

**SELF-DEFENSE TARGETINGS OF NON-STATE ACTORS
AND PERMISSIBILITY OF U.S.
USE OF DRONES IN PAKISTAN**

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INTRODUCTION

The United States has used unmanned aerial vehicles (UAVs) or drones over portions of Pakistani territory for reconnaissance and the targeting of members of al Qaeda and the Taliban who have in various ways taken a direct and active part in extensive and ongoing armed attacks against U.S. military personnel and other U.S. nationals in Afghanistan.¹ Some have argued that the

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1. On general use of drones and other unmanned systems and the requirement of selective and proportionate targeting during war, see generally Jack M. Beard, *Law and War in the Virtual Era*, 103 AM. J. INT'L L. 409, 414, 422 n.61, 431, 441, 444-45 (2009). For a glimpse of the history of development of the U.S. targeted killing program and use of drones by the C.I.A., see, for example, NILS MELZER, *TARGETED KILLING IN INTERNATIONAL LAW* 41-42 (2008); A. John Radsan, *An Overt Turn On Covert Action*, 53 ST. LOUIS U. L.J. 485, 488-89, 539-42 (2009); Mohammed Khan & Douglas Jehl, *The Reach of War: Anti-Terrorism: Attack Kills a Top Leader of Al Qaeda, Pakistan Says*, N.Y. TIMES, Dec. 4, 2005, at 24; Josh Meyer, *CIA Expands Use of Drones in Terror War*, L.A. TIMES, Jan. 29, 2006, at A1; James

U.S. use of drones in Pakistan appears to have violated international law.² Is the use of drones within Pakistan merely to target non-state actors under such circumstances violative of international law? Must the United States obtain the express consent of Pakistan before targeting non-state actors who engage in ongoing armed attacks against United States military personnel? Does such a use of armed force against non-state actors necessarily require a conclusion that the United States is at war with either the state from which non-state actor armed attacks are emanating or the non-state actor? Does the selective use of force in self-defense violate the human right to life of human targets who take an active part in the armed attacks? Does use of drones necessarily constitute indiscriminate targeting in violation of the general principle of proportionality?

Before addressing these questions, one should consider relevant international legal norms concerning the permissibility of selective self-defense in response to armed attacks by non-state actors emanating from another state.

I. SELF-DEFENSE IS PERMISSIBLE AGAINST ARMED ATTACKS BY NON-STATE ACTORS

The vast majority of writers agree that an armed attack by a non-state actor on a state, its embassies, its military, or other nationals abroad can trigger the right of self-defense addressed in Article 51 of the United Nations Charter, even if selective respon-

Risen & Mark Mazzetti, *C.I.A. Said to Use Outsiders to Put Bombs on Drones*, N.Y. TIMES, Aug. 21, 2009, at A1.

2. See, e.g., Mary Ellen O'Connell, *Unlawful Killing With Combat Drones: A Case Study of Pakistan, 2004-2009*, in SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT (Simon Bronitt ed., forthcoming 2010) (Notre Dame Legal Studies Research Paper No. 09-43, Nov. 2009) [hereinafter O'Connell, *Unlawful Killing* 1], (on file with author). Professor O'Connell had stated: "U.S. attacks violated fundamental law"; use of drones is "use [of] an unlawful . . . tactic"; and "[t]he only conclusion is there is no legal right to use drone attacks against Pakistan under the law of self-defense." *Id.* (manuscript at 3, 21). This article has used the Dec. 20th version in certain places as well as her newest version online (dated Aug. 7, 2010, from a "final draft" of July 2010), which changed the wording of the first quotation to read "appears to have violated." Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, in SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT (Simon Bronitt ed., forthcoming 2010) (Notre Dame Legal Studies Research Paper No. 09-43, July 2010) (manuscript at 2), <http://ssrn.com/abstract=1501144>. [hereinafter O'Connell, *Unlawful Killing* 2]; see also *infra* notes 34, 37. The newest version also changed the third quoted language to read "[t]he strongest conclusion to draw . . ." *Id.* (manuscript at 21). The introductory abstract on SSRN declares, "[t]hese attacks cannot be justified under international law." O'Connell, *Unlawful Killing* 2, *supra* (manuscript intro.). Her book chapter is an important criticism of the U.S. use of force in Pakistan without special Pakistani consent. It rests mostly on preferences concerning the permissibility of self-defense against non-state actors that are addressed in this article in Parts II and IV *infra*.

sive force directed against a non-state actor occurs within a foreign country.³ Article 51 of the Charter expressly affirms the right of a

3. See, e.g., THOMAS BUERGENTHAL & SEAN D. MURPHY, PUBLIC INTERNATIONAL LAW 336 (4th ed. 2007); ANTONIO CASSESE, INTERNATIONAL LAW 354-55 (2d ed. 2005); LORI F. DAMROSCH ET AL., INTERNATIONAL LAW 1191 (5th ed. 2009) (“[S]elf-defense against [“non-state actor”] terrorist attacks is not in doubt”); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 183-85, 204-06, 208 (4th ed. 2005); JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 150 (2004) (discussing the relevancy of “instancy” or “immediacy” as a requirement of responsive force “particularly in the context of sustained insurgent activities”); JOHN NORTON MOORE & ROBERT F. TURNER, NATIONAL SECURITY LAW 490 (2d ed. 2005); Sophie Clavier, *Contrasting Perspectives on Preemptive Strike: The United States, France, and the War on Terror*, 58 ME. L. REV. 565, 571-72 (2006); Thomas M. Franck, Editorial Comment, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT’L L. 839, 840 (2001); Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT’L L.J. 7, 16-18, 21-23, 37 (2003); Emanuel Gross, *Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defense: Human Rights Versus the State’s Duty to Protect Its Citizens*, 15 TEMP. INT’L & COMP. L.J. 195, 211, 213-17 (2001); Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT’L L. 319, 323-26; 330 (2004); John W. Head, *Essay: The United States and International Law After September 11*, 11 KAN. J.L. & PUB. POL’Y 1, 3 (2001); Louis Henkin, *War and Terrorism: Law or Metaphor*, 45 SANTA CLARA L. REV. 817, 821 (2005); Derek Jinks, Remarks, *Self-Defense in an Age of Terrorism*, 97 AM. SOC’Y INT’L L. PROC. 144, 146 (2003); Timothy Kearley, *Raising the Caroline*, 17 WIS. INT’L L.J. 325, 325 (1999); Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT’L L.J. 23, 24-25, 27-28 (2002); Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT’L L. 537, 540, 547 (1999); Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?*, 99 AM. J. INT’L L. 62, 62-69 (2005); Sean D. Murphy, *Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter*, 43 HARV. INT’L L.J. 41, 50 (2002); Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1343-45 (2004) [hereinafter Paust, *Overreaction*]; Jordan J. Paust, *Responding Lawfully to International Terrorism: The Use of Force Abroad*, 8 WHITTIER L. REV. 711, 715-16, 723, 729 (1986) [hereinafter Paust, *Responding*]; Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT’L L.J. 533, 534-35 (2002) [hereinafter Paust, *Use of Force*]; Norman G. Printer, Jr., *The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 UCLA J. INT’L L. & FOREIGN AFF. 331, 333-34, 348-49, 353 (2003); Daphné Richemond, *Transnational Terrorist Organizations and the Use of Force*, 56 CATH. U. L. REV. 1001, 1003, 1007-09, 1011 (2007); Natalino Ronzitti, *The Expanding Law of Self-Defense*, 11 J. CONFLICT & SEC. L. 343, 344, 348 (2006); Oscar Schachter, *The Extra-Territorial Use of Force Against Terrorist Bases*, 11 HOUS. J. INT’L L. 309, 311-12 (1989); Christian J. Tams, *Light Treatment of a Complex Problem: The Law of Self-Defense in the Wall Case*, 16 EUR. J. INT’L L. 963, 972-73 (2005); Kimberly N. Trapp, *Back to Basics: Necessity, Proportionality, and the Right of Self-Defense Against Non-State Actors*, 56 INT’L & COMP. L.Q. 141, 151 (2007); Kimberly N. Trapp, *The Use of Force Against Terrorists: A Reply to Christian J. Tams*, 20 EUR. J. INT’L L. 1049, 1049 (2009) [hereinafter Trapp, *Reply*]; Robert F. Turner, *Legal Responses to International Terrorism: Constitutional Constraints on Presidential Power*, 22 HOUS. J. INT’L L. 77, 87, 89 (1999); Ruth Wedgwood, *The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense*, 99 AM. J. INT’L L. 52, 57-58 (2005); Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT’L L. 559, 564-65 (1999); Elizabeth Wilmshurst et al., *The Chatham House Principles of International Law on the Use of Force in Self-Defense*, 55 INT’L & COMP. L.Q. 963, 965-71 (2006) (consensus documentation of principles by Chatham House study participants Berman, Gow, Greenwood, Lowe, Roberts, Sands, Shaw, Simpson, Warbrick, Wheeler, Wilmshurst, and Wood); Robert A. Caplen, Note, *Mending the “Fence”: How Treatment of the Israeli-Palestinian Conflict by the International Court of Justice at the Hague Has Redefined the Doctrine of Self-Defense*, 57 FLA. L. REV. 717, 757 (2005); Franz W. Paasche,

Note, *The Use of Force in Combating Terrorism*, 25 COLUM. J. TRANSNAT'L L. 377, 386 & n.40, 392-93 (1987); Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Remarks at Annual Meeting of the American Society of International Law: The Obama Administration and International Law, pt. III.B (Mar. 25, 2010) [hereinafter Koh, Obama Administration], <http://www.state.gov/s//releases/remarks/139119.htm>; see also Michael D. Banks, *Addressing State (Ir-)Responsibility: The Use of Military Force as Self-Defense in International Counter-Terrorism Operations*, 200 MIL. L. REV. 54, 57, 77-78, 84, 88-90, 98, 105-06 (2009); Jack M. Beard, *America's New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J.L. & PUB. POL'Y 559, 565-67, 590 (2002); Tom J. Farer, Editorial Comment, *Beyond the Charter Frame: Unilateralism or Condominium?*, 96 AM. J. INT'L L. 359, 359 (2002); Terry D. Gill, *The Eleventh of September and the Right of Self-Defense in TERRORISM AND THE MILITARY: INTERNATIONAL LEGAL IMPLICATIONS* 23, 25-29 (Wybo P. Heere ed. 2003) (there is no reason why self-defense cannot be permissible against non-state actor armed attacks despite a prior "Statist presumption" among a minority of state-oriented positivists that was partly to the contrary); David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT'L L. 171, 173, 179-83, 188 (2005) (targeted killings in a foreign state can be permissible if it is "not feasible" to apprehend or arrest a terrorist who "is involved in executing or planning a terrorist attack" and "other means of preventing that attack are likely to fail"); Ved P. Nanda, *International Law Implications of the United States' 'War on Terror'*, 37 DENV. J. INT'L L. & POL'Y 513, 533 (2009) ("One could justify the targeted strikes by the US in Pakistan on the ground that the geographical region of conflict stretches from Afghanistan to Pakistan It is recommended that the Obama administration review its policy authorizing the killing of suspected terrorists outside the geographical region of armed conflict. . . . [A]nd if killings are sought outside the area of hostilities the 'proportionality' element be strictly adhered to, and that if terrorists can be apprehended killings should be a last resort."); Andreas Paulus, *Realism and International Law: Two Optics in Need of Each Other*, 96 AM. SOC'Y INT'L L. PROC. 269, 271-72 (2002); W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3, 48-49 (1999); Raphaël Van Steenberghe, *Self-Defence in Response to Attacks by Non-State Actors in Light of Recent State Practice: A Step Forward?*, 23 LEIDEN J. INT'L L. 183 (2010); Jane E. Stromseth, *Law and Force After Iraq: A Transitional Moment*, 97 AM. J. INT'L L. 628, 634-35 (2003) (noting that the Security Council and NATO recognized the permissibility of self-defense against non-state terrorists, "law enforcement" is not sufficient, and responses "may also require the appropriate and selective use of military force"); Myres S. McDougal & W. Michael Reisman, *Entebbe*, N.Y. TIMES, July 19, 1976, at A20, reprinted in MYRES S. MCDUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 876-77 (1981) (regarding the propriety of the Israeli Entebbe raid into Uganda in 1976 in self-defense against non-state actor hostage-takers in order to protect nationals from imminent death); other authors and materials cited *infra* notes 5, 9, 15, 23, 29, 30, 31, 34, 51; *infra* text accompanying notes 9 & 30. *But see* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, (*Advisory Opinion on the Wall*) 2004 I.C.J. 136, 189, 194 (July 9) (¶ 139: "Article 51 . . . recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State," adding that "Israel exercises control" of occupied territory from which "the threat . . . originates," and that "[t]he situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001)," concerning the U.S. right of self-defense against non-state actor armed attacks that occurred on 9/11. Concerning an important insight by Professor O'Connell into the probable meaning of these seemingly inconsistent statements, see also *infra* note 39. The majority may have used a severely restrictive reading of Article 51 if it thought that attacks must be by a state. The phrase "attack by one State," whether meant to be exclusive or most likely merely inclusive, was used in a sentence that was remarkably terse and set forth without citations); MARY ELLEN O'CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE 319 (2d ed. 2009) ("If the state or states where the terrorist group is found happens to be making a good faith effort to stop the terrorist group and has some basic ability to do so, then the victim state cannot hold the territorial state responsible for the acts of terrorism and may not respond with armed force on the territory of that state."); Mary Ellen O'Connell, *The Legal Case Against the Global War on Terror*, 36 CASE W. RES. J. INT'L L. 349, 356-57 (2004) (arguing that

state to respond defensively “if an armed attack occurs,”⁴ and nothing in the language of Article 51 restricts the right to engage in self-defense actions to circumstances of armed attacks by a “state.”⁵ Moreover, nothing in the language of the Charter requires a conclusion lacking in common sense that a state being attacked can only defend itself within its own borders. General patterns of practice over time and general patterns of legal expectation concerning the propriety of self-defense confirm these recognitions.

Early in the Nineteenth Century, a prominent debate between the United States and Great Britain (which had control of Canada) involving the famous *Caroline* incident in 1837, affirmed the propriety of use of force in self-defense against armed attacks by non-

Israel had no right of self-defense against non-state actor attacks); O’Connell, *Unlawful Killing* 1, *supra* note 2.

In the case *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168 (Dec. 19), Judges Kooijmans and Simma recognized that self-defense can be permissible against non-state actor armed attacks whether or not the state from whose territory an attack emanates is involved. *See Armed Activities on the Congo*, 2005 I.C.J. at 313-14, ¶¶ 26-30 (separate opinion of Judge Kooijmans); *Armed Activities on the Congo*, 2005 I.C.J. at 336-37, ¶¶ 7-12 (separate opinion of Judge Simma). The majority opinion also impliedly recognized that consent of the state is not necessary and that such forms of self-defense can be permissible. *See infra* note 36.

4. U.N. Charter art. 51. The French version is potentially broader, since it uses the phrase *agression armée* (i.e., armed aggression). *See also* Carin Kahgan, *Jus Cogens and the Inherent Right to Self-Defense*, 3 ILSA J. INT’L & COMP. L. 767, 816, 819 (1997) (debate during formation of the Charter addressed self-defense responses to armed attacks as well as aggression); Wilmschurst et al., *supra* note 3, at 970 n.23 (*agression armée* is more limited than other forms of aggression by a state); *cf.* THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACK* 50 (2002) (stating that the creators of the U.N. Charter “deliberately closed the door on any claim of ‘anticipatory self-defense’”).

5. *See, e.g.*, BARRY E. CARTER ET AL., *INTERNATIONAL LAW* 992 (5th ed. 2007); DINSTEN, *supra* note 3, at 184-85, 204-08; MOORE & TURNER, *supra* note 3, at 490; Banks, *supra* note 3, at 89-90; Franck, *supra* note 3, at 840; Greenwood, *supra* note 3, at 16-17; Paust, *Use of Force*, *supra* note 3, at 534 & n.3; Richemond, *supra* note 3, at 1007; *supra* note 3; *see also Advisory Opinion on the Wall*, 2004 I.C.J. at 215, ¶ 33 (separate opinion of Judge Higgins), 2004 I.C.J. at 229-30, ¶ 35 (separate opinion of Judge Kooijmans), 2004 I.C.J. at 242-43, ¶ 6 (declaration of Judge Buergenthal); Yoram Dinstein, Remarks, *Humanitarian Law on the Conflict in Afghanistan*, 96 AM. SOC’Y INT’L L. PROC. 23, 24 (2002); Wilmschurst et al., *supra* note 3, at 970. *But see Advisory Opinion on the Wall*, 2004 I.C.J. at 194, 195 ¶¶ 139, 142; Trapp, *Reply*, *supra* note 3.

