm. on Int'l Operations, S. Comm. Foreign Relations). Senator Grams went on to say that he respectfully disagreed with the Dutch delegate and that "the International Criminal Court is a monster." *Id.*

<sup>8</sup> *Id.* at 12 (statement of Hon. David J. Scheffer, Ambassador-at-Large for War Crimes Issues).

as follows: the ICC's jurisdiction over nationals of non-party States; the provision that allows States Parties to "opt-out" of the ICC's jurisdiction over war crimes for seven years after ratification; a *proprio motu*<sup>9</sup> prosecutor, that is, a prosecutor who may initiate investigations and prosecutions on her own volition; the inclusion of a crime of aggression; and the prohibition of reservations to the Rome Statute. This article will focus on the jurisdiction of the ICC over nationals of non-party States, the *proprio motu* prosecutor, and the crime of aggression.

### A. Jurisdiction over Nationals of non-Party States

The first primary objection of the USG is the ICC's jurisdiction over nationals of non-party States. This was adopted in Rome over the strenuous objection of the U.S. delegation.<sup>10</sup> The Rome Statute provides that referrals may be made to the ICC by the United Nations Security Council (UNSC), a State Party, or the ICC prosecutor.<sup>11</sup> It further provides that when a State Party refers or when the ICC prosecutor initiates a case, "the Court may exercise its jurisdiction if one or more of the following States are Parties" to the Rome Statute or have accepted the jurisdiction of the ICC: "The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; [or] the State of which the person accused of the crime is a national."<sup>12</sup>

During the negotiations in Rome, the U.S. delegation proposed an amendment to the text that would have required both the State where the crime was committed *and* the State of nationality to be State Parties, or at the very least, the ICC obtain the consent of the State of nationality. The proposal was rejected. As Ambassador Scheffer stated to the Subcommittee on International Operations:

We are left with consequences that do not serve the cause of international justice. Since most atrocities are committed internally and most internal conflicts are between warring parties of the same nationality, the worst offenders of international humanitarian law can choose never to join the treaty and be fully insulated from its reach absent a Security Council referral. Yet multinational peacekeeping forces

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<sup>9</sup> See D.P. SIMPSON, CASSELL'S NEW LATIN DICTIONARY 381, 482 (Funk & Wagnalia 1960) (defining *motus* as "a motion, movement" and *proprius* as "one's own, special, particular, peculiar."); see also EUGENE EHRLICH, AMO, AMAS, AMAT AND MORE 232 (1985) (defining *proprio motu* as, "by one's own initiative," literally, "on one's own motion").

<sup>10</sup> *Hearing, supra* note 7, at 12 (statement of Hon. David J. Scheffer, Ambassador-at-Large for War Crimes Issues).

<sup>11</sup> Rome Statute, *supra* note 2, art. 13.

<sup>12</sup> *Id.* art. 12., para. 2.

operating in a country that has joined the treaty can be exposed to the Court's jurisdiction even if the country of the individual peacekeeper has not joined the treaty. Thus, the treaty purports to establish an arrangement whereby U.S. armed forces operating overseas could be conceivably prosecuted by the international court even if the United States has not agreed to be bound by the treaty. Not only is this contrary to the most fundamental principles of treaty law, it could inhibit the ability of the United States to use its military to meet alliance obligations and participate in multinational operations, including humanitarian interventions to save civilian lives. Other contributors to peacekeeping operations will be similarly exposed.<sup>13</sup>

Ambassador Scheffer's statement that the jurisdictional scheme of the Rome Statute is "contrary to the most fundamental principles of treaty law" is supported by the Vienna Convention on the Law of Treaties (VCLT). The VCLT states, "A treaty does not create either obligations or rights for a third State without its consent."<sup>14</sup> Moreover, an obligation may not be imposed on a third State by an international agreement unless the parties to the agreement intend the provision of the agreement to "establish the obligation and the third state accepts that obligation."<sup>15</sup> This fundamental principle of international law stresses that a State cannot be bound to a treaty without its express consent. This is so because States are sovereign. The sovereign independence of every State has long been recognized and is enshrined in article 2, paragraph 1, of the United Nations (U.N.) Charter, which states: "The Organization is based on the principle of the sovereign equality of all its Members."<sup>16</sup> The U.N. General Assembly (UNGA) has asserted that this "sovereign equality" includes, among other things, the fundamental principles that "(a) States are juridically equal; (b)

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<sup>13</sup> *Hearing, supra* note 7, at 12–13 (statement of Hon. David J. Scheffer, Ambassador-at-Large for War Crimes Issues).

<sup>14</sup> Vienna Convention on the Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 331. The United States is not a party to the VCLT but considers it to be an accurate reflection of customary international law. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 324 (1) (1987) ("An international agreement does not create either obligations or rights for a third state without its consent."); see also *id.* cmt. a.

<sup>15</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 324 (2) (1987); see also Vienna Convention on the Law of Treaties art. 35, May 23, 1969, 1155 U.N.T.S. 331 (requiring the third State to expressly accept the obligation "in writing").

<sup>16</sup> See U.N. Charter art. 2, para. 1.

Each State enjoys the rights inherent in full sovereignty; [and] (c) Each State has the duty to respect the personality of other States.”<sup>17</sup>

Moreover, international law itself would not exist but for the consent of independent sovereign States. The Permanent Court of International Justice, stated:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usage generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.<sup>18</sup>

Therefore, States are sovereign and may not be bound unless they consent to be bound. Finally, the International Court of Justice (ICJ) has recognized this principle as well, stating, “International law rests on the principle of the sovereignty of States and thus originates from their consent.”<sup>19</sup> Without such consent, the law does not exist.<sup>20</sup>

The USG concern was that despite this fundamental principle, the Rome Statute purportedly grants the ICC jurisdiction over nationals of a non-party

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<sup>17</sup> Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations., G.A. Res. 2625 (XXV), at 124, U.N. Doc. A/8082 (Oct. 24, 1970).

<sup>18</sup> S.S. “Lotus” (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

<sup>19</sup> See Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 291 (July 8) (separate opinion of Judge Guillame).

<sup>20</sup> Some would argue that there are peremptory norms that are in place regardless of State consent. See Prosecutor v. Furund@ija, Case No. IT-95-17/1-T, Judgment, ¶¶ 153–155 (Int’l Crim. Trib. For the Former Yugoslavia Dec. 10, 1998) (noting that states cannot abrogate peremptory norms through treaties or local laws, and that states cannot ignore an internationally recognized prohibition against torture through national measures). This concept is referred to as *jus cogens* meaning “compelling law.” BLACK’S LAW DICTIONARY 876 (8th ed. 2004). Any treaty between or among states that violates *jus cogens* is void. See Vienna Convention on the Law of Treaties art. 54, May 23, 1969, 1155 U.N.T.S. 331. The American Law Institute defines certain specific concepts as being *jus cogens* including genocide; slavery or slave trade; the murder or causing the disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; and systematic racial discrimination. See THE RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (a)–(f), cmt. n (1987). There is a lack of general agreement on just what amounts to *jus cogens*, however, further supporting the requirement of State consent. See José A. Cabranes, *International Law by Consent of the Governed*, 42 Val. U. L. Rev. 119, 140–141 (2007).

State without the consent of that State.<sup>21</sup> This jurisdiction may be exercised even over individuals who are acting in an official capacity on behalf of the non-party State.<sup>22</sup> Short of obtaining the State's consent, however, the ICC should only be permitted to exercise jurisdiction over the official actions of a non-party State when the UNSC refers the matter under its Chapter VII authority. Article 24(1) of the U.N. Charter states, "Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."<sup>23</sup> Article 25 states, "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."<sup>24</sup>

With respect to granting the UNSC referral power, Ambassador Scheffer stated,

There will necessarily be cases where the international court cannot and should not have jurisdiction unless the Security Council decides otherwise. The United States has long supported the right of the Security Council to refer situations to the Court with mandatory effect, meaning that any rogue state could not deny the Court's jurisdiction under any circumstances. We believe this is the only way under international law and the U.N. Charter to impose the Court's jurisdiction on a non-party state. In fact, the treaty reaffirms this Security Council referral power. Again, the governments

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<sup>21</sup> See *Hearing*, *supra* note 7, at 12 (statement of Hon. David J. Scheffer, Ambassador-at-Large for War Crimes Issues).

<sup>22</sup> *Id.* at 13 (statement of Hon. David J. Scheffer, Ambassador-at-Large for War Crimes Issues); see also Rome Statute, *supra* note 2, art. 27.

<sup>23</sup> This position is not universally accepted, however. India for example objected to the Rome Statute's provisions granting the UNSC referral authority. See Mr. Dilip Lahiri, Additional Secretary (UN), Explanation of vote on the adoption of the Statute of the International Criminal Court (July 17, 1998), <http://www.un.int/india/ind272.htm>. ("Allow me, Mr. Chairman, to explain to this meeting of plenipotentiaries our fundamental objections to this Statute. Firstly, the Statute gives to the Security Council a role in terms that violate international law. We have been told that the Council must have a role built into the Statute because it had set up the ad hoc tribunals for the former Yugoslavia and for Rwanda, and has therefore established its right to do so. Those were decisions of a dubious legality. The Charter did not give the Council the power to set up Courts, the Council did so in any case, and can do so again, only because its power cannot be challenged. But what the Council seeks from the ICC through the Statute, and what the draft gives it, is something else—it is the power to refer, the power to block and the power to bind non-States Parties. All three are undesirable."). This position, however, is difficult to sustain in light of the plain language of articles 24 and 25 of the U.N. Charter.

<sup>24</sup> U.N. Charter art. 25.

that collectively adopt this treaty accept that this power would be available to assert jurisdiction over rogue states.<sup>25</sup>

The United States argued that ignoring this fundamental principle of international law of requiring State consent except in cases of UNSC action could lead to perverse results. For instance, it renders meaningless the ratification process for States. As Ambassador Scheffer testified, “In fact, under such a theory, two governments could join together to create a criminal court and purport to extend its jurisdiction over everyone everywhere in the world.”<sup>26</sup> Another perverse result is that under the Rome Statute a State Party may opt out of the application of war crimes jurisdiction for seven years.<sup>27</sup> Yet, non-party States are always exposed should they deploy forces to assist a State Party involved in an armed conflict.<sup>28</sup>

This valid, principled concern has been consistently raised by the USG through three different Administrations.<sup>29</sup> In fact, the validity of this fundamental concern was shared by other States as well. During the negotiations of the Rome Statute, representatives of States that eventually voted in favor of the Rome Statute raised the same concern. For example, during the final week of negotiations in Rome, the Japanese representative, Ambassador Hisashi Owada, told a diplomat from Cameroon that non-party States could not be bound and that their interests had to be addressed.<sup>30</sup> The Cameroon diplomat replied, “Here we are facing evil. What we do here is a departure from international law, and it should be.”<sup>31</sup> This is an incredible statement. The fact we are facing evil is not a justification to abandon our obligations under international law. When training our Marines on the law of war, we often are confronted with the question “Why must we adhere to the law when our enemies regularly violate the laws of war.” We stress that facing an enemy that ignores the laws and customs of war is not justification for us to ignore the law. We do not commit war crimes just because we are facing an evil enemy.<sup>32</sup> Public

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<sup>25</sup> *Hearing, supra* note 7, at 13 (statement of Hon. David J. Scheffer, Ambassador-at-Large for War Crimes Issues).

<sup>26</sup> *Id.*

<sup>27</sup> Rome Statute, *supra* note 2, art. 124.

<sup>28</sup> *See id.* art. 12, para. 2 (a).

<sup>29</sup> *See* John B. Bellinger, Legal Advisor to the Sec’y of State, Remarks to the DePaul University College of Law, *The United States and the International Criminal Court: Where We’ve Been and Where We’re Going* (Apr. 25, 2008), available at <http://2001-2009.state.gov/s/l/rls/104053.htm>.

<sup>30</sup> SCHEFFER, *supra* note 4, at 214.

<sup>31</sup> *Id.*

<sup>32</sup> *See e.g.*, INST. OF INT’L LAW, THE LAWS OF WAR ON LAND art. 84 (1880). The principle of reprisal may permit a violation of the law of war to compel an enemy to cease his own violation, so long as the “nature and scope” of the reprisal does not exceed that of the violation by the enemy, and that the reprisal conforms to the “laws of humanity and morality.” *Id.* art. 86. The decision to

opinion in support of the war effort as well as maintaining the humanity of our service members are two reasons to adhere to the law despite our enemy's continuous violations. Moreover, the rule of law must count for something.

Although this is a principled concern of the United States, it must be admitted that its validity only holds up for so long as the United States remains outside the Rome Statute. If the Assembly of States Parties (ASP) were to correct this flaw in the Rome Statute, it would be a step in the right direction but not a reason for the United States to accede to the Rome Statute. The remaining two concerns are also legitimate objections that must be addressed before the United States should even consider acceding to the Rome Statute.

### **B. *Proprio Motu* Prosecutor**

The second fundamental objection of the United States to the Rome Statute is the establishment of a *proprio motu* prosecutor. Article 15 of the Rome Statute states, "The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court."<sup>33</sup> Ambassador Scheffer stated the USG concerns with this provision as follows:

The treaty also creates a *proprio motu*, or self-initiating prosecutor, who on his or her own authority, with the consent of two judges, can initiate investigations and prosecutions without referral to the Court of a situation either by a government that is a party to the treaty or by the Security Council. We opposed this proposal, as we are concerned that it will encourage overwhelming the Court with complaints and risk diversion of its resources, as well as embroil the Court in controversy, political decision making, and confusion.<sup>34</sup>

It should be emphasized that the United States strongly supported the concept of an independent and effective prosecutor for the ICC. The United States believes, however, that the best way to achieve this result was for situations to be referred by States or, in appropriate cases, the UNSC.

It is our firm view that the proposal for a *proprio motu* prosecutor—one tasked with responding to any and all indications that a crime within the potential jurisdiction of the

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engage in a reprisal, however, is made at the national level—by the commander-in-chief—and not at the tactical level—for example, by Marines on the ground. *See id.*

<sup>33</sup> *See* Rome Statute, *supra* note 2, art. 15, para. 1.

<sup>34</sup> *See Hearing, supra* note 7, at 14 (statement of Hon. David J. Scheffer, Ambassador-at-Large for War Crimes Issues).

Court may have been committed—not only offers little by way of advancing the mandate of the Court and the principles of prosecutorial independence and effectiveness, but also will make much more difficult the Prosecutor’s central task of thoroughly and fairly investigating the most egregious of crimes.<sup>35</sup>

In supporting the ICC prosecutor’s effectiveness, the longstanding USG position was that only the ICC prosecutor should determine “whether a crime has been committed and by whom.”<sup>36</sup> Therefore, the United States pushed for only allowing States, and in certain instances the UNSC, to refer “situations” to the ICC, not particular cases against specific individuals.<sup>37</sup> The United States did not want see other entities—much less individuals—have the ability to refer specific cases to the ICC. Yet that is what the Rome Statute allows. The Rome Statute limits States and the UNSC to referrals of “large-scale situations of atrocities,”<sup>38</sup> with the ICC prosecutor then investigating to determine which individual suspects should be prosecuted. On the other hand, the Rome Statute allows the ICC prosecutor to initiate investigations into “a crime,” which may be based on information received from non-governmental organizations (NGOs) and individuals outside the context of a situation referred by a State or the UNSC.<sup>39</sup> This will divert the limited resources of the ICC, distract the ICC prosecutor from focusing on those “most serious crimes of concern to the international community as a whole,”<sup>40</sup> increase the risk of politically-motivated prosecutions, and challenge the supremacy of the UNSC in the area of maintaining international peace and security, all of which will jeopardize the ICC’s legitimacy and effectiveness.

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<sup>35</sup> *Hearing, supra* note 7, at 147–148 (Appendix, Related Document, The Concerns of the United States Delegation Regarding the Proposal for a *Proprio Motu* Prosecutor). This document, dated June 22, 1998, was submitted by the U.S. delegation in Rome during negotiations and was appended to the Congressional record of the hearing of the Subcommittee on International Operations.

<sup>36</sup> *See id.* at 148.

<sup>37</sup> *Id.*

<sup>38</sup> Rome Statute, *supra* note 2, art. 13(a)–(b); *see also Hearing, supra* note 7, (Appendix, Related Documents, Statement of the United States Delegation on “Article 11 bis—Preliminary Rulings Regarding Admissibility”) (“Public acknowledgement of a referral of large-scale ‘matters’, as opposed to the filing of a complaint against an individual suspect, should not be objectionable.”); *see also SCHEFFER, supra* note 4, at 176 (pointing out that under the Rome Statute the UNSC and state parties can only refer “large-scale situations of atrocities” to the ICC).

<sup>39</sup> *See Rome Statute, supra* note 2, arts. 13 (c), 15.

<sup>40</sup> *Id.* art. 5(1).



## 1. Diversion of Resources

Article 5 of the Rome Statute limits the jurisdiction of the ICC “to the most serious crimes of concern to the international community as a whole.”<sup>41</sup> This also is stressed in the preamble to the Rome Statute, which, when read together with article 5, demonstrates unequivocally that the purpose of the ICC is “to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole.”<sup>42</sup> The establishment of a *proprio motu* prosecutor may actually work to defeat this purpose by opening the door to NGOs and even individuals to refer specific cases to the ICC prosecutor. Article 15 of the Rome Statute states, “The Prosecutor *shall* analyse the seriousness of the information received.”<sup>43</sup> Therefore, the ICC prosecutor is required to review and potentially conduct preliminary examinations into all communications she receives. This will be a tremendous drain on the ICC prosecutor’s limited resources. The United States recommended that only States or in certain cases the UNSC refer situations to the ICC in order to protect the office of the ICC prosecutor from being overwhelmed with matters that will interfere with its independence and effectiveness. Relying only on State or UNSC referrals will enhance the ICC prosecutor’s ability to focus on those “serious crimes of concern to the international community as a whole,”<sup>44</sup> as well.

The United States was deeply concerned with the ICC prosecutor being overwhelmed with information received from individuals and organizations. It noted that in 1997 alone, the U.N. Human Rights Commission received close to 30,000 communications under its Resolution 1503 procedures.<sup>45</sup> Even if the ICC prosecutor received only a fraction of this total, she would be bogged down in preliminary examinations to determine whether the information merited a full-blown investigation by the ICC prosecutor. This would spread thin a small office and detrimentally impact that office’s ability to address those serious crimes of concern to the international community. States, on the other hand,

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<sup>41</sup> *Id.* art. 5.

<sup>42</sup> *Id.* pmb.

<sup>43</sup> *Id.* art. 15, para. 2 (emphasis added).

<sup>44</sup> *Hearing, supra* note 7, at 148 (Appendix, Related Document, The Concerns of the United States Delegation Regarding the Proposal for a *Proprio Motu* Prosecutor).

<sup>45</sup> *Id.* at 149. U.N. Commission on Human Rights Resolution 1503 enables two bodies of the UN—the Sub-Commission on the Promotion and Protection of Human Rights and the Commission on Human Rights—to examine complaints which appear to show consistent patterns of gross and reliably attested human rights violations received from individuals or NGOs. *See* Economic and Social Council Res. 1503 (XLVIII), Procedure for dealing with communications relating to violations of human rights and fundamental freedoms, May 11–28, 1970, 48th U.N. ESCOR Supp. No. 1A, U.N. Doc. E/4832/Add.1, at 8 (1970).

would serve as the necessary filter to ensure only those most serious situations, not individual crimes, were brought to the ICC prosecutor for her full attention. History has borne out U.S. concerns.

The ICC's own Report to the UNGA on the activities of the ICC for 2010 and 2011 noted that "the growing casework and the referral of a new situation by the Security Council has increased pressure on the resources available to the Court."<sup>46</sup> In addition to the six investigations being conducted by the ICC prosecutor at the time of the Report's filing, the "Office of the Prosecutor is conducting preliminary examinations in Afghanistan, Colombia, Côte d'Ivoire, Georgia, Guinea, Honduras, Nigeria, the Republic of Korea and Palestine."<sup>47</sup> To get a sense of the true number of preliminary examinations that the ICC prosecutor has been required to conduct, it should be noted that as of 31 July 2011, the ICC prosecutor had received 9,253 communications under article 15 of the Rome Statute, with 419 being received during the reporting period.<sup>48</sup> These communications are not of "large-scale situations of atrocities," but rather individual cases. Each must be reviewed and analyzed by the ICC prosecutor.

From 1 August 2011 through 30 June 2012, the ICC prosecutor received an additional 287 communications related to article 15 from various sources alleging crimes under the court's jurisdiction.<sup>49</sup> Of these, the ICC prosecutor determined that 176 fell outside the court's jurisdiction, 35 were linked to situations already before the court, 47 were linked to actual investigations or prosecutions, and 28 warranted further analysis.<sup>50</sup> With over sixty percent of last term's communications being unfounded, the argument to free the ICC prosecutor from this burden of having to conduct preliminary examinations into individualized complaints becomes more compelling. Referral of overarching situations by States, and the UNSC when appropriate, is the only way to

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<sup>46</sup> See Rep. of the Int'l Criminal Court, 66th Sess., 1 Aug. 2010–31 July 2011, para. 123, U.N. Doc A/66/309 (19 Aug. 2011), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/455/95/PDF/N1145595.pdf?OpenElement> [hereinafter ICC 2010/11 Report]. The report of the ICC on its activities for August 1, 2010 to July 31, 2011, was submitted to the General Assembly in accordance with article 6 of the Relationship Agreement between the United Nations and the International Criminal Court and paragraph 17 of UNGA Resolution 65/12. *Id.* at 2–3.

<sup>47</sup> *Id.* at 3.

<sup>48</sup> *Id.* para. 62.

<sup>49</sup> Rep. of the Int'l Criminal Court, 67th Sess., 1 Aug. 2011–31 Jul. 2012, para.72, U.N. Doc A/67/308 (14 Aug 2012), available at [http://www.icc- cpi.int/en\\_menus/icc/reports%20on%20activities/court%20reports%20and%20statements/Document%20s/A67308EN.pdf](http://www.icc- cpi.int/en_menus/icc/reports%20on%20activities/court%20reports%20and%20statements/Document%20s/A67308EN.pdf) [hereinafter ICC 2011/12 Report]. The report of the ICC on its activities from 1 August 2011 to 31 July 2012 was submitted to the General Assembly in accordance with article 6 of the Relationship Agreement between the United Nations and the International Criminal Court and paragraph 19 of UNGA Resolution 66/262. *Id.* at 2–3.

<sup>50</sup> *Id.* A calculation of the reported number of communications and their stated disposition leaves one reported communication unaccounted for in the ICC 2011/12 Report. *See id.*

preserve the independence of the ICC prosecutor to determine which individual cases should be brought forward.

Another example of how limited resources are diverted can be seen in the matter of Palestine. On 22 January 2009, the Palestinian National Authority (PNA) purportedly “accepted” the jurisdiction of the ICC under article 12, paragraph 3 of the Rome Statute, although it is not even a State, and sought ICC jurisdiction over the 2006 conflict between the Palestinians and Israel.<sup>51</sup> Rather than rejecting the request out of hand, which would have been the right thing to do, the ICC prosecutor took more than three years to “examine whether the declaration meets statutory requirements.”<sup>52</sup> On 3 April 2012, the ICC prosecutor determined that she would not take jurisdiction over the matter.<sup>53</sup> In the meantime, the ICC prosecutor had received 400 communications for events in Palestine alone.<sup>54</sup> If the ICC did take jurisdiction over the situation respecting Palestine, the effort the ICC prosecutor would have to put into these communications would prevent her from addressing the actual situations now before the ICC.<sup>55</sup>

It is interesting that the ICC prosecutor decided not to proceed with the request by the PNA, because it was “for the relevant bodies at the United Nations or the Assembly of States Parties to the Rome Statute to make the legal determination as to whether Palestine qualifies as a State for the purpose of acceding to the Rome Statute and thereby enabling the exercise of jurisdiction by the Court.”<sup>56</sup> It is ironic how when faced with a case that would “embroil the Court in controversy, political decision making, and confusion,” the ICC opted

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<sup>51</sup> The fact that the PNA would refer the matter in Gaza to the ICC is intriguing. If the ICC agreed to move forward and investigate the matter, it would be required to review the actions of both Israel and the Palestinians. See Assembly of State Parties to the Rome Statute of the Int’l Criminal Court, Rules of Procedure and Evidence, Rule 44, para. 2, U.N. Doc. ICC-ASP /1/3, U.N. Sales No.E.03.V.2 (2002) [hereinafter Rules of Procedure and Evidence]. It would appear that the Palestinians would have more to lose than gain by such an investigation based on its numerous violations of the law of armed conflict. See *infra* note 60 and accompanying text.

<sup>52</sup> See ICC 2010/11 Report, *supra* note 46, para. 84.

<sup>53</sup> See Office of the Prosecutor, Int’l Criminal Court, *Situation in Palestine*, at para. 6 (Apr. 3, 2012), <http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>; see also ICC 2011/12 Report, *supra* note 49, para. 81.

<sup>54</sup> See ICC 2010/11 Report, *supra* note 46, para. 84.

<sup>55</sup> The ICC has eighteen cases in seven situations before it at this writing: Central African Republic, Côte d’Ivoire (accepted subsequent to the ICC 2011/2012 Report), Democratic Republic of the Congo, Kenya, Libya, Sudan (Darfur), and Uganda. See Int’l Criminal Court, ICC, *Situations and Cases*, ICC-CPI.INT, [http://www.icc-cpi.int/en\\_menus/icc/situations\\_and\\_cases/Pages/situations\\_and\\_cases.aspx](http://www.icc-cpi.int/en_menus/icc/situations_and_cases/Pages/situations_and_cases.aspx) (last visited 15 Jan. 2013). The ICC prosecutor’s office is currently conducting preliminary examinations in at least seven other countries including Afghanistan, Georgia, Guinea, Colombia, Honduras, Korea and Nigeria. See *id.*

<sup>56</sup> See ICC 2011/12 Report, *supra* note 49, para. 82.

to defer to the UNSC and the ASP, precisely the bodies the United States claims should be referring matters to the ICC in the first instance.<sup>57</sup>

On 29 November 2012, the UNGA voted to grant the Palestinians non-member observer state status.<sup>58</sup> If the petition was resubmitted and the ICC agreed to move forward and investigate the matter, it would be required to review the actions of both Israel and the Palestinians.<sup>59</sup> It would appear that the Palestinians would have more to lose than gain by such an investigation based on its numerous violations of the law of war.<sup>60</sup> It will be interesting to see if the PNA will resubmit its application to the ICC.<sup>61</sup>

## 2. Crimes not of Concern to the International Community as a Whole

In addition to being overwhelmed with matters to investigate, another problem with allowing a *proprio motu* prosecutor to initiate investigations and permitting NGOs, individuals, and others to provide information to the ICC prosecutor for examination is that many of the crimes referred to the ICC prosecutor will not rise to the level of serious crimes of concern to the international community as a whole. The categories of criminal conduct covered by war crimes as defined in the Rome Statute are wide-ranging and do not necessarily exclude conduct short of serious crimes of concern to the international community as a whole.<sup>62</sup> The same can be said with respect to crimes against humanity, which is broadly defined.<sup>63</sup> “Thus, it is essential that there be some screen to distinguish between crimes which do rise to level of concern to the international community and those which do not.”<sup>64</sup> Only States,

<sup>57</sup> See *Hearing*, *supra* note 7, at 14 (statement of Hon. David J. Scheffer, Ambassador-at-Large for War Crimes Issues).

<sup>58</sup> G.A. Res 67/L.28, U.N. Doc A/RES/67/L.28 (Nov. 26, 2012); see also *General Assembly Grants Palestine non-member observer State Status at UN*, UNITED NATIONS NEWS CENTRE (Nov. 29, 2012), <http://www.un.org/apps/news/story.asp?NewsID=43640>.

<sup>59</sup> See Rules of Procedure and Evidence, *supra* note 51, Rule 44, para. 2.

<sup>60</sup> See e.g., Laurie Blank, *Protecting Civilians—Using Them as Pawns: The Israel-Hamas Conflict*, JURIST—FORUM, (Dec. 1, 2012), <http://jurist.org/forum/2012/12/laurie-blank-israel-hamas.php>.

<sup>61</sup> If the PNA does not resubmit its application, it is evidence the ICC was being used for political purposes all along, because the PNA did not expect the ICC to take jurisdiction before it was recognized as a State. Using the ICC for a publicity stunt and political purposes is consistent with the warnings the USG made with respect to the *proprio motu* prosecutor.

<sup>62</sup> Rome Statute, *supra* note 2, art. 8; see *Hearing*, *supra* note 7, at 148 (Appendix, Related Document, The Concerns of the United States Delegation Regarding the Proposal for a *Proprio Motu* Prosecutor).

<sup>63</sup> Rome Statute, *supra* note 2, art. 7; see *Hearing*, *supra* note 7, at 148 (Appendix, Related Document, The Concerns of the United States Delegation Regarding the Proposal for a *Proprio Motu* Prosecutor).

<sup>64</sup> *Hearing*, *supra* note 7, at 148 (Appendix, Related Document, The Concerns of the United States Delegation Regarding the Proposal for a *Proprio Motu* Prosecutor).

and in certain cases the UNSC, should make the determination of what crimes are of concern to the international community as a whole.<sup>65</sup>

In making referrals, States are expressing political will and political support for the Prosecutor and his work; they are signaling to other States the level of their concern about the situation at issue and their commitment to stand behind and assist the Prosecutor both directly, and in his or her dealings with other States, including those likely to be hostile to the Prosecutor's investigation.<sup>66</sup>

While there will be an element of politicization even with State and UNSC referrals, it is equally true that States will be more likely to refrain from referring a matter unless it clearly rises to the level of crimes of concern to the international community as a whole. Moreover, NGOs and individuals may be more likely to make referrals on political grounds, because most NGOs are constituted to support a particular political cause, have a constituency to appease, and have a stated agenda they are committed to pursue. Their constituents are not merely like-minded individuals, but donors. The NGO must appease its donor base if it expects to keep its operations going. NGOs, unlike States, are more likely to refer individual acts that are of concern to their donor base, which may not necessarily be of concern to the international community as a whole.<sup>67</sup> Individuals as well will likely have either a political motive or a personal stake in the matter. Individuals are more likely to refer individual acts personally considered heinous but not rising to the level set forth in the Rome Statute. Perhaps a solution to this issue would be to amend articles 13 and 15 of the Rome Statute to allow referrals of situations to the ICC by States and the UNSC only, but then allow the ICC prosecutor to entertain referrals of specific crimes by others within the context of those situations referred by States or the UNSC only.<sup>68</sup>

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 149.

<sup>67</sup> See Colonel Charles J. Dunlap, Jr., Article Prepared for Humanitarian Challenges in Military Intervention Conference, *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts*, at 3 (Nov. 29, 2001), available at <http://people.duke.edu/~pfeaver/dunlap.pdf> ("Too often NGO positions look like political agendas. With respect to [Law of Armed Conflict] issues, it must always be kept in mind that NGOs are not political entities equivalent to a sovereign nation; rather, they are no more than self-selected, idiosyncratic *interest groups* who are not accountable to any ballot box.") (emphasis in original); see also *Hearing, supra* note 7, at 23 (statement of Hon. David J. Scheffer, Ambassador-at-Large for War Crimes Issues) (explaining the potential for the office of the ICC prosecutor to make politicized decisions regarding prosecutions instituted by individuals and organizations as opposed to states or the UNSC).

<sup>68</sup> This would require amending article 13 of the Rome Statute by deleting subsection (c), and amending article 15, paragraph 4, by deleting the phrase, "and that the case appears to fall within the

Ambassador Scheffer and the U.S. delegation expressed these concerns to the other delegates succinctly:

Without the screen of a State and Security Council referral mechanism, the volume of complaints will expand significantly, including those that will prove to be inappropriate bases for prosecution. These will include some directed against particular individuals for personal reasons and some motivated by improper political considerations; some will relate to situations that are not sufficiently serious to come within the Court's proper jurisdiction.<sup>69</sup>

The ICC's actions with respect to post-election violence in Kenya in late 2007 and the beginning of 2008 seem to validate the USG position. On 26 November 2009, the ICC prosecutor filed a request with the Pre-Trial Chamber to initiate an investigation into post-election violence in Kenya that began on 30 December 2007.<sup>70</sup> The request was not referred to the ICC by a State Party or the UNSC, but instead was based on thirty communications received from "individuals, groups and others regarding information on crimes within the jurisdiction of the Court . . . ."<sup>71</sup> The crimes involved "a reported 1,133 to 1,220 killings of civilians, more than nine hundred documented acts of rape and other forms of sexual violence, with many more unreported, the internal displacement of 350,000 persons, and 3,561 reported acts causing serious injury."<sup>72</sup> The violence originally entailed attacks in the Rift Valley against members of the non-Kalenjin ethnic groups—to include Kikuyu, Kamba, Luyha, and Kisii—for their support of the Party of National Unity (PNU) and opposition to the Orange Democratic Movement (ODM).<sup>73</sup> In retaliation, attacks against non-Kikuyus were conducted in Nakuru and Naivasha provinces. Many of these attacks were carried out by the criminal gang, Mungiki.<sup>74</sup>

The ICC prosecutor originally initiated two cases against six suspects. With respect to the attacks against the non-Kalenjin ethnic groups, the ICC

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jurisdiction of the Court." Article 15, paragraph 1, would also have to be amended to include the clause, "and referred to the Court in accordance with article 13" at the end.

<sup>69</sup> *Hearing, supra* note 7, at 149 (Appendix, Related Document, The Concerns of the United States Delegation Regarding the Proposal for a *Proprio Motu* Prosecutor).

<sup>70</sup> Office of the Prosecutor, Request for authorization of an investigation pursuant to Article 15, at para. 4, ICC-01/09 (Nov. 26, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc785972.pdf>.

<sup>71</sup> *Id.* at 3.

<sup>72</sup> *Id.* para. 56.

<sup>73</sup> See Mwangi S. Kimenyi & Anne W. Kamau, *The International Criminal Court's Ruling and Kenya's Politics and Prospects for Peace*, BROOKINGS INSTITUTION (Jan. 20, 2012), <http://www.brookings.edu/research/opinions/2012/01/20-kenya-politics-prospects-kimenyi-kamau>.

<sup>74</sup> *Id.*

prosecutor brought six counts—crimes against humanity of murder, deportation, or forcible transfer of population, and persecution—against three suspects: William Samoei Ruto, a member of Parliament and former Minister of Higher Education, Science, and Technology; Henry Kiprono Kosgey, former Minister of Industrialization, Member of the Parliament, and Chairman of the ODM; and Joshua Arap Sang, radio personality (Case 1).<sup>75</sup>

For the retaliation by the Kikuyus, the ICC prosecutor presented ten counts charging three individuals with crimes against humanity of murder, deportation or forcible transfer of population, rape and other forms of sexual violence, other inhumane acts, and persecution.<sup>76</sup> The individuals charged were Ambassador Francis Kirimi Muthaura, permanent secretary and former Head of the Public Service and Secretary to the Cabinet; Uhuru Muigai Kenyatta, Deputy Prime Minister and former Minister of Finance; and Major Mohammed Hussein Ali, former commissioner of police and current Chief Executive of the Postal Corporation (Case 2).<sup>77</sup>

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<sup>75</sup> *Id.*; see also Press Release, Int'l Criminal Court, Summary of Decision in Two Kenya Cases (Jan. 23, 2012), [http://www.icc-cpi.int/en\\_menus/icc/press\\_and\\_media/press\\_releases/news\\_and\\_highlights/Pages/summary\\_of\\_decision\\_in\\_the\\_two\\_kenya\\_cases.aspx](http://www.icc-cpi.int/en_menus/icc/press_and_media/press_releases/news_and_highlights/Pages/summary_of_decision_in_the_two_kenya_cases.aspx); Int'l Criminal Court, *ICC, Situations and Cases, Situations, ICC-01/09, Related Cases, ICC-01/09-01/11*, ICC—THE REPUBLIC OF KENYA, [http://www.icc-cpi.int/en\\_menus/icc/situations\\_and\\_cases/situations/situation\\_icc\\_0109/related\\_cases/icc01090111/Pages/icc01090111.aspx](http://www.icc-cpi.int/en_menus/icc/situations_and_cases/situations/situation_icc_0109/related_cases/icc01090111/Pages/icc01090111.aspx) (last visited 28 Mar. 2013) (stating Pre-Trial Chamber II declined to confirm the charges against Mr. Kosgey).

<sup>76</sup> Press Release, Int'l Criminal Court, *supra* note 75.

<sup>77</sup> See Kimenyi & Kamau, *supra* note 73; see also Int'l Criminal Court, *ICC Situations, The Republic of Kenya, ICC-01/09-02/11, Related Cases, ICC ICC-01/09-02/11*, ICC—THE REPUBLIC OF KENYA, [http://www.icc-cpi.int/en\\_menus/icc/situations\\_and\\_cases/situations/situation\\_icc\\_0109/related\\_cases/icc01090211/Pages/icc01090111.aspx](http://www.icc-cpi.int/en_menus/icc/situations_and_cases/situations/situation_icc_0109/related_cases/icc01090211/Pages/icc01090111.aspx) (last visited 28 Mar. 2013) (stating Pre-Trial Chamber II declined to confirm the charges against Mr. Ali). On 23 January 2012, the ICC Pre-Trial Chamber II confirmed the charges against Mssrs. Ruto and Sang in Case 1 and Muthaura and Kenyatta in Case 2, but the Chamber refused to confirm the charges against Kosgey and Ali. See *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Articles 61(7)(a) and (b) of the Rome Statute, at 138 (Jan. 23, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1314535.pdf>; *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Articles 61(7)(a) and (b) of the Rome Statute, p. 154 (Jan. 23, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf>; see also ICC 2011/12 Report, *supra* note 49, paras. 29, 34. On 11 March 2013, the ICC Prosecutor filed a notice to the Judges to withdraw charges against Mr. Muthaura. Press Release, Int'l Criminal Court, Statement by ICC Prosecutor on the Notice to Withdraw Charges Against Mr. Muthaura (11 Mar. 2013), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/OTP-statement-11-03-2013.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/OTP-statement-11-03-2013.aspx). It should also be noted that Mr. Kenyatta just defeated Prime Minister Raila Odinga in the recent Kenyan presidential elections. Jeffrey Gettleman, *Kenyan Court Asked to Order New Election for President*, N.Y. TIMES, March 17, 2013, at A12. Also, William Ruto of Case 1, is actually scheduled to be Mr. Kenyatta's vice president; Mr. Ruto was Kenyatta's running mate. *Id.* Prime Minister Odinga has filed papers contesting the election. *Id.* The Kenyan Supreme Court has held hearing on the matter and is expected to rule soon. Jeffrey Gettleman, *Kenyan*

Notwithstanding the fact that the number of dead, injured, and displaced is staggering, there is a question as to whether the crimes qualify as “crimes against humanity” under the Rome Statute and, therefore, whether they rise to the level of concern for the international community as a whole, or whether they are domestic criminal acts better handled by Kenya itself. For instance, article 7 of the Rome Statute states in pertinent part that “crimes against humanity” means certain acts “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>78</sup> The Rome Statute further defines an “[a]ttack directed against any civilian population” as “a course of conduct involving the multiple commission of acts . . . against any civilian population, pursuant to or in the furtherance of a *State or organizational policy* to commit such attack.”<sup>79</sup>

The post-election violence was not in furtherance of a State policy of the government of Kenya. Accordingly the ICC needed to establish that it had jurisdiction over crimes committed during the post-election violence through some other mechanism. The ICC was called upon to determine if the violence was in furtherance of an “organizational policy” or, instead, if individuals of political parties incited like-minded individuals predisposed to acts of violence. If the former, a charge of crimes against humanity would have been justified; if the latter, such a charge should not have been supported under the Rome Statute.

The issue of whether these crimes rose to the level of crimes against humanity was litigated before an ICC Pre-Trial Chamber consisting of three judges. Whether the violence was perpetrated by an “organization” within the meaning of article 7, paragraph 2 (a) of the Rome Statute was the subject of a difference in opinion between the two-judge majority and the dissenting judge.<sup>80</sup> The Chamber ultimately held that it had jurisdiction. In his dissenting opinions Judge Hans-Peter Kaul maintained that the ICC was not competent to exercise jurisdiction, because the crimes committed on the territory of the Republic of Kenya during the post-election violence of 2007–2008 were serious common crimes under Kenyan criminal law but not crimes against humanity as codified in article 7 of the Rome Statute.<sup>81</sup>

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*Officials Advise Against Calling New Election Despite a Vote’s Flaws*, N.Y. TIMES, March 29, 2013, at A10.

<sup>78</sup> Rome Statute, *supra* note 2, art. 7, para. 1.

<sup>79</sup> Rome Statute, *supra* note 2, art. 7, para. 2 (a) (emphasis added).

<sup>80</sup> See Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Articles 61(7)(a) and (b) of the Rome Statute, Dissenting Opinion of Judge Hans-Peter Kaul, at para. 2 (Jan. 23, 2012), [hereinafter Case 1 Dissent].

<sup>81</sup> See *id.* paras. 58–60. Judge Kaul had initially dissented in the authorizing the ICC prosecutor to commence a *proprio motu* investigation for the cases into the situation in Kenya, on grounds he



Judge Kaul disagreed with the majority interpretation of the term “organization.”<sup>82</sup> Throughout the proceedings, Judge Kaul maintained that although organizations need not demonstrate the “constitutive elements of statehood” they “should partake of some characteristics of a State.”<sup>83</sup>

These characteristics could involve the following: (a) a collectivity of persons; (b) which was established and acts for a common purpose; (c) over a prolonged period of time; (d) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (e) with the capacity to impose the policy on its members and to sanction them; and (f) which has the capacity and means available to attack any civilian population on a large scale.<sup>84</sup>

In Judge Kaul’s opinion, “violence-prone groups of persons formed on an ad hoc basis, randomly, spontaneously, for a passing occasion, with fluctuating membership and without a structure and level to set up a policy are not within the ambit of the Statute, even if they engage in numerous serious and organized crimes.”<sup>85</sup> The ICC prosecutor alleged that, with respect to Case 1, the accused Messrs. Ruto, Kosgey, and Sang committed crimes against humanity through a “Network” that consisted of five components: political; media; financial; tribal; and military.<sup>86</sup> Thus, the ICC prosecutor claimed this Network qualified as an organization within the meaning of article 7(2)(a) of the Rome Statute.<sup>87</sup> Again, Judge Kaul stated:

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would later reiterate in Case 1. *See* Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr, Dissenting Opinion of Judge Hans-Peter Kaul, paras. 58–60 (Mar. 31, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc854562.pdf> [hereinafter Dissent in Authorization Decision]. He also dissented in Case 2 on exactly the same grounds. *See* Prosecutor v. Francis Kirimi Muthaura, Uhuri Muigai Kenyatta, Mohammed Hussein Ali Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Articles 61(7)(a) and (b) of the Rome Statute, Dissenting Opinion of Judge Hans-Peter Kaul, paras. 64–66 (Jan. 23, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf>.

<sup>82</sup> *See* Case 1 Dissent, *supra* note 80, para. 8.

<sup>83</sup> *See id.* (quoting Dissent in Authorization Decision, *supra* note 81, para. 51).

<sup>84</sup> Case 1 Dissent, *supra* note 80, para. 8, (quoting Dissent in Authorization Decision, *supra* note 81, para. 51).

<sup>85</sup> *See* Case 1 Dissent, *supra* note 80, para. 8. (quoting Dissent in Authorization Decision, *supra* note 81, para. 52).

<sup>86</sup> *See* Case 1 Dissent, *supra* note 80, para. 5.

<sup>87</sup> *See id.* para. 11; *see also* Rome Statute, *supra* note 2, art. 7, para. 2 (a) (defining an “Attack directed against any civilian population” as “a course of conduct involving the multiple commission of acts referred to in [7(1)] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attacks.”) (emphasis added).