The word “state” does not appear as a limit in Article 51, although it appears elsewhere in the United Nations Charter, especially in Article 2(4) with respect to restrictions on the right of member states to use armed force against the territorial integrity or political independence of another state. U.N. Charter art. 2, para. 4. It is evident, therefore, that the drafters knew how to use the word “state” as a limitation and chose not to do so with respect to armed attacks and the “inherent right” of self-defense addressed in Article 51 of the Charter. Importantly, despite a self-imposed blindness among a minority of state-oriented positivists, it is widely known that there have been and are many actors in the international legal process other than the state. *See, e.g.*, LUNG-CHU CHEN, *AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW* 25-38 (2d ed. 2000); MELZER, *supra* note 1, at 71; JORDAN J. PAUST ET AL., *INTERNATIONAL LAW AND LITIGATION IN THE U.S.* 5-20 (3d ed. 2009); Jordan J. Paust, *The Reality of Private Rights, Duties, and Participation in the International Legal Process*, 25 MICH. J. INT’L L. 1229 (2004).

state actors.⁶ The *Caroline* incident arose after a British-Canadian use of armed force in the United States in self-defense against prior and ongoing armed attacks against British rule by local insurgents who initially tried to capture Toronto, grew to nearly one thousand strong and styled themselves the “Patriot Army,” had taken control of Navy Island in Canada and proclaimed a government, were carrying out armed attacks in Canada at least since early December, were operating partly from within the United States and from Navy Island in Canadian territory, and were being supported by certain persons and supplies from the United States, including by the vessel *Caroline*, which had made three trips on December 29 to and from Navy Island.⁷ The British use of force against the *Caroline* during the evening of December 29, 1837 “resulted in the death of [at least] one U.S. citizen, the wounding of several others, one person being missing, and loss of the burning vessel [*Caroline*] over Niagara Falls.”⁸ The incident led to disagreement between the United States and Great Britain whether particular acts of self-defense were proper, but there was no disagreement whether non-state insurgent armed attacks could trigger the right of self-defense under international law “ ‘within the territory of a power at peace.’ ”⁹ The United States had argued for a very strict limitation on particular methods of responsive force when claiming that when the countries are “at peace, nothing less than a clear and absolute necessity can afford ground of justification,”¹⁰ and that use of a particular means of self-defense should only be permissible when the “ ‘necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation;’ ”¹¹ “since the act, justified by the

6. See, e.g., Paust, *Overreaction*, *supra* note 3, at 1345-46; Paust, *Use of Force*, *supra* note 3, at 535 & n.6.

7. See, e.g., R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 82-84 (1938); Martin A. Rogoff & Edward Collins, Jr., *The Caroline Incident and the Development of International Law*, 16 BROOK. J. INT'L L. 493, 494-95 (1990).

8. PAUST ET AL., *supra* note 5, at 1099; see Jennings, *supra* note 7, at 82-84; Rogoff & Collins, *supra* note 7, at 495. The British force was composed of some forty-five to fifty men in five to seven boats (writers use different numbers) under the command of British Navy Commander Andrew Drew. *United Kingdom Webster-Ashburton Treaty*, in 4 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 363, 443-45 (Hunter Miller ed., 1934).

9. Letter from Daniel Webster, U.S. Sec'y of State, to Lord Ashburton (July 27, 1842), in 4 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA, *supra* note 8, at 446, 446.; see PAUST ET AL., *supra* note 5, at 1099; Paust, *Overreaction*, *supra* note 3, at 1345-46; see also DINSTEIN, *supra* note 3, at 184-85.

10. Rogoff & Collins, *supra* note 7, at 497 (quoting Letter from Daniel Webster, U.S. Sec'y of State, to Henry S. Fox, British Minister in Wash., D.C. (Apr. 24, 1841), reprinted in 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 412 (1906)).

11. Letter from Daniel Webster, U.S. Sec'y of State, to Lord Ashburton (Aug. 6, 1842), in 4 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA, *supra*

necessity of self-defence, must be limited by that necessity, and kept clearly within it.”¹² The United States claimed that the British attack on the ship *Caroline* in U.S. waters at night did not meet that test, presumably because in those days the British could have waited until the vessel entered Canadian waters and “it would not have been enough to seize and detain the vessel.”¹³ Additionally, it was not shown “that there was a necessity, present and inevitable, for attacking her, in the darkness of night, while moored to the shore . . . and, careless to know whether there might not be in her the innocent with the guilty.”¹⁴

Although some have misunderstood,¹⁵ all that had been addressed was a claimed right of “ ‘self-defense’ ” and “ ‘self-preservation’ ” against prior and ongoing armed attacks.¹⁶ There was no recognition of a right of preemptive self-defense or even a right of what some term anticipatory self-defense prior to the existence of an actual armed attack or the initiation of a process of armed attacks.¹⁷ Moreover, it is important to note that the United

note 8, at 454, 455.

12. Letter from Daniel Webster, U.S. Sec’y of State, to Henry S. Fox, British Minister in Wash., D.C. (Apr. 24, 1841), in 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 412 (1906); Rogoff & Collins, *supra* note 7, at 498 (quoting Letter from Daniel Webster, *supra* note 10). An extract of the letter was also sent to Lord Ashburton on July 27, 1842. See Letter from Daniel Webster, *supra* note 9, at 446, 449. In response, Ashburton, who agreed with the standard articulated by Webster with respect to particular measures of self-defense, wrote that although “ ‘respect for the inviolable character of the territory of independent nations’ ” is of great importance, “ ‘a strong overpowering necessity may arise when this great principle may and must be suspended,’ ” and such occurs when self-defense is necessary and is “ ‘strictly confined within the narrowest limits imposed by that necessity.’ ” Rogoff & Collins, *supra* note 7, at 498 (quoting Letter from Lord Ashburton, to Daniel Webster, U.S. Sec’y of State (July 28, 1842)) (also noting that Ashburton had argued that the British action fit the standard); *id.* at 499.

13. Reisman, *supra* note 3, at 45 (quoting U.S. Secretary of State Webster); see Paust, *Use of Force*, *supra* note 3, at 535 n.6; Letter from Daniel Webster, *supra* note 10.

14. Jennings, *supra* note 7, at 89; Reisman, *supra* note 3, at 45; Letter from Daniel Webster, *supra* note 10.

15. See, e.g., Greenwood, *supra* note 3, at 12-13; Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 EUR. J. INT’L L. 209 (2003) (providing a very useful exposition of the *Caroline* incident, but arguing that the exchange of views between the United States and Great Britain somehow justifies preemptive use of force, i.e., use of armed force in response to a perceived threat long before a threat of imminent attack and prior to the existence of an actual armed attack, although rightly noting that most international lawyers do not accept the permissibility of mere preemptive self-defense); cf. Reisman, *supra* note 3, at 46-47 (apparently missing the point that non-state actor armed attacks had already occurred and were continuing); International Military Tribunal (Nuremberg), Judgment and Sentences (Oct. 1, 1946), reprinted in 41 AM. J. INT’L L. 172, 205 (1947) (stating that “preventative action in foreign territory is justified only” under *The Caroline* text announced by Webster).

16. Compare James A. Green, *Docking the Caroline: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defense*, 14 CARDOZO J. INT’L & COMP. L. 429, 439 (2006), and authorities cited *supra* notes 9-12, with Reisman, *supra* note 3, at 43-46, and Sofaer, *supra* note 15.

17. See, e.g., Paust, *Overreaction*, *supra* note 3, at 1345-46. There is also widespread agreement today that under express language in Article 51 of the Charter an “armed at-

States did not have effective control of the insurgents or direct involvement in their operations and the British did not claim that the conduct of the insurgents could be imputed to the United States. Nonetheless, it was recognized that a British measure of self-defense within the territory of the United States during peace between the two countries directed against non-state actors directly involved in the ongoing armed attacks could have been permissible if the method used had met international legal standards, which was the primary point of contention between the United States and Great Britain. Today, the limits that exist on the type of self-defense response employed (e.g., under principles of reasonable necessity and proportionality) are more malleable than the United States had preferred during the time of the incident.¹⁸ It is also worth noting that the United States and Britain were not at war, and the British responsive use of force was directed against the *Caroline* as such and those directly involved in insurgent attacks, and not against the United States. Clearly, it was understood that self-defense could be permissible outside the context of war and without consent of the territorial state from which non-state actor attacks emanate.

Prior to the *Caroline* incident, the United States had used military force partly in self-defense to clear islands off the coast of Florida from non-state actor pirates, smugglers, and privateers and to temporarily occupy Amelia Island in 1817, while relying partly on Spain's inability to control misuse of its islands to prevent armed attacks on U.S. territory and shipping emanating from

tack" must be initiated before the right of self-defense exists. *See, e.g.*, Paust, *Use of Force*, *supra* note 3, at 534 & n.2. Many argue that anticipatory self-defense should be tolerated when an armed attack is imminent, but textwriter and state support for preemptive self-defense when an attack is not imminent is misplaced and rare. *See, e.g.*, FRANCK, *supra* note 4, at 4, 9, 50, 107-08, 191; Greenwood, *supra* note 3, at 12-16; Paust, *Use of Force*, *supra* note 3, at 537, 538 & n.15; Wilmshurst et al., *supra* note 3, at 968; Mary Ellen O'Connell, *UN Resolution 1441: Compelling Saddam, Restraining Bush*, JURIST, Nov. 25, 2002, <http://jurist.law.pitt.edu/forum/forumnew73.php> ("states may only use force . . . in the face of an armed attack," and "[o]nce an attack is underway or will be imminently"); *see also* *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, 223-24, ¶ 148 (Dec. 19) ("Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force by a State to protect perceived security threats beyond these parameters."). *But see* Sofaer, *supra* note 15.

18. *See Armed Activities on the Congo*, 2005 I.C.J. at 223, ¶ 147 (Dec. 19) (dictum that Ugandan use of force did "not seem proportionate to the series of transborder attacks" by irregular forces); *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161 (Nov. 6), ¶¶ 72-78; GARDAM, *supra* note 3, at 141-48; MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 217, 222-24, 242-43 (1961); Green, *supra* note 16, at 473-74; Schachter, *supra* note 3, at 313-16. In the *Oil Platforms* case, the U.S. could not identify the entity that had attacked a U.S. warship and, without attribution of the attack "by an unidentified agency" to Iran, the U.S. had no right to attack Iran as such or its vessels and aircraft. 2003 I.C.J. 161, ¶ 77.

the islands and assuring Spain that even the temporary control of Amelia Island was not a threat to its sovereignty.¹⁹ Clearly, the U.S. had not been at war with the pirates and privateers or with Spain. Also prior to the *Caroline* incident, the United States claimed self-defense in partial justification for use of force against Seminole Indians and former slaves in 1814, 1816, and 1818 in response to their attacks emanating from Spanish Florida.²⁰ Neither Spain nor the United States considered that they were at war. Clearly also, in both circumstances consent from Spain was not necessary.

In 1854, following an attack on a U.S. diplomat in Nicaragua during a period in which the community of San Juan del Norte (Greytown), Nicaragua had forcibly taken possession of the town, erected a government not recognized by the United States, and engaged in other acts of violence against U.S. nationals, the U.S. Secretary of the Navy ordered the bombardment of the town after refusal of a U.S. demand for redress.²¹ While on circuit, Justice Nelson of the U.S. Supreme Court decided a case involving the presidential authorization of military force used at Greytown and recognized in his opinion that the President had the power to order the responsive use of armed force as part of a power of “protection” of U.S. nationals abroad against “[a]cts of lawless violence” and “an irresponsible and marauding community.”²² The U.S. did not con-

19. See, e.g., James W. Garner, *Some Questions of International Law in the European War*, 9 AM. J. INT'L L. 72, 78 (1915); Green, *supra* note 16, at 440 & n.47; Sofaer, *supra* note 15, at 220 & n.33; Abraham D. Sofaer, *The Power Over War*, 50 U. MIAMI L. REV. 33, 46 (1995). In 1801, President Jefferson dispatched a naval force with Marines to defend U.S. vessels attacked by Barbary “pirates,” but hostilities mostly involved a defensive partial war against Tripoli (1801-1805) and Algiers (1815) after their breach of treaties with the United States that had provided immunity for U.S. vessels from attack. President Jefferson sent a message to Congress concerning the defensive response. See President Thomas Jefferson, First Message to Congress (Dec. 8, 1801), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 326 (1896); 11 ANNALS OF CONG. 11-12 (1801).

20. See, e.g., 2 MOORE, *supra* note 12, at 402-05; Green, *supra* note 16, at 440 & n.47; Sofaer, *supra* note 15, at 220 n.33; Rex J. Zedalis, *Protection of Nationals Abroad: Is Consent the Basis of Legal Obligation?*, 25 TEX. INT'L L.J. 209, 241-42 (1990) (noting that in a letter to the U.S. Minister to Madrid on November 28, 1818, Secretary of State Adams claimed that U.S. conduct was “a necessary measure of self-defense”). Part of the U.S. motivation was nefarious, involving a growing desire to acquire Spanish Florida and a related purpose to eradicate a safe haven for former slaves from Georgia and South Carolina. See HENRY J. RICHARDSON III, *THE ORIGINS OF AFRICAN-AMERICAN INTERESTS IN INTERNATIONAL LAW* 387-89 (2008).

21. See, e.g., *Durand v. Hollins*, 8 F. Cas. 111 (C.C.S.D.N.Y. 1860) (No. 4186). Due to lack of recognition of the putative government, the community can be classified as a non-state actor.

22. *Id.* at 112. Domestically, the constitutionally-based duty of the President to faithfully execute the laws, including international law regarding self-defense, provides a competence for the President to authorize measures of self-defense consistent with international law. In this sense, presidential power is enhanced by international law. See U.S. CONST. art. II, § 3; *The Prize Cases*, 67 U.S. (2 Black) 635, 665, 671 (1862); PAUST ET AL., *supra* note 5,

sider that it had been at war with the community at Greytown or its unrecognized government.

U.S. use of force in 1916 against Francisco “Pancho” Villa in Mexico was authorized by President Wilson and justified in part because of attacks by Pancho Villa’s bands on towns in Texas and Columbus, New Mexico.²³ A second U.S. use of force occurred later that year against Mexican marauders who had attacked Glen

at 271-73, 1201-03. While answering its question “[h]ad the President a right to institute a blockade . . . on the principles of international law,” the Supreme Court declared in *The Prize Cases* “that the President had a right, *jure belli*,” and was “bound” to act by using armed force. 67 U.S. at 665, 671. The Court also addressed prior congressional authority contained in 1795 and 1807 legislation wherein the President had been “authorized to . . . use the military and naval forces . . . in case of invasion by foreign nations, and to suppress insurrection.” 67 U.S. at 668; Act of Mar. 3, 1807, ch. 39, 2 Stat. 443 (“[W]here it is lawful for the President . . . to call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed, it shall be lawful for him to employ . . . such part of the land or naval force of the United States, as shall be judged necessary.”); Act of Feb. 28, 1795, ch. 36, § 1, 1 Stat. 424 (“[W]hensoever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President . . . [a]nd in case of an insurrection in any state . . .”). Under the 1807 Act, the President can use U.S. military personnel to duly execute the competence delegated in the 1795 Act in case of invasion, i.e., to cause “the laws to be duly executed.” Ch. 39, 2 Stat. at 443; see also William C. Banks, *Providing “Supplemental Security” – The Insurrection Act and the Military Role in Responding to Domestic Crises*, 3 J. NAT’L SECURITY L. & POL’Y 39, 60-62 (2009) (concerning the early legislation and historic developments). The Constitution also requires that “[t]he United States shall . . . protect each of . . . [the States] against invasion . . .” U.S. CONST. art. IV, § 4; see also *id.* art. I, § 8, cl. 15 (establishing congressional power “[t]o provide for calling forth the militia to . . . repel invasions,” a power delegated to the President in the early legislation). It was the prior general legislative authority and perhaps Article II, Section 3 of the Constitution that the Court was referring to and not some inherent presidential power when the Court declared that if there is an invasion, “the President is not only authorized but bound to resist force . . . without waiting for any special legislative authority.” See 67 U.S. at 668. Too many textwriters have misread the case by ignoring the general statutory authority that the Court had addressed immediately prior to its statement about the lack of a need for new “special” authority. As noted, international law also provided authority for the President. Today, relevant international law that the President can execute on behalf of the United States includes Article 51 of the United Nations Charter.

23. See, e.g., Zedalis, *supra* note 20, at 243 (noting that the U.S. justification was based primarily on a right of “hot pursuit,” but that this was understood to involve a claim of self-defense); see also John Alan Cohan, *Legal War: When Does It Exist, and When Does It End?*, 27 HASTINGS INT’L & COMP. L. REV. 221, 270-72 (2004) (also addressing remarks of President Wilson and a Senate resolution concerning the expedition that had involved some 3,000 U.S. soldiers); Yoram Dinstein, *Ius ad Bellum Aspects of the ‘War on Terrorism,’ in* TERRORISM AND THE MILITARY: INTERNATIONAL LEGAL IMPLICATIONS, *supra* note 3, at 13, 21 (Professor Dinstein also reiterated his affirmation that states can respond in self-defense against non-state actor armed attacks “launched from a foreign State” whether or not the state is complicit or negligent. *Id.* at 17); George A. Finch, Editorial Comment, *Mexico and the United States*, 11 AM. J. INT’L L. 399, 399-400 (1917) (addressing the events). Three years earlier, the U.S. had detained Mexican nationals at Fort Bliss in El Paso, Texas and then at Fort Rosecrans in California who had been fighting in a Mexican civil war and fled to the U.S. from Naco, Mexico. A federal district court recognized that the President had a duty to execute a multilateral treaty relevant to the neutrality of the U.S. and that detention was not unreasonable under the circumstances. See *Ex parte* Toscano, 208 F. 939, 942-44 (S.D. Cal. 1913).

Springs, Texas.²⁴ Still later, there were clashes between Mexican and United States armed forces, which recognizably created a state of war between Mexico and the United States of short duration.²⁵

On August 20, 1998, President Clinton authorized some seventy-five cruise missile strikes against Usama bin Laden and other members of al Qaeda and their training camps in Afghanistan without consent of the Taliban government in response to al Qaeda bomb attacks on U.S. embassy compounds in Nairobi, Kenya, and in Dar Es Salaam, Tanzania that killed more than 250 persons (including 12 U.S. nationals) and injured more than 5,500 people.²⁶ The U.S. based its claim to do so partly on self-defense against groups and key terrorist leaders that “played the key role in the Embassy bombings,” had “executed terrorist attacks against Americans in the past,” and “were planning additional terrorist attacks against our citizens and others.”²⁷ In a letter to the United Nations, U.S. Ambassador Richardson stated that the United States had “acted pursuant to the right of self-defence confirmed by Article 51 of the Charter” in response to prior armed attacks and “to prevent these attacks from continuing.”²⁸ The United States also claimed that Afghanistan had been warned for years not to be a safe-haven for terrorists.²⁹ As in the case of the 1998 response to al

24. See, e.g., Zedalis, *supra* note 20, at 243.

25. See, e.g., *Arce v. State*, 202 S.W. 951, 951-52 (Tex. Crim. App. 1918); Cohan, *supra* note 23, at 271-72.

26. See, e.g., *Ceremony Honors U.S. Embassy Bombing Victims*, CNN.COM, Sept. 11, 1998, <http://www.cnn.com/US/9809/11/embassy.bomb.memorial/index.html>; Benjamin Weiser, *4 Are Sentenced to Life in Prison in U.S. Embassy Bombings*, N.Y. TIMES, Oct. 19, 2001, at A1.