I remain unconvinced by the Prosecutor's allegation that the "Network" as a whole, qualifies as an "organization" within the meaning of article 7(2)(a) of the Statute. At the Hearing no sufficiently compelling new argument, fact or piece of evidence was presented for me to reconsider my previous assessment of the facts in this case. This concerns in particular my finding as to the alleged existence of the various components of the "Network" which, according to my reading of the evidence, did either not exist in that form or are reflective of the tribal component of the "Network." My conclusion therefore was that the violence during the 2007/2008 violence was in essence ethnically driven. That said, I reaffirm my previous finding that the "Network," as portrayed, is "essentially an amorphous alliance" of "coordinating members of a tribe with a predisposition towards violence with fluctuating membership" which existed temporarily for a specific purpose. The "Network," characterized by the ethno-political affiliation of its members, emerged only in connection with the 2007/2008 post-election violence and, in my opinion, was "created *ad hoc* solely to assist, admittedly in an abhorrent way, the community's aspiring and existing political leaders in gaining or maintaining political power in the Rift Valley on the occasion of the 2007 presidential elections." Nevertheless, I maintain my view that "members of a tribe . . . do not form a state-like 'organisation,' unless they meet additional prerequisites. By the same token, those members of a tribe who instigated violence cannot alone constitute an 'organisation.'" Lastly, I maintain that the planning and coordination of violence in a series of meetings during the time period relevant to this case "does not transform an ethnically-based gathering of perpetrators into a State-like organization."<sup>88</sup>

The retaliatory attacks encompassed in Case 2 were primarily committed by members of the Mungiki criminal organization, clearly not a State or the type of organization contemplated by the Rome Statute. The ICC prosecutor alleged that government members, Muthuara, and Kenyatta "procured the services" of the Mungiki criminal organization to carry out the

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<sup>88</sup> Case 1 Dissent, *supra* note 80, para. 12 (internal quotation marks in original) (footnote call numbers in original omitted).

retaliation, while Muthuara and Ali ensured the Kenyan police would not intervene.<sup>89</sup>

Although two of three judges at the Pre-Trial Division held the post-election violence constituted crimes against humanity if proven, the matter is not so cut-and-dry. It is a fact that this exercise of jurisdiction by the ICC is controversial<sup>90</sup> and that it is disputed that the post-election violence in Kenya represented “serious crimes of concern to the international community as a whole.”<sup>91</sup> If it were, a State, or even the UNSC, would have referred the matter to the ICC for investigation and prosecution. Instead, over an almost two-year period, from when the violence commenced to when the ICC prosecutor filed his petition to initiate an investigation, no State thought the matter sufficiently egregious to warrant a referral to the ICC. The UNSC over the same period also failed to take any action, further suggesting the Kenyan post-election violence was a domestic matter and did not constitute “serious crimes of concern to the international community as a whole.”

### 3. Politically Motivated Prosecutions

The Kenya cases also highlight another fundamental concern regarding the *proprio motu* prosecutor in relation to the “complementarity” provisions of the Rome Statute. Complementarity refers to those provisions of the Rome Statute wherein the ICC is supposed to be a court of last resort deferring to national courts. The preamble to the Rome Statute specifically emphasized that the ICC “shall be complementary to national criminal jurisdictions.”<sup>92</sup> The Rome Statute also provides that a case is inadmissible where that case “is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.”<sup>93</sup> The same standard is applied to State decisions not to prosecute.<sup>94</sup> These provisions reflect the long-held intention to ensure the ICC serve as a complement to national criminal justice systems, because “the clearest

<sup>89</sup> See Office of the Prosecutor, Int'l Criminal Court, The Post-Election Violence and Mediation, para. 17 (Jan. 2012), <http://www.icc-cpi.int/NR/rdonlyres/26D853E3-83A6-45F1-BEE9-8B64E3723C55/0/BackgroundNoteKenyaJanuary2012.pdf>.

<sup>90</sup> See *African Union Backs Kenya Call to Delay ICC Case*, BBC NEWS, <http://www.bbc.co.uk/news/world-africa-12332563> (last updated Feb 1, 2011, 4:50 AM); PPS, *Kibaki Thanks China for Support on ICC*, DAILY NATION (Kenya), <http://www.nation.co.ke/News/politics/-/1064/1128480/-/7pogwn/-/index.html> (Mar. 18, 2011, 2:56 PM).

<sup>91</sup> See Rome Statute, *supra* note 2, pmb1. The African Union supports the prosecution of these cases by Kenyan domestic courts as well. See *African Union Backs Kenya Call to Delay ICC Case*, *supra* note 90.

<sup>92</sup> Rome Statute, *supra* note 2, pmb1.

<sup>93</sup> *Id.* art. 17, para. 1 (a).

<sup>94</sup> See *id.* art. 17, para. 1 (b).

current deterrent to widespread violation of the law is found in state domestic law and the disciplinary codes and judicial systems of the various armed forces.”<sup>95</sup> The ICC involvement in Kenya violated the principle of complementarity, because the ICC took jurisdiction over criminal acts that were “serious common crimes under Kenyan criminal law” over which Kenya had jurisdiction.<sup>96</sup> This calls into question the ICC prosecutor’s and court’s integrity, which is what the United States wanted to avoid.

Two months after the post-election violence, international mediation efforts undertaken by Kofi Annan, Chair of the African Union Panel of Eminent African Personalities, led to a power-sharing arrangement between Mwai Kibaki as President and Raila Odinga as Prime Minister.<sup>97</sup> The agreement established the Commission of Inquiry on Post-Election Violence (CIPEV), the Truth, Justice and Reconciliation Commission, and the Independent Review Commission on the General Elections held in Kenya on 27 December 2007.<sup>98</sup> In October 2008, the CIPEV recommended a special tribunal be established to hold those individuals responsible for the post-election violence accountable.<sup>99</sup> CIPEV also recommended that the documentation it collected be forwarded to the ICC.<sup>100</sup> Although both President Kibaki and Prime Minister Odinga agreed with this recommendation, efforts to establish the special tribunal were continually thwarted due to the Kenyan Parliament’s failure to pass the necessary legislation.<sup>101</sup> In July 2009, a high-level delegation of the Kenyan Government met with the ICC prosecutor in The Hague to provide information on steps being taken by the Kenyan Government to investigate and prosecute those responsible for the post-election violence.<sup>102</sup> The Kenyan Parliament again failed to adopt the requisite legislation due to problems with meeting the necessary parliamentary quorum.<sup>103</sup>

In November 2009, the ICC prosecutor met with President Kibaki and Prime Minister Odinga and informed them he intended to open an investigation into the post-election violence. He also sought the cooperation of the Kenyan Government.<sup>104</sup> The President and Prime Minister issued a joint statement wherein they “recalled their constructive meeting with the Prosecutor.”<sup>105</sup> The

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<sup>95</sup> See Lietzau, *supra* note 3, at 121.

<sup>96</sup> See *supra* notes 78–81 and accompanying text.

<sup>97</sup> See Office of the Prosecutor, Int’l Criminal Court, *supra* note 89, para. 2.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* para. 3.

<sup>100</sup> *Id.* para. 3.

<sup>101</sup> See *id.* para. 4.

<sup>102</sup> *Id.* para. 6.

<sup>103</sup> *Id.* para. 9.

<sup>104</sup> See Office of the Prosecutor, Int’l Criminal Court, *supra* note 89, para.10.

<sup>105</sup> *Id.* para. 11.

Kenyan Government also stated it was committed to cooperating with the ICC in accordance with the Rome Statute and Kenya's International Crimes Act.<sup>106</sup>

On 26 November 2009, the ICC prosecutor filed a request with the ICC Pre-Trial Chamber seeking authorization to commence an investigation into the post-election violence; the request was granted on 31 March 2010.<sup>107</sup> This request was based on the "absence of national proceedings relating to those bearing the greatest responsibility for" the post-election violence.<sup>108</sup>

While the Kenyan Government had stated a commitment to cooperate with the ICC,<sup>109</sup> the Kenyan Government did file an application with the ICC pursuant to article 19 of the Rome Statute challenging the jurisdiction of the ICC over the alleged crimes because Kenya had instituted national investigations.<sup>110</sup> Moreover, the Kenyan Government made statements before filing its application that it was not supportive of the ICC moving forward with its investigation and potential prosecution.<sup>111</sup> If the ICC is truly the court of last resort and a complement to national efforts, then it should have abated its proceedings in order to allow the Kenyans to investigate and potentially prosecute these cases. Notwithstanding the parliamentary issues that precluded the establishment of a special tribunal in the past, the Kenyans have expressed the intent to move forward on these allegations. Despite this, the ICC Pre-Trial Chamber rejected Kenya's application under article 19, on 30 May 2011; the decision was upheld by the ICC Appeals Chamber on 30 August 2011.<sup>112</sup> The ICC ignored its responsibilities under the complementarity provisions of the Rome Statute. This does nothing but bolster U.S. concerns that the ICC would act similarly against the United States and would pursue U.S. service members even if those service

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

<sup>107</sup> *Id.* para. 12.

<sup>108</sup> Office of the Prosecutor, *supra* note 70, at 3.

<sup>109</sup> See Office of the Prosecutor, Int'l Criminal Court, *supra* note 89, para. 11.

<sup>110</sup> In an effort to facilitate its prosecution of the case, the Kenyan Government requested that the ICC turn over copies of relevant documents. See Geoffrey Rice & Rodney Dixon, Gov't of Republic of Kenya, Case No. ICC-01/09, Request for Assistance on behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) and Rule 194, ¶¶ 1-5 (Apr. 21, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc1062611.pdf>. Kenya also challenged the jurisdiction of the ICC to hear cases regarding post-election violence, but the court proceeded nonetheless claiming that it was upholding the principle of complementarity because Kenya had not effectively initiated prosecutions. See Prosecutor v. Francis Kirimi Muthaura, Uhuri Muigai Kenyatta, Mohammed Hussein Ali, Case No. ICC 01/09-02/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ¶ 40 (May 30, 2011) <http://icc-cpi.int/iccdocs/doc/doc1078823.pdf>.

<sup>111</sup> See PPS, *supra* note 90.

<sup>112</sup> See ICC 2011/12 Report, *supra* note 49, paras. 28, 33.

members were investigated under the Uniform Code of Military Justice (UCMJ).<sup>113</sup>

In addition to the concerns raised by Ambassador Scheffer, the U.S. Military had its own concerns about a *proprio motu* prosecutor as well. Foremost was the prospect of having U.S. service members exposed to politically-motivated prosecutions. “An ill-constituted ICC with the authority to make the final determination as to which cases will be investigated or come before it invites the use of the court for political mischief.”<sup>114</sup> It is no secret that those who oppose the United States will attempt to use international law as a weapon to either prevent the United States from engaging in armed conflict in the first instance, or, failing that, to prevent the United States from achieving its objectives once engaged. The concept is referred to as “Lawfare.”<sup>115</sup> This method of warfare is particularly effective when the conflict or operation is controversial.

It is in politically-charged and controversial situations that adversaries, as well as those opposed to any use of force by the United States, will use allegations of war crimes—real or imagined—to bring discredit upon an operation. The purpose would be to undercut public opinion and, therefore, reduce international or domestic support for the United States. Military enemies know that what they cannot accomplish on the battlefield, they may be able to accomplish with lies and exaggerations that incite public opinion against the USG. It is no surprise that terrorist groups instruct their personnel to spread false rumors as a tactic to achieve their strategic objectives.<sup>116</sup>

A *proprio motu* prosecutor invites politically-motivated allegations just by virtue of the fact that NGOs, individuals, and other entities have direct access to the ICC prosecutor. A system based on State and UNSC referrals, however, would minimize unfounded accusations. If NGOs, individuals, and other entities believe a particular matter should be investigated by the ICC, they should bring the matter to a State, not directly to the ICC prosecutor. The State can then act as a filter to ensure only those serious crimes of concern to the

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<sup>113</sup> UCMJ (2012) (codified as amended at 10 U.S.C. §§ 801–946 (2006 & Supp. V 2011)).

<sup>114</sup> See Lietzau, *supra* note 3, at 127.

<sup>115</sup> See Dunlap, *supra* note 67, at 5. Major General Charles J. Dunlap, USAF (Ret), is recognized as the individual who popularized the term “Lawfare.” Dunlap defined the term in 2001, as the “use of law as a weapon of war.” Adversaries dishonestly use the law to “handcuff the United States” and “exploit our values to defeat us.” *Id.* at 36.

<sup>116</sup> See e.g., al-Qaeda Manual, (UK/BM-12 trans.), available at [http://www.justice.gov/ag/manualpart1\\_1.pdf](http://www.justice.gov/ag/manualpart1_1.pdf) (last visited 16 Jan. 2013). This document is a translation of a “manual” that was captured in a home in Manchester, United Kingdom and introduced into evidence at a trial in the United States. See *id.* In it, al-Qaeda members are charged with “[s]preading rumors and writing statements that instigate people against the enemy.” *Id.*

international community as a whole are referred to the ICC prosecutor for preliminary examination and potential investigation and prosecution. Otherwise, the ICC prosecutor will be subject to political pressure by various groups and individuals to pursue a particular investigation although the merits of the case are suspect. The events surrounding the International Criminal Tribunal for the Former Yugoslavia (ICTY) prosecutor's inquiry into unfounded allegations of war crimes on the part of NATO during the Kosovo campaign is an historical example of an international prosecutor succumbing to political pressure.<sup>117</sup>

In 1999, political pressure mounted on the ICTY prosecutor to investigate war crimes allegedly committed by NATO forces.<sup>118</sup> The allegation was that NATO's bombing of Serbian forces in Kosovo amounted to the crime of "wanton destruction of cities, towns or villages, or devastation not justified by military necessity."<sup>119</sup> In 2000, the ICTY prosecutor, Carla Del Ponte, commenced an inquiry into certain alleged war crimes committed by NATO to determine whether a formal investigation and possible prosecution should proceed.<sup>120</sup> The inquiry led nowhere and wasted valuable resources and time. There is no reason to believe the ICC prosecutor will not be subject to the same pressures.

To its credit, however, the ICC prosecutor has not yet instigated politically-motivated investigations, but has been rather even-handed in its approach, at least with respect to the United States. While the first and current ICC prosecutors are to be commended for their even-handedness toward the United States, the structure of the ICC system is such that the personality of the sitting ICC prosecutor will be the determining factor in whether politically-motivated prosecutions are pursued. Individuals with fewer scruples than the first two ICC prosecutors could abuse the system. The Rome Statute should be amended to remove the personality factor from the equation.

#### 4. Challenge to Primacy of the UNSC

Establishing a *proprio motu* prosecutor violates another principle of international law, that is, the primacy of the UNSC in overseeing issues of

<sup>117</sup> See Lietzau, *supra* note 3, at 127 n.33.

<sup>118</sup> See Jonathan M. Miller, Commentary, *International Law May Halt the Bombing*, L.A. TIMES, May 11, 1999, at B-7.

<sup>119</sup> U.N. Secretary-General, *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, Annex, art. (b), U.N. Doc. S/25704 (3 May 1993); Miller, *supra* note 118, at B-7.

<sup>120</sup> See Charles Trueheart, *War Crimes Court is Looking at NATO*, WASH. POST, Dec. 29, 1999, at A20; Steven Erlanger, *U.N. Tribunal Plays Down its Scrutiny of NATO Acts*, N.Y. TIMES, Dec. 29, 1999, at A5.

international peace and security. This responsibility was placed on the UNSC by the 193 members of the U.N. in article 24, which states: “In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.”<sup>121</sup> In addition, the Members “agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”<sup>122</sup>

Establishing a *proprio motu* prosecutor independent of the U.N. is a direct challenge to the UNSC’s longstanding role and creates a competing body with the UNSC in the area of maintaining international peace and security. Ambassador Scheffer expressed the USG’s view that the UNSC has the primary responsibility for international peace and security and that this “primary responsibility requires that if there is a matter that is brought to the [ICC] that is within the jurisdiction of the [UNSC] under the U.N. Charter, the [UNSC] should have a prior review of whether or not that matter should be linked into a judicial process.”<sup>123</sup> While not many States supported this view, for the United States, the Rome Statute could not change the reality of UNSC primacy in the area of international peace and security.<sup>124</sup>

The position of the United States in this regard was supported by the legal scholars of the United Nations General Assembly International Law Commission (ILC).<sup>125</sup> In fact, a draft statute for an international criminal court, promulgated by the ILC in 1994, did not include a provision for a *proprio motu* prosecutor.<sup>126</sup> The draft statute only provided for jurisdiction if the matter was referred to the court by a State Party to the statute,<sup>127</sup> the UNSC,<sup>128</sup> or, in the

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<sup>121</sup> See U.N. Charter art. 24, para. 1.

<sup>122</sup> See U.N. Charter art. 25.

<sup>123</sup> Hearing, *supra* note 7, at 16 (statement of Hon. David J. Scheffer, Ambassador-at-Large for War Crimes Issues).

<sup>124</sup> See *id.*

<sup>125</sup> See SCHEFFER, *supra* note 4, at 173. The ILC was a group of thirty-four independent experts from thirty-four different States who were tasked with drafting a statute for an international criminal court. *Id.* at 168.

<sup>126</sup> See U.N.G.A. Int’l Law Comm’n, Working Group on a Draft Statute for an Int’l Criminal Court, *Draft Statute for an International Criminal Court*, U.N. Doc. A/CN.4/L.491/Rev.2 (July 14, 1994) [hereinafter ILC Draft Statute 1994]; U.N.G.A. Int’l Law Comm’n, Working Group on a Draft Statute for an Int’l Criminal Court, *Draft commentary to preamble and Parts 1 to 3 of the draft Statute (arts. 1 to 24)*, U.N. Doc. A/CN.4/L.491/Rev.2/Add.1 (July 19, 1994) [hereinafter ILC Commentary 1]; U.N.G.A. Int’l Law Comm’n, Working Group on a Draft Statute for an Int’l Criminal Court, *Draft commentary to preamble and Parts 4 and 5 of the Draft Statute (arts. 25 to 47)*, U.N. Doc. A/CN.4/L.491/Rev.2/Add.2 (July, 18 1994) [hereinafter ILC Commentary 2].

<sup>127</sup> See ILC Draft Statute 1994, *supra* note 126, art. 25, para. 2.

<sup>128</sup> See *id.* art. 23, para. 1.



case of the crime of genocide, any State Party to the Genocide Convention.<sup>129</sup> As Professor James Crawford stated, “The Court’s jurisdiction—with the significant exception of genocide—would be dependent on the acceptance of States or on triggering by the Security Council under Chapter VII.”<sup>130</sup>

The ILC, like the United States, was concerned with the court receiving frivolous or politically-motivated complaints, so it sought to minimize this by allowing matters to be referred only by States or the UNSC. The ILC stated, “Given the personnel required for and the costs involved in a criminal prosecution, the jurisdiction should not be invoked on the basis of frivolous, groundless or politically motivated complaints.”<sup>131</sup> The ILC believed that complaints would not be brought to the ICC without a preliminary investigation conducted by the referring State, thereby acting as a filter against “frivolous, groundless or politically motivated complaints.”<sup>132</sup> This mirrored the USG position.

Moreover, only one of the thirty-four members of the ILC Working Group thought the prosecutor should have the authority to initiate an investigation and then only “if it appears that a crime apparently within the jurisdiction of the Court would otherwise not be duly investigated.”<sup>133</sup> This was rejected, however, as the other members of the ILC Working Group believed investigations and prosecutions “should not be undertaken in the absence of the support of a State or the Security Council, at least not at the present stage of development of the international legal system.”<sup>134</sup> Only four years passed between this decision of leading international legal scholars and the passage of the Rome Statute. Nothing changed in the “stage of development of the international legal system” over those four years to ignore this rationale. The United States should not abandon its principled position of opposing a *proprio motu* prosecutor.

### C. Crime of Aggression

The United States also strenuously objected to the inclusion of a crime of aggression because the crime had not been defined under customary international law for the purpose of holding an individual criminally

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<sup>129</sup> See *id.* art. 25, para. 1.

<sup>130</sup> James Crawford, Int’l Law Comm’n, Statement to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (June 15, 1998) (on file with the author) (setting forth the “six main characteristics of the ICC which the Commission recommended in 1994”).

<sup>131</sup> ILC Commentary 2, *supra* note 126, art. 25, cmt 5.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* art. 25, cmt 4.

<sup>134</sup> *Id.*

accountable.<sup>135</sup> Moreover, the United States insisted that “there had to be a direct linkage between a prior Security Council decision that a State had committed aggression and the conduct of an individual of that State.”<sup>136</sup> This was not asserted because the United States is a permanent member of the UNSC but because the Rome Statute and U.N. Charter clash.<sup>137</sup> The Rome Statute provides for the ICC to exercise jurisdiction over a crime of aggression but left open its definition until at least seven years after the Rome Statute had entered into force.<sup>138</sup> Unfortunately, nothing in the statute “guarantee[d] that the vital linkage with a prior decision by the Security Council [would] be required by the definition that emerge[d].”<sup>139</sup>

Again, the United States was not alone in its assertion that the present Rome Statute scheme regarding crimes of aggression usurps the role of the UNSC, thereby undercutting the current and universally accepted international legal order. For instance, the ILC Working Group draft Statute contained the following provision: “A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint.”<sup>140</sup> The ILC Working Group found that “a Security Council determination of aggression is a necessary preliminary to a complaint being brought in respect of or directly related to the act of aggression.”<sup>141</sup> It was axiomatic that “criminal responsibility of an individual for an act or crime of aggression necessarily presupposes that a State had been held to have committed aggression, and such a finding would be for the Security Council acting in accordance with Chapter VII of the [UN] Charter to make.”<sup>142</sup>

In including a crime of aggression, the ILC Working Group recognized the “special responsibilities of the Security Council under Chapter VII” of the U.N. Charter.<sup>143</sup> The Working Group stated:

The crime of aggression presents more difficulty in that there is no treaty definition comparable to genocide. General Assembly resolution 3314 (XXIX) deals with aggression by

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<sup>135</sup> See *Hearing, supra* note 7, at 14 (statement of Hon. David J. Scheffer, Ambassador-at-Large for War Crimes Issues).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 13.

<sup>138</sup> See Rome Statute, *supra* note 2, art. 5, para. 2, art. 123, para. 1.

<sup>139</sup> See *Hearing, supra* note 7, at 14 (statement of Hon. David J. Scheffer, Ambassador-at-Large for War Crimes Issues).

<sup>140</sup> ILC Draft Statute 1994, *supra* note 126, art. 23, para. 2.

<sup>141</sup> ILC Commentary 1, *supra* note 126, art. 23, cmt. 9.

<sup>142</sup> *Id.* art 23, cmt. 8.

<sup>143</sup> See ILC Commentary 1, *supra* note 126, art. 20, cmts. 3, 6.