27. Remarks in Martha's Vineyard, Massachusetts, on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 PUB. PAPERS 1460 (Aug. 20, 1998); see also Guiora, *supra* note 3, at 325-26; Reisman, *supra* note 3, at 48.

28. UNITED NATIONS, SECURITY COUNCIL, LETTER DATED 20 AUGUST 1998 FROM THE PERMANENT REPRESENTATIVE OF THE UNITED STATES OF AMERICA TO THE UNITED NATIONS ADDRESSED TO THE PRESIDENT OF THE SECURITY COUNCIL, U.N. Doc. S/1998/780 (1998). Domestically, President Clinton could execute the competence of the U.S. to engage in self-defense under the U.N. Charter without prior approval from Congress. See *supra* note 22.

29. See, e.g., CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 115-19 (2000) (noting that “the response of the rest of the world was generally muted,” but opining that most states are opposed to “a veneer of legality” that exists with respect to claims to use self-defense “to protect nationals . . . and to respond to terrorist and other past attacks”) Yet, she offers very little evidence of such allegedly shared expectations of “the vast majority of other states” and apparently does not realize that every act of self-defense “if an armed attack occurs” will involve a response to a past attack (unless the attack is still occurring) and that the state responding to a series of armed attacks might also have a motive to prevent and deter their continuation. See also PAUST ET AL., *supra* note 5, at 1120; Ryan C. Hendrickson, *Article 51 and the Clinton Presidency: Military Strikes and the U.N. Charter*, 19 B.U. INT'L L.J. 207, 221-222 (2001) (stating that “[t]he response from the rest of the world also indicates general acceptance of Article 51's application” to the responsive strikes against a non-state actor, with some dissent); Lobel, *supra* note 3, at 556 (most states were unconcerned and “acquiesced in the U.S. missile attacks”); Lucy Martinez, *September 11th*,

Qaeda attacks, most self-defense responses to prior armed attacks will involve the motive to prevent such attacks from continuing, but the existence of mixed motives will not limit the permissibility of otherwise lawful measures of self-defense against an ongoing process of armed attacks. It is also evident that in 1998 the United States was not at war with al Qaeda or Afghanistan, but claimed the right to use significant measures of self-defense under Article 51 of the Charter outside the context of actual war.

In 2001, the United Nations Security Council and NATO recognized that the non-state al Qaeda armed attacks on September 11, 2001 triggered rights of individual and collective self-defense under the United Nations Charter and the North Atlantic Treaty.³⁰ Use of force against al Qaeda by the United States on October 7, 2001 in Afghanistan was justified, and justifiable, as self-defense against ongoing processes of armed attack on the United States, its embassies, its military, and other U.S. nationals abroad,³¹ al-

Iraq, and the Doctrine of Anticipatory Self-Defense, 72 UMKC L. REV. 123, 143, 160-61 (2003); Mary Ellen O'Connell, *Re-Leashing the Dogs of War*, 97 AM. J. INT'L L. 446, 450 (2003) (book review); cf. Lori Fisler Damrosch, *Sanctions Against Perpetrators of Terrorism*, 22 HOUS. J. INT'L L. 63, 67-68 (1999) (considering use of the cruise missiles as a "strike against the territory of Afghanistan, on the ground that Osama bin Laden was allegedly being sheltered there or carrying out his activities from bases in that territory," but not addressing the difference between an attack on al Qaeda as such and an attack against Afghanistan); Reisman, *supra* note 3, at 19, 47-49 (noting the concomitant claim of permissibility to prevent use of training camps to prepare for future attacks). There was also a missile strike on a pharmaceutical company in the Sudan that had been based on faulty intelligence and was generally condemned. See, e.g., FRANCK, *supra* note 4, at 94-96; Hendrickson, *supra*, at 222; Lobel, *supra* note 3, at 543-47.

30. See, e.g., Franck, *supra* note 3, at 840; Paust, *Use of Force*, *supra* note 3, at 535 & nn.4-5 (citing S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001)); Wilmshurst et al., *supra* note 3, at 970; O'Connell, *supra* note 29, at 450-51; see also U.N. S.C. Res. 1373, pmbl., U.N. Doc. S/RES/1373 (2001) ("unequivocal condemnation of the terrorist attacks" that occurred on 9/11, "[r]eaffirming the inherent right of individual or collective self-defence," and "[r]eaffirming the need to combat by all means . . . terrorist acts"); *id.* ¶ 3 ("Calls upon all States to . . . [c]ooperate . . . to prevent and suppress terrorist attacks and take action against perpetrators of such acts."). The call to "suppress terrorist attacks," to "combat by all means," and to "take action" is close to creating a broader Security Council authorization to use armed force against terrorist attacks and perpetrators and is at least a significant recognition of the permissibility of suppression, combat, and responsive action when the right of self-defense is triggered by non-state actor "terrorist attacks." See, e.g., Paust, *Use of Force*, *supra* note 3, at 544-45; see also *infra* note 41.

31. Paust, *Use of Force*, *supra* note 3, at 533-36; see also Greenwood, *supra* note 3, at 21-23; Adam Roberts, *The Laws of War in the War on Terror*, in TERRORISM AND THE MILITARY: INTERNATIONAL LEGAL IMPLICATIONS, *supra* note 3, at 65, 68 ("As regards the *ius ad bellum* issues raised after 11 September, my own views are in favour of the legality . . . of the military action in Afghanistan."); O'Connell, *supra* note 29, at 450-51 ("[U]se of force in Afghanistan in 2001 was lawful self-defense. . . . September 11 attacks were part of a series of terrorist actions" that began in 1993 "and would include future attacks," and Security Council resolutions "reveal the Council's consensus that armed force in self-defense following terrorist attacks is lawful."); Jonathan Ulrich, Note, *The Gloves Were Never On: Defining the President's Authority to Order Targeted Killing in the War Against Terrorism*, 45 VA. J. INT'L L. 1029, 1047-49 (2005).

though permissibility of the use of force against the Taliban at that time was “highly problematic” and, to be lawful, would have had to have hinged on some form of direct involvement by the Taliban in and control of the al Qaeda attacks that would have resulted in attribution of the 9/11 attacks to the Taliban government (which has never been proven) and not merely on an alleged tolerating, harboring, endorsing, or financing of al Qaeda by the Taliban that might merely lead to what is termed “state responsibility.”³² Neither the Security Council nor NATO expected that there must be geographic or time limits that might condition permissibility of U.S. measures of self-defense against al Qaeda, nor was there an expectation that measures of self-defense against al Qaeda in Afghanistan would require the consent of the Afghan government or the existence of an armed conflict with the United States.

II. NEITHER CONSENT FROM NOR ATTRIBUTION TO THE FOREIGN STATE IS REQUIRED

Nothing in the language of Article 51 of the United Nations Charter or in customary international law reflected therein or in pre-Charter practice noted in Part I requires consent of the state from which a non-state actor armed attack is emanating and on whose territory a self-defense action takes place against the non-state actor. In fact, with respect to permissible measures of self-defense under Article 51, a form of consent of each member of the United Nations already exists in advance by treaty. In contrast, consent generally would be required for ordinary law enforcement measures,³³ but selective use of armed force in self-defense is not

32. Paust, *Use of Force*, *supra* note 3, at 540-43. Permissibility of self-defense measures against the state on whose territory the non-state actor attacks originated (as opposed to those against the non-state actor as such) does not exist when the state merely has “state responsibility” for tolerating, harboring, or financing the attacks, which can lead to political, diplomatic, economic, or juridic sanctions against the state, but not a responsive use of military force against the state as such. *See id.* at 540-41. “State responsibility” is therefore not the same as “attribution” or “imputation,” whereby the acts of the non-state actor are attributed to the state as if the state had engaged in the armed attacks. Concerning the general test with respect to attribution justifying military force in self-defense against the state, see, for example, *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶¶ 115, 195, 228, 230 (June 27); Paust, *Use of Force*, *supra* note 3, at 540-43; *see also* *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, 222-23, 226, ¶¶ 146-147, 160 (Dec. 19). In the *Armed Activities* case, Judges Kooijmans and Simma rightly recognized that self-defense can be permissible against non-state actor armed attacks whether or not the state from whose territory an attack emanates is involved. *See supra* note 3. Importantly also, Article 2(4) of the Charter does not have to be violated by a state before a responding state can exercise its “inherent right” of self-defense against non-state actor armed attacks.

33. *See, e.g.*, *The Apollon*, 22 U.S. (9 Wheat.) 362, 370-71 (1824); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 432(2), 433(1)(a) (1987)

simplistically “law enforcement” whether the measures of self-defense are used in time of war or relative peace.

For these reasons, with respect to U.S. use of drones in Pakistan to target al Qaeda and Taliban leaders and fighters, it is clear that the U.S. would not need the express consent of Pakistan to carry out self-defense targeting.³⁴ It is also clear that the U.S. has the right to use drones in Pakistan under Article 51 of the Charter in self-defense to protect U.S. troops from a continual process of al Qaeda and Taliban attacks³⁵ on U.S. military personnel and others in Afghanistan that have emanated or been directed partly from

[hereinafter RESTATEMENT]; PAUST ET AL., *supra* note 5, at 658-65; *see also* Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9), 34-35 (a state cannot intervene in foreign territorial waters in order to obtain evidence of a past wrong by the coastal state); *cf. infra* note 71 (concerning the special circumstance of occupied territory and the authority of an occupying power).

34. *But see* O’Connell, *Unlawful Killing 2*, *supra* note 2 (manuscript at 18) (stating that the United States “could have joined” Pakistan in use of force “upon an invitation to do so,” and that “[w]ithout express, public consent . . . Pakistan is in a position to claim that the U.S. is acting unlawfully”); *id.* (manuscript at 21) (stating that “Pakistan has not expressly invited the United States”); *id.* (manuscript at 25-26) (stating that “Pakistan has neither requested U.S. assistance in the form of drone attacks nor expressly consented” and concluding that the United States does not “have a basis in the law of self-defense for attacking inside Pakistan.”). She even opines that the U.S. cannot rightly defend its troops in Afghanistan by use of force “from Afghan territory” unless it gets “consent” from the Afghan government. *See* O’Connell, *Unlawful Killing 2*, *supra* note 2 (manuscript at 20-21) (claiming that “the U.S. needs Afghanistan’s consent to carry out such raids from Afghan territory.”). This preference for a special double-consent of states and the possibility of a single veto seems to rest on notions arising from a law enforcement or crimes paradigm operative amidst a rigid state-oriented system of law and power and, in any event, it is evident that acceptance of such an extreme viewpoint would cripple the right of self-defense. With respect to an alleged need for consent, *see* Jonathan Somer, *Acts of Non-State Armed Groups and the Law Governing Armed Conflict*, ASIL INSIGHTS, Aug. 24, 2006, <http://www.asil.org/insights/2006/08/insights060824.html> (arguing that “[i]f that State does not give its consent, then any use of force on its territory will be an illegal use of force according to the traditional Charter system”); *see also* Banks, *supra* note 3, at 66-67 (arguing that “the injured state must provide the host State with some warning, and either request that the host State handle the problem itself, or seek the host State’s permission”), *id.* at 93-94, 106-07 (preferring an alleged “duty to warn” the foreign state because of a concern for its “territorial integrity”—but seemingly missing the points (1) that force may not actually be directed against “territorial integrity” and the integrity of territory may not be directly thwarted by use of selective force against non-state attackers, and (2) “territorial integrity” must ultimately be subordinate to permissible self-defense unless the state being attacked can only defend itself within its own borders). *But see id.* at 77-78 (rightly noting that “the host State may not be aware of the terrorist infestation, or may be unable to operate against the terrorists” and requiring “attribution” of the attacks to the state “is a red herring when addressing a State’s right of self-defense when faced with an imminent or actual terrorist attack.” Furthermore, “the force used is directed primarily against the terrorist organization itself, and not necessarily against host State forces or facilities.” (citing Michael N. Schmitt, *Deconstructing October 7th: A Case Study in the Lawfulness of Counterterrorist Military Operations, in* TERRORISM AND INTERNATIONAL LAW: CHALLENGES AND RESPONSES 39, 45 (Michael N. Schmitt ed., 2002))); Paust, *Use of Force*, *supra* note 3, at 540), *id.* at 84 (“[T]here is no need to attribute the terrorist attacks to the host State . . . [i]f the force used in self-defense is directed solely against the terrorist organization.”); *Armed Activities on the Congo*, 2005 I.C.J. at 222, ¶ 144 (quoted *infra* note 36).

35. *But see supra* notes 2 & 34.

territory in Pakistan for several years during a continuing international armed conflict and when al Qaeda and Taliban fighters move back and forth across the porous border that neither country effectively controls. Some might claim that Article 51 self-defense measures in response to attacks that involve “armed cross-border incursions” by “militant groups” that “remain active along a border for a considerable period of time” and cause continued death and destruction do not create a right of self-defense³⁶ and that, absent consent, self-defense measures involving significant force may only be used on the territory of a state that is responsible for an armed attack on the defending state.³⁷

In any event, it would be incorrect to claim that a state being attacked by non-state actors has no right to defend itself outside its own territory absent (1) consent from a foreign state from which

36. See O’Connell, *Unlawful Killing 2*, *supra* note 2 (manuscript at 15). She considers that the ICJ *Armed Activities on the Territory of the Congo* case supports her view because the ICJ did not find imputation to the Congo of non-state acts of violence. See *id.* (manuscript at 15) (arguing further that cross-border incursions “are not considered attacks under Article 51 . . . unless the state where the group is present is responsible for their actions”). However, because the issue addressed by the ICJ involved use of force against a state the ICJ expressly declared that it had “no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.” *Armed Activities on the Congo*, 2005 I.C.J. at 223, ¶ 147; see also Trapp, *Reply*, *supra* note 3; Wilmshurst et al., *supra* note 3, at 970-71 n.25 (ICJ did “not answer the question as to . . . an armed attack by irregular forces”). More importantly and compelling, the ICJ impliedly recognized that consent of the territorial state is not required and that such forms of self-defense can be permissible when it stated that Ugandan military operations on the territory of the Democratic Republic of the Congo (DRC) against a non-state actor allegedly “in self-defence in response to attacks that had occurred . . . cannot be classified as coming within the consent of the DRC, and their legality . . . must stand or fall by reference to self-defence as stated in Article 51 of the Charter.” *Armed Activities on the Congo*, 2005 I.C.J. at 222, ¶ 144.

37. See *supra* note 34; see also O’Connell, *Unlawful Killing 2*, *supra* note 2 (manuscript at 14) (stating that “[t]he reference in Article 51 to self-defense is to the right of the victim state to use significant offensive military force on the territory of a state legally responsible for the attack” and that “a terrorist attack will almost never meet these parameters for the lawful exercise of self-defense. . . . [in part because they may not rise to the level of an attack and because they] are rarely the responsibility of the state where the perpetrators are located”); *id.* (manuscript at 21) (stating that “Pakistan is not responsible for an armed attack on the United States and so there is no right to resort to military force under the law of self-defense”); *id.* (manuscript at 26) (claiming that the United States does not “have a basis in the law of self-defense for attacking inside Pakistan”); O’CONNELL, *supra* note 3, at 319 (quoted *supra* note 3), 320 (quoted *infra* note 39); *supra* note 36. But see O’Connell, *supra* note 29, at 450-51 (quoted *supra* note 31 regarding permissible use of force on Afghan territory and Security Council recognition that “armed force in self-defense following terrorist attacks is lawful”). Ultimately, the result of such a preference would be to value territorial integrity over the right of self-defense against armed attacks and, where the foreign state has not provided special consent and non-state actor attacks are not imputed to the state, to most likely encourage violence and functional safe havens for those who initiate violence against other human beings. This would not appear to serve peace and security when such armed attacks are occurring or peace more generally over time when various non-state actors are prepared to engage in transnational acts of terroristic violence without regard to peace, territorial boundaries, the dictates of humanity, or the dignity of their victims.

continuing armed attacks emanate, (2) attribution or imputation of non-state actor attacks to the foreign state when that state is in control of the non-state actor and the foreign state is thereby directly responsible for the armed attacks as if it engaged in the attacks, or (3) a relevant international or non-international armed conflict.³⁸ There is no evidence of a consistent pattern of generally shared legal expectation in the international community that directly supports such a restrictive view of the right of self-defense against armed attacks³⁹ and it is inconsistent with pre-Charter

38. *But see supra* notes 2, 34, 36-37.

39. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9); *see also supra* note 3; *cf.* O'CONNELL, *supra* note 3, at 320. In this regard, Professor O'Connell referred merely to a 1988 incident when "Israel sent a commando team to Tunisia to kill" a high level member of the PLO, which was condemned by the Security Council as an impermissible "assassination" (*see* U.N. S.C. Res. 611, U.N. Doc. S/RES/611 (Apr. 25, 1988), and the *Advisory Opinion on the Wall*, 2004 I.C.J. 136). *Id.* at 320. The 1988 Security Council resolution made no mention of an Israeli claim of self-defense against an armed attack, and the U.S. Ambassador at the time stated that the Israeli conduct was a "political assassination," not self-defense. *Id.* For this reason, the 1988 assassination is not actually an example of use of armed force in self-defense against an armed attack by a non-state actor.