States, not with the crimes of individuals, and is designed as a guide for the Security Council, not as a definition for judicial use. But, given the provisions of Article 2(4) of the Charter of the United Nations, that resolution offers some guidance, and a court must, today, be in a better position to define the customary law crime of aggression than was the [Nuremberg] Tribunal in 1946. It would thus seem retrogressive to exclude individual criminal responsibility for aggression (in particular, acts directly associated with the waging of a war of aggression) 50 years after [Nuremberg]. On the other hand the difficulties of definition and application, combined with the Security Council's special responsibilities under Chapter VII of the Charter, mean that special provision should be made to ensure that prosecutions are brought for aggression only if the Security Council first determines that the State in question has committed aggression in circumstances involving the crime of aggression which is the subject of the charge.<sup>144</sup>

The first Review Conference to the Rome Statute was held in Kampala, Uganda, 31 May through 11 June 2010. The Conference addressed the adoption of a crime of aggression and ultimately adopted an amendment to the Rome Statute which included a definition of the crime of aggression and set forth the conditions under which the ICC could exercise jurisdiction over the crime.<sup>145</sup> The Conference adopted a definition based on UNGA resolution 3314 (XXIX) of 14 December 1974.<sup>146</sup> According to the amendment, a *crime of aggression* “means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”<sup>147</sup>

The amended Rome Statute defines “act of aggression” as:

[T]he use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the

<sup>144</sup> *Id.* art. 20, cmt 6.

<sup>145</sup> See Int'l Criminal Court, *ICC Weekly Update 14 June 2010 #37*, ICC-CPI.INT, at 4 (Jun. 14, 2010), <http://www.icc-cpi.int/NR/rdonlyres/B38C00DE-56CF-4A5C-AEB1-FE61E62808D7/282134/ED37ENG1.pdf>.

<sup>146</sup> *Id.*

<sup>147</sup> Rome Statute, *supra* note 2, art. 8 *bis*, para 1. Article 8 *bis* was inserted after the initial version of the Rome Statute was ratified. I.C.C. Res. RC/Res.6, U.N. Depository Notification C.N.651.2010 Treaties-8, at 18 (June 11, 2010), *available at* [http://www.icc-cpi.int/iccdocs/asp\\_docs/resolutions/rc-res.6-eng.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/resolutions/rc-res.6-eng.pdf).

United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.<sup>148</sup>

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<sup>148</sup> Rome Statute, *supra* note 2, art. 8 *bis*, para. 2.

These definitions are problematic on many levels. For one, the definition of “act of aggression” is vague and overbroad.<sup>149</sup> Moreover, the definition of “crime of aggression” on its face is limited to persons “in a position effectively to exercise control over or to direct the political or military action of a State.”<sup>150</sup> But where is the line drawn when “in modern democracies, preparation for armed conflict engages more than military and defense ministry personnel”?<sup>151</sup> Intelligence officials, diplomats, legislators, and even lawyers are part of the planning and preparation process.<sup>152</sup>

With respect to when the ICC may exercise jurisdiction over the crime of aggression, the amendments adopted provide that a situation may be referred to the ICC by a State Party, the ICC prosecutor,<sup>153</sup> or the UNSC. The rules are different, however, depending on how a situation is referred. For instance, when the ICC prosecutor initiates a case *proprio motu*, or in the case of a State referral where the ICC prosecutor has concluded there is a reasonable basis to proceed with an investigation into a crime of aggression, the ICC prosecutor must first ascertain whether the UNSC has determined an act of aggression has been committed by the State concerned in the matter. The ICC prosecutor also must notify the U.N. Secretary General of the situation before the ICC.<sup>154</sup> If the UNSC has made such a determination, the ICC prosecutor may proceed with an investigation of a crime of aggression.<sup>155</sup> Where the UNSC has not made such a determination within six months of the ICC prosecutor’s notification to the U.N. Secretary General, the ICC prosecutor may proceed with an investigation into the alleged crime of aggression as long as the ICC Pre-Trial Division has so authorized.<sup>156</sup>

Non-party States, such as the United States, did obtain protection, in cases referred by the ICC prosecutor or a State Party, because the amendment shields non-party States when the crime of aggression is committed by the non-party State’s nationals or on its territory.<sup>157</sup> The UNSC, however, acting under its Chapter VII authority, may refer a situation involving a State Party or a non-

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<sup>149</sup> See Michael J. Glennon, *The Blank-Prosse Crime of Aggression*, 35 YALE J. INT’L L. 71, 88 (2010).

<sup>150</sup> Rome Statute, *supra* note 2, art. 8 *bis*, para. 1.

<sup>151</sup> See Glennon, *supra* note 149, at 99.

<sup>152</sup> See *id.*

<sup>153</sup> See Rome Statute, *supra* note 2, art. 15 *bis*, para. 1. Article 15 *bis* was inserted after the initial version of the Rome Statute was ratified. See I.C.C. Res. RC/Res.6, U.N. Depository Notification C.N.651.2010.Treaties-8, at 19 (June 11, 2010).

<sup>154</sup> See Rome Statute, *supra* note 2, art. 15 *bis*, para. 6.

<sup>155</sup> See *id.* art. 15 *bis*, para. 7.

<sup>156</sup> See *id.* art. 15 *bis*, para. 8.

<sup>157</sup> See *id.* art. 15 *bis*, para. 5.

State Party.<sup>158</sup> The amendments also shield States Parties that declare non-acceptance of the ICC's jurisdiction over the crime of aggression.<sup>159</sup> In order to obtain such protection, a State Party must affirmatively file a declaration with the ICC Registrar stating that it does not accept such jurisdiction.

Notwithstanding the protection afforded to non-party States at the Conference, risk still exists because the actual exercise of jurisdiction is subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Rome Statute.<sup>160</sup> The whole amendment may be readdressed by the post-2017 Conference if enough States are not willing to approve the exercise of jurisdiction under the adopted amendment.

#### IV. U.S. Concerns—Real or Imagined?

***“Here we are facing evil. What we do here is a departure from international law, and it should be.”***<sup>161</sup>

The USG has expressed several concerns about how the ICC would be used and how it would act in influencing events on the international stage. Many of those concerns have been borne out over the past ten years. For instance, the actions of the United States, a non-party State and leading promoter of democracy, freedom, and the rule of law, have come under scrutiny of the ICC while ruthless regimes that murder thousands of their own people are beyond its reach.<sup>162</sup> Also, the *proprio motu* prosecutor has ignored the complementarity provisions of the Rome Statute and, in one case, actually interfered with the peace and reconciliation process of a particular conflict.<sup>163</sup>

The situation in Syria supports the USG concern expressed by Ambassador Scheffer before the Subcommittee on International Operations that:

[T]he worst offenders of international humanitarian law can choose never to join the treaty and be fully insulated from its reach absent a Security Council referral. Yet multinational peacekeeping forces operating in a country that has joined the

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<sup>158</sup> See *id.* art. 15 *ter*, para. 1 (referring to Rome Statute, *supra* note 2, art. 13 (b)). Article 15 *ter* was inserted after the initial version of the Rome Statute was ratified. See I.C.C. Res. RC/Res.6, U.N. Depository Notification C.N.651.2010 Treaties-8, at 20 (June 11, 2010).

<sup>159</sup> See Rome Statute, *supra* note 2, art. 15 *bis*, para. 4.

<sup>160</sup> See *id.* art. 15 *bis*, para. 3.

<sup>161</sup> See SCHEFFER, *supra* note 4, at 214.

<sup>162</sup> See *infra* note 173 and accompanying text.

<sup>163</sup> See *infra* note 174 and accompanying text.

treaty can be exposed to the Court's jurisdiction even if the country of the individual peacekeeper has not joined the treaty.<sup>164</sup>

Currently, the regime of Bashar al-Assad in Syria continues to suppress protests throughout the country. On 2 January 2013, the U.N. estimated that 59,648 unique killings had occurred in Syria.<sup>165</sup> Syria is not a State Party to the Rome Statute,<sup>166</sup> and the armed conflict is contained within Syria's borders involving Syrians on Syrians.<sup>167</sup> The only mechanism to refer the matter to the ICC is by UNSC resolution. Unlike Libya, where the UNSC referred the situation to the ICC,<sup>168</sup> the UNSC is gridlocked on taking action on Syria. The United States and European nations are at odds with Russia and China, which oppose intervention in Syria.<sup>169</sup> In fact, Russia and China have blocked at least three UNSC resolutions on Syria.<sup>170</sup> Therefore, the prospect of the UNSC reversing the situation in Syria to the ICC seems extremely doubtful.<sup>171</sup>

<sup>164</sup> See *Hearing*, *supra* note 7, at 12–13 (statement of Hon. David J. Scheffer, Ambassador-at-Large for War Crimes Issues).

<sup>165</sup> PATRICK BALL, JEFF KLINGNER & MEGAN PRICE, U. N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, PRELIMINARY STATISTICAL ANALYSIS OF DOCUMENTATION OF KILLINGS IN THE SYRIAN ARAB REPUBLIC 1 (2013), available at <http://www.ohchr.org/Documents/Countries/SY/PreliminaryStatAnalysisKillingsInSyria.pdf>.

<sup>166</sup> See Int'l Criminal Court, *The States Parties to the Rome Statute*, ICC—THE STATES PARTIES TO THE ROME STATUTE, <http://www2.icc-cpi.int/Menus/ASP/states+parties/> (last visited 16 Jan. 2013).

<sup>167</sup> See Laurie R. Blank & Geoffroy S. Corn, *Syria Must be Held to the Law of War*, CNN, <http://www.cnn.com/2012/04/04/opinion/blank-corn-syria-war/index.html> (last updated 4 Apr. 2012, 11:41 AM).

<sup>168</sup> See S.C. Res. 1970, U.N. Doc S/RES/1970 (Feb. 26, 2011).

<sup>169</sup> See *Syria Rejects Arab Troop Proposal*, ALJAZEERA, <http://www.aljazeera.com/news/middleeast/2012/01/2012117144237812928.html>, (last modified 17 Jan. 2012, 8:14 PM) (“Western countries say the resolution isn’t tough enough, [the] Russians say it’s not the Security Council’s place to take sides in civil dispute,” Al Jazeera’s Kristin Saloomey reported from the United Nations.”).

<sup>170</sup> See *Russia, China Veto Syria Resolution at U.N.*, ONLINE.WSJ.COM, <http://online.wsj.com/article/SB10000872396390444097904577536793560681930.html> (last updated Jul. 19, 2012, 5:08 PM); see also *China and Russia Act to Block a New Precedent for Intervention*, STRATFOR.COM, [http://www.stratfor.com/geopolitical-diary/china-and-russia-act-block-new-precedent-intervention?utm\\_source=paid\\_admin&utm\\_medium=email&utm\\_campaign=20120207&utm\\_term=restart-gdiary&utm\\_content=display&elq=f40019659fb44a7a8c27049cb2323aeb](http://www.stratfor.com/geopolitical-diary/china-and-russia-act-block-new-precedent-intervention?utm_source=paid_admin&utm_medium=email&utm_campaign=20120207&utm_term=restart-gdiary&utm_content=display&elq=f40019659fb44a7a8c27049cb2323aeb) (Feb. 7, 2012) (subscription required) (reporting that China and Russia vetoed a proposed UNSC Resolution introduced by the United States and others, which “was not particularly aggressive and committed the United Nations and its members to minimal actions, including expressing support for an Arab League proposal that would call for Syrian President Bashar al Assad to step down”).

<sup>171</sup> Of course, the wisdom of referring the situation to the ICC while the conflict is still ongoing is questionable.

On the other hand, in Afghanistan, which is a State Party to the Rome Statute,<sup>172</sup> the ICC prosecutor opened a preliminary examination in 2007 based on a communication into “alleged crimes within the jurisdiction of the Court by all actors involved.”<sup>173</sup> Hence, the United States, with the largest contingent of forces in Afghanistan, is subject to an ICC prosecutor preliminary examination, and possible investigation and prosecution, even though it is not a State Party to the Rome Statute, while Syria falls outside ICC jurisdiction. This is just the situation Ambassador Scheffer warned of, in that an aggressive dictatorship waging war on its own people remains beyond the jurisdiction of the ICC, yet forces of a non-party State, in the territory of a State Party to assist that State Party in protecting the civilian population against a ruthless insurgency led by Islamic extremists is exposed to examination, investigation, and prosecution by the ICC.

One possible result of this is that the United States may decline to come to the aid of States Parties who request help to fight off an insurgency. More likely, however, this could have a chilling effect on potential coalition partners, especially those that are States Parties to the Rome Statute. In this case, the ICC prosecutor has acted responsibly and no charges are likely to be filed against the United States or ICC States Parties such as the United Kingdom. But, in the future, with a more politically-motivated prosecutor, the potential for charges being filed may result in potential coalition partners balking at providing needed support. Again, the responsibility of the ICC should not be left to the personality of the ICC prosecutor, but rather the Rome Statute itself should be reconfigured to ensure a politically motivated prosecutor cannot initiate matters *proprio motu*.

The situation in Libya also demonstrated how the ICC prosecutor can misuse the ICC even when the UNSC has referred the matter to it. In Libya, the ICC prosecutor demonstrated his unwillingness to abide by the complementarity provisions of the Rome Statute when he rejected out-of-hand any potential settlement of the dispute between the Libyan national transitional council and Colonel Muammar Gaddafi’s regime.<sup>174</sup> The settlement, which would have allowed Gaddafi to remain in Libya after he relinquished power, was suggested by both the United Kingdom and France, two P-5 members of the UNSC.<sup>175</sup> “What happens to Gaddafi is ultimately a question for the Libyans,” British

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<sup>172</sup> See Int’l Criminal Court, *The States Parties to the Rome Statute*, ICC—THE STATES PARTIES TO THE ROME STATUTE, <http://www2.icc-cpi.int/Menus/ASP/states+parties/> (last visited 16 Jan. 2013).

<sup>173</sup> See Int’l Criminal Court, *Office of the Prosecutor, Communications, Referrals and Preliminary Examinations, Afghanistan*, [http://www.icc-cpi.int/en\\_menus/icc/structure\\_of\\_the\\_court/office\\_of\\_the\\_prosecutor/comm\\_and\\_ref/afghanistan/Pages/afghanistan.aspx](http://www.icc-cpi.int/en_menus/icc/structure_of_the_court/office_of_the_prosecutor/comm_and_ref/afghanistan/Pages/afghanistan.aspx) (last visited 16 Jan. 2013).

<sup>174</sup> See Richard Norton-Taylor & Chris Stephen, *Gaddafi Can’t Be Left in Libya, Says International Criminal Court*, GUARDIAN (UK), July 27, 2011, at 6.

<sup>175</sup> See *id.*



Foreign Secretary, William Hague, was quoted as stating.<sup>176</sup> “It is for the Libyan people to determine their own future. Whatever happens, Gaddafi must leave power. He must never again be able to threaten the lives of Libyan civilians, nor to destabilize Libya once he has left power.”<sup>177</sup> These statements by the British Foreign Secretary echoed statements made earlier in July 2011, by Mustafa Abdul Jalil, President of the Rebel National Transitional Council that Gaddafi could remain in Libya if he agreed to step down. Jalil was reported as saying, “We will determine the place under international supervision.”<sup>178</sup> The ICC prosecutor, however, quickly nixed this idea by stating Gaddafi “has to be arrested,” and that any “negotiation or deal has to respect (UN Security Council resolution) 1970 and the ICC’s decision (to issue arrest warrants).”<sup>179</sup> Whether the UNSC had to affirmatively direct the ICC to refrain from moving forward because the situation had been referred by the UNSC is not relevant at this point. The simple fact of the matter is that the ICC prosecutor, rather than allowing the parties to the conflict work toward a peaceful resolution through diplomatic channels, took affirmative steps to preclude that from happening, thereby extending the conflict. To the extent his statements thwarted a political resolution, the ICC prosecutor prevented the Libyans from resolving the issue and prolonged a conflict. Numerous lives were lost that ultimately may not have been lost had the conflict been resolved peacefully, including the life of Gaddafi, the very person the ICC prosecutor wanted to prosecute the most.

## V. Conclusion

The point of this paper has been to demonstrate that the U.S. objections to the Rome Statute are principled and meritorious. They have been supported by leading international legal scholars, as was demonstrated by the positions taken by the ILC in 1994,<sup>180</sup> and by three different U.S. administrations.<sup>181</sup> The U.S. objections also are supported by other States to varying degrees and were even acknowledged by proponents of the Rome Statute during the negotiations.

The United States should not consider acceding to the Rome Statute until the fundamental concerns of the USG are addressed. Once they are addressed, the USG should only consider acceding if a compelling national security interest arises that outweighs the loss of sovereignty and the abdication

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *See id.*

<sup>179</sup> *See id.* The decision of the UNSC to refer the situation in Libya to the ICC also is cause for concern, in that, rather than using the ICC as a post-conflict tool to mete out justice, it inserted the ICC into the conflict prematurely. This was foolhardy because the threat of prosecution at that stage certainly could have done nothing but made the regime more intransigent.

<sup>180</sup> *See supra* notes 121–31 and accompanying text.

<sup>181</sup> *See supra* note 29 and accompanying text.

of the constitutional rights of USG officials and our service members that would arise through acceding to the Rome Statute. The sovereignty of the United States and the supremacy of the U.S. Constitution must be protected at all costs.

Those compelling national security interests presently do not exist with respect to the rationale behind the ICC. While the purpose of the Rome Statute and the ICC are laudable, there is no compelling national security interest for us to accede to a treaty with such “significant flaws.”<sup>182</sup> Even if the ASP were to fix these flaws, the national security interest does not warrant ceding U.S. sovereignty or exposing U.S. service members to a criminal justice system that does not afford them the rights they have under the U.S. Constitution and the UCMJ. This is nothing like the North Atlantic Treaty status of forces agreement in which it was agreed to expose our service members to the criminal jurisdiction of our NATO allies in certain circumstances.<sup>183</sup> While many of the criminal justice jurisdictions of these States do not provide all of the protections afforded to our service members under the U.S. Constitution and the UCMJ, the compelling nature of the threat to U.S. national security—the Soviet Union, at the time—justified such an abdication of sovereignty and constitutional protections.<sup>184</sup> No such rationale exists with respect to the ICC. While seeing alleged war criminals such as Joseph Kony brought to justice is laudable, the fact they remain beyond the reach of the law at this point poses no compelling threat to the national security of the United States. The United States should not water down its sovereignty or give up the constitutional protections afforded U.S. service members simply for a feel-good treaty.

The ICC and its proponents must come to grips with the fact the United States will not accede to the Rome Statute anytime soon, if ever. That being said, the United States has taken many steps to support and promote the efforts of the ICC.<sup>185</sup> To the extent the ICC is working consistent with our national security interests, the USG should continue such support.<sup>186</sup> That said, it is

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<sup>182</sup> Statement on the Rome Treaty on the International Criminal Court, *supra* note 1, at 2816.

<sup>183</sup> See North Atlantic Treaty Status of Forces, Jun. 19, 1951, TIAS 2846, 4 U.S.T. 1792.

<sup>184</sup> While the Soviet threat is gone, the national security interest in keeping a coherent alliance, especially in light of a fraying European Union, is still very compelling.

<sup>185</sup> For instance: the Bush administration, in March 2005, refused to veto and abstained on the UNSCR referring the matter in Darfur, Sudan, to the ICC; it also waived many statutory restrictions on the provision of military aid to ICC State Parties; Congress eventually repealed those restrictions in 2008; the USG indicated it would consider cooperating with the ICC in connection with the matter in Darfur; and the USG voted for the UNSCR (1970) referring the matter in Libya to the ICC. See generally Am. Non-Governmental Orgs. Coal. for the Int'l Criminal Court, Chronology of U.S. Actions Related to the International Criminal Court (4 Mar. 2011), <http://www.amicc.org/docs/US%20Chronology.pdf>.

<sup>186</sup> Any support must be provided consistent with U.S. law. See e.g., American Servicemembers' Protection Act, Pub. L. No. 107-206, 116 Stat. 820 (Aug. 2, 2002) (codified as amended at 22 U.S.C.

important that ICC supporters take a similarly practiced approach in working with [the United States] on these issues, one that reflects respect for [the U.S.] decision not to become a party to the Rome Statute. It is in our common interest to find a *modus vivendi* on the ICC based on mutual respect for the positions of both sides.<sup>187</sup>

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§§ 7421–7433 (2012)); Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act, Fiscal Years 2000–2001, Pub. L. No. 106–113, 113 Stat. 1501, A.460–61 (Nov. 29, 1999) (codified as amended at 22 U.S.C. §§ 7401–7402 (2012)).

<sup>187</sup> See Bellinger, *supra* note 29, at 6.

# AN ANALYSIS OF CHINESE MARITIME CLAIMS IN THE SOUTH CHINA SEA

Commander Dustin E. Wallace, JAGC, USN\*

## I. Introduction

### A. Background and Strategic Context

“Consistent with customary international law, legitimate claims to maritime space in the South China Sea should be derived solely from legitimate claims to land features.”<sup>1</sup> By articulating that international law requires specific and identifiable land territory rights as a condition precedent to lawful maritime claims, U.S. Secretary of State Hillary Clinton formally rejected the People’s Republic of China’s (PRC) controversial claim to “historic rights” over nearly all of the water and airspace in the South China Sea. Moreover, Secretary Clinton’s decision to characterize the peaceful resolution of conflicting claims in the South China Sea as a United States “national interest” while visiting Vietnam and as a prelude to a meeting of the Association of Southeast Asian Nations (ASEAN)<sup>2</sup> sent another clear and unequivocal message to the PRC: The United States will proactively work within the framework of both international law—that is, the United Nations Convention on the Law of the Sea—and regional arrangements—for example, ASEAN—to affirmatively counter excessive Chinese maritime claims in the South China Sea.<sup>3</sup>

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<sup>1</sup> Hillary Rodham Clinton, U.S. Sec’y of State, Remarks at the National Convention Center, Hanoi, Vietnam (July 23, 2010), available at <http://www.state.gov/secretary/rm/2010/07/145095.htm>.