With respect to the ICJ Advisory Opinion, Professor O'Connell recognized in an earlier writing that "the situation Israel faced at the time of the Advisory Opinion was more akin to terrorist attacks perpetrated by the state's own nationals within the state's own territory" (or a law enforcement paradigm when attacks emanate from occupied territory under Israeli control and the attacks have "been treated as criminal" acts) than self-defense against armed attacks originating from abroad, "because of the measure of control Israel exercises over the occupied territories." Mary Ellen O'Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror?*, 43 COLUM. J. TRANSNAT'L L. 435, 451 (2005). Her important insight and compelling characterization in 2005 causes one to question whether the Advisory Opinion directly addressed the right of self-defense against non-state actor attacks emanating from the territory of another state where the victim state has no law enforcement authority, and whether the Advisory Opinion impliedly did so in a way that some textwriters have missed when it attempted to distinguish the permissibility of responses to the 9/11 attacks contemplated by Security Council resolutions 1368 and 1373 from the Israeli construction of a wall on occupied territory. *See Advisory Opinion on the Wall*, 2004 I.C.J. 136; *see also* MELZER, *supra* note 1, at 52 n.46 (the ICJ held that as an occupying power Israel had effective control over occupied territory and "could not base its security measures . . . on Art 51"); Wilmshurst et al., *supra* note 3, at 966 (asserting that the Advisory Opinion "may be read as reflecting the obvious point that unless an attack is directed from outside territory under the control of the defending State the question of self-defence in the sense of Article 51 does not normally arise"); *id.* at 969 ("[Article 51] should not be read as suggesting that the use of force in self-defense is not permissible unless the armed attack is by a State."). *But see* O'CONNELL, *supra* note 3, at 320 ("The Wall Case explains that where a state is not responsible for terrorist attacks, Article 51 may not be invoked to justify measures in self-defense.").

Earlier, when Israel attacked the headquarters of the PLO in Tunis, Tunisia on October 1, 1985, it was in a circumstance that was not justified by the necessity of self-defense against ongoing armed attacks, and the Israeli attack was condemned. *See, e.g.,* Paust, *Responding*, *supra* note 3, at 712-13, 723; U.N. S.C. Res. 573, U.N. Doc. S/RES/573 (Oct. 4, 1985). However, the United States declared that in different circumstance "a state subjected to continuing terrorist attacks may respond with appropriate use of force to defend against further attacks." *See* Paust, *Responding*, *supra* note 3, at 712, 723 (quoting Press Release, U.S. Mission to the U.N., No. 106(85) (Oct. 4, 1985), extract reprinted in 80 AM. J. INT'L L. 166, 167 (1986)).

practice and patterns of expectation noted in Part I above that were undoubtedly known to some of the drafters of the U.N. Charter.

Professor O'Connell argues that "States are restricted from using military force outside" of self-defense or authorization from the Security Council;⁴⁰ that "drone attacks in Pakistan involve significant firepower," "have amounted to significant uses of force," and "[t]he right to use them must be found in the *jus ad bellum*" (which would clearly include the right of self-defense);⁴¹ and that "signifi-

40. O'Connell, *Unlawful Killing 2*, *supra* note 2 (manuscript at 11). This misses the point that a regional organization can also authorize the use of "regional action" under Article 52 of the United Nations Charter and inquiry into permissible use of force under the Charter must be more nuanced. *See, e.g.*, PAUST ET AL., *supra* note 5, at 1092-93 (regarding O.A.S. authorization in 1962 with respect to the Cuban Missile interdiction and NATO authorization concerning Kosovo in 1999); Paust, *Use of Force*, *supra* note 3, at 545-47, 536-38 (concerning the preamble to the Charter and what are merely three forms of force proscribed in Article 2(4) of the Charter and the need to consider the character, gravity, and scale of force used and other features of context before concluding that a particular use of force is "against" territorial "integrity," "against" political independence or in any other manner inconsistent with the purposes of the Charter). Concerning the history of Article 52 and the desire to protect lawful regional action in opposition to completely concentrated power in the Security Council (and its five permanent members), see Mark B. Baker, *Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nations Charter)*, 10 HOUS. J. INT'L L. 25, 30-31 (1987).

41. O'Connell, *Unlawful Killing 2*, *supra* note 2 (manuscript at 13); *see also id.* (manuscript at 3 n.15) (claiming also that a U.S. selective strike against members of al Qaeda riding in a car in Yemen in November, 2002 "was an unlawful action because it was military force used outside of an armed conflict"); *id.* (manuscript at 19) ("There simply is no right to use military force against a terrorist suspect far from any battlefield."); O'Connell, *supra* note 29, at 454-55 (claiming that "the Predator strike was an extrajudicial execution prohibited by the [ICCPR]," but not addressing the limiting reach of the ICCPR set forth in Article 2(1) of the ICCPR that is addressed in Part IV.B *infra* or the fact that the test under relevant human rights law would involve inquiry whether a particular self-defense targeting was "arbitrary"); *cf.* MELZER, *supra* note 1, at 4 (lack of "physical custody . . . distinguishes targeted killings from . . . extrajudicial 'executions' "); *id.* at 224 (regarding the targeting in Yemen); Chris Downes, *'Targeted Killings' in an Age of Terror: The Legality of the Yemen Strike*, 9 J. CONFLICT & SECURITY L. 277, 282-85 (2004) (also stating that U.N. S.C. Res. 1373 provided states with an unprecedented mandate to use force." *Id.* at 286). *But see* Gregory E. Maggs, *Assessing the Legality of Counterterrorism Measures Without Characterizing Them as Law Enforcement or Military Action*, 80 TEMP. L. REV. 661, 677 (2007) (addressing the U.S. claim before the U.N. Commission on Human Rights); Printer, *supra* note 3, at 353, 354, 356-58 (arguing that the attack was justified by military necessity against ongoing attacks and that U.N. S.C. Res. 1373 provided an "imprimatur" in the context of U.S. notification to the Security Council of its use of self-defense against al Qaeda in Afghanistan on October 7, 2001, the lack of Security Council inquiry into the propriety of the action, and the specific language in the resolution calling for the combating of terrorist acts "by all means." *See also supra* note 30.).

A similar military strike by helicopter on a key al Qaeda operative in a car in Somalia on September 15, 2009 was authorized by President Obama. The al Qaeda "senior operative" was said to be tied to the U.S. Embassy bombings in Kenya and Tanzania. An Information Minister of Somalia said "[w]e welcome that attack." *See* Mohammed Amin Adow et al., *Key al Qaeda Operative Killed in U.S. Strike, Somalia Says*, CNN.COM, Sept. 15, 2009, <http://www.cnn.com/2009/WORLD/africa/09/15/somalia.strike/index.html>. We do not know what the al Qaeda persons in Yemen or Somalia were doing at or near the time of targeting. For example, were they directly participating in armed attacks on U.S. soldiers in Afghanis-

cant military attacks . . . [are] only lawful in the course of an armed conflict.”⁴² For these reasons, she seems to be of the opinion that use of significant military force in response to a significant armed attack by a non-state actor outside the context of war should be unlawful.⁴³ In any event, there is no evidence of widespread expectation or general patterns of practice that directly support such a view and it would not be policy-serving or realistic. Furthermore, she does not seem to fully consider the fact that continuing al Qaeda and Taliban armed attacks planned, initiated, coordinated, or directed from inside Afghanistan and Pakistan on U.S. military personnel in Afghanistan who are engaged in an international armed conflict are necessarily part of such an armed conflict and that the *de facto* theatre of war has expanded into parts of Pakistan at least since 2004,⁴⁴ although she recognizes

tan through use of cell phones or computers or in some other way? If so, they would be targetable under both the self-defense and law of war paradigms as direct participants in armed attacks (DPAA) or in hostilities (DPH). *See also infra* note 90. They would also be targetable regardless of their nationality. *See infra* note 60.

42. O’Connell, *Unlawful Killing 2*, *supra* note 2 (manuscript at 25); *see also id.* (manuscript at 3 n.15) (claiming that “the Yemen strike was an unlawful action because it was military force used outside of an armed conflict”); *id.* (manuscript at 13) (claiming that drones “used in Pakistan are lawful for use only on the battlefield” but that permissibility is tested under “the *jus ad bellum*,” which necessarily includes the right of self-defense); *id.* (manuscript at 16) (claiming that where “there has been no armed conflict. . . even express consent by Pakistan would not justify” use of drones in self-defense); *id.* (manuscript at 17) (alleging that a “state may not consent to the use of military force on its territory in the absence of armed conflict hostilities”); *id.* (manuscript at 25) (“only lawful in the course of an armed conflict”); *supra* note 41. However, some prefer to recognize the existence of an armed conflict with respect to violence involving merely “organized armed groups” that are “[e]ngaged in fighting of some intensity” and, therefore, violence below the customary criteria for an insurgency and those set forth in Geneva Protocol II. *Compare id.* (manuscript at 8 n.32) *with* materials cited *infra* notes 52-53. This approach might result in recognition that an armed conflict exists between the United States and al Qaeda and that there is a greatly expanded theatre of “war.” *But see infra* note 53.

43. She also states in this regard that “[a]n armed response to a terrorist attack will almost never meet these parameters for the lawful exercise of self-defense” involving an attack constituting a “significant amount of force” and an attack for which some state is “legally responsible.” O’Connell, *Unlawful Killing 2*, *supra* note 2 (manuscript at 14); *see also supra* note 36. Of course, this begs the question whether a particular “terrorist attack” is an armed attack that triggers Article 51 of the Charter. *See also supra* note 30. Since she considers that use of one drone’s missile will constitute a “significant” use of force, she must agree that use of a similar missile or rocket by a non-state actor group will constitute a significant use of force and, for example, that use of similar “firepower” from a terrorist bomb (as in the case of the al Qaeda armed attack on the U.S.S. Cole in Yemen that led to the death of 17 U.S. nationals and the al Qaeda attacks on U.S. embassies in Kenya and Tanzania that resulted in the death of some 250 persons) or destruction of a commercial aircraft in flight with some 300 persons on board will also be significant.

44. *See also* O’Connell, *Unlawful Killing 2*, *supra* note 2 (manuscript at 16) (“For much of the period that the United States has used drones on the territory of Pakistan, there has been no armed conflict [and allegedly] . . . [t]herefore, even express consent by Pakistan would not justify their use.”); *id.* (manuscript at 21) (arguing that “the only armed conflict in Pakistan is an internal or non-international armed conflict” that occurred in the spring of 2009). *But see* Nanda, *supra* note 3, at 533 (recognizing that the theatre of war or “geographical region of conflict” necessarily includes parts of Pakistan); Koh, Obama Ad-

that “[a]pparently U.S. drone attacks in Pakistan aim at militants who attack U.S. troops in Afghanistan or join with al-Qaeda.”⁴⁵

Importantly, the theater can expand when the area of direct participation in hostilities expands and this can occur, for example, when al Qaeda or Taliban leaders use cell phones or computers inside Pakistan to directly participate in hostilities. Additionally, direct participation in a process of armed attacks that triggers the right of self-defense under Article 51 of the U.N. Charter and the right to target those who are directly participating in the process of armed attacks can occur outside of an area where the armed attacks are finally experienced.

Two hypothetical situations demonstrate why claims to change the law of self-defense by imposing new requirements of “express consent,” attribution, and/or the existence of an armed conflict are not compelling, policy-serving, or realistic. First, consider the circumstance where a non-state terrorist group acquires rockets capable of striking short-range targets and starts firing them from Mexico (without the consent of the Government of Mexico or prior foreseeability) into Fort Bliss, a U.S. military base near El Paso, Texas. Must the United States actually obtain a special expressed consent of the Mexican Government or already be engaged in a war with the terrorist group (if that is even possible) before resorting to a selective use of force in self-defense to silence the terrorist attacks on U.S. military personnel and other U.S. nationals? I

ministration, *supra* note 3, pt. B (claiming that “the United States is in an armed conflict with al-Qaeda, . . . and may use force consistent with its inherent right of self-defense . . . [and since] al Qaeda . . . continues to attack us . . . in this ongoing armed conflict, the United States has the authority under international law . . . to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks”). Professor Nanda’s apt recognition is important and alerts one to the complexities involved with respect to the nature of the international armed conflict and the realities of participation by various persons from inside Afghanistan and Pakistan, especially among Pashtuns and others with cross-border ties and loyalties that have existed long before the Soviet invasion of Afghanistan and the more recent use of armed force in Afghanistan since October 7, 2001 by the United States. Two of the dirty little secrets relevant to such interconnections involve the fact that thousands of members of the Pakistan military were aiding the Taliban in its war with the Northern Alliance when the United States first intervened (*see, e.g.*, Paust, *Use of Force, supra* note 3, at 539 n.19, 543 n.36) and that the “oil” in Afghanistan is opium destined mostly for Europe through the hands of organized crime that now helps to finance the Taliban war against the United States. Professor O’Connell notes that the United States has used drones in Pakistan since 2004. *See* O’Connell, *Unlawful Killing 2, supra* note 2 (manuscript at 4); *see also supra* note 1. It would not be surprising to learn that Special Operations units had been on the ground in Pakistan very early in the war as well. *See* STEPHEN DYCUS ET AL., COUNTERTERRORISM LAW 71 (2007). Jane Mayer notes that “the C.I.A. has joined the Pakistani intelligence service in an aggressive campaign to eradicate local and foreign militants” and that the President of Pakistan now has “more control over whom to target.” Jane Mayer, *The Predator War*, THE NEW YORKER, Oct. 26, 2009, at 36, 37, 42.

45. O’Connell, *Unlawful Killing 2, supra* note 2 (manuscript at 19).

doubt that any state under such a process of armed attack would wait while the rocket attacks continue or expect that under international law it must wait to engage in selective self-defense against the attackers. Furthermore, I doubt that any state would expect that it cannot engage in measures of self-defense to stop such rocket attacks if it had not been and cannot be at war with non-state terrorist attackers or that it cannot take such defensive measures if it is not otherwise engaged in a relevant armed conflict.

Certainly the President of the United States would try to communicate as soon as possible with the President of Mexico and others concerning what is occurring, and the fact that the United States is not attacking Mexico, but the U.S. President would not have to wait for a formal response while rockets were raining down on U.S. soldiers. Additionally, although it would be polite, the United States would not have to warn Mexican authorities before engaging in selective measures of self-defense to stop continuing attacks. Under various circumstances, a warning can be impracticable, futile, and/or create complications threatening the success of a self-defense response,⁴⁶ especially in other contexts if a special operations unit is being used for reconnaissance or to carry out the self-defense action.

Such a form of selective self-defense would be an intervention and interference with the sovereignty of Mexico, but it begs the question at stake to conclude that the "sovereignty" of Mexico is "violated" or has been "attacked" (or if violated that an exception does not exist) when permissible measures of self-defense are used merely against non-state actors engaged in armed attacks. This is especially evident when it is realized that sovereignty of the state is not absolute under international law or impervious to its reach,⁴⁷ territorial integrity of the state is merely one of the values

46. See, e.g., Banks, *supra* note 3, at 93-94.

47. See, e.g., Nationality Decrees in Tunis and Morocco, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 24-32 (Feb. 7); United States v. Von Leeb (The High Command Case), in 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 462, 489 (1950) ("International law operates as a restriction and limitation on the sovereignty of nations."); THOMAS BUERGENTHAL ET AL., INTERNATIONAL HUMAN RIGHTS 3-7 (3d ed. 2002); CHEN, *supra* note 5, at 314-17; RICHARD B. LILICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS 613-14 (3d ed. 1995); HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (Richard B. Lillich ed. 1973); MYRES S. MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER 181-82, 208-15, 238-42, 670 (1980); FERNANDO R. TESON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (2d ed. 1997); HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 95 (Da Capo Press 1972) (1846) (sovereignty is not an absolute barrier to military intervention and cannot be exercised in a manner "inconsistent with the equal rights of other States"); Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and National Defense*, 126 MIL. L. REV. 89, 106 (1989) ("[T]erritorial integrity is not

preferred in the U.N. Charter, and permissible measures of self-defense under Article 51 of the Charter that are reasonably necessary and proportionate against actual armed violence must necessarily override the general impermissibility that attaches to armed intervention.⁴⁸ Moreover, members of the U.N. have consented in advance by treaty to permissible self-defense under Article 51 of the Charter. If Mexico communicates its special ad hoc consent during the process of armed attacks, hardly anyone would question the permissibility of a necessary and proportionate U.S. response.

Second, with respect to analogous inquiry into claims of self-defense under domestic law, if a person is firing a rifle from the back bedroom window of a house into another house and had killed a child in the other house, would the neighbor whose child had been killed and who is still under a rifle attack have to warn the shooter before using a weapon to kill the shooter, and isn't the shooter on notice of what can happen next? Would the neighbor have to wait for consent from the owner of the house from which

entitled to absolute deference."); see also RESTATEMENT, *supra* note 33, § 905 cmt. g (1987) ("It is generally accepted that Article 2(4) [of the U.N. Charter] does not forbid limited use of force in the territory of another state incidental to attempts to rescue persons whose lives are endangered there, as in the rescue at Entebbe in 1976."); Koh, Obama Administration, *supra* note 3, pt. B ("[W]hether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including . . . the sovereignty of the other states involved."). More specifically, the pretended cloak of state sovereignty ends where human rights begin (especially with respect to public, diplomatic, and juridic sanctions), although admittedly not all violations of international law by a state can lead to permissible use of force in response.

48. See also *supra* note 12 and accompanying text (recognitions of Ashburton and Webster during the *Caroline* incident); Letter of Daniel Webster, *supra* note 11, at 454, 455 ("Respect for the inviolable character of the territory of independent States is the most essential foundation of civilization. And while it is admitted, on both sides, that there are exceptions to this rule . . . such exceptions must come within the limitations stated and the terms used in a former communication from this Department to the British Plenipotentiary here. Undoubtedly it is just, that while it is admitted that exceptions growing out of the great law of self-defence do exist, those exceptions should be confined to cases in which the 'necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.' "). It is also of interest that intervention is not absolutely prohibited. For example, intervention into "the affairs of" a state is impermissible. See, e.g., U.N. Charter art. 2(7); 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), pmbl., U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028, at 121, (Oct. 24, 1970). But non-state actor armed attacks emanating from a state are not simplistically merely the "affairs of" that state. Within the Americas, self-defense "in accordance with existing treaties or in fulfillment thereof" is also permissible under Article 22 of the O.A.S. Charter. Charter of the Organization of American States, art. 22, Apr. 30, 1948, 2 U.S.T. 2394. Article 21 of the O.A.S. Charter declares that "territory of a State is inviolable" and "may not be the object . . . of . . . measures of force" (*id.* art. 21), but self-defense is an exception under the U.N. Charter and, therefore, Article 22, and in the hypothetical the territory of Mexico would not be "the object" of a selective self-defense strike against non-state attackers nor would the use of force be "against" its territory or its territorial "integrity" within the language of Article 2(4) of the U.N. Charter in view of its character, gravity, and scale.

the rifle fire is coming before using a weapon in self-defense or defense of his family? And if the neighbor was renting the house in which he and his family is being attacked, does he have to obtain consent from the owner of the house in order to respond in self-defense? What domestic law of any state within the United States or any country requires such a warning or consent or some similarly extreme limitation on the right of self-defense or defense of others? Certainly police could be called by the neighbor (assuming there is time to do that), but must the neighbor wait until the police arrive and take “measures necessary to maintain”⁴⁹ law and order while the neighbor and his family are still under rifle attack? The answers seem self-evident.

III. RESPONSIVE MEASURES OF SELF-DEFENSE DO NOT NECESSARILY CREATE A STATE OF WAR

If a state engages in legitimate self-defense in a selective and proportionate manner merely against non-state actors that are perpetrating, aiding, or directing ongoing armed attacks, such selective responsive targetings are not an attack on the state in which the non-state actors are located. Such a defensive use of force will not create a state of war or an armed conflict of any duration between the state engaged in self-defense and the state on whose territory the self-defense targetings take place.⁵⁰ Former Legal Adviser to the Secretary of State Abraham Sofaer has recognized, for example, that in a circumstance where U.S. units capture non-state actor terrorists who have taken hostages in a foreign state,

the President may decide to deploy specially trained anti-terrorist units in an effort to secure the release of the hostages or to capture the terrorists who pepe-

49. U.N. Charter art. 51 (“until the Security Council has taken measures necessary to maintain international peace and security”). In the domestic context, there are police that might arrive later, but in the international context waiting for the “police” while being subjected to ongoing armed attacks would be in vain. See Greenwood, *supra* note 3, at 22 (stating that no legal requirement exists for a state to wait for Security Council approval).

50. See, e.g., Paust, *Overreaction*, *supra* note 3, at 1341 & n.23, 1344; Paust, *Use of Force*, *supra* note 3, at 535 n.3; see also Banks, *supra* note 3, at 77-78, 84; Henkin, *supra* note 3, at 821; Roberts, *supra* note 31, at 69-70 (“Neither all terrorist activities, nor all counter-terrorist military operations, even when they have some international dimension, necessarily constitute armed conflict between States,” state responses “outside its own territory” to some non-state terrorists do not necessarily constitute armed conflicts, and some terrorist organizations do not even trigger application of Geneva provisions concerning insurgencies); cf. DINSTEIN, *supra* note 3, at 245 (arguing that such creates an “armed conflict” with the state but not a “war”).

trated the act. . . . [W]here no confrontation is expected between our units and forces of another state. . . . such units can reasonably be distinguished from . . . “forces equipped for combat.” And their actions against terrorists differ greatly from the “hostilities” expressly contemplated by the [War Powers] resolution.⁵¹

Importantly, in the case of U.S. use of drones in Pakistan for several years without special Pakistani consent against members of al Qaeda and the Taliban in self-defense and in connection with the international armed conflict in Afghanistan and its expanded *de facto* theatre, neither Pakistan nor the United States have considered that it is at war with the other—nor does it seem that any other state or international organization considers Pakistan and the United States to be at war.

Additionally, it is error to assume that a state of war necessarily exists between a state and non-state actor whenever a state that has been subjected to an armed attack by a non-state actor responds against the non-state actor with military force, since the minimal level of war or armed conflict under international law involves an armed conflict not of an international character or an

51. *War Powers, Libya, and State-Sponsored Terrorism: Hearing Before the Subcomm. on Arms Control, International Security and Science of the H. Comm. on Foreign Affairs*, 99th Cong. 6-7 (1986) (statement of Abraham D. Sofaer, Legal Adviser, Department of State). As noted in another writing,

I am one of several scholars who also recognize that the use of reasonably necessary and proportionate force to rescue hostages abroad can be legally permissible. This is especially so when the use of force is reasonably necessary in order to defend one’s nationals and/or others from imminent threat of death or serious bodily harm in violation of fundamental human rights, and when the overall effort is to extract hostages from such a circumstance of harm. Evacuation missions involve merely a temporary and proportionate use of force in order to withdraw the victims . . . [and they are] potentially the least destructive form of any of the self-help or sanction responses [that are permissible under the U.N. Charter].

Paust, *Responding*, *supra* note 3, at 728-29. The 1976 Israeli Entebbe raid into Uganda to rescue Israeli nationals being held hostage by non-state actors and under a threat of imminent death was an example mentioned in the writing. *See id.* at 728 n.60 (citing McDougal & Reisman, *Entebbe*, *supra* note 3, among other works). Professor Green notes that “Israel referred to the *Caroline* explicitly in relation to” the Entebbe rescue operation while defending its self-defense action before the U.N. Security Council. Green, *supra* note 16, at 446; *see also* Rogoff & Collins, *supra* note 7, at 507 (quoting Israeli Ambassador Herzog’s remarks before the U.N. Security Council). Concerning the permissibility of such defensive rescue and evacuation measures as measures of self-defense, *see* Gill, *supra* note 3, at 27; Martinez, *supra* note 29, at 157-58; John F. Murphy, *State Self-Help and Problems of Public International Law*, in *LEGAL ASPECTS OF INTERNATIONAL TERRORISM* 553, 554-58, 563 (Alona E. Evans & John F. Murphy eds., 1978); Oscar Schachter, *Self-Defense and the Rule of Law*, 83 *AM. J. INT’L L.* 259, 271 (1989); Sofaer, *supra* note 47, at 107. Concerning the view that such a rescue is not prohibited under Article 2(4) of the U.N. Charter, *see*, for example, *RESTATEMENT*, *supra* note 33, § 905, cmt. g (quoted *supra* note 47).

insurgency⁵² and some non-state actors, such as al Qaeda, do not meet the test for insurgent status.⁵³ Moreover, the United States does not have to be at war with al Qaeda in order to target their members in self-defense. No one argues that self-defense under Article 51 of the Charter can only be engaged in during war.⁵⁴ For these reasons, Article 51 self-defense actions provide a paradigm that is potentially different than either a mere law enforcement or war paradigm, and it is understood that military force can be used in self-defense when measures are reasonably necessary and proportionate. The Charter-based “inherent right” of self-defense in case of an armed attack by a non-state actor and the self-defense paradigm are also partly outside the state-to-state use of force paradigm requiring attribution to a state of non-state actor attacks

52. See, e.g., JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW 654 (3d ed. 2007), and references cited therein. Traditional criteria for existence of an insurgency include the need for (1) semblance of a government, (2) control of significant territory as its own, (3) an organized armed force with the ability to field military units in sustained hostilities, and (4) a population base of support. See *id.* at 646-48, 651; Paust, *Overreaction*, *supra* note 3, at 1341. But see MELZER, *supra* note 1, at 254 (arguing that Geneva common Article 3 conflicts do not require “territorial control or any other form of factual authority”).

An opinion of the Appeals Chamber of the International Criminal Tribunal for Former Yugoslavia chose a much lower threshold, stating that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995). The *Tadic* preference is shared by some writers but is generally without support in state practice and generally shared patterns of legal expectation and is even broader than Article 1(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, adopted on June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Geneva Protocol II]. The Geneva Protocol requires an organized armed group to be “under responsible command, [and] exercise such control over a part of . . . [a state’s] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” *Id.* art. 1(1). Would the *Tadic* preference apply to continued violence between rival gangs in East Los Angeles or Chicago? If so, would local police become lawful targets during “war”? Would gang members who directly and actively participate in social violence be lawful targets under the laws of war? Concerning dangers with respect to lowering the threshold of armed conflict below insurgency levels of social violence, see, for example, PAUST ET AL., *supra*, at 837 (addressing a salient warning from the Supreme Court of India).

53. See, e.g., Paust, *Overreaction*, *supra* note 3, at 1340-42; Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT’L L. 325, 326-27 (2003). Al Qaeda has not even met the test set forth in Geneva Protocol II, since it never controlled territory as its own or engaged in sustained and concerted military actions. See Geneva Protocol II, *supra* note 52, art. 1(1). As the writings cited here note, for this reason the U.S. cannot be at “war” with al Qaeda as such, although the laws of war apply during the armed conflicts in Iraq and Afghanistan and members of al Qaeda in the theatre of war have rights and duties under the laws of war. But see MELZER, *supra* note 1, at 267 (but otherwise rightly noting that a common Article 3 insurgent group must be “sufficiently organized to carry out military operations reaching the threshold of intensity required for an armed conflict” to exist).

54. See Koh, Obama Administration, *supra* note 3, pt. B (“a state that is engaged in an armed conflict or in legitimate self-defense” can engage appropriate targets); cf. O’Connell, *Unlawful Killing 1*, *supra* note 2 (manuscript at 4 n.12, 19, 25) (arguing against use of “significant” or “military” force in self-defense outside the context of war); *supra* note 42.

before a responding state can target the military forces of the other state as opposed to targeting merely the non-state actors.

It should be noted, however, that if the non-state entity that initiated the armed attack has belligerent or insurgent status, an armed conflict between the responding state and the belligerent or insurgent can arise. An armed conflict involving use of armed force by the armed forces of a state outside its territory against an insurgent force should be recognized as an international armed conflict to which all of the customary laws of war apply.⁵⁵ It is in the interest of the United States and other countries to recognize the international character of such an armed conflict so that members of their armed forces have “combatant” status, prisoner of war status if captured, and “combatant immunity” for lawful acts of warfare engaged in during an international armed conflict.⁵⁶ An armed conflict between a state and a belligerent is an international armed conflict during which all of the customary laws of war apply.⁵⁷ The armed conflict between U.S. military forces and those of the Taliban inside and outside of Afghanistan since October 7, 2001 is an international armed conflict.⁵⁸

IV. TYPES OF PERMISSIBLE TARGETINGS AND CAPTURES

A. Targeted Killings and Captures During Self-Defense

With respect to permissible conduct engaged in during self-defense, measures of legitimate self-defense can include the targeting of what would be lawful military targets during war, like the head of a non-state entity (such as Usama bin Laden) or the head

55. See PAUST ET AL., *supra* note 52, at 661-62. Such a conflict is clearly not “internal” and realistically has been internationalized by the responding state. The armed conflict that has occurred in Afghanistan since October 7, 2001, is realistically international in several respects, including (1) participation by U.S. combat troops in sustained hostilities for more than eight years, (2) participation by Taliban forces (initially by armed forces of the *de facto* government of Afghanistan), (3) general control of large areas of Afghanistan by the Taliban, and (4) the expanded theatre of war into portions of Pakistan outside the effective control of the government of Pakistan.

56. Concerning “combatant” status and “combatant immunity,” see, for example, MELZER, *supra* note 1, at 309, 329; PAUST ET AL., *supra* note 52, at 651-52; Paust, *supra* note 53, at 328-32.

57. See, e.g., The Prize Cases, 67 U.S. (2 Black) 635, 666, 669 (1862); U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 9, ¶ 11(a) (1956) [hereinafter FIELD MANUAL 27-10] (“The customary law of war becomes applicable to civil war upon recognition of the rebels as belligerents.”); MELZER, *supra* note 1, at 248-49; PAUST ET AL., *supra* note 52, at 645, 651, 657, 661; Paust, *Overreaction*, *supra* note 3, at 1341 n.24. The Civil War between the United States and the Confederate States of America is an example of the classic civil war between a state and a “belligerent.”

58. See, e.g., Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law*, 43 COLUM. J. TRANSNAT’L L. 811, 813 & n.3 (2005); *supra* note 44.

of a state directly participating in ongoing processes of armed attack on the United States, U.S. military, or U.S. nationals abroad. Such lawful targetings in self-defense would not be “assassinations” which, in times of armed conflict, are considered to be “treacherous” acts and war crimes.⁵⁹

Furthermore, as noted in another writing addressing the fact that targeted killing of certain persons is clearly lawful under the laws of war, during war the selective killing of persons who are taking a direct part in armed hostilities, including enemy combatants, unprivileged combatants, and their civilian leaders (and, thus, excluding captured persons of any status), would not be impermissible “assassination.”⁶⁰

The right of self-defense also justifies the capture of bin Laden or other members of al Qaeda during a permissible defensive military incursion into Afghanistan or some other country, in order to capture and arrest those directly responsible for, or who directly participate in the ongoing [armed] attacks.⁶¹

59. See Paust, *Use of Force*, *supra* note 3, at 538; see also FIELD MANUAL 27-10, *supra* note 57, at 17, ¶ 31 (the selective targeting of enemy combatants is not “treacherous” and is, therefore, not impermissible “assassination,” and the prohibition of assassination “does not . . . preclude attacks on individual soldiers or officers of the enemy whether in a zone of hostilities, occupied territory, or elsewhere” (emphasis added)); DYCUS ET AL., *supra* note 44, at 67-69, 75; MELZER, *supra* note 1, at 47-50; W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW. 4, 7-8 (Dec. 1989); Sofaer, *supra* note 47, at 117, 120-21; Turner, *supra* note 3, at 87, 90; Howard A. Wachtel, *Targeting Osama Bin Laden: Examining the Legality of Assassination as a Tool of U.S. Foreign Policy*, 55 DUKE L.J. 677, 680-85, 690-92 (2005); Patricia Zengel, *Assassination and the Law of Armed Conflict*, 134 MIL. L. REV. 123, 125, 129-31 (1991); Koh, Obama Administration, *supra* note 3, pt. B. *But see* Gary Solis, *Targeted Killing and the Law of Armed Conflict*, 60 NAVAL WAR C. REV. 127, 134-35 (2007) (claiming that “[w]ithout an ongoing armed conflict the targeted killing of a civilian, terrorist or not, would be assassination—a homicide and a domestic crime”).

60. See, e.g., Paust, *Use of Force*, *supra* note 3, at 538 & n.17. Targeted killings have long included the killing of a particular enemy combatant with long-range sniper fire and it has been irrelevant whether that person’s name was known or whether the enemy combatant was a U.S. or foreign national. See also *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (quoting *Ex parte Quirin*, 317 U.S. 1, 20, 37-38 (1942)) (U.S. citizenship does not change enemy combatant status and consequences under the laws of war).

61. See, e.g., Farer, *supra* note 3, at 359; Michael J. Glennon, *State Sponsored Abduction: A Comment on United States v. Alvarez-Machain*, 86 AM. J. INT’L L. 746, 749, 755 (1992); Malvina Halberstam, *In Defense of the Supreme Court Decision in Alvarez-Machain*, 86 AM. J. INT’L L. 736, 736 n.5 (1992); Paust, *Use of Force*, *supra* note 3, at 538-39 & n.18; see also Sofaer, *supra* note 47, at 107; *infra* note 62. In 1992, President Clinton’s administration claimed such a right of self-defense capture on behalf of the United States “in certain extreme cases, such as the harboring by a hostile foreign country of a terrorist who has attacked U.S. nationals and is likely to do so again.” See PAUST ET AL., *supra* note 5, at 689. Bin Laden could be brought to the United States and prosecuted in a federal district court for (1) any war crimes committed at his direction or that he aided and abetted during actual wars in Afghanistan or Iraq (see generally PAUST ET AL., *supra* note 5, at 160-64; Jordan J. Paust, *After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 TEX. L. REV. 6 (1971)), (2) relevant violations of the Antiterrorism Act (see, e.g.,

Clearly, self-defense captures would be less injurious than self-defense targetings that lead to the deaths of those targeted. The captured person would not have law of war protections if he or she was captured outside the theater of an actual war and was not directly participating in an actual war, but the captured person would have relevant customary and treaty-based human rights protections.⁶²

Importantly, a self-defense “capture” would not constitute an impermissible “abduction”⁶³ of the person captured or an “arbitrary” deprivation of liberty⁶⁴ in violation of human rights law, because the deprivation of liberty would be not merely rational and policy-serving, but also part of a reasonably necessary response in self-defense that would be less injurious than a lawful targeted killing.

B. *The Relative Human Right to Life*

An otherwise lawful targeted killing in self-defense during relative peace or during war would not constitute a violation of the human right to life, which merely guarantees freedom from being “arbitrarily” deprived of life,⁶⁵ since it would be rational with re-

18 U.S.C. § 2332(a) (regarding killings of U.S. nationals outside the U.S.), (b), and (c)), and (3) violations of other relevant federal statutes (*see, e.g.*, United States v. bin Laden, 92 F. Supp. 2d 189 (S.D.N.Y. 2000)). Moreover, his capture and detention would fit within the congressional authorization in the Authorization for Use of Military Force, S.J. Res. 23, 107th Cong., 115 Stat. 224, (2001), since he planned, authorized, and ordered the 9/11 attacks. *See also Hamdi*, 542 U.S. at 517-21 (2004).

62. Jordan J. Paust, *Responding Lawfully to al Qaeda*, 56 CATH. U. L. REV. 759, 765 (2007); *see also Nanda*, *supra* note 3 (arguing for apprehension as an alternative to killings where that is feasible).

63. Concerning impermissible “abductions” as such, *see, for example*, S.C. Res. 579, U.N. Doc. S/RES/579 (Dec. 18, 1985); S.C. Res. 138, U.N. Doc. S/RES/138 (June 23, 1960) (condemnation of the Israeli kidnapping of Adolf Eichmann in Argentina); PAUST ET AL., *supra* note 5, at 446-47, 471, 499, 659, 669-70, 674, 676-77, 746. *See also* Carrie Schmizzi, *Italy Judge Convicts 23 Former CIA Agents in Rendition Trial*, JURIST, Nov. 4, 2009, <http://jurist.law.pitt.edu/paperchase/2009/11/italy-judge-convicts-23-former-cia.php>.