<sup>2</sup> Karen DeYoung, *North Korean Warns of Nuclear Response to U.S.-South Korea Exercises; Pyongyang Calls Military Drills a Threat to Its Sovereignty, Security*, WASH. POST, July 24, 2010, at A7; see also Gordon G. Chang, *Hillary Clinton Changes America’s China Policy, Op/Ed*, FORBES.COM (July 28, 2010, 2:15 PM EDT), <http://www.forbes.com/2010/07/28/china-beijing-asia-hillary-clinton-opinions-columnists-gordon-g-chang.html> (discussing Secretary Clinton’s assertion that sovereignty claims in the South China Sea are a U.S. “national interest”). ASEAN is a multilateral organization comprising of ten countries located in Southeast Asia formed on August 8, 1967 by Indonesia, Malaysia, the Philippines, Singapore, and Thailand. Amitav Acharya, *ASEAN at 40: Mid-Life Rejuvenation?, Postscripts, Features*, FOREIGN AFF. (Aug. 15, 2007), <http://www.foreignaffairs.com/articles/64249/amitav-acharya/asean-at-40-mid-life-rejuvenation>.

Membership has expanded to include Brunei, Burma (Myanmar), Cambodia, Laos, and Vietnam. *Id.*

<sup>3</sup> Clinton, *supra* note 1. During her remarks at the National Conference Center in Hanoi, Secretary Clinton asserted, “While the United States does not take sides on the competing territorial disputes

The PRC swiftly responded by denouncing the United States' efforts to "internationalize" maritime disputes in the South China Sea and asserting that such attempts will only result in exacerbating tensions in the region.<sup>4</sup> Beijing further raised the stakes when Chinese Foreign Minister Yang Jiechi later described Secretary's Clinton's remarks as "an attack on China."<sup>5</sup>

The intensifying debate over the "legitimacy" of the PRC's maritime claims in the South China Sea has important strategic and geopolitical ramifications. While the term "legitimacy" necessarily incorporates various elements and factors—including legal, political, and general acceptance within the international community—the limited focus herein is to explore the contours of the PRC's legal and historic claims to the South China Sea and subsequently assess these claims from the perspective of the PRC's adherence to international law, most notably the United Nations Convention on the Law of the Sea (UNCLOS).<sup>6</sup>

What are the PRC's maritime claims in the South China Sea, and do these claims comply with UNCLOS? To answer these questions, one must examine three primary aspects of this important geopolitical issue: (1) The strategic importance of the South China Sea, where the debate over competing and overlapping maritime claims has been raging for decades; (2) the basic legal framework for maritime claims and the law of the sea, including UNCLOS; and (3) the PRC's legal and "historic" maritime claims in the South China Sea—and their application under international law. In sum, the PRC has failed to affirmatively link all of its maritime claims in the South China Sea to specific and identifiable land features; moreover, the PRC has not articulated the exact

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over land features in the South China Sea, we believe claimants should pursue their territorial claims and accompanying rights to maritime space in accordance with the UN Convention on the Law of the Sea." *Id.*

<sup>4</sup> *Vietnam, U.S. Display Military Ties Amid China Tension*, AGENCE FRANCE-PRESSE, Aug. 10, 2010, available at <http://www.thefreelibrary.com/Vietnam,+US+display+military+ties+amid+China+tension-a01612297155>.

<sup>5</sup> Chang, *supra* note 2. Note that the PRC and United States subsequently toned down the rhetoric in attempt to foster improved military-to-military relations. Thom Shanker, *Chinese and Americans Soften Tone On Disputed Seas*, N.Y. TIMES, Oct. 13, 2010, at A9. Specifically, while at a meeting of Defense Ministers in Vietnam in October 2010, U.S. Secretary of Defense Robert Gates asserted, "The United States does not take sides on competing territorial claims, such as those in the South China Sea." *Id.* Secretary Gates further stated, "Competing claims should be settled peacefully, without force or coercion, through collaborative diplomatic processes and in keeping with customary international law." *Id.* At the same meeting, PRC Defense Minister Liang Guanglie promoted "mutual trust" throughout the region, further stating: "China's defensive development is not aimed to challenge or threaten anyone, but to ensure its security and to promote international peace and stability." *Id.*

<sup>6</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 396 [hereinafter UNCLOS].

nature and scope of its South China Sea claims, thereby failing to provide “due publicity” to the international community as required by UNCLOS.

## B. Strategic Importance of the South China Sea

The geopolitical strategic importance of the South China Sea cannot be overstated. Encompassing approximately 800,000 square kilometers, or 310,000 square miles,<sup>7</sup> the South China Sea is teeming with natural resources,<sup>8</sup> home to more than fifty percent of global maritime commerce,<sup>9</sup> the site of one of the world’s most critical and vulnerable geographic chokepoints—the Strait of Malacca<sup>10</sup>—containing myriad critical sea lines of communication, and host to daily interaction and all too frequent stand-offs between the world’s two most powerful naval forces—the United States and the PRC.<sup>11</sup> Secretary Clinton summarized the current strategic imperative of the South China Sea—along with a clear yet subtle denunciation of the PRC’s increasing assertiveness in securing its maritime claims—during her remarks in Hanoi: “The United States, like every nation, has a national interest in freedom of navigation, open access to Asia’s maritime commons, and respect for international law in the South China Sea.” Secretary Clinton further noted, “We share these interests not only with ASEAN members or ASEAN Regional Forum participants, but with other maritime nations and the broader international community.”<sup>12</sup>

Ownership over nearly all of the South China Sea is a hotly contested issue threatening to undermine both regional and international stability. As will be discussed in detail below, the PRC asserts ambiguous and undefined legal and “historic rights” to virtually the entire South China Sea.<sup>13</sup> The other primary claimants to various portions of the South China Sea include Taiwan, Vietnam,

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<sup>7</sup> See Christopher Joyner, *The Spratly Islands Dispute in the South China Sea: Problems, Policies, and Prospects for Diplomatic Accommodation*, in INVESTIGATING CONFIDENCE BUILDING MEASURES IN THE ASIA PACIFIC REGION 53, 55 (Ranjeet Singh ed., 1999) [hereinafter Joyner, *Spratly Islands Dispute*]. See also *infra* Appendix 1.

<sup>8</sup> Joyner, *supra* note 7, at 66–69 (describing the area as being rich in fish and hydrocarbon deposits).

<sup>9</sup> See *Maritime Issues and Sovereignty Disputes in East Asia: Hearing Before the Subcomm. on E. Asian and Pac. Affairs. of the S. Comm. on Foreign Relations*, 111th Cong. 4 (2009) [hereinafter Marciel Statement] (statement of Hon. Scot Marciel, Deputy Assistant Secretary of State, Bureau of East Asian and Pacific Affairs, Ambassador for ASEAN Affairs) (stating over half of the world’s commerce in tonnage travels through the South China Sea).

<sup>10</sup> Robert S. Ross, *China’s Naval Nationalism: Sources, Prospects, and the U.S. Response*, INT’L SEC., Fall 2009, at 46, 70.

<sup>11</sup> See Joyner, *supra* note 7, at 69; see also *China Hits Out at U.S. on Navy Row, Asia Pacific*, BBC NEWS (Mar. 10, 2009, 10:04 GMT), <http://news.bbc.co.uk/2/hi/7934138.stm>.

<sup>12</sup> Mark Landler, *Offering to Aid Talks, U.S. Challenges China on Disputed Islands*, N.Y. TIMES, July 24, 2010, at A4.

<sup>13</sup> See Peter Dutton & John Garofano, *China Undermines Maritime Laws*, FAR E. ECON. REV., Apr. 2009; see also Thomas J. Christensen, *The Advantages of an Assertive China: Responding to Beijing’s Abrasive Diplomacy*, FOREIGN AFF., Mar./Apr. 2011, at 54, 59.

Philippines, Brunei, Malaysia, and Indonesia.<sup>14</sup> The most volatile disputes revolve around competing territorial claims to the Paracel Islands—claimed by the PRC, Taiwan, and Vietnam—and the Spratly Islands—claimed in their entirety by the PRC, Taiwan, and Vietnam; claimed in part by Philippines, Brunei, and Malaysia.<sup>15</sup> These territorial disputes also give rise to overlapping and conflicting legal rights flowing from territorial ownership under international law, such as the right to explore and exploit natural resources within a coastal nation’s Exclusive Economic Zone (EEZ) and its Continental Shelf.<sup>16</sup>

As the nations of Southeast Asia and the Asia-Pacific seek to quench their ever-growing thirst for oil and secure access to vital natural resources, the scope of competing claims in the South China Sea has proliferated. The status of these competing claims and identifying a means of peaceful resolution has evolved into a preeminent regional issue with global implications.

In response to the numerous competing claims to the vital resources in the South China Sea—and in light of its desire to counter the decades-long United States’ military and commercial hegemony in the region—the PRC has become increasingly “assertive” in securing its maritime claims.<sup>17</sup> Case in point is the PRC’s announcement on 26 August 2010, that a small PRC submersible planted the Chinese flag at the bottom of an undisclosed location in the South China Sea.<sup>18</sup> Although legally insignificant under international law,<sup>19</sup> the move highlights the PRC’s goal of sovereignty at the expense of regional cooperation and employing diplomatic and legal mechanisms for dispute settlement.

Growing PRC assertiveness in pursuit of its maritime claims to the South China Sea is further evidenced by consistent acts of legal warfare,<sup>20</sup> PRC

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<sup>14</sup> See *infra* Appendix 2.

<sup>15</sup> *Disputes—International*, CIA—WORLD FACTBOOK, available at <https://www.cia.gov/library/publications/the-world-factbook/fields/2070.html#pf> (last visited 15 Jan. 2013); see also *infra* Appendices 3–4.

<sup>16</sup> See Joshua P. Rowan, *UNCLOS and Sovereignty Claims in the South China Sea*, ASIAN SURV., May–June 2005, at 414–36 (providing a detailed analysis of the South China Sea claims of all interested nations); *infra* Part II.

<sup>17</sup> Jim Gomez, *U.S. Opposes Use of Force in South China Sea Dispute*, UTSANDIEGO.COM (Aug. 18, 2010, 6:24 AM), <http://www.utsandiego.com/news/2010/aug/18/us-opposes-use-of-force-in-south-china-sea-dispute/?ap> (noting that the U.S. has stated its intention to maintain a presence in the region to keep sea and air lanes open for the massive amount of commercial traffic regularly navigating the area).

<sup>18</sup> *China: A Stealth Move to Make an Underwater Claim*, N.Y. TIMES, Aug. 27, 2010, at A8 [hereinafter *Stealth Move*].

<sup>19</sup> See *infra* Part II.

<sup>20</sup> *Vietnam Says China Violates Sovereignty With Administration Plan for Disputed Islands*, ASSOCIATED PRESS, Dec. 4, 2007, available at LEXIS (describing the PRC’s establishment the Sansha Administrative Region of to govern the Paracel and Spratly Islands); *China Hits Out at US*

state interference with Vietnamese commercial oil ventures near the Paracel Islands,<sup>21</sup> physical confrontations at sea,<sup>22</sup> ubiquitous detentions at sea for alleged illegal fishing activities,<sup>23</sup> a significant increase in PRC military activity throughout the disputed area,<sup>24</sup> and outright military action in support of its maritime claims.<sup>25</sup>

### C. The PRC Classifies South China Sea as a “Core Interest”

Despite the growing importance of the region and the increased PRC “assertiveness” highlighted above, the United States heretofore refrained from categorically rejecting the PRC’s South China Sea claims.<sup>26</sup> However, for the United States and its regional partners, the strategic imperative of countering excessive PRC maritime claims in the South China Sea crystallized when Beijing added the South China Sea to its short list of “core interests.”<sup>27</sup> In early

*on Navy Row*, *supra* note 11 (reporting on PRC diplomatic and legal protests against U.S. military activities inside its claimed EEZ); *infra* Part II (discussing specific legal implications of the EEZ).

<sup>21</sup> Marciel Statement, *supra* note 9 (“Starting in the summer of 2007, China told a number of U.S. and foreign oil and gas firms to stop exploration work with Vietnamese partners in the South China Sea or face unspecified consequences in their business dealings with China.”); *see also* Jason Folkmanis, *China Warns Some Oil Companies on Work with Vietnam*, *U.S. Says*, BLOOMBERG (July 16, 2009, 1:21 EDT), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ak.IQfinkDStU>; Edward Wong, *Vietnam Enlists Allies to Stave Off China’s Reach*, *N.Y. TIMES*, Feb. 5, 2010, at A11.

<sup>22</sup> *China Hits Out at US on Navy Row*, *supra* note 11 (describing an event in which Chinese maritime forces stalked USNS *Impeccable*); James Kraska, *China Set for Naval Hegemony*, *DIPLOMAT* (May 6, 2010), <http://thediplomat.com/2010/05/06/china-ready-to-dominate-seas/?all=true> (describing the USNS *Impeccable* incident); John Pomfret, *Militaries Bulk Up in Southeast Asia; Vietnam, Other Nations Buying Hardware as China Gains Power*, *WASH. POST*, Aug. 9, 2010, at A8 (describing an event in which a PRC maritime law enforcement vessel training a machine gun on an Indonesian naval patrol craft; *see also* Joyner, *Spratly Islands Dispute*, *supra* note 7).

<sup>23</sup> Kraska, *supra* note 22 (asserting the PRC seized 33 Vietnamese fishing boats and 433 crew members in 2009); Pomfret, *supra* note 22.

<sup>24</sup> *See* Kraska, *supra* note 22; Pomfret, *supra* note 22; Daniel Schearf, *China Conducts Military Exercises in South China Sea*, *VOICE OF AM.* (July 29, 2010, 8:00 PM), <http://www.voanews.com/content/china-conducts-military-exercise-in-south-china-sea-99615779/122943.html> (“State media say China’s military forces this week conducted the largest exercise of its kind since the founding of the military, known as the People’s Liberation Army. The official Xinhua news agency reports numerous warships, submarines, and combat aircraft took part in live fire exercises held Monday in the South China Sea.”).

<sup>25</sup> *See* Dutton & Garofano, *supra* note 13 (describing the PRC’s forcible taking of the Paracel Islands from Vietnam in 1974; firing on Vietnamese boats in the Spratly Islands in 1988 in order to occupy Fiery Cross Reef, a location within the Philippines’ EEZ; and occupying Mischief Reef in 1994 despite Philippine claims to the area); Jim Gomez, *U.S. Expects Long Presence in Region of South China Sea*, *WASH. TIMES* (Aug. 18, 2010), <http://www.washingtontimes.com/news/2010/aug/18/us-expects-long-presence-in-region-of-s-china-sea/?page=all>.

<sup>26</sup> CHANG, *supra* note 2.

<sup>27</sup> Peter Ford, *China and the U.S. Battle to Assert Presence in the South China Sea*, *CHRISTIAN SCI. MONITOR*, Aug. 17, 2010, available at <http://www.csmonitor.com/World/Asia-Pacific/2010/0817/China-and-the-US-battle-to-assert-presence-in-South-China-Sea>; *see also* *China Adds South China Sea to “Core Interests” in New Policy*, *ZEE NEWS.COM* (July 4, 2010, 16:03),



March 2010, PRC Foreign Minister Yang Jiechi and State Councilor Dai Bingguo called a meeting in Beijing with U.S. Deputy Secretary of State James Steinberg and Jeffrey Bader, the Senior Director for Asian Affairs at the National Security Council. At that meeting, Councilor Dai relayed the new PRC policy: The South China Sea is a PRC “core interest” which concerns its sovereignty and territorial integrity. In short, the new PRC policy placed the issue of its maritime claims in the South China Sea at the highest possible level of its national security interests on par with only Taiwan, Tibet, and Xinjiang—the Uyghur Autonomous Region.<sup>28</sup>

The PRC’s designation of its maritime claims in the South China Sea as a “core interest” contained several important messages.<sup>29</sup> First and foremost, the PRC will use military force to protect its sovereignty and territorial integrity in the South China Sea. Second, by raising the profile of its South China Sea claims, Beijing signaled its unwillingness to compromise or discuss the issue within the framework of international diplomacy, as the PRC considers issues of national sovereignty and territorial integrity to be non-negotiable. Moreover, the PRC conveyed it will continue aggressively securing its maritime claims and interests through a range of activities such as increasing its military and law enforcement presence, including both naval and civilian maritime patrols; thwarting what it deems as “illegal military activities” by the United States or other nations within the PRC-claimed EEZ; and proactively using fishing bans and detentions of those engaged in “illegal fishing activity,” all of which are designed to strengthen the PRC’s legal and historic claims to sovereignty and territorial integrity in the South China Sea.<sup>30</sup> According to Gary Li of London’s

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[http://zeenews.india.com/news/world/china-adds-south-china-sea-to-core-interest-in-new-policy\\_638592.html](http://zeenews.india.com/news/world/china-adds-south-china-sea-to-core-interest-in-new-policy_638592.html).

<sup>28</sup> *China Adds South China Sea to “Core Interests” in New Policy*, *supra* note 27.

<sup>29</sup> See Michael Richardson, *Assuaging China’s Expanding Core Concerns*, JAPAN TIMES ONLINE (Mar. 14, 2010), <http://www.japantimes.co.jp/text/ea20100314mr.html> (stating that prior to this new policy, the PRC characterized the South China Sea territorial disputes—along with other such disputes with Japan and India—as involving the PRC’s “indisputable” or “inalienable” sovereignty” subject to diplomatic negotiation).

<sup>30</sup> *China Hits Out at U.S. on Navy Row*, *supra* note 11; *Stealth Move*, *supra* note 18. The PRC launched a fishing ban in May 2010 as a “unilateral act that comes amid unprecedented tensions in the disputed area and fresh fears that Beijing is using the moratorium to assert its sovereignty there.” Greg Torode, *China Ban on Fishing As Tension Runs High*, S. CHINA MORNING POST, May 16, 2010, at 1. Moreover, “the ban is going ahead despite a diplomatic protest from Vietnam—which claims both island groups [referring to the Paracel and Spratly Islands]—and recent incidents involving intensified patrols by new Chinese fisheries protection ships, some of which are armed with heavy machine guns.” *Id.* Finally, the article states, “When China first instituted the ban in 1999 in a bid to ease pressure on rapidly declining fish stocks, it received relatively little attention. Now, however, it is a different story given growing pressures on resources as well as [the South China Sea’s] strategic importance.” *Id.*; see also *China to Open Disputed Paracels to Tourists*, BBC NEWS (Apr. 11, 1998, 09:22 GMT), <http://news.bbc.co.uk/2/hi/asia-pacific/77167.stm>; *Vietnam Condemns China Tourism Plan for Archipelago*, AGENCE FRANCE-PRESSE, Jan. 4, 2010, available

Institute of Strategic Studies, the fishing bans, detentions, and increased presence “have a strategic purpose beyond the issue of fishing . . . the leadership is desperately trying to create a historical precedent, hoping to show that they are largely unchallenged in asserting their sovereignty.”<sup>31</sup> Finally, by making the announcement to the United States—and the United States alone—the PRC told the United States in no uncertain terms to stay out of the South China Sea.<sup>32</sup>

Although Beijing likely added its South China Sea claims to its short list of “core interests” as a means to ward off United States involvement in the dispute, warn/intimidate its neighbors, solidify its ever-growing commercial interests, and enhance its legal claim, the PRC’s move had the opposite effect. In fact, China’s announcement became the impetus for increased regional and international cooperation designed to thwart PRC excessive claims and stimulate broad support for a diplomatic and peaceful resolution to the disputes. As noted by Secretary Clinton in Hanoi in another apparent rebuttal of the PRC: “The United States supports a collaborative diplomatic process by all claimants for resolving the various territorial disputes without coercion. We oppose the use or threat of force by any claimant.”<sup>33</sup> Recent actions by the United States and other

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at [http://www.google.com/hostednews/afp/article/ALeqM5iOrsJaaV-uMm1lZu58Qrkxyrj\\_jw](http://www.google.com/hostednews/afp/article/ALeqM5iOrsJaaV-uMm1lZu58Qrkxyrj_jw) (asserting the PRC is also developing a high-end tourism industry on several of the Paracel Islands, despite protests from Vietnam).

<sup>31</sup> Torode, *supra* note 30.

<sup>32</sup> See, e.g., Michael Sainsbury, *Don't Interfere With Us: China Warns US to Keep Its Nose Out*, AUSTL., Aug. 6, 2010, at 11 (“A strongly worded editorial that appeared in the Communist Party newspaper the People’s Daily and its sister paper the Global Times yesterday said there were signs the U.S. was ‘trying to meddle and dominate issues involving China.’”); see also Robert D. Kaplan, *The Geography of Chinese Power*, FOREIGN AFF., May/June 2010, at 22 (“China’s actions abroad are propelled by its need to secure energy, metals, and strategic minerals in order to support the rising living standards of its immense population, which amounts to about one-fifth of the world’s total. . . . [The PRC] wants to secure port access throughout the Indian Ocean and South China Sea, which connects the hydrocarbon-rich Arab-Persian world to the Chinese seaboard.”)

<sup>33</sup> Clinton, *supra* note 1. In addition, U.S. President Barack Obama has reiterated Secretary Clinton’s support for an international approach to resolving South China Sea disputes. Christopher Rhoads, *Obama Edges Closer to Allies in Key Region*, WALL ST. J., Sep. 25, 2010, at A13. Specifically, President Obama asserted the U.S. has an “enormous stake” in the South China Sea. *Id.* President Obama met with the leaders of ASEAN on 24 September 2010, to discuss the South China Sea and other regional issues. *Id.* According to a press briefing, “The president and the leaders agreed on the importance of peaceful resolution of disputes, freedom of navigation, regional stability, and respect of international law, including in the South China Sea.” *Id.* Also on 24 September 2010, PRC Foreign Ministry Spokesperson Jiang Yu declared that “China has and always will work for the peaceful resolution of the South China Sea disputes.” *China Stresses Peaceful Resolution of South China Sea Disputes*, XINHUA NEWS, Sept. 25, 2010, available at [http://news.xinhuanet.com/english2010/china/2010-09/25/c\\_13529147.htm](http://news.xinhuanet.com/english2010/china/2010-09/25/c_13529147.htm). Finally, while at a meeting of ASEAN Defense Ministers on 11 October 2010, U.S. Secretary of Defense Robert Gates asserted that “[re]lying exclusively on bilateral relationships is not enough—we need multilateral institutions in order to confront the most important security challenges in this region.” See Phil Stewart, *Gates, in Hanoi, Backs Multilateral Dispute Approach*, REUTERS, Oct. 11, 2010, available at <http://uk.reuters.com/article/2010/10/11/uk-usa-china-idUKTRE69A0X220101011>.

regional actors—including the United States and Vietnam holding their first-ever “Defense Talks,”<sup>34</sup> enhanced military cooperation, training and exercises between the United States and Vietnam;<sup>35</sup> renewed ties between the United States and Indonesian Special Forces (“Kopassus”) after a twelve-year hiatus;<sup>36</sup> continued collaboration between the United States and the Philippines to monitor and deter acts of aggression in the South China Sea;<sup>37</sup> and planned multilateral military exercises among the United States and other regional nations hosted by Cambodia—exemplify a new, proactive commitment among regional partners and the international community to affirmatively oppose the PRC’s South China Sea claims.<sup>38</sup>

In light of this volatile strategic context, the PRC’s maritime claims to nearly the entire South China Sea require scrutiny under international law. What are the PRC’s maritime claims in the South China Sea and are they consistent with international law? To answer these critical questions, one must first analyze the legal framework for maritime claims and the law of the sea.

## II. Legal Framework for Maritime Claims and the Law of the Sea

### A. Overview of UNCLOS

Signed and opened for ratification on 10 December 1982, UNCLOS constitutes a multilateral international agreement defining the legal rights and responsibilities of nations with respect to the world’s oceans and superjacent airspace.<sup>39</sup> After its signing, United Nations Secretary General Javier Perez De Cuellar described UNCLOS as “possibly the most significant legal instrument of

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<sup>34</sup> *U.S., Vietnam To Hold First Defense Talks, Marine Corps News*, MARINE CORPS TIMES (Aug. 17, 2010, 13:17 EDT), <http://www.marinecorpstimes.com/news/2010/08/ap-military-vietnam-us-defense-talks-081710/>.

<sup>35</sup> *Vietnam, U.S. Display Military Ties Amid China Tension*, *supra* note 4.

<sup>36</sup> John Lee, *China’s Water Grab, Argument*, FOREIGN POL’Y (Aug. 24, 2010), [http://www.foreignpolicy.com/articles/2010/08/23/chinas\\_water\\_grab?page=full](http://www.foreignpolicy.com/articles/2010/08/23/chinas_water_grab?page=full).

<sup>37</sup> *See Gomez, supra* note 17. The U.S. and the Philippines signed a Mutual Defense Treaty in 1951. *Id.* At a Defense consultation meeting in August 2010, the sides “discussed previous plans outlining how the Philippines and the U.S. can protect each another in case conflict breaks out in the disputed region.” *Id.* Commander of U.S. Pacific Command, Admiral Robert Willard stated, “We discussed the assertiveness that we’re experiencing by the Chinese in the South China Sea and the concerns that that has generated within the region.” *Id.*

<sup>38</sup> *See Clifford McCoy, U.S. and Cambodia in Controversial Lockstep, Southeast Asia*, ASIA TIMES ONLINE (July 30, 2010), [http://www.atimes.com/atimes/Southeast\\_Asia/LG31Ae01.html](http://www.atimes.com/atimes/Southeast_Asia/LG31Ae01.html).

<sup>39</sup> U.N. Office of Legal Affairs, Div. for Ocean Affairs and the Law of the Sea, United Nations Convention on the Law of the Sea: A Historical Perspective, [http://www.un.org/Depts/los/convention\\_agreements/convention\\_historical\\_perspective.htm](http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm) (last visited 1 Apr. 2013).

this century.”<sup>40</sup> Representing a codification of customary international law combined with progressive new legal regimes such as the EEZ, UNCLOS creates rules for coastal nation establishment of territorial seas and other ocean boundaries, along with attendant rights and responsibilities therein; defines navigational freedoms in the maritime domain; and establishes dispute resolution mechanisms for competing claims and international disagreements.<sup>41</sup>

UNCLOS entered into force in 1994 after Guyana became the sixtieth nation to ratify the treaty.<sup>42</sup> One hundred sixty-five nations are currently parties to UNCLOS, including the PRC, most ASEAN nations, the United Kingdom, Canada, Japan, Australia, and Russia.<sup>43</sup> Although the United States is not a party to UNCLOS, in 1983 President Ronald Reagan asserted the United States views the navigation and overflight provisions of UNCLOS as a reflection of customary international law and that “the United States will exercise and assert its navigational and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the Convention.”<sup>44</sup> The United States continues to view the navigation and

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<sup>40</sup> *Id.* The United Nations takes an active, although sometimes indirect, role in international maritime affairs. *Id.* Specifically, the goal of the UN “is to help States to better understand and implement the Convention in order to utilize their marine resources in an environment relatively free of conflict and conducive to development, safeguarding the rule of law in the oceans.” *Id.* Moreover, the UN Division for Ocean Affairs and the Law of the Sea “helps to coordinate the Organization’s activities and programmes in the area of marine affairs. *Id.* It is active in assisting and advising States in the integration of the marine sector in their development planning. *Id.* It also responds to requests for information and advice on the legal, economic and political aspects of the Convention and its implications for States. *Id.* Such information is used by States during the ratification process, in the management of the marine sector of their economies and in the development of a national sea-use policy.” *Id.* Finally, the UN “gives assistance to the two newly created institutions—the International Seabed Authority and the International Tribunal for the Law of the Sea.” *Id.*

<sup>41</sup> *Id.*; see also Daniel J. Hollis & Tatjana Rosen, *United Nations Convention on the Law of the Sea, (UNCLOS), 1982*, ENCYCLOPEDIA OF EARTH (Nov. 11, 2012, 11:35 PM), [http://www.eoearth.org/article/United\\_Nations\\_Convention\\_on\\_Law\\_of\\_the\\_Sea\\_\(UNCLOS\)\\_1982](http://www.eoearth.org/article/United_Nations_Convention_on_Law_of_the_Sea_(UNCLOS)_1982); U.S. DEP’T OF NAVY, NAVAL WARFARE PUB. 1-14M, COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, at 1-1, 2-2, (July 2007) [hereinafter COMMANDER’S HANDBOOK].

<sup>42</sup> U.N. Office of Legal Affairs, *supra* note 39.

<sup>43</sup> See *Chronological List of Ratifications of, Accessions and Succession to the Convention and Related Agreements as of 23 January 2013*, OCEAN AFF. AND THE LAW OF THE SEA, OFFICE OF LEGAL AFFAIRS, UNITED NATIONS, available at [http://www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm).

<sup>44</sup> United States Oceans Policy, 19 WEEKLY COMP. PRES. DOC. 383 (Mar. 14, 1983). After participating in extensive negotiations to amend the deep seabed mining provisions in part XI of UNCLOS, U.N. Office of Legal Affairs, *supra* note 39, President Bill Clinton signed the agreement and forwarded it to the Senate ratification, S. Treaty Doc. No. 103-39 (1994). Despite support from both the Bush and Obama Administrations, the Senate, to date, has not ratified the agreement. See *United Nations Convention on the Law of the Sea*, U.S. SENATE COMMITTEE ON FOREIGN REL., <http://www.foreign.senate.gov/treaties/details/103-39> (last visited 18 Jan. 2013) (indicating that the Committee on Foreign Relations has done nothing more than hold hearings relating to UNCLOS).

overflight regimes of UNCLOS as reflecting customary international law, as Secretary Clinton recently noted: “Let me add one more point with respect to the Law of the Sea Convention. It has strong bipartisan support in the United States, and one of our diplomatic priorities over the course of the next year is to secure its ratification in the Senate.”<sup>45</sup>

## B. Key Provisions of UNCLOS

At its core, UNCLOS represents a framework for establishing maritime boundaries or regimes and defining attendant rights, authorities, and responsibilities underneath, on, and above the world’s oceans. Before assessing the legitimacy of the PRC’s maritime claims in the South China Sea, five principal tenets of UNCLOS must be examined: (1) Territorial Sea; (2) EEZ; (3) Rocks and Islands; (4) Incidents of Ownership/Sovereignty; and (5) Dispute Resolution.<sup>46</sup>

### 1. Territorial Sea

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<sup>45</sup> Clinton, *supra* note 1.

<sup>46</sup> In addition to the five tenets discussed herein, UNCLOS also codified coastal nations’ rights over their adjoining continental shelf. Article 76 of UNCLOS defines the continental shelf of a coastal state as the seabed and subsoil throughout the natural prolongation of its land territory to the outer edge of the continental margin or to a distance of two hundred nautical miles from the baselines where the outer edge of the continental margin does not extend to two hundred nautical miles. Under this definition, the continental shelf rights of most nations are encompassed within their EEZ rights, as the EEZ already grants the coastal state the exclusive right to explore and exploit the seabed and its subsoil out to two hundred nautical miles from the baseline (i.e., inside the EEZ). The true significance of the continental shelf under UNCLOS pertains to areas where the continental margin extends further than two hundred miles from the baseline. In these cases, article 76 allows the coastal state to assert resource-related jurisdiction within the seabed and subsoil up to three hundred fifty nautical miles from the baseline or one hundred miles from the 2500 meter isobath (depth). Nations claiming a continental shelf in excess of two hundred nautical miles must submit their claim (along with extensive and detailed supporting scientific data) to the Commission on the Limits of the Continental Shelf (CLCS). See ROBERT R. CHURCHILL & ALAN V. LOWE, *THE LAW OF THE SEA* 124–30 (2d ed. 1988). South China Sea nations which have submitted extended continental shelf claims with the CLCS include Indonesia (2008), Philippines (2009), Malaysia (joint submission with Vietnam, 2009), and Vietnam (two submissions, including a joint submission with Malaysia, 2009). See *Submissions, Through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, Pursuant to Article 76, Paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982*, OCEAN AFF. AND THE LAW OF THE SEA, OFFICE OF LEGAL AFFAIRS, UNITED NATIONS, available at [http://www.un.org/Depts/los/clcs\\_new/commission\\_submissions.htm](http://www.un.org/Depts/los/clcs_new/commission_submissions.htm) (last visited 1 Apr. 2013). The PRC submitted a preliminary claim to the CLCS in May 2009, but the PRC only delineated an extended continental shelf claim in the East China Sea (while reserving the right to file a later claim in the South China Sea or other areas). *Id.* Because the PRC has not submitted a continental shelf claim to the South China Sea, this paper does not include a discussion of the current continental shelf dispute in the South China Sea.

Article 3 of UNCLOS asserts: “Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from the baselines determined in accordance with this Convention.”<sup>47</sup> Under this definition, the “coastal State” must first establish a “baseline” from a coastal land feature.<sup>48</sup> The baseline serves as the building block for nearly all maritime areas and zones delineated in UNCLOS,<sup>49</sup> leading to Secretary Clinton’s assertion that maritime claims must be tied to “land features.”<sup>50</sup> Article 5 of UNCLOS articulates the general rule for drawing a baseline: “Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.”<sup>51</sup> Therefore, the vast majority of baselines will be measured from the “low watermark” or “low tide,” and baselines follow the curvature of the coast.<sup>52</sup> If a coastal state asserts “straight baselines” rather than baselines based on low tide,<sup>53</sup> article 16 of UNCLOS mandates such baselines “shall be shown on charts of a scale or scales adequate for ascertaining their position” or by publishing “a list of geographical coordinates of points.”<sup>54</sup> Moreover, the coastal state “shall give due publicity to such charts or lists of geographical coordinates and shall deposit a copy of each such chart or list with the Secretary General of the United Nations.”<sup>55</sup>

All water inside or “landward” of a baseline is called “internal water,” the legal equivalent of land for purposes of the coastal state’s right of complete sovereign authority.<sup>56</sup> The water outside or “seaward” of the baseline up to a

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<sup>47</sup> UNCLOS, *supra* note 6. Note that states are not required to declare a twelve-nautical-mile territorial sea. *Id.* Prior to UNCLOS, customary law authorized states to declare a three-nautical-mile territorial sea. NAVAL WAR COLL., ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS para. 1.4.2 n.33, at 1-15 (1997). Although UNCLOS increased the maximum breadth of the territorial sea to twelve nautical miles, some states (*e.g.*, Japan) still claim a three nautical mile territorial sea in certain strategic areas in order to maximize coastal nation authority and flexibility. *Id.* 1-81 to 1-83 tbl.A1-5.

<sup>48</sup> *See supra* note 46 and accompanying text.

<sup>49</sup> *See supra* note 46 and accompanying text.

<sup>50</sup> *See supra* note 1 and accompanying text.

<sup>51</sup> UNCLOS, *supra* note 6, art. 5.

<sup>52</sup> *Id.* Article 7 of UNCLOS provides limited exceptions that allow coastal states to draw “straight baselines.” *Id.* art. 7. Although not recognized by the U.S., the PRC has established straight baselines for most of their coastline and the area encompassing the Paracel Islands. *See* MARITIME CLAIMS REFERENCE MANUAL, DoD 2005.1-M (2008), *available at* <http://www.dtic.mil/whs/directives/corres/html/20051m.htm>.

<sup>53</sup> *Id.* Articles 7–16 of UNCLOS establish detailed rules for straight baselines. Examples of geographic situations which may warrant a straight baseline include deeply indented coastlines, fringing islands, and historic bays. UNCLOS, *supra* note 6, arts. 7–16.

<sup>54</sup> UNCLOS, *supra* note 6, art. 16.

<sup>55</sup> *Id.*

<sup>56</sup> *See* COMMANDER’S HANDBOOK, *supra* note 41, at 1-7.

maximum of twelve nautical miles constitutes the territorial sea.<sup>57</sup> Coastal nations may exercise sovereign control of the territorial sea subject to certain limitations, such as the right of innocent passage and safe harbor.<sup>58</sup> Although subject to specified, limited coastal state sovereign rights, such as EEZ authority as delineated below, the area beyond the territorial sea is generally referred to under customary international law as “international water.”<sup>59</sup> While UNCLOS does not use the term “international water,” UNCLOS preserves and guarantees freedoms of navigation and overflight for all nations in the water and airspace beyond the territorial sea.<sup>60</sup>

## 2. Exclusive Economic Zone (EEZ)

Part V of UNCLOS creates the legal regime of the EEZ, which represents “one of the most revolutionary features of the Convention, and one which already has had a profound impact on the management and conservation of the resources of the oceans.”<sup>61</sup> Inside the EEZ, which may extend a maximum of two-hundred nautical miles from the baseline, the coastal nation may exercise “sovereign rights for the purpose of exploring, exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed, and of the seabed and its subsoil.”<sup>62</sup> Within the EEZ and subject to UNCLOS limitations, the coastal nation has “jurisdiction” with regard to artificial islands, including “installations” and “structures;” marine scientific research; and protection and preservation of the marine environment.<sup>63</sup>

Fundamentally, the EEZ represents a resource-related maritime area primarily designed to protect the coastal nation’s economic interest over the natural resources contained therein. In furtherance of this underlying economic

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<sup>57</sup> UNCLOS, *supra* note 6, art. 3.

<sup>58</sup> *Id.* Innocent passage allows for ships of all nations to transit inside territorial water in a continuous and expeditious manner that is not “prejudicial to the peace, good order or security of the coastal State.” See UNCLOS, *supra* note 6, at art. 19. Note the right of innocent passage does not apply to aircraft; aircraft must have the approval of the coastal nation to enter the airspace superjacent to the territorial sea, subject to a customary international law exception for safe harbor or *force majeure*.

<sup>59</sup> COMMANDER’S HANDBOOK, *supra* note 41, at 1-9. In addition to the EEZ authorities discussed herein, UNCLOS authorizes coastal nations to establish a “Contiguous Zone” not to exceed 24 nautical miles from their baseline. Although not subject to absolute coastal state sovereignty, Contiguous Zones are subject to coastal state actions and regulations related to immigration, sanitation, customs and fiscal issues. Also, for a differing view on the meaning of “international water” under UNCLOS, see Ji Guoxing, *The Legality of the Impeccable Incident*, CHINA SECURITY, Spring 2009, at 17 (arguing the term “international water” has no legal meaning after UNCLOS).

<sup>60</sup> UNCLOS, *supra* note 6, arts. 58, 87.

<sup>61</sup> See UNCLOS HISTORICAL, *supra* note 39.

<sup>62</sup> UNCLOS, *supra* note 6, art. 56.

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

interest, article 73 authorizes the coastal nation to take measures, including “boarding, inspection, arrest, and judicial proceedings,” to enforce its economic and resource-related rights inside the EEZ.<sup>64</sup> Article 73, however, does not give the coastal nation plenary law enforcement authority, as “arrested vessels and their crews shall be promptly released upon the posting of bond or other security” and punishments for violations of fishing laws “may not include imprisonment.”<sup>65</sup> While states must comply with coastal state EEZ regulations established in a manner consistent with UNCLOS, article 58 guarantees all nations the freedom of navigation and overflight within the EEZ.

Similar to article 16’s requirement to clearly delineate straight baselines through international notification, article 75 requires coastal states to establish the “outer limit lines” and lines of delimitation or boundaries of their EEZ through “charts” or “lists of geographical coordinates of points.”<sup>66</sup> The coastal state shall give “due publicity” to such charts or coordinates and deposit a copy with the Secretary General of the United Nations.<sup>67</sup>

The importance of the EEZ in today’s global economy cannot be overemphasized. As noted by the United Nations: “Almost 99 percent of the world’s fisheries now fall under some nation’s jurisdiction. Also, a large percentage of world oil and gas production is offshore . . . .” The EEZ concept codified in UNCLOS “provides a long-needed opportunity for rational, well-managed exploitation under an assured authority.”<sup>68</sup> As shown in Appendix 2, nearly the entire South China Sea falls inside the EEZ of one or more coastal nations.

### 3. Islands & Rocks

Perhaps the most important UNCLOS principles pertaining to the debate over competing claims to the Paracel and Spratly Islands is article 121 and its “Regime of Islands.” Herein, UNCLOS creates a dichotomy between islands and rocks. An “island” is a “naturally formed area of land, surrounded by water, which is above water at high tide.”<sup>69</sup> Islands are entitled to a territorial

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<sup>64</sup> *Id.* art. 73. Warships are exempt from coastal state law enforcement or other similar action. Articles 29–32 of UNCLOS define “warship” and codify the customary international law immunities of warships.

<sup>65</sup> *Id.*

<sup>66</sup> UNCLOS, *supra* note 6, art. 75.

<sup>67</sup> *Id.*

<sup>68</sup> See U.N. Office of Legal Affairs, *supra* note 39.

<sup>69</sup> UNCLOS, *supra* note 6, art. 121.



sea, contiguous zone, EEZ and a continental shelf as “determined in accordance with the provisions of this Convention applicable to other land territory.”<sup>70</sup>

In contrast, “rocks which cannot sustain human habitation or economic life of their own shall have no EEZ or continental shelf.”<sup>71</sup> Therefore, while both islands and rocks generally warrant the coastal nation to establish a territorial sea,<sup>72</sup> only islands justify the coastal nation establishment of an EEZ or continental shelf.

Article 121’s islands versus rocks dichotomy has generated a robust legal debate over the specific requirements for an island and its attendant EEZ and continental shelf rights. While this debate is clearly germane for the competing claims throughout the South China Sea, there is no simple formula for determining which land masses are islands and which land masses are mere rocks. Most scholars do agree that the size of the land mass is a critical, although not necessarily determinative, factor. As noted by Steven Wei Su, “It seems to have been an accepted view from the very beginning of [UNCLOS] that a very small islet should not receive the same maritime spaces as a piece of land or a large island.”<sup>73</sup>

Does the existence of a military garrison establish a land mass as an “island” under UNCLOS? Based on UNCLOS’ history and scholarly analysis, military garrisons are legally irrelevant for claiming a land mass as an island.<sup>74</sup> According to Marius Gjetnes, “It is well known that soldiers are stationed on many of the Spratly Islands. The presence of military personnel could perhaps be seen as an indication that an island can sustain human habitation.”<sup>75</sup> However, Gjetnes adds: “The mere fact of inhabitants cannot be sufficient. Moreover, as derived from the [UNCLOS] *travaux préparatoires* and the object and purpose of Article 121, the requirement of human habitation can and should be interpreted so as to disregard personnel stationed on an island for sovereignty or scientific purposes.”<sup>76</sup>

In short, the specific legal requirements for an island, as opposed to a rock, under UNCLOS remain unresolved. As described by Robert W. Smith, “It

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*; see also COMMANDER’S HANDBOOK, *supra* note 41, at 1-7. Note that rocks are entitled to a territorial sea “provided they remain above water at high tide.” *Id.*

<sup>73</sup> See Steven Wei Su, *The Tiaoyu Islands and Their Possible Effect on the Maritime Boundary Delimitation between China and Japan*, 3 CHINESE J. INT’L L. 385, 395 (2004).

<sup>74</sup> See generally Marius Gjetnes, *The Spratlys: Are They Rocks or Islands?*, 32 OCEAN DEV. & INT’L L. 191 (2001).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 200.

seems as though article 121, paragraph 3, was drafted with the following idea: ‘I cannot exactly define what I mean, but show me an offshore territory and I will let you know if it is a paragraph 3 rock.’”<sup>77</sup>

The legal vacuum created by article 121’s island versus rock dichotomy may be a significant factor in the PRC’s recent actions noted above—establishment of military garrisons, fishing bans, and tourism in the Paracels.<sup>78</sup> In essence, the PRC is taking specific steps designed to provide a legal basis for their sovereignty on disputed islands/rocks and establish binding legal precedent in the absence of clear legal standards.

#### 4. Incidents of Ownership/Sovereignty

UNCLOS is virtually silent on the issue of establishing ownership or sovereignty. Likewise, UNCLOS does not address evidence or “incidents of ownership” which may provide a legal basis for a maritime claim and, thus, UNCLOS provides no legal basis for the PRC placing a flag at the bottom of the South China Sea as a means to claim ownership.<sup>79</sup> However, two basic principles related to “ownership” or sovereignty may be gleaned from the text: (1) Maritime claims are inherently linked to land features and (2) maritime claims must be open, transparent, and duly publicized to the international community. Specifically, UNCLOS consistently uses the term “coastal State” when referring to maritime claimants, as opposed to using the term “State” when discussing non-claimant nations.<sup>80</sup> This subtle yet important feature of UNCLOS is directly tied to the baseline provision discussed above. As noted, baselines are the fundamental building block of nearly all maritime regimes and areas, and baselines require land, referred to in UNCLOS as the “coast”. Accordingly, UNCLOS requires all maritime claims be derived from specific, identifiable claims to land features. Moreover, as discussed above, articles 16 and 75 require coastal nations to publish charts or lists of geographic coordinates delineating straight baselines and the outer limits/boundaries of their EEZ. The underlying purpose is clear: Maritime claims must be open, transparent, and duly publicized to the international community.