64. Concerning the prohibition of “arbitrary” arrest or detention of any person under human rights law, *see, for example*, International Covenant on Civil and Political Rights, art. 9(1), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, arts. 3, 9, U.N. Doc. A/RES/217 (III), (Dec. 10, 1948); Organization of American States, American Convention on Human Rights, art. 7(3), Nov. 22, 1969, O.A.S. T.S. No. 36, 1144 U.N.T.S. 123; African [Banjul] Charter on Human and Peoples’ Rights, art. 6, Oct. 21, 1986, 1981 O.A.U. Doc. CAB/LEG/67/3 Rev. 5, 1520 U.N.T.S. 217; *see also supra* notes 61, 63; *infra* note 92.

65. *See* ICCPR, *supra* note 64, art. 6(1). As I noted in another writing: With respect to tests or limits concerning applicability of the right to life, it should be noted that the authoritative *General Comment No. 24* of the Human Rights Committee operative under the *International Covenant on Civil and Political Rights*, identifies the human right to life as one among many that are peremptory norms *jus cogens* but recognizes that perpetra-

spect to a person actively participating in and taking a direct part in armed attacks (including a person who is planning or directing such attacks), policy-serving, and reasonably necessary. With respect to the application of protections under human rights law, there is an additional requirement that too many textwriters overlook. For example, under Article 2, paragraph 1, of the International Covenant on Civil and Political Rights, the critical question is whether a person being targeted by a drone flying in the airspace of a foreign country is within the jurisdiction, actual power, or effective control of the state using the drone.⁶⁶ Such a person is

tors cannot “arbitrarily deprive persons of their lives.” Necessarily, the right to life is conditioned by the word “arbitrarily,” and the word “arbitrarily” demonstrates that the right to life is a relative right and its proper application will depend upon contextual analysis concerning whether or not a particular death is arbitrary under the circumstances. Indeed, the ICCPR actually uses the conditioning word “arbitrarily” when affirming that “[n]o one shall be *arbitrarily* deprived of his life.” The Covenant also recognizes exceptions with respect to the death penalty and the *Covenant’s Protocol Aiming at the Abolition of the Death Penalty* recognizes a possible exception “in time of war.” Like the *International Covenant* and the Human Rights Committee Report, the *American Convention on Human Rights* recognizes that the right to life requires that “[n]o one shall be *arbitrarily* deprived of his life,” and thus impliedly recognizes that nonarbitrary deprivations of life can be permissible. The *American Convention* also recognizes exceptions with respect to capital punishment, and its *Protocol to Abolish the Death Penalty* also contains a possible exception “in wartime in accordance with international law.” Similarly, the *African Charter on Human and Peoples’ Rights* contains a relativist limitation on the right to life while affirming that “[n]o one may be *arbitrarily* deprived of this right.” Using these standards, nonderogability means that even in times of war or other public emergency, persons cannot be arbitrarily killed. It does not mean that no person can rightly be killed.

Jordan J. Paust, *The Right to Life in Human Rights Law and the Law of War*, 65 SASKATCHEWAN L. REV. 411, 414-16 (2002) (citations omitted); see also MELZER, *supra* note 1, at 92 (lawfulness of targeted killings under human rights law “depends entirely on the meaning of the term ‘arbitrary’ ”); *id.* at 93-101 (yet, growing practice within the institutional bodies set up under the auspices of such treaties addressing a law enforcement context within the territory of a state using force and outside the context of war tends to require use of principles of reasonable necessity and proportionality in connection with broad goals of protecting other persons “from imminent death or serious injury, to effect an arrest or prevent the escape of a person suspected of a serious crime, or to otherwise maintain law and order or to protect the security of all,” and “[a] deprivation of life is ‘arbitrary’ when the force used is disproportionate to the actual danger present”); *id.* at 384 (human rights law can allow use of lethal force against a broader category of persons than international humanitarian law).

66. See ICCPR, *supra* note 64, art. 2(1); United Nations, Human Rights Comm., General Comment No. 31[80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) (the treaty rights apply to those within the territory, jurisdiction (which can include occupied territory), or actual “power or effective control of [a] [S]tate party”); PAUST ET AL., *supra* note 52, at 812-13; MELZER, *supra* note 1, at 4 (“lack of physical custody”), 123-25, 135-36, 139 (“must be determined by reference to the level of control actually exercised over the . . . person”); *cf.* MELZER, *supra* note 1, at 125-28 (regarding practice under the American Declaration of the Rights and Duties of Man, which “does not contain a jurisdiction clause”). *But see* MELZER, *supra* note 1, at 138 (arguing for a far looser standard of “effective control or . . . directly affected” and claiming that “every . . . targeted killing . . . outside the territorial jurisdiction

clearly not within the territorial jurisdiction of the state responding in self-defense (unless the person is within territory that is occupied by the responding state and is, therefore, within a related form of territorial jurisdiction) and such a person does not appear to be within the actual “power or effective control” of the responding state.⁶⁷ It is evident, therefore, that human rights protections do not pertain and that a human rights paradigm is not directly relevant.

Professor Philip Alston, acting as the U.N. Special Rapporteur on extrajudicial, summary, or arbitrary executions, has expressed concern that predator drones might be used to carry out arbitrary executions⁶⁸ and has rightly affirmed that human rights obligations of states under the United Nations Charter and other treaty-based and customary international law apply during war,⁶⁹ despite

of the operating State brings the targeted person within the ‘jurisdiction’ of that State” and that all that should be required is that a state exercise “sufficient factual control or power to carry out a targeted killing.” With respect, the power to carry out an attack on a particular target (by drone, aircraft, artillery, or long distance sniper fire) is simply not the same as actual “power or effective control” over the individual, especially if the person cannot be relatively easily captured or otherwise detained, can attempt to run away, or can fight back).

A similar problem exists with respect to application of certain protections for persons under the 1949 Geneva Conventions and Geneva Protocol I if they are not “in the hands of” or “in the power of” a party to the conflict or subject to being “treated” or to “treatment” under common Article 3 (which assumes some control over the person being treated and who has the right to humane treatment). *See, e.g.*, PAUST ET AL., *supra* note 52, at 683. This is undoubtedly why Geneva Protocol I contains other provisions to protect most civilians from being directly targeted and from the effects of indiscriminate targetings. *See infra* Part IV.C.

67. MELZER, *supra* note 1, at 138.

68. *See* Amelia Mathias, *UN Rights Investigator Warns US Drone Attacks May Violate International Law*, JURIST, Oct. 28, 2009, <http://jurist.law.pitt.edu/paperchase/2009/10/un-rights-investigator-warns-us-drone.php>. This was an apparent change from a prior statement that the 2002 U.S. strike against members of al Qaeda in Yemen was “a clear case of extrajudicial killing.” *See* Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, *Rep. on Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*, Comm. on Human Rights, ¶ 39, U.N. Doc. E/CN.4/2003/3 (Jan. 13, 2003) (by Asma Jahangir); O’Connell, *Unlawful Killing 1*, *supra* note 2 (manuscript at 4); *see also* Jane Mayer, *Predator Versus International Law?*, THE NEW YORKER NEWS DESK BLOG, Oct. 29, 2009, <http://www.newyorker.com/online/blogs/newsdesk/2009/10/jane-mayer-predator-versus-international-law.html> (quoting Mr. Alston: “While there may be circumstances in which the use of such techniques is consistent with applicable international law”).

Of course, all lawful killings in self-defense and during war are “extrajudicial” unless they follow from a lawful conviction and death sentence. Therefore, whether they are “extrajudicial” in the context of permissible self-defense targeting is not determinative. Admittedly, the circumstance where a person has been captured, is otherwise in “effective control,” or can easily be arrested presents a different context. *See also* MELZER, *supra* note 1, at 4 (“[L]ack of physical custody . . . distinguishes targeted killings from . . . extrajudicial ‘executions.’”); *infra* note 101.

69. Mathias, *supra* note 68. That human rights law applies during war, *see, for example*, *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, 242-45, 280 ¶¶ 216-20, 345(3) (Dec. 19); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 2004 I.C.J. 136, 177-78,

a clearly erroneous and troubling claim by the Obama Administration that U.N. Charter-based human rights do not apply in a war zone.⁷⁰ As noted, however, the significant question under general human rights law is whether a particular person is within the jurisdiction or actual “power or effective control” of the responding state and, even assuming applicability of human rights law to a particular person, the ultimate question would be whether a targeted killing is arbitrary. As noted above, if it occurs as part of a

¶¶ 104-106 (July 9); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 95, 226, 239-40, ¶ 25 (July 8); BUERGENTHAL ET AL., *supra* note 47, at 331-32 (3d ed. 2002); JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 299-306 (ICRC 2005); RICHARD B. LILICH ET AL., INTERNATIONAL HUMAN RIGHTS 216 (4th ed. 2006); MELZER, *supra* note 1, at 76-78; JORDAN J. PAUST, BEYOND THE LAW: THE BUSH ADMINISTRATION’S UNLAWFUL RESPONSES IN THE “WAR” ON TERROR 4, 140 n.35 (2007) [hereinafter PAUST, BEYOND THE LAW]; PAUST ET AL., *supra* note 52, at 640 (quoting Johann Bluntschli’s recognition in 1866), 653, 676, 811, 813; Philip Alston et al., *The Competence of the UN Human Rights Council and Its Special Procedures in Relation to Armed Conflicts: Extrajudicial Executions in the “War on Terror”*, 19 EUR. J. INT’L L. 183, 192-97 (2008) (also offering an extensive survey of international institutional recognitions); Kretzmer, *supra* note 3, at 184-86; O’Connell, *Unlawful Killing* 1, *supra* note 2 (manuscript at 12); Paust, *supra* note 58, at 820-23 & n.35; *see also* Coard v. United States, Case No. 10.951, Inter-Am. Comm’n H.R., Report No. 109/99, OEA/Ser.L/V/II.106, doc. 6 rev. ¶ 39 (1999) (“[C]ore guarantees apply in all circumstances, including situations of conflict.”); G.A. Res. 63/166, pmb., U.N. Doc. A/RES/63/166 (Feb. 19, 2009) (“[F]reedom from torture and other cruel, inhuman or degrading treatment or punishment is a non-derogable right that must be protected under all circumstances, including in times of international or internal armed conflict or disturbance.”); G.A. Res. 62/148, pmb., U.N. Doc. A/RES/62/148 (Mar. 4, 2008); G.A. Res. 60/148, pmb., U.N. Doc. A/RES/60/148 (Feb. 21, 2006); G.A. Res. 59/182, pmb. & ¶¶ 1-2, U.N. Doc. A/RES/59/182 (Mar. 8, 2005); S.C. Res. 1738, ¶ 9, U.N. Doc. S/RES/1738 (Dec. 23, 2006) (“violations of international humanitarian and human rights law in situations of armed conflict”); S.C. Res. 1265, ¶ 4, U.N. Doc. S/RES/1265 (Sept. 17, 1999); Council of Europe, Parliamentary Assembly, Res. 1433, ¶ 4 (2005), *available at* <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta05/ERES1433.htm>; General Comment No. 31[80], *supra* note 66, ¶ 11; United Nations Human Rights Comm., General Comment No. 29 States of Emergency (Article 4), ¶¶ 3, 9, 11, n.6, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001); Alfred de Zayas, *The Status of Guantanamo Bay and the Status of the Detainees*, 37 U.B.C. L. REV. 277, 281-82, 309-10 (2004); Jordan J. Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 VAL. U. L. REV. 1535, 1535-37 (2009) [hereinafter Paust, *Absolute Prohibition of Torture*] (human rights law applies in all social contexts, including contexts in which humanitarian law applies). More generally, the duty of states under the United Nations Charter to respect and observe human rights applies universally and without a war-context limitation. *See* U.N. Charter arts. 55(c), 56.

70. Alston et al., *supra* note 69, at 193-96. The erroneous claim arose during the Bush Administration’s program of serial criminality. *See, e.g.*, MELZER, *supra* note 1, at 79-80; PAUST, BEYOND THE LAW, *supra* note 69, at 4, 31-32; Alston et al., *supra* note 69, at 186-90. The human rights obligations of states under Articles 55(c) and 56 are expressly “universal” in scope and have no territorial or contextual limitation. *See* U.N. Charter arts. 55(c), 56; *see also* Secretary of State Hillary Clinton, Remarks on the Human Rights Agenda for the 21st Century at Georgetown University (Dec. 14, 2009) (transcript *available at* <http://www.state.gov/secretary/rm/2009a/12/133544.htm>) (noting that “a commitment to human rights starts with universal standards and with holding everyone accountable to those standards, including ourselves” and human rights are “rights that apply everywhere, to everyone”); *supra* note 69. However, those most relevant obligations apply where there is actual “power or effective control” over persons. United Nations Human Rights Comm., General Comment No. 31[80], *supra* note 66.

permissible self-defense response, such a targeting will be reasonably necessary, rational, and not arbitrary.

In 2005, the Supreme Court of Israel, quoting the European Court of Human Rights, stated that when targeting is not necessary because the person can be arrested (which must presume that foreign state consent to arrest on its territory exists or that the state using force is an occupying power with *de jure* authority under international law to arrest),⁷¹ “use of lethal force would be rendered disproportionate,”⁷² the Israeli Supreme Court adding that at times the possibility of arrest “does not exist” and “at times it involves a risk so great to the lives of the soldiers, that it is not required.”⁷³ It is worth noting that the most relevant permissible de-

71. Concerning the general need for foreign state consent during law enforcement efforts to arrest persons on foreign state soil, see *supra* note 33. The Israeli Supreme Court seems to have had in mind authority of an occupying power to arrest persons in areas generally under effective control, an authority under the laws of war that overrides the general need for foreign state consent. Concerning such powers, see FIELD MANUAL 27-10, *supra* note 57, at 141-43; Hague Convention No. IV Respecting the Laws and Customs of War on Land art. 43, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 64-68, 71, 78, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention].

72. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Israel, [2005] 46 I.L.M. 375, available at http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf (quoting *McCann v. United Kingdom*, App. No. 18984/91, 21 Eur. H.R. Rep. 97 (1995)). The *McCann* case involved the killing of “three Irish republican terrorists . . . by members of the British security forces in Gibraltar” who “honestly and reasonably believed” that the terrorists “had planted a car bomb in a crowded area and were likely to have been carrying a concealed detonator, which would have allowed them to explode the bomb by the touch of a button” if they were not shot. CLARE OVEY & ROBIN C.A. WHITE, JACOBS & WHITE: EUROPEAN CONVENTION ON HUMAN RIGHTS 43 (3d ed. 2002). “The Court accepted that the soldiers were not to blame,” but using the “strict test” under the European Convention, the Court found that the British authorities knew who the three men were and could have arrested them “as they entered Gibraltar, before there was any risk of them having set a car bomb.” *Id.* Therefore, *McCann* involved a circumstance where arrest was possible on territory under the control of the state using force and was like a law enforcement circumstance, unlike a self-defense paradigm or war paradigm where a state is under attack from non-state actors located in a foreign state and reliance on the strict test in *McCann* in a context of a state’s self-defense response to an armed attack would be misplaced. Significantly, even in a law enforcement context, there was recognition that the killings by the soldiers were not impermissible when they reasonably believed that force was needed for defense of others. See MELZER, *supra* note 1, at 105-07 (in a hybrid paradigm of law enforcement and insurgency within Russia, the European Court recognized that “‘the military reasonably considered that there was an attack or a risk of attack from illegal insurgents, and that the air strike was a legitimate response to that attack.’” *Id.* at 389 (quoting *Isayeva v. Russia*, App No. 57947-49/00 Eur Ct. H.R.(2000)). Melzer added that the Court shifted from a strict European Convention standard applicable in a law enforcement paradigm “to a more liberal interpretation . . . in accordance with the principle of military necessity” and, “[a]ccordingly, the use of lethal force is justified not only against immediate threats, but also where it can be ‘reasonably considered’ that there is ‘a risk of attack.’” *Id.*; Kretzmer, *supra* note 3, at 179 (“‘[T]he law-enforcement model’ assumes that the suspected perpetrator is within the jurisdiction of the law-enforcement authorities . . . so that an arrest can be effected.”).

73. Pub. Comm. Against Torture in Isr. v. Israel, [2005]. For a critical analysis of the final 2006 decision of the Israeli Supreme Court in this case and its lack of needed guidance, see MELZER, *supra* note 1, at 33-36.

privation of life listed under the European Convention for the Protection of Human Rights and Fundamental Freedoms,⁷⁴ which was used by the European Court as a basis for its decision, would be limited to “the use of force which is no more than absolutely necessary . . . in defense of any person from unlawful violence.”⁷⁵ However, an important exception exists in Article 15, paragraph 2, which states that there is to be no derogation from the limits set forth in Article 2 “except in respect of deaths resulting from lawful acts of war.”⁷⁶ Because Article 15 creates an expressed “lawful acts of war” exception, it is evident that the absolute necessity standard attached to limits contained in Article 2 does not apply to “‘deaths resulting from lawful acts of war.’”⁷⁷

In any event, the European Convention’s general test of absolute necessity outside the context of war is far more restrictive than general human rights law reflected, for example, in Article 6, paragraph 1, of the ICCPR,⁷⁸ which, as a global multilateral human rights treaty created under the U.N. system, informs the meaning and reach of human rights obligations of U.N. members under Article 56 of the United Nations Charter. Moreover, the ICCPR is the primary human rights treaty for the United States, Afghanistan, and Pakistan, not the European Convention. Additionally, in case of a clash between limits contained in the European Convention and general human rights law incorporated through and based in Articles 55(c) and 56 of the United Nations Charter, the U.N. Charter will prevail.⁷⁹ Similarly, in case of a

74. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5 [hereinafter European Convention], available at <http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishtanglais.pdf>.

75. *Id.* art. 2(2)(a). *But see id.* art. 15(2). Moreover, persons would benefit from the European Convention’s test only if they are within the “jurisdiction” of a party to the treaty. *Id.* art. 1.

76. *Id.* art. 15(2).

77. See Paust, *supra* note 65, at 417 (quoting European Convention); see also MELZER, *supra* note 1, at 121-22 (stating that the right to life under Article 2 “may indeed be derogated from, albeit only in situations of armed conflict”). *But see* Francisco Forrest Martin, *The Unified Use of Force Rule: Amplifications in Light of the Comments of Professors Green and Paust*, 65 SASKATCHEWAN L. REV. 451, 451-52 (2002).

78. See ICCPR, *supra* note 65, and accompanying text; Paust, *supra* note 65, at 417. *But cf.* Kretzmer, *supra* note 3, at 177 (preferring the strict European standard in Article 2 of the European Convention), 186 n.66 (noting possible application of the Article 15(2) exception during war and noting that if “killings are permitted” under the laws of war, “they will not be regarded as arbitrary deprivations of life under article 6 of the ICCPR”).

79. See U.N. Charter art. 103 (“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”). It should be noted, however, that the U.N. Charter would not trump applicable norms *jus cogens* because they recognizably prevail over any treaty. See, e.g., PAUST ET AL., *supra* note 5, at 58, 61-62.

clash between limits in the European Convention and the right of self-defense under Article 51 of the U.N. Charter, the right to engage in permissible measures of self-defense guaranteed in the U.N. Charter will prevail.⁸⁰ For these reasons, the test concerning permissibility of self-defense targeting under the ICCPR and U.N. Charter-based human rights law, assuming that they apply to particular targeted persons, should involve inquiry into whether a particular targeting is arbitrary and not whether it is absolutely necessary. Nonetheless, measures of self-defense under Article 51 of the Charter in time of relative peace or war must be reasonably necessary and proportionate with respect to the armed attack or process of armed attacks that trigger the right to engage in self-defense.⁸¹ Therefore, the test with respect to permissibility of particular measures of self-defense (*i.e.*, whether the measure is reasonably necessary and proportionate) actually has a higher threshold than that under general human rights law. It is interesting in this regard that while recognizing the “arbitrary deprivation” test concerning human rights law the International Court of Justice has declared that

whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the [ICCPR], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.⁸²

80. See U.N. Charter art. 103; see also Jan Wouters & Frederik Naert, *The European Union and ‘September 11’*, 13 *IND. INT’L & COMP. L. REV.* 719, 767 (2003) (“[O]bligations under the UN Charter prevail over the EU and EC Treaty by virtue of Article 103.”).

81. See *supra* note 18; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 95, ¶ 41 (July 8) (“[S]ubmission of the exercise of the right of self-defense to the conditions of necessity and proportionality is a rule of customary international law.”); *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 176 (June 27) (describing “measures which are proportional to the armed attack and necessary”), ¶ 194 (noting that whether the response to the attack is lawful is dependent on “observance of the criteria of the necessity and the proportionality of the measures taken”). Therefore, permissibility of self-defense involves more than the question whether a state can respond and also involves inquiry into whether the methods and means used are reasonably necessary and proportionate.

82. *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 95, ¶ 25; see also MELZER, *supra* note 1, at 78 (quoting the Inter-American Commission on Human Rights for a similar recognition and that treaty-based and customary provisions of “‘humanitarian law generally afford victims of armed conflicts greater or more specific protections than do the more generally phrased guarantees in the American Convention and other human rights instruments.’”); *id.* at 81.

C. Principles of Reasonable Necessity and Proportionality

General principles of reasonable necessity and proportionality have been integrated into several provisions of Geneva law applicable during an international armed conflict that will condition the permissibility of actual measures taken in self-defense during an international armed conflict and they provide useful guidance with respect to methods and means of self-defense in other contexts because all measures of self-defense must comply with the same general principles. For example, Articles 48 and 50-51 of Protocol I to the 1949 Geneva Conventions reflect treaty-based and customary international legal requirements concerning necessity and proportionality. These include (1) the need to distinguish between civilians (who are protected from attack “unless and for such time as they take a direct part in hostilities”)⁸³ and lawful military targets (the so-called principle of distinction), (2) the prohibition of attacks directed at protected civilians or civilian objects as such, and (3) the prohibition of indiscriminate attacks.⁸⁴ A customary prohibition related to the prohibition of “indiscriminate” attacks⁸⁵ is the more general prohibition of unnecessary death, injury, or suffering during war,⁸⁶ one that is also partly reflected in the duty set forth in Geneva Protocol I to avoid attacks “expected to cause incidental loss of civilian life . . . which would be excessive in relation to the concrete and direct military advantage anticipated.”⁸⁷ Some “inci-

83. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51(3), *adopted on* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Protocol I]; *see also infra* note 90.

84. *See* Geneva Protocol I, *supra* note 83, arts. 48, 51-53; *see also* HENCKAERTS & DOSWALD-BECK, *supra* note 69, at 3-67.

85. *See* Geneva Protocol I, *supra* note 83, art. 51(4).

86. *See, e.g.*, PAUST ET AL., *supra* note 52, at 639, 679-80, 697-99. The International Committee of the Red Cross (ICRC) considers this customary principle to be reflected in what it terms the “principle of humanity.” *See, e.g.*, ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* 79-80 (2009) [hereinafter ICRC, *Interpretive Guidance*], available at [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0990/\\$File/ICRC_002_0990.PDF](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0990/$File/ICRC_002_0990.PDF).

87. *See* Geneva Protocol I, *supra* note 83, art. 51(5)(b); *see also* HENCKAERTS & DOSWALD-BECK, *supra* note 69, at 46-50 (concerning the principle of proportionality). A full inquiry using the general prohibition of unnecessary death, injury or suffering or the principles of necessity and proportionality could involve a weighing of the probable loss of U.S. lives and those of Afghan nationals against those killed in the drone attack, but the “incidental” loss test may not allow such a consideration unless one can use such a calculation in connection with the phrase “excessive in relation to the concrete and direct overall military advantage to be anticipated.” *See* HENCKAERTS & DOSWALD-BECK, *supra* note 69, at 49-50 (noting that the Rome Statute of the International Criminal Court added the word “overall” to read: “concrete and direct *overall* military advantage anticipated.” (quoting the Rome Statute of the International Criminal Court, art. 8(2)(b)(iv), July 17, 1998, 2187 U.N.T.S. 90, U.N. Doc. A/CONF.183/9 (1998))). That is what several states apparently expect when claiming that the military advantage anticipated must be “considered as a whole and not only from isolated or particular parts of the attack,” but others opine that the military ad-

dental” loss of civilian life might be foreseeable but still permissible if the requirements of reasonable necessity and proportionality are met. As explained in *United States v. List*⁸⁸ during the subsequent Nuremberg proceedings, “[m]ilitary necessity . . . permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable.”⁸⁹

In the context of war, if the U.S. intentionally targets a civilian who is known not to be taking a direct and active part in hostilities, the targeting would violate the laws of war. The international community undoubtedly would agree that al Qaeda and Taliban fighters traversing in and out of Afghanistan from Pakistan and their leaders are directly, continuously, and actively taking part in hostilities in Afghanistan whether or not they constantly take up the gun,⁹⁰ but the community might not agree that drug lords and

vantage must be “substantial and relatively close,” although such a phrase is also somewhat ambiguous. See *id.*; see also Kretzmer, *supra* note 3, at 200-04. One hundred and sixty states met in Rome to create the Statute and consider that it generally reflects customary international law. See, e.g., PAUST ET AL., *supra* note 52, at 550. Nonetheless, the phrase “concrete and direct” must necessarily rule out claims of broad strategic necessity such as those used on all sides during World War II—claims that, if tolerated today, would obliterate the principle of distinction and the prohibition of direct attacks on civilians.

88. *United States v. List (The Hostage Case)*, in 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 757 (1950).

89. *Id.* at 1253-54; see also INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, GENERAL ORDERS NO. 100, art. 15 (Apr. 24, 1863) [hereinafter LIEBER CODE] (“Military necessity admits of all direct destruction of life or limb of armed enemies and of other persons whose destruction is incidentally unavoidable in the armed contests of the war.”), art. 22 (stating that there must be a “distinction between the private individual . . . and the hostile country itself, with its men in arms” and “the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit”), art. 155 (“[N]on-combatants . . . [are] unarmed citizens.”); ICRC, *Interpretive Guidance*, *supra* note 86, at 37, 40 (noting that civilians might risk “incidental death or injury” because of “[t]heir activities or location”); MELZER, *supra* note 1, at 278-86, 297-98.

90. An extremely restrictive view of direct and active participation might involve the claim that civilians who are members of a non-state organization engaged in armed attacks can only be targeted during the time that they actually carry out the attacks and when they move to and from an area of attack or, if they are leaders, when they issue orders or directly participate in other ways. See also Kretzmer, *supra* note 3, at 193, 199-200 (quoting Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, doc. 5, rev. 1 corr. (Oct. 22, 2002), at ¶ 69, which noted that “[i]t is possible . . . [that the fighter who engaged in hostilities] cannot . . . revert back to civilian status or otherwise alternate between combatant and civilian status”). The more realistic and policy-serving view is that such persons who directly participate in a process of armed attacks over time *are* directly and actively taking a part in hostilities. It is not a question of formal status, but of direct and active participation over time. *But see* O’Connell, *Unlawful Killing* 2, *supra* note 2 (manuscript at 25) (claiming that “[a]t the time of the attack, the ‘bodyguards’ and ‘lieutenant’ were not directly participating in hostilities,” but noting that the ICRC “might . . . support targeting them if, as appears to have been the case[,] . . . they were engaged in a continuous combat function”). With respect to the targeting of guards who are found to be directly participating in hostilities, especially if they are guarding a lawful military target (like a top Taliban leader) see *infra* note 99. Importantly, the ICRC has recognized that such non-state fighters can be recognized as “members” of “organized armed groups . . . [that consist] of individuals whose continuous function is to take a direct part in hostilities (‘continuous combat function’) or ‘members of an organized armed group’ with a

other civilians who merely finance al Qaeda or the Taliban take a direct and active part in hostilities.⁹¹ If it is not generally expected that such a financier is taking a direct part in hostilities, the intentional targeting of such a financier during the war in Afghanistan who is known to be merely a financier would be illegal and arguably “treacherous” and, if so, an “assassination,” although such a killing might be rational and not “arbitrary” under applicable human rights law. One can recognize, therefore, that the threshold of permissibility under the laws of war concerning the intentional targeting of civilians is higher (requiring direct and active participation in hostilities) than that under general human rights law (requiring merely that a killing not be “arbitrary”). For this reason, it is apparent that application of general human rights law prohibiting “arbitrary” detention⁹² or killing⁹³ does not inhibit lawful

continuous combat function and that they are targetable. ICRC, *Interpretive Guidance*, *supra* note 86, at 16, 27, 36, 70-73. The ICRC adds that “members of organized armed groups . . . cease to be civilians . . . and lose protection against direct attack.” *Id.* at 17. The ICRC would distinguish such member-fighters or “fighting forces” “from civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis.” *Id.* at 34. The latter are targetable when they directly participate in hostilities. Moreover, direct participation in hostilities by civilians includes “[m]easures preparatory to the execution of a specific act . . . as well as the deployment to and the return from a location of its execution.” *Id.* at 17, 65-68; *see also* YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 27-29 (2004) (preferring that civilians who are directly participating lose civilian status); MELZER, *supra* note 1, at 56, 310, 314, 317 (general practice is “to directly attack insurgents,” or organized armed groups, “even when they are not engaged in a particular military operation,” the practice is not internationally condemned; and “members of organized armed groups . . . are not regarded as civilians, but as approximately equivalent to State armed forces” for targeting purposes), 319-20, 327-28 (those with “functional ‘combatancy’” are targetable), 345 (direct participation is “reached where a civilian supplies ammunition to an operational firing position, arms an airplane with bombs for a concrete attack, or transports combatants to an operational combat area”); HCJ 769/02 Pub. Comm. Against Torture v. Israel [2006] IsrLR (2) 459, ¶ 39, available at http://elyon1.court.gov.il/files_eng/02/690/007/e16/02007690.e16.pdf (“[A] civilian who has joined a terrorist organization . . . and within the framework of his role in position in that organization he carries out a series of hostilities, with short interruptions between them for resting, loses his immunity from being attacked.”).

A major problem with the ICRC’s preference concerning “sporadic” fighters is that military forces engaged in targetings might not be able to tell whether a fighter is a member of an organized group or only joins in sporadically. *See* MELZER, *supra* note 1, at 319 (stating that it may be “problematic in operational reality”).

91. *See* ICRC, *Interpretive Guidance*, *supra* note 86, at 51-52, 54 (economic or financial activities engaged in by civilians may be “war-sustaining activities,” but not direct participation in hostilities); MELZER, *supra* note 1, at 341, 345; *see also* HCJ 769/02 Pub. Comm. Against Torture v. Israel [2006] IsrLR (2) 459, at ¶ 35 (“[A] person who sells an unlawful combatant food products or medicines does not take a direct part, but merely an indirect one, in the hostilities. The same is true of someone who helps unlawful combatants with a general strategic analysis and grants them general logistical support, including financial support.”). *But see* Amos N. Guiora, *Proportionality “Re-Configured,”* in 31 A.B.A. NAT’L SECURITY L. REP. 9, 13 (2009) (arguing for a change in law to allow targeting of those who are merely “passive supporters” of hostilities). Professor David Luban notes why such an expansive form of targeting is unacceptable. *See* David Luban, *Was the Gaza Campaign Legal?*, 31 A.B.A. NAT’L SECURITY L. REP. 15-16 (2009).

92. Human rights law prohibits “arbitrary” detention, *see supra* note 64, but during

military conduct on the battlefield, or more generally, during an armed conflict; and the Obama Administration should not be reluctant to admit what the international community knows and expects—that human rights apply during war.⁹⁴

an international armed conflict detention or internment without trial of civilians who pose a significant security threat must be reasonably necessary, and the continued propriety of detention must be subject to periodic review. *See, e.g.*, Geneva Convention, *supra* note 71, arts. 5, 42 (detention in territory of a party to the conflict “if the security of the Detaining Power makes it absolutely necessary”) 43, 78 (detention in occupied territory if necessary “for imperative reasons of security”); HENCKAERTS & DOSWALD-BECK, *supra* note 69, at 344-45 (during an international armed conflict), 347-49 (prohibition of “arbitrary” detention during a non-international armed conflict); Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT’L L.J. 503, 510-14 (2003) (quoted in part in *Hamdi v. Rumsfeld*, 542 U.S. 507, 520-21 (2004)). The human right to freedom from arbitrary detention will apply to any person within the actual power or effective control of the detaining power. *See supra* note 66. With respect to the human rights standard of freedom from “arbitrary” detention, it should be noted that when applying such a standard there must not be discrimination on the basis of impermissible grounds, such as national origin or religion. *See e.g.*, ICCPR, *supra* note 64, arts. 2(1), 26. Moreover, the right of access to courts for review of the propriety of detention must be the same for citizens and aliens. *See, e.g., id.* arts. 2(3), 9(4), 14(1), 26; Paust, *Judicial Power, supra*, at 507-10, 514.

It should be emphasized that the standard for detention (e.g., reasonable necessity to detain a civilian who poses a significant security threat) is far more lenient than the standard for targeting a civilian who is taking a direct and active part in hostilities and the standards should not be confused. For example, a civilian may pose a significant security threat without taking a direct and active part in hostilities and may be detained, but not targeted. *Cf. Al-Bihani v. Obama*, 590 F.3d 866, 871 (D.C. Cir. 2010) (Brown, J., opinion) (assuming in error that a “purposefully and materially supported” standard for detention and trial under the 2009 Military Commissions Act can be used to justify the targeting of civilians during war and arguing per dicta, contrary to numerous Supreme Court cases and in significant error, that the laws of war are not relevant regarding statutory interpretation, must be incorporated by Congress, have not been incorporated by Congress, do not limit presidential powers, are overridden by legislation that did not express a clear and unequivocal intent to override and ignoring Supreme Court opinions that recognize a “rights under” treaties and a law of war exception to the last-in-time rule); Faiza Patel, *Who Can Be Detained in the “War on Terror”? The Emerging Answer*, ASIL INSIGHTS, Oct. 20, 2009, <http://www.asil.org/insights091020.cfm> (noting that some U.S. district court opinions demonstrate needless confusion in this regard).

93. *See supra* note 65.