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<sup>77</sup> See Robert W. Smith, *The Effect of Extended Maritime Jurisdiction*, in *THE 1982 CONVENTION ON THE LAW OF THE SEA 345* (Albert W. Koers & Bernard H. Oxman, eds., 1984).

<sup>78</sup> See *supra* Part I.C.

<sup>79</sup> See STEALTH MOVE, *supra* note 18. Russia similarly attempted to plant a flag at the bottom of the North Pole in August 2007 in attempt to evidence ownership and justify Russian Arctic claims. See *Russia Plants Flag Under N Pole*, BBC NEWS (Aug. 2, 2007, 17:22 GMT), <http://news.bbc.co.uk/2/hi/europe/6927395.stm>.

<sup>80</sup> E.g., UNCLOS, *supra* note 6, arts 2–3.

## 5. Dispute Resolution

Article 74 asserts conflicting and overlapping maritime claims shall be resolved through mutual agreement, the “equitable solution,” or in accordance with the dispute resolution provisions in UNCLOS part XV. Although article 74 technically applies to EEZ disputes, its language and spirit are generally viewed as applicable to all disagreements between state parties under UNCLOS. Consistent with article 2 of the Charter of the United Nations, all parties are required to resolve their disputes by peaceful means.<sup>81</sup> Moreover, while pending resolution of any dispute—and “in a spirit of understanding and cooperation”—states should not take action which may “jeopardize or hamper” a final agreement.<sup>82</sup>

Under UNCLOS, states are empowered to employ whatever peaceful means they wish to resolve disputes. If unable to resolve a conflict by their own means of recourse, a party may invoke the dispute resolution procedures in part XV, which include referring the matter to the International Tribunal for the Law of the Sea, the International Court of Justice, or international arbitration.<sup>83</sup> To date, no party to the South China Sea maritime dispute has referred the matter under part XV of UNCLOS.

### III. PRC Maritime Claims in the South China Sea

#### A. PRC Legal Claims

The PRC’s legal claims to the South China Sea center around four salient documents: (1) 1992 Law on the Territorial Sea and Contiguous Zone, which the PRC reaffirmed in 1996 after its accession to UNCLOS; (2) 1996 Declaration on the Baselines of the Territorial Sea; (3) 1996 Declaration upon Ratification of UNCLOS; and (4) 1998 Exclusive Economic Zone and Continental Shelf Act.

#### 1. 1992 Law on the Territorial Sea and Contiguous Zone<sup>84</sup>

The 1992 Law is the cornerstone of the PRC’s maritime claims in the South China Sea. Herein, the PRC ostensibly conforms to UNCLOS’

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<sup>81</sup> U.N. Charter art 2., para 3.

<sup>82</sup> UNCLOS, *supra* note 6, at art. 74.

<sup>83</sup> *Id.* pt. XV.

<sup>84</sup> *Zhonghua Renmin Gongheguo Linghai Ji Pilianou Fa* (中华人民共和国领海及毗连区法) [The Law of the People’s Republic of China on the Territorial Sea and Contiguous Zone] (promulgated by the Standing Comm. Nat’l People’s Cong., Feb. 25, 1992, effective Feb. 25, 1992) [hereinafter 1992 LAW].

requirement to affirmatively link maritime claims to land features, as article 2 states: “The PRC’s territorial sea refers to the waters adjacent to its territorial land.”<sup>85</sup> Article 2 also specifically identifies some areas of the PRC’s territorial land, but only vaguely references others: “The PRC’s territorial land includes the mainland and its offshore islands, Taiwan and the various affiliated islands including Diaoyu Island, Penghu Islands, Dongsha Islands, Xisha [Paracel] Islands, Nansha [Spratly] Islands and other islands that belong to the People’s Republic of China.”<sup>86</sup> As an initial point, the ambiguous and unhelpful reference to “other islands belonging to the People’s Republic of China” fails to affirmatively identify any territorial land from which to measure a baseline or otherwise stake a maritime claim. This cryptic and unsupported reference to “other islands” is insufficient under UNCLOS to support a maritime claim, as it lacks specifically identified land territory and fails to provide the international community any fair notice of the claimed land mass from which to draw a baseline.

Regarding the South China Sea, article 2’s general reference to the Paracel and Spratly Islands lacks the required specificity under UNCLOS and fails to adequately put other nations on notice as to the specific land mass and geographic location of the claimed area.<sup>87</sup> Whereas the reference to the mainland, Taiwan and its affiliated islands leaves little, if any, room for doubt as to the land masses claimed, as the geographic scope of these areas is commonly known and understood throughout the international community, the exact scope of the hundreds of islands, rocks, reefs, and “navigational hazards” which comprise the Paracel and Spratly Island chains is not so clear.<sup>88</sup> In the case of the Spratly Islands, this lack of specificity is more problematic in light of the large number of land masses encompassed within the island chain; the overall size of the sea area—at least 160,000 square kilometers; the lack of geographic

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<sup>85</sup> *Id.* art 2.

<sup>86</sup> *Id.*

<sup>87</sup> The PRC is not the only nation to assert vague maritime claims. However, consistent with the letter and spirit of UNCLOS, both Malaysia and the Philippines have specifically identified their respective Spratly Islands claims and have published coordinates and charts with amplifying details. For more information, see *South China Sea Tables and Maps—US EIA*, THE SOUTH CHINA SEA (Sep. 2003), <http://www.southchinasea.org/south-china-sea-tables-and-maps-us-eia/>.

<sup>88</sup> According to [Globalsecurity.org](http://www.globalsecurity.org), the South China Sea “includes more than 200 small islands, rocks, and reefs, with the majority located in the Paracel and Spratly Island chains.” *South China Sea/Spratly Islands*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/world/war/spratly.htm> (last visited 1 Apr. 2013). Moreover, the Spratly Islands “are coral, low and small, about 5 to 6 meters above water, spread over 160,000 to 180,000 square kilometers of sea zone (or 12 times that of the Paracels), with a total land area of 10 square kilometers only. *Id.* In contrast, the Paracel Islands “also has a total land area of 10 square kilometers,” but is spread over a sea zone of only 15,000 to 16,000 square kilometers. *Id.* Importantly, “many of these islands are partially submerged islets, rocks, and reefs that are little more than shipping hazards not suitable for habitation.” *Id.*

proximity to the PRC; the closer proximity to other claimants—within two-hundred nautical miles of several claimants); and the fact that unlike the Paracel Islands the PRC has not published straight baseline coordinates for the Spratly Islands which may otherwise provide a basis for identifying the areas claimed.<sup>89</sup> The PRC's failure to specifically identify the islands claimed and affirmatively link its claims to specific land features is exacerbated within the South China Sea because, as one scholar noted, "most of the rocks and reefs of the Spratly and Paracel chains are merely navigational hazards and not 'islands.'"<sup>90</sup>

Therefore, while providing a starting point that focuses on baselines drawn from land features, the 1992 Law fails to comply with the specificity and due notice requirements applicable to the PRC under article 16. In short, the 1992 Law lacks the specificity necessary to provide due notice to the international community of the scope and contours of PRC's South China Sea claims.

## 2. 1996 Declaration on the Baselines of the Territorial Sea<sup>91</sup>

On the issue of baselines, article 3 of the 1992 Law states, "The PRC's baseline of the territorial sea is designated with the method of straight baselines, formed by joining the various base points with straight lines."<sup>92</sup> In 1996, the PRC published its Declaration on the Baselines of the Territorial Sea in order to promulgate the specific straight baselines asserted in the 1992 Law.<sup>93</sup> The 1996 Baselines Declaration established straight baselines for the PRC's mainland coastline and the Paracel Islands. Although the PRC's claimed straight baselines around the Paracel Islands are problematic under UNCLOS (discussed below), the straight baselines do articulate that the PRC claims the land masses inside the straight baselines as the land territory from which to draw a baseline, thereby mitigating the lack of specificity with regard to their Paracel Islands claim discussed above. In contrast, the PRC did not publish straight baselines—or any other baselines—for the Spratly Islands or any other islands in the South China Sea, further highlighting the lack of specific and identifiable claims to land features for those island claims.

In his excellent and thorough analysis of the PRC's straight baseline claims, Daniel Dzurek notes myriad legal deficiencies with the PRC's straight

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<sup>89</sup> Declaration of the Government of the People's Republic of China on the Baselines of the Territorial Sea, 15 May 1996, [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN\\_1996\\_Declaration.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1996_Declaration.pdf) [hereinafter 1996 Baselines Declaration].

<sup>90</sup> See Kraska, *supra* note 23.

<sup>91</sup> 1996 Baselines Declaration, *supra* note 89.

<sup>92</sup> See 1992 LAW, *supra* note 84.

<sup>93</sup> 1996 Baselines Declaration, *supra* note 89.

baseline system.<sup>94</sup> The PRC's claimed straight baselines around the Parcel Islands fail to comply with UNCLOS for two reasons. First, under article 46 of UNCLOS, only an "archipelagic state"—a nation comprised wholly of one or more archipelagos, also known as an "island nation"—may draw archipelagic baselines around its island groups. The PRC is not an archipelagic state and thus not entitled to claim archipelagic baselines around the Parcels or any other island or group of islands.<sup>95</sup> Moreover, as noted by Dzurek, "The ratio in the water to land area in an archipelago must be between 1:1 and 9:1," and the PRC's claim does not meet UNCLOS' ratio requirement for archipelagic baselines.<sup>96</sup>

### 3. 1996 Declaration upon Ratification of UNCLOS<sup>97</sup>

Upon becoming a party to UNCLOS in 1996, the PRC issued its Declaration highlighting several aspects of its accession to the Treaty.<sup>98</sup> First, the Declaration states: "In accordance with the provisions of the United Nations Convention on the Law of the Sea, the People's Republic of China shall enjoy sovereign rights and jurisdiction over an EEZ of two-hundred nautical miles and the continental shelf."<sup>99</sup> The PRC's failure to link its two hundred nautical mile EEZ to its baseline is problematic, as the Declaration fails to affirmatively tie its EEZ to specific and identifiable land features.

More problematic is the PRC "reaffirm[ing] its sovereignty over all its archipelagos and islands as listed in article 2 of the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone."<sup>100</sup> As noted above, the PRC is not an archipelagic state under article 46 of UNCLOS, and thus not entitled to archipelagic claims. Moreover, herein the PRC again asserts

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<sup>94</sup> See Daniel Dzurek, *The People's Republic of China Straight Baseline Claim*, BOUNDARY & SECURITY BULL., Summer 1996, at 77. A complete discussion of all the deficiencies in the PRC's straight baseline system is beyond the scope of this paper. The focus herein will be on the deficiencies in the straight baseline system around the Parcel Islands.

<sup>95</sup> See *id.* at 85. Note that Vietnam also claims archipelagic baselines around the Parcel Islands. Like the PRC, Vietnam is not an archipelagic state under UNCLOS, and thus not entitled to claim archipelagic baselines around the Parcel Islands. As stated by Dzurek: "The PRC is hardly alone in violating the spirit, if not the letter, of the 1982 UN Convention. Excessive baseline claims are all too common in Asia, and elsewhere." *Id.*

<sup>96</sup> See *id.*

<sup>97</sup> United Nations Convention on the Law of the Sea: China's Declaration Made upon Ratification, 7 June 1996, [http://www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm#China%20after%20ratification](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China%20after%20ratification) [hereinafter 1996 Ratification Declaration].

<sup>98</sup> See *id.*

<sup>99</sup> See *id.*

<sup>100</sup> See *id.*

sovereignty over nebulously defined “other islands” referenced in the 1992 Law and discussed above.<sup>101</sup>

On the positive side, the 1996 Ratification Declaration asserted the PRC’s desire to resolve maritime boundary disputes in accordance with international law and based on principles of equitability—certainly a positive statement which is consistent with UNCLOS.

#### 4. 1998 Exclusive Economic Zone and Continental Shelf Act<sup>102</sup>

The 1998 EEZ Act represents a mixed blessing under UNCLOS. Article 2 asserts the PRC EEZ extends “200 nautical miles from the baselines from which the breadth of the territorial sea is measured.”<sup>103</sup> Article 2 also includes similar language affirmatively linking its continental shelf to its baselines. On the positive side, this language affirmatively ties the EEZ and continental shelf to a baseline—not the case with the 1996 Ratification Declaration discussed above—and, on its face, limits the PRC to a two hundred nautical mile EEZ consistent with letter and spirit of UNCLOS.

However, another perspective on the 1998 EEZ Act is that it must be read in conjunction with the 1992 Law and 1996 Baselines Declaration. In doing so, the 1998 Act can be interpreted to include a two-hundred-nautical-mile EEZ around the Paracel and Spratly Islands and “other islands” of the PRC. From this perspective, the 1998 EEZ Act constitutes the PRC’s legal assertion of EEZ rights throughout nearly the entire South China Sea. Based on the PRC’s rhetorical assertions noted above, and the language in article 14 of the 1998 Act noted below, this latter interpretation most accurately reflects the statutory framework for the PRC’s legal claim in the South China Sea.

As noted above, article 75 of UNCLOS requires the coastal nation to delineate the “outer limits” of their EEZ and “lines of delimitation” with opposite and adjacent states either on charts or through a list of geographical coordinates published to the international community. To date, the PRC has

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<sup>101</sup> See Dutton & Garofano, *supra* note 13. Another issue of concern with the 1996 Ratification Declaration is the PRC assertion of the right to limit innocent passage within its territorial water. While the PRC’s view of the freedom of navigation and overflight provisions is inconsistent with UNCLOS and customary international law, this issue is beyond the scope of this paper. For an excellent discussion of the legal issues concerning the PRC’s view of its authority to regulate navigation and overflight, *see id.*

<sup>102</sup> *Zhonghua Renmin Gongheguo Zhuanshu Jingjiou He Dalu Jiafa* (中华人民共和国专属经济区和大陆架法) [People’s Republic of China Exclusive Economic Zone and Continental Shelf Act] (promulgated by the Standing Comm. Nat’l People’s Cong., June 26, 1998, effective June 26, 1998) [hereinafter 1998 EEZ Act].

<sup>103</sup> *Id.*

failed to publish charts or coordinates specifying the outer limits or lines of delimitation of their claimed EEZ with respect to the Parcel Islands, Spratly Islands, or “other islands” referenced above.

Perhaps the most controversial section of the 1998 EEZ Act is article 14, which states: “The provisions of this Act shall not affect the historical rights of the People’s Republic of China.”<sup>104</sup> If this provision codifies the legal foundation for the PRC’s “historic waters” claim, it is totally devoid of any degree of specificity required to put the international community on notice and fails to include any link between its maritime claims and an identifiable land feature. The bottom line is the exact scope and contours of article 14 are ambiguous, unclear, and inconsistent with the specificity and international publication requirements pursuant to UNCLOS.

The 1998 EEZ Act’s reference to the “historical rights” of the PRC may represent the PRC’s attempt to establish a legal basis for their “historic waters” claim to the South China Sea. What is the PRC’s “historic claim” and is it consistent with UNCLOS?

### **B. The PRC’s “Historic Waters” Claims and the Nine-Dash Line**

PRC Ministry of Defense spokesperson Geng Yansheng recently asserted that the PRC’s “indisputable” sovereignty in the South China Sea “has sufficient historical and legal backing” to support its claims.<sup>105</sup> But what exactly are PRC’s “historic” claims to the South China Sea?

In 1947, the Nationalist government of China led by Chiang Kai-Shek published a map of the South China Sea.<sup>106</sup> The map included eleven dashes encompassing nearly all of the South China Sea. “The dotted line encloses the main island features of the South China Sea: Pratas Islands, the Parcel Islands, the Macclesfield Bank, and the Spratly Islands. The dotted line also captures James Shoal, which is as far south as 4 degrees north latitude.”<sup>107</sup> The evidence clearly indicates China published the map as an assertion of national sovereignty over the land, water, and airspace of nearly the entire South China Sea. “According to Wang Xiguang, who participated in the compilation of maps at the Geography Department of the Ministry of Internal Affairs, ‘the dotted

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<sup>104</sup> See *id.*

<sup>105</sup> See Mark Valencia, *Standoff in the South China Sea*, TAIPEI TIMES, Aug. 17, 2010, at 8.

<sup>106</sup> See Dutton & Garofano, *supra* note 13; see also Kraska, *supra* note 23; Li Jinming and Li Dexia, *The Dotted Line on the Chinese Map of the South China Sea*, 34 OCEAN DEV. & INT’L L. 287, 287–95 (2003).

<sup>107</sup> See Li & Li, *supra* note 106.



national boundary line was drawn as the median line between China and the adjacent states.”<sup>108</sup>

Upon the creation of the People’s Republic of China in 1949, the new Communist government adopted the eleven-dash line as its own, “citing the voyages of Chinese vessels in and across [the South China Sea] beginning 2,000 years ago, interrupted by Western subjugation of China and other Asian states.”<sup>109</sup> However, in 1953 Premier Zhou Enlai ordered removal of the two dashes in the Gulf of Tonkin as a symbolic show of support for the Communist government in North Vietnam.<sup>110</sup> Appendix 5 shows the PRC’s nine-dash-line, often referred to as the “U-Shape Map” or the “Cow’s Tongue.”<sup>111</sup> Since 1953, the PRC has used the nine-dash line to assert historic rights over the South China Sea.

What rights does the PRC assert in furtherance of its historic claims: Full sovereignty wherein the South China Sea is PRC “territorial water” under UNCLOS or exclusive EEZ rights of exploration and exploitation of the natural resources within two hundred nautical miles of all islands? The answer is unclear, as the PRC has never formally clarified or defined the scope of its historic claims. The PRC’s legal ambiguity coupled with its rhetorical assertions of sovereign rights to the South China Sea fosters additional controversy and debate. In assessing his view of the PRC’s historic claim, Professor Zhou Lihai from the Law Department of Beijing University stated the nine-dash line “indicates clearly Chinese territory and sovereignty of the four islands in the South China Sea and confirms China’s maritime boundary of the South China Sea Islands that have been included in Chinese domain at least since the 15th century.”<sup>112</sup> In defining the PRC’s rights over this claim, Professor Zhou concludes: “All the islands and their adjacent waters within the boundary line should be under the jurisdiction and control of China.”<sup>113</sup>

Indonesian diplomat Hasjim Djalal has a different view of the nine-dash line. Focusing on the lack of specificity in the claim as required by UNCLOS, Djalal stated: “There was no definition of those dotted lines, nor were their coordinates stated. Therefore, the legality and the precise locations of those lines were not clear.” Djalal further noted, “It was presumed, however,

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<sup>108</sup> See *id.* at 290.

<sup>109</sup> Dutton & Garofano, *supra* note 13.

<sup>110</sup> See *id.*

<sup>111</sup> See Kraska, *supra* note 23.

<sup>112</sup> See Li & Li, *supra* note 106, at 291.

<sup>113</sup> See *id.*

that what China was claiming, at least originally, was limited to the islands and the rocks, but not the whole sea enclosed by those undefined dotted lines.”<sup>114</sup>

From an UNCLOS perspective, Djalal’s assessment is directly on point. Neither the original eleven-dash line map nor the PRC’s ambiguous and vague nine-dash line map comply with UNCLOS requirements to use charts or geographic coordinates to publish the PRC’s claimed straight baselines<sup>115</sup> or the PRC’s outer limits of its claimed EEZ.<sup>116</sup> Simply stated, the PRC’s nebulous historic rights claim fails to provide due notice to the international community as mandated by UNCLOS.

Interestingly, article 15 of UNCLOS does reference “historic rights” by asserting that “historic title” may provide an exception to the general rule that overlapping territorial seas are delimited at the “median line” based on principles of equidistance. However, the PRC has not relied on Article 15 as a legal basis for its historic rights and there is a dearth of evidence discussing the intent of article 15. More importantly, assuming, *arguendo*, article 15 did provide a legal basis under UNCLOS for the PRC’s historic rights, the PRC would still be bound to publish such an “historic delimitation” to the international community, something it has failed to do.

The PRC has, however, taken concrete steps to build a legal foundation for its “historic rights” claims in the South China Sea. In other words, the PRC’s legal and historic claims must be read in concert rather than isolation. In its 1992 Law on the Territorial Sea & Contiguous Zone, the PRC claimed territorial sovereignty over the Paracel Islands, Spratly Islands, and “other islands” belonging to the PRC. Equally as important is the PRC’s 1998 EEZ Act, which states, “The provisions of this Act shall not affect the historical rights of the People’s Republic of China.”<sup>117</sup> In other words, the PRC has systematically tied its legal claims under UNCLOS to its historic rights claims espoused for more than fifty years. By merging its historic and legal claims, the PRC may be asserting UNCLOS-based rights—for example, EEZ and continental shelf—to all its claimed historic waters. This theory, however, is an informed hypothesis based on analysis of the factual record, as the PRC has failed to expressly articulate the exact scope and contours of its South China Sea claims.

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<sup>114</sup> *See id.*

<sup>115</sup> UNCLOS, *supra* note 6, art. 16.

<sup>116</sup> UNCLOS, *supra* note 6, art. 75.

<sup>117</sup> Li & Li, *supra* note 106, at 291.