94. *See supra* note 69. The customary and treaty-based human rights prohibitions of torture and cruel, inhuman, or degrading treatment of any detained person anywhere and in any context (*see, e.g.*, ICCPR, *supra* note 64, art. 7) are matched by customary and treaty-based laws of war that apply to any detainee of any status during any armed conflict, and both sets of prohibition and right are absolute; and, therefore, they apply without any exception based on alleged necessity. *See, e.g.*, PAUST, BEYOND THE LAW, *supra* note 69, at 2-5. Therefore, application of such forms of human rights during war will not inhibit lawful military conduct during war concerning the treatment of detainees. In fact, I know of no relevant human right that would needlessly inhibit lawful conduct on the battlefield. Some claim that the laws of war are a superior *lex specialis*, but such Latinized nonsense is intellectually bankrupt and unacceptable. Some human rights are peremptory norms *jus cogens*—that is, they are superior and trump any inconsistent international law in any circumstance, including inconsistent laws of war. *See generally* PAUST, BEYOND THE LAW, *supra* note 69, at 4, 35, 37, 69; PAUST ET AL., *supra* note 5, at 61-64. Furthermore, some human rights are nonderogable—that is, they cannot be derogated from even in times of war or because of an alleged necessity. *See, e.g.*, ICCPR, *supra* note 64, art. 4(2); BUERGENTHAL & MURPHY, *supra* note 3, at 163; PAUST, BEYOND THE LAW, *supra* note 69, at 4, 141 n.38. Moreover, the phrase *lex specialis* has been made up and favored by a few textwriters and

V. THE QUESTION OF USE OF DRONES AND INDISCRIMINATE TARGETINGS

Application of the principles of reasonable necessity and proportionality and the prohibition of indiscriminate attacks requires nuanced choice and contextual inquiry with respect to the circumstances triggering the right of self-defense and circumstances in which responsive force is used. One claim of significant concern with respect to indiscriminate targeting has been raised by Professor O'Connell. Although she states that "[d]rones can be used for . . . precision attacks"⁹⁵ and, therefore, that they must necessarily not be inherently indiscriminate weapons, she claims that U.S. use of drones in Pakistan has resulted in a "high rate of unintended deaths."⁹⁶ She identifies a disturbing pattern of excessive deaths when reporting that "[b]etween 2006 and late 2009, about 20 suspected militant leaders have reportedly been killed . . . during strikes that killed between 750 and 1000 other persons."⁹⁷ She

jurists who do not seem to understand that norms *jus cogens* have primacy, not every type of law of war. Additionally, the phrase *lex specialis* appears in no known international agreement. It is nonsense to claim that every law of war will displace or prevail over every relevant human right in time of armed conflict. Additionally, human rights obligations are universal and apply in all social contexts under the United Nations Charter, and Article 103 of the Charter guarantees their primacy over inconsistent law of war treaties. *See supra* notes 69, 74. In any event, as this article notes, the United States has nothing to fear from application of relevant human rights law and U.S. military lawyers should be trained in relevant human rights law as well as in the laws of war.

Melzer notes that the proper consideration of *lex specialis* is not to "exclude the applicability" of human rights, "but merely" to determine "the interpretation" of applicable human rights law. MELZER, *supra* note 1, at 81, 176, 290. This would be acceptable. *But see id.* at 81, 382-83 (claiming that "[t]o the extent that the *lex specialis* provides a rule designed for the special situation at hand . . . it takes precedence" and "[o]nly where the *lex specialis* of IHL [international humanitarian law] does not provide any rule at all . . . will having recourse to the *lex generalis* of human rights law be justified" (citing Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 266-67 (2000), among other writings)). However, this latter theoretic preference for "precedence" and a lack of "recourse" is unacceptable concerning both *jus cogens* and non-derogable human rights and it ignores the potential primacy of all human rights under Article 103 of the U.N. Charter. Therefore, the better approach involves use of the law of war merely as an interpretive aid where there are gaps or ambiguities under human rights law or where human rights are not applicable because persons are not within the jurisdiction or actual "power or effective control" of a responding state. Melzer's important study also contains a detailed exposition of the *jus cogens* status of the right to life that he considers to be relevant to "the case of legitimate military targets, under the paradigm of hostilities." *Id.* at 212-21; *see also id.* at 290, 298-99 (concerning applicability of non-derogable human rights).

95. O'Connell, *Unlawful Killing 2*, *supra* note 2 (manuscript at 5).

96. *Id.* (manuscript at 8); *see also id.* (manuscript at 6) ("large number of persons being killed"). It should be noted that criminal responsibility under the customary laws of war can occur when there is wanton or reckless disregard of consequences. *See, e.g.*, PAUST ET AL., *supra* note 52, at 696-99.

97. O'Connell, *Unlawful Killing 2*, *supra* note 2 (manuscript at 9). She considers this to mean that "the U.S. was killing 50 unintended targets for each intended target." *Id.* (ma-

claims that intended targets are, “in general, surrounded by many persons not involved in hostilities, not suspected militants, and not intended targets.”⁹⁸ Thereafter, she addresses the killing of the top Taliban leader inside Pakistan in 2009, as well as his wife, his wife’s parents, his uncle, a lieutenant, and seven “‘bodyguards’”⁹⁹ as an arguably disproportionate use of force.¹⁰⁰ However, the killing of nine members of the Taliban, one of whom was a top leader, with a consequential loss of four persons, who may not have participated in hostilities (a ratio of some two targetable persons to one), would not appear to be disproportionate or indiscriminate. Clearly, the importance of the target must be weighed as part of a nuanced calculation. Moreover, part of the calculation should include consideration of equally effective alternative methods of targeting and readily available weaponry. In the context of ongoing attacks on U.S. military personnel in Afghanistan and the *de facto* expansion of the theatre of war, targeting the top Taliban leader and his guards was reasonably necessary. Would use of cruise missiles have resulted in less deaths, injury or suffering? Would use of fighter aircraft (with what weaponry?) that might have had to swerve to dodge local ground fire (including shoulder-held rockets firing at the aircraft)? Would use of a Special Operations team on the ground involve fewer deaths or less injury or suffering? Was use of a predator drone arguably more “smart,” controllable, and proportionate under the circumstances? Nils Melzer notes that while it is desirable to allow fighters on a conventional battlefield to surrender where that is realistically feasible, they “run the risk of being individually targeted” and, in reality, belligerents cannot reasonably be prevented “from resorting to surprise attacks of instantaneous lethality or to employ units and weapons systems which are incapable of taking prisoners, if such action is justified by military necessity and [is] otherwise in compliance with IHL.”¹⁰¹

nuscript at 1). Such a ratio is startling because, if correct, it raises a concern that some of the targetings might have involved wanton or reckless disregard of consequences, and a pattern of such unintended killings of such a proportion can also result in conclusions of dereliction of duty of military commanders and civilian leaders who knew or should have known of such a pattern and did not engage in reasonable corrective action. Concerning the test for leader responsibility, see, for example, PAUST ET AL., *supra* note 52, at 51-82, 88-100.

98. O’Connell, *Unlawful Killing 2*, *supra* note 2 (manuscript at 10).

99. With respect to guards, the ICRC notes that even a “civilian” who engages in “the defense of military personnel and other military objectives against enemy attacks” is engaged in “direct participation in hostilities” and is targetable. See ICRC, *Interpretive Guidance*, *supra* note 86, at 38; MELZER, *supra* note 1, at 333.

100. See O’Connell, *Unlawful Killing 2*, *supra* note 2 (manuscript at 10). This incident was reported by Jane Mayer, *supra* note 44, at 36.

101. MELZER, *supra* note 1, at 370, 413; see also *id.* at 397-98 (arguing that part of a nuanced contextual inquiry should involve consideration of “the actual level of control exercised over the situation by the operating State” and consideration of “required intensity or

In contrast to reports of high numbers of apparently excessive deaths, others report that some 600 people have been killed “in northwestern Pakistan since August 2008, including around 400 militants”¹⁰² (which would be a ratio of some two targetable persons to one), and Senator John Kerry has stated that drones had been successful in combating al Qaeda and have resulted in minimal collateral damage.¹⁰³ Still others claim that only ten percent of the persons killed are “civilians.”¹⁰⁴ Part of the problem involves access to all relevant facts and the characterization and later identification of persons as “civilians,” especially since civilians who take a direct and active part in hostilities can be targeted. Another problem involves proper application of the customary norm reflected in Article 51(7) of Geneva Protocol I. Article 51(7) recognizes that

[t]he presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attack or to shield military operations.¹⁰⁵

In view of this well-known admonition, if al Qaeda and Taliban fighters purposely intermix with civilians who take no active part in hostilities in an effort to shield themselves, they are violating

urgency may” involve “a generous standard of ‘reasonableness’ in traditional battlefield confrontations.” Further, there should be inquiry into qualitative, quantitative, and temporal necessity and whether methods and means “contribute effectively to the achievement of a concrete and direct military advantage . . . without unreasonably increasing the security risk of the operating forces or the civilian population”); cf. Amos N. Guiora, *License to Kill*, FOREIGN POL’Y, July 13, 2009, http://www.foreignpolicy.com/articles/2009/07/13/licence_to_kill (former Israeli IDF legal advisor to the commander of the Gaza Strip from 1994-1997 states that in an occupied territory “the commander must determine that any alternatives, such as capturing and detaining the individual, are not operationally possible” and “must also seek to minimize the collateral damage” to civilians).

102. See Mathias, *supra* note 68.

103. *Id.*; see also Koh, Obama Administration, *supra* note 3, pt. B (“Our procedures and practices for identifying lawful targets are extremely robust, and advanced technologies have helped to make our targeting even more precise. In my experience, the principles of distinction and proportionality . . . are implemented rigorously throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with all applicable law.”).

104. See O’Connell, *Unlawful Killing 2*, *supra* note 2 (manuscript at 2 n.6).

105. Geneva Protocol I, *supra* note 83, art. 51(7).

the prohibition of use of human shields and resultant deaths of civilians can be their responsibility if targetings of al Qaeda and Taliban fighters are otherwise reasonably necessary under the circumstances. Nonetheless, Article 51(8) affirms that “[a]ny violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians.”¹⁰⁶ Were some of the civilian deaths attributable to al Qaeda and Taliban fighters intermixing with civilians in order to shield themselves? Were some of the civilians even “voluntary shields?”¹⁰⁷ If so, were target selections and actual targetings in such circumstances adequately attentive to principles of reasonable necessity and proportionality? A mere listing of the number of civilian deaths during a given time period does not allow full consideration whether some “civilians” were taking a direct and active part in hostilities, whether some were intermixed with al Qaeda and Taliban fighters who used them as shields,¹⁰⁸ and whether other features of context were relevant with respect to application of principles of reasonable necessity and proportionality.

Professor O’Connell identifies another problem with respect to the use of drones that deserves the immediate attention of the Obama Administration: the status of the persons who fly them and engage in targetings. She rightly notes that under the laws of war if such persons are not members of the regular armed forces of a party to an international armed conflict, they are unprivileged fighters who, like members of al Qaeda, are not entitled to “combatant” status and “combatant immunity”¹⁰⁹ for what otherwise would be lawful targetings during war and they can be prosecuted under relevant U.S. or Pakistani domestic law for murder,¹¹⁰ sub-

106. *Id.* art. 51(8).

107. Concerning voluntary shields, see, for example, ICRC, *Interpretive Guidance*, *supra* note 86, at 56-57 (whether or not they can be considered to be taking a direct part in hostilities in particular circumstances, “through their voluntary presence near legitimate military objectives, voluntary human shields are particularly exposed to the dangers of military operations and, therefore, incur an increased risk of suffering incidental death or injury during attacks”); MELZER, *supra* note 1, at 346.

108. See also Mayer, *supra* note 44, at 44 (“After such attacks, the Taliban, attempting to stir up anti-American sentiment in the region, routinely claims, falsely, that the victims are all innocent civilians.”).

109. See ICRC, *Interpretive Guidance*, *supra* note 86, at 33 n.52, 83-84; Gary Solis, *America’s Unlawful Combatants*, WASH. POST, Mar. 12, 2010, at A17; *supra* note 56; *infra* note 110.

110. See O’Connell, *Unlawful Killing 1*, *supra* note 2 (manuscript at 8, 22, 26); *supra* note 56. It is not a violation of the laws of war merely because a C.I.A. civilian engages in combat activities or otherwise takes a direct part in hostilities, but such a person is subject to prosecution under relevant domestic law because the law of war does not provide combatant immunity to such a person. See, e.g., Paust, *supra* note 62, at 768, n.44, 770-71; see also LIEBER CODE, *supra* note 89, art. 57 (a privileged belligerent’s “warlike acts are not individual crimes or offenses”), art. 82 (but unprivileged fighters “who commit hostilities . . . with-

ject to any applicable domestic defense such as defense of others from death or serious bodily injury.¹¹¹ It is quite obvious that during an international armed conflict the better approach for the United States would be to require that only military personnel use drones for the targeting of persons.¹¹² If civilians who are presently engaged in such conduct are thought to be valuable, perhaps they could become members of the armed forces.

The problem is more complex, since Article 51 self-defense targetings can be lawful outside the context of an international armed conflict during which combatant immunity pertains. Does a similar immunity exist for those engaged in self-defense targetings that are permissible under the United Nations Charter? An implied self-defense immunity must logically follow or acts of permissible self-defense outside the context of an international armed conflict would be crippled when those who engage in otherwise permissible measures of self-defense are subject to domestic prose-

out commission, without being part and portion of the organized hostile army . . . are not entitled to the privileges of prisoners of war"). If domestic U.S. law allows a C.I.A. civilian to engage in combat activities during war, then it might be that such law would prevail over prior U.S. domestic law allowing prosecution for murder. However, U.S. domestic law would not be relevant in the case of prosecution in a foreign state or international tribunal. Of course, any person of any status who violates the laws of war is subject to prosecution in any country as a war criminal. *See, e.g.*, FIELD MANUAL 27-10, *supra* note 57, at 178, ¶¶ 498-499; Paust, *supra* note 62, at 771, n.54.

111. More than domestic law would be relevant if the right to defend others from unlawful death can be implied from the general human right to life. Killing "in defence of any person from unlawful violence" is an expressed exception to impermissible deprivation of life in Article 2(2)(a) of the European Convention. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 74, art. 2(2)(a). Self-defense and defense of others against imminent unlawful death or serious injury is also generally recognized in international criminal law. *See, e.g.*, Rome Statute, *supra* note 87, art. 31(1)(c); PAUST ET AL., *supra* note 52, at 126.

112. This is such an obvious point that one must assume that lawyers at the sites where pilots actually operate the drones (e.g., at Nellis Air Force Base in Nevada) and lawyers in the C.I.A. and at even higher levels in the Obama Administration must not be aware of some of the most basic principles of the laws of war. *See* Heinz Klug, *The Rule of Law, War, or Terror*, 2003 WIS. L. REV. 365, 371-72, 377-79 (2003) (contrasting targetings by military commanders that have input from military lawyers with targetings by C.I.A. personnel); James Risen & Mark Mazzetti, *Blackwater Guards Tied to Secret Raids by C.I.A.*, N.Y. TIMES, Dec. 11, 2009, at A1 (C.I.A. and private contractor civilians were engaged in combat roles in Afghanistan and Iraq); *cf.* Professor Geoffrey Corn, *Remarks*, EJIL: TALK! (Sept. 29, 2009), <http://www.ejiltalk.org/the-united-states-use-of-drones-in-pakistan/> ("CIA General Counsel's office received LOAC [law of armed conflict] training from the ILAW Department at the [U.S. Army] JAG School."). Some top C.I.A. lawyers are leftover lawyers from the Bush Administration who have proven either to be remarkably ignorant of the laws of war or conveniently quiet and complicit during the Bush-Cheney program of serial and cascading criminality. *See, e.g.*, PAUST, BEYOND THE LAW, *supra* note 69; Paust, *Absolute Prohibition of Torture*, *supra* note 69. Given that President Obama has allowed them to stay and is not prosecuting them when they are reasonably accused of complicity is an outrage and continuing danger to the United States. The end result is that low level C.I.A. personnel and other civilians who are not members of the armed forces of the United States and who engage in targetings by drone are needlessly placed in harm's way.

cution.¹¹³ The problem is even more complex, however, because whether such an implied immunity under international law controls in a domestic legal process can depend on how international law is incorporated and whether it has a priority over ordinary domestic law. The general practice of states and evident patterns of expectation are opposed to prosecution of those engaged in lawful self-defense targetings, but self-defense immunity for lawful conduct engaged in as part of self-defense outside the context of war should be more clearly affirmed by the international community.

CONCLUSION

As this article affirms, self-defense can be permissible against non-state actor armed attacks, and measures of self-defense can occur in the territory of another state without special consent of the other state or imputation of the armed attacks to that state as long as the measures of self-defense are directed against the non-state actors. Additionally, when directed merely against the non-state actors, responsive force is not engaged in against the foreign state as such or as an attack “on” or “against” its territory. Responsive measures of self-defense in a foreign state would not necessarily create a state of war between the responding state and the foreign state, or between the responding state and the non-state actors; and whether or not an armed conflict exists to which the laws of war apply would be tested under normal criteria with respect to the existence of an international or non-international armed conflict. It is understandable, therefore, that a self-defense paradigm can be different than a war paradigm, and both are dif-

113. A famous domestic prosecution of a person who participated in self-defense actions outside the context of an international armed conflict occurred in connection with the *Caroline* incident. A Canadian deputy sheriff, Alexander McLeod, was arrested November 12, 1840, and prosecuted in New York for murder and arson during the incident. See, e.g., *People v. McLeod*, 25 Wend. 483 (N.Y. Sup. Ct. 1841); David J. Bederman, *The Cautionary Tale of Alexander McLeod: Superior Orders and the American Writ of Habeas Corpus*, 41 EMORY L.J. 515 (1992); Green, *supra* note 16, at 434-35; Rogoff & Collins, *supra* note 7, at 495 (also noting that other British nationals had been arrested in 1838 in New York on charges of murder and arson in connection with “the *Caroline* incident, but all were eventually released after interrogation”). The British had argued that he was engaged in “a transaction of a public character” and should be immune, but he was prosecuted and, nonetheless, found not guilty “on proof of an alibi.” Rogoff & Collins, *supra* note 7, at 496 (also noting that Secretary Webster had agreed with the British that McLeod should not be prosecuted and tried to intervene, but the Governor of New York protested the “unwarrantable interference by Webster in the internal affairs of the State of New York”). *Id.* at 496, 519-20. In case of a clash between Article 51 of the U.N. Charter and a bilateral extradition treaty, the Charter should prevail. See U.N. Charter art. 103. This does not guarantee that foreign domestic prosecution will not proceed if foreign enforcement jurisdiction is acquired over an accused by means other than extradition.

ferent than a mere law enforcement paradigm.

During a lawful self-defense response, targeted killings and the capture of non-state actor fighters and others who are directly and actively engaged in non-state actor armed attacks can be permissible no matter where such forms of direct participation occur. Human rights law applies in all social contexts, but whether a particular person has protection can depend on whether that person is within the jurisdiction or “effective control” of a responding state. When a person is protected, the general human right to life is a right to freedom from arbitrary deprivation of life and does not provide a guarantee that would not otherwise result from the application of a higher