### C. Summary of Analysis Under UNCLOS and the Road Ahead

The PRC's maritime claims in the South China Sea, most notably the Paracel Islands, Spratly Islands, "other islands" and "historic rights," are undermined by two primary legal deficiencies: (1) The PRC's failure to affirmatively link all maritime claims to specific and identifiable land features and (2) the PRC's failure to give "due publicity" to the international community regarding the exact nature and scope of its claims. Though the PRC has attempted to build a legal basis for its historic claims to the South China Sea through myriad actions—including legislation, rhetoric, diplomatic protests, fishing bans, and detentions at sea, increased naval and law enforcement presence, and establishing military garrisons on claimed "islands"—the PRC has nonetheless failed to comply with the specificity and international notification requirements delineated in articles 16 and 75 of UNCLOS. These UNCLOS requirements are designed to avoid confusion, eliminate ambiguity, and ensure all nations are playing by the same set of rules. However, the PRC's vague claims to the South China Sea foster confusion, create ambiguity, and indicate the PRC is playing under its own set of rules.<sup>118</sup>

Importantly, the PRC's failure to comply with the specificity and notification requirements of UNCLOS is not the only area of concern. Other legal defects include the PRC's straight baseline system, which largely fails to comply with strict requirements for deviating from the general rule that baselines begin at the low water mark; the PRC's claimed archipelagic baselines around the Paracel Islands and other undefined areas, which contravene Article 46's rule that only archipelagic nations may establish archipelagic baselines, and that such baselines must adhere to strict water-to-land ratio requirements; the PRC's failure to pursue its claims and resolve disputes by using only peaceful means—note, for example, the PRC's military actions in 1974, 1988 and 1994

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<sup>118</sup> The issue of specifically identifying islands claimed in the South China Sea and placing the international community on notice is not new. "The Land and Water Maps Inspection Committee made significant contributions to the defense of China's sovereignty in the South China Sea. At its 25th meeting held on December 21, 1934, the Committee examined and approved both Chinese and English names for all of the Chinese islands and reefs in the South China Sea. In the first issue of the Committee's journal published in January 1935, they listed the names of 132 islands, reefs, and low tide elevations in the South China Sea, of which 28 were in the Paracel Islands archipelago and 96 in the Spratly Islands archipelago." Li & Li, *supra* note 106, at 289. In short, many of the land masses in the South China Sea have already been named and identified and are recognized as such by the international community. Moreover, the Chinese government in the 1930s undertook extensive efforts to specify which land masses they claimed in order to provide international notification. Unfortunately, this trend did not continue, leading to the subsequent publication of the ambiguous eleven and nine-dash line maps discussed herein.

to secure claims against Vietnam and the Philippines; and the PRC's assertion of authority to regulate and restrict freedoms of navigation and overflight.<sup>119</sup>

In addition to the PRC's substantive failure to comply with UNCLOS, the PRC has further undermined its credibility and evidenced a lack of good faith on UNCLOS-related issues through its repeated protests against other nations' respective claims. For example, the PRC has consistently protested Japanese claims asserting Okinotorishima, located in the Philippine Sea, is an "island" under article 46 of UNCLOS which is entitled to an EEZ.<sup>120</sup> Though the PRC does not assert any rights to the Okinotorishima, the PRC has consistently protested Japanese claims that Okinotorishima is an island under UNCLOS. While having its geopolitical reasons for rebutting such a Japanese claim, primarily centered on the PRC desire to conduct military activities near the island,<sup>121</sup> such protests against Japan while the PRC simultaneously claims authority over undefined and unidentified "islands" in the South China Sea speaks of bad faith. Likewise, the PRC's virulent protests against the extended continental shelf submissions of Vietnam, Malaysia, and the Philippines—declaring such claims "seriously infringed China's sovereignty, sovereign rights and jurisdiction in the South China Sea"—evidence the fact the PRC is ignoring the claims of its neighbors made pursuant to the specific rules and regulations established by UNCLOS.<sup>122</sup>

Like all nations, the PRC is fully entitled to assert maritime claims. However, its maritime claims must comply with the legal requirements codified in UNCLOS. Moreover, while the PRC's claims to the Paracel Islands, Spratly Islands, "other islands," and "historic rights" in the South China Sea do not comport with UNCLOS for the reasons stated above, this does not abrogate the PRC's UNCLOS-compliant claims, as the PRC possesses the full panoply of UNCLOS rights to the mainland—this claim is directly tied to specific and identifiable land mass—and the international community has adequate and fair notice of the scope of such claim.<sup>123</sup>

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<sup>119</sup> See Dutton & Garofano, *supra* note 13.

<sup>120</sup> See Yukie Yoshikawa, *Okinotorishima: Just the Tip of the Iceberg*, HARV. ASIA Q., Fall 2005, at 1.

<sup>121</sup> *Id.*

<sup>122</sup> See SAM BATEMAN & CLIVE SCHOFIELD, S. RAJARATNAM SCH. OF INT'L STUDIES, NANYANG TECHNOLOGICAL UNIV., RSIS COMMENTARIES NO. 65/2009, OUTER SHELF CLAIMS IN THE SOUTH CHINA SEA: NEW DIMENSION TO OLD DISPUTES, RSIS COMMENTARIES (2009), available at <http://www.rsis.edu.sg/publications/Perspective/RSIS0652009.pdf>.

<sup>123</sup> See Yoree Ko, *Boat Crash Fuels Beijing-Tokyo Row*, WALL ST. J., Sept. 9, 2010, at A11. Note the PRC's clearly UNCLOS-compliant claims are limited to the mainland and its immediate off-shore islands. Although the PRC also claims sovereignty over the "Diaoyu Islands," a group of uninhabited rocks, *supra* Part II, this claim arguably suffers from many of the same UNCLOS deficiencies as its South China Sea claims. In addition, the PRC's claim of sovereignty over Diaoyu

In order for the PRC to become compliant with both the letter and spirit of UNCLOS, it should take several important steps: (1) Articulate the precise nature and scope of all claims in the South China Sea; (2) affirmatively link all claims to land features and provide due publicity to the international community by publishing charts or list of geographic coordinates pursuant to articles 16 and 75 delineating all straight baselines and the outer limits and lines of delimitation of their EEZ; (3) agree to respect their neighbors' claims until such time as all parties can either enter into mutual agreements or employ dispute resolution procedures established in UNCLOS;<sup>124</sup> (4) work within the framework of ASEAN, other regional organizations, or the international community to foster a long-term, equitable solution within the framework of UNCLOS;<sup>125</sup> and (5) ensure all parties to the South China Sea are afforded the opportunity to actively participate in the process of negotiated settlement.<sup>126</sup>

By taking these positive actions, the PRC would not "legitimize" its South China Sea claim, as that is a larger political issue for the regional and international community. However, such actions would align the PRC's claims with the requirements of UNCLOS, remove the current stigma associated with its nebulous and vague claims to historic rights, and begin the process of resolving this dispute peacefully and within the framework of international law.

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is strongly contested by Japan, which also claims the island (referred to as the "Senkaku Islands" by Japan). For more information on the dispute between the PRC and Japan over the Diaoyu/Senkaku Islands, see *id.*; see also Erica Strecker Downs & Phillip C. Saunders, *Legitimacy and the Limits of Nationalism: China and the Diaoyu Islands*, INT'L SEC., Winter 1998/1999, at 114, 114–46. Similarly, the PRC's claims over Taiwan—which include myriad legal and political issues—are beyond the scope of this paper.

<sup>124</sup> Respecting its neighbors' claims does not require formal PRC recognition of such claims. Instead, it requires the PRC to act in good faith and in accordance with UNCLOS. One aspect of this step would necessarily involve a collective re-affirmation of the Declaration on the Conduct of Parties in the South China Sea, Brunei-Cambodia-China-Indon.-Laos-Malay.-Myan.-Phil.-Sing.-Thai.-Viet., 4 Nov. 2002, <http://www.asean.org/asean/external-relations/china/item/declaration-on-the-conduct-of-parties-in-the-south-china-sea>. The 2002 Code of Conduct requires all parties "to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea." *Id.* Furthermore, the parties agree to "exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner." *Id.*

<sup>125</sup> As noted herein, the PRC has consistently sought bilateral negotiations rather than regional or international forums for dispute resolution. As noted by Robert Kaplan, "As for the region as a whole, the PRC has in some respects adopted a divide and conquer strategy. In the past, it negotiated with each country in ASEAN separately, not as a unit." See Kaplan, *supra* note 32, at 31.

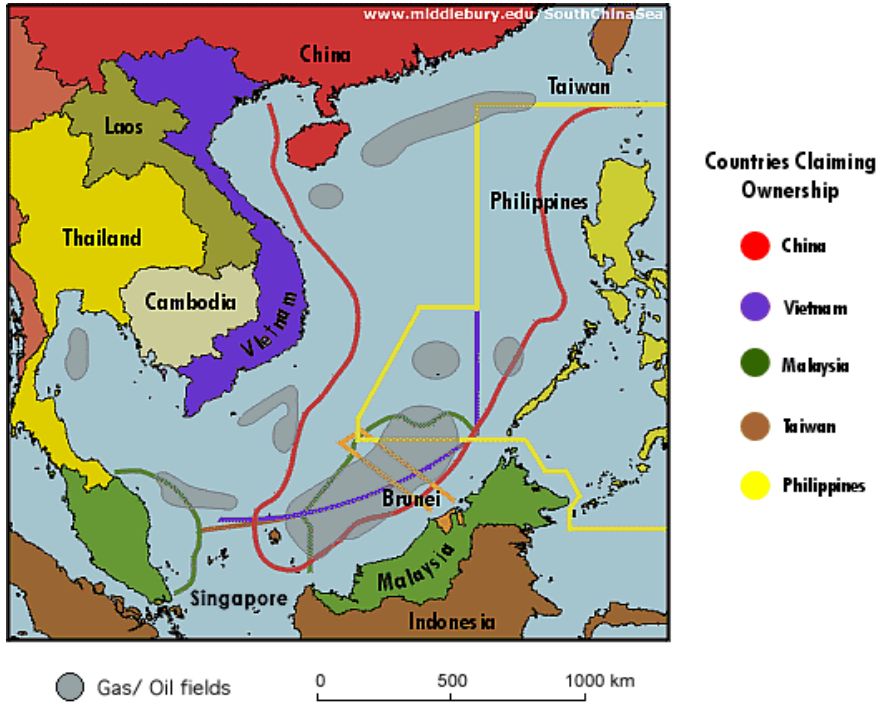
<sup>126</sup> Inclusion of all parties in the dispute resolution process is critical. Seeking bilateral agreements—while potentially of marginal utility—may ultimately undermine a long-term agreement wherein all parties agree on the legitimacy (if not the result) of the process. Moreover, including all affected parties may lead to useful joint development areas throughout the South China Sea, such as the case in the Gulf of Thailand involving Thailand and Malaysia.

Appendix 1: Map of the South China Sea



Source: *County Analysis Briefs: South China Sea*, U.S. ENERGY INFO. AGENCY (Mar. 2008), [http://www.eia.doe.gov/emeu/cabs/South\\_China\\_Sea/pdf.pdf](http://www.eia.doe.gov/emeu/cabs/South_China_Sea/pdf.pdf).

Appendix 2: Maps of Competing Maritime Claims in the South China Sea



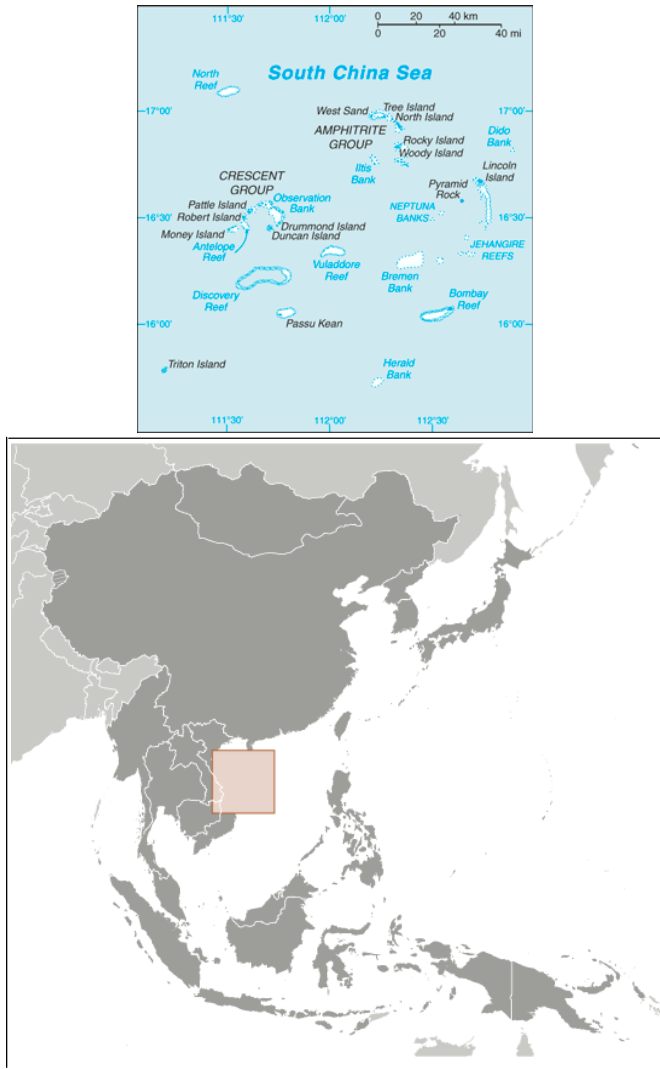
Source: *County Analysis Briefs: South China Sea*,  
U.S. ENERGY INFO. AGENCY (Mar. 2008),  
[http://www.eia.doe.gov/emeu/cabs/South\\_China\\_Sea/pdf.pdf](http://www.eia.doe.gov/emeu/cabs/South_China_Sea/pdf.pdf).



Source: *County Analysis Briefs: South China Sea*, U.S. ENERGY INFO. AGENCY (Mar. 2008), [http://www.eia.doe.gov/emeu/cabs/South\\_China\\_Sea/pdf.pdf](http://www.eia.doe.gov/emeu/cabs/South_China_Sea/pdf.pdf).

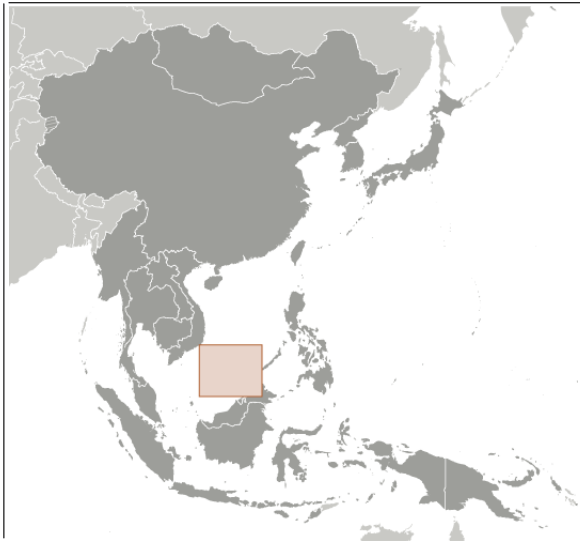


### Appendix 3: Maps of the Paracel Islands



Source: *East and Southeast Asia: Paracel Islands*, CIA—WORLD FACTBOOK (June 20, 2012), <https://www.cia.gov/library/publications/the-world-factbook/geos/pg.htm>.

## Appendix 4: Maps of the Spratly Islands



Source: *East and Southeast Asia: Spratly Islands*, CIA—WORLD FACTBOOK (June 20, 2012), <https://www.cia.gov/library/publications/the-world-factbook/geos/pg.htm>.

## Appendix 5: Map of the PRC's 9-Dash Line

China's Nine-Dash Line Map of South China Sea Claims

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[www.middlebury.edu/SouthChinaSea/](http://www.middlebury.edu/SouthChinaSea/)



Map 2: Official Chinese map of the South China Sea with the nine-dotted line

Source: The Traffic and Tourist Map of Hainan, 1999.

Adapted from Stein Tonnesson, "China and the South China Sea: A Peace Proposal," *Security Dialogue*, vol. 31, no. 3, September 2000

Source: Cire Sarr, *9-Dash Line Map—PRC*, SOUTH CHINA SEA (Aug. 19, 2011, 5:22 PM), <http://www.southchinasea.org/2011/08/19/9-dash-line-map-prc/>.

## BOOK REVIEW

**Lieutenant Colonel George Cadwalader, Jr., USMC\***

***The Best Defense? Legitimacy and Preventive Force*<sup>1</sup>**

This exceptionally well written and researched book represents the findings of the Stanford University Task Force on Preventive Force. Under the chairmanship of former Secretary of State George P. Schultz and Dr. Coit D. Blacker, the Task Force assembled a distinguished panel of international experts to evaluate the legal and policy concerns surrounding the use of preventive military force. The Task Force recognized the need for this inquiry given evolving threats to national and international security posed by failed states, rogue regimes, weapons of mass destruction (WMDs), and transnational criminal and terrorist organizations. The result is a comprehensive study authored by Mr. Sofaer which argues that international law has not adapted to modern threats and thus runs the risk of irrelevancy. Recognizing the necessity of preventive force in certain circumstances, the report recommends that nations be guided by principles of legitimacy to ensure their actions are in keeping with values enshrined in the Charter of the United Nations (U.N.) even if they are not in strict accordance with existing international law.

The author brings substantial experience to the task of articulating the Task Force's research. He is an Air Force veteran and former assistant United States attorney, Professor of Law at Columbia University School of Law, United States District Court Judge for the Southern District Court of New York, and legal adviser to the United States Department of State. Since 1994, Mr. Sofaer has served as the George P. Shultz Distinguished Scholar and Senior Fellow at the Hoover Institution.

The underlying premise of the report is some non-imminent threats to international security are so inherently dangerous that preventive force is preferable to the consequences of inaction. Mr. Sofaer observes that the use of force by a nation which violates the sovereignty of another is generally

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<sup>1</sup> ABRAHAM D. SOFAER, *THE BEST DEFENSE? LEGITIMACY & PREVENTATIVE FORCE* (2010).

considered illegal under international law unless sanctioned by the U.N. Security Council or justified by self-defense against an actual or imminent state-sponsored armed attack. He notes this current legal paradigm presents unacceptable risks to international security for a variety of reasons. These include the fact that the U.N. does not always provide a credible deterrent or response to international threats. Moreover, transnational terrorist groups often operate in the territories of states unwilling or unable to fulfill their sovereign responsibility to eliminate these unlawful entities. With access to weapons of mass destruction, the possibility for terrorist groups or rogue regimes to cause catastrophic harm requires preventive action even if the exact time and location of their attacks may be unknown.

Article 51 of the U.N. Charter provides that “nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”<sup>2</sup> Mr. Sofaer asserts that there is wide support among international law scholars for the proposition that anticipatory self-defense is only authorized when the need is “instant, overwhelming, leaving no choice of means, and no moment for deliberation.”<sup>3</sup> This standard is derived from Secretary of State Daniel Webster’s famous 1841 legal argument against a British military attack upon Canadian insurgents operating from U.S. territory.<sup>4</sup> However, Mr. Sofaer opines that Secretary Webster’s assessment of the law regarding preemptive self defense must be viewed in the context that the United States was willing and able to address the illegal actions of these insurgents through domestic action. Despite this, Mr. Sofaer maintains that in the post-U.N. Charter period:

Webster’s words have been used to describe the full scope of anticipatory self-defense. This reading leaves no room for preventive actions without [U.N. Security] Council approval for the purpose of averting any non-imminent danger, no matter how serious the threat and however the likelihood of it being realized. It also precludes lawful action to deal with any non-imminent threat posed by a group in another state, however unwilling or unable the foreign state may be to deal effectively with the threat.<sup>5</sup>

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<sup>2</sup> U.N. Charter art. 51.

<sup>3</sup> SOAFER, *supra* note 1, at 89.

<sup>4</sup> Letter from Daniel Webster, U.S. Secretary of State, to Henry Fox, British minister in Washington (Apr. 24, 1841), *quoted in* JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 412 (1906).

<sup>5</sup> SOAFER, *supra* note 1, at 90.

In light of the failure of international law to provide legal justification for self-defense sufficient to account for modern threats, Mr. Sofaer's report argues preventive action may be morally justifiable even if legally questionable. He opines that impractical limitations on the right of anticipatory self-defense undermine the fundamental goal of the U.N. Charter to maintain international peace and security. Furthermore, when international law fails to provide the tools necessary to effectively address current threats, states may ignore the law and act solely in their self-interest without any regard for international norms. Accordingly, his report argues that nations should be guided by concepts of legitimacy when determining the propriety of preventive force.

Drawing on the work of the Task Force and the 2004 U.N. Secretary General's High-level Panel on Threats, Challenges and Change,<sup>6</sup> Mr. Sofaer outlines several factors on which the legitimacy of preventive force will depend. These include whether (1) the severity of the threat is sufficient to justify military force, (2) the military action is necessary because diplomacy and other measures have been exhausted, (3) the amount of force is proportionate to the danger to be averted, (4) the action has international support, (5) the action supports U.N. Charter values and objectives, (6) the strength of the evidence justifies the use of force, and (7) a careful balancing of consequences is conducted to determine if the action will cause more harm than good.

By recognizing preemptive force as an essential counterweight to terrorism and unconventional threats, the 2002 and 2006 iterations of the National Security Strategy of the United States brought wide spread attention to legal and policy issues highlighted in Mr. Sofaer's report. The U.S. led invasion of Iraq in 2003 also generated significant controversy. However, Mr. Sofaer highlights that preventive force has been exercised either unilaterally or by regional organizations for a multitude of purposes since the inception of the U.N. Charter. These actions have been met with varying degrees of approval or condemnation by the international community, and he uses extensive historical analysis to help derive the factors that support or undermine the legitimacy of preventive force. For example, he cites the humanitarian intervention in Kosovo where NATO employed military force without approval of the U.N. Security Council. This intervention has been widely considered just and necessary even if technically illegal under existing international law.

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<sup>6</sup> U.N. Secretary-General, *A More Secure World: Our Shared Responsibility: Rep. of the Secretary General's High-level Panel on Threats, Challenges and Change*, U.N. Doc. A/59/565 (Dec. 2, 2004).

Mr. Sofaer does not view preventive force as a simple panacea for the world's ills. His report carefully outlines its dangers and limitations. The uncertainties involved with locating and attacking inchoate threats invite greater possibility for error than in those cases of imminent self-defense in which threats and targets are more clearly delineated. He notes that preventive force against non-imminent threats are by definition based on predictions of future behavior and may be victim to intelligence failures such as the incorrect conclusion that Iraq harbored WMD. Additionally, while a policy of preventive force can serve as a deterrent, it can also destabilize international relations, provoke terrorist activity that would not otherwise occur, and trigger unintended consequences more dangerous than the original problem.

Mr. Sofaer's report does not provide easy answers. It is sure to be controversial in advocating a departure from the existing bright line rules under international law governing the use of force. However, it does provide valuable and pragmatic guidelines for consideration by policy makers and strategists in determining how to address threats that have evolved more rapidly than the law, while not abandoning the underlying values of the U.N. Charter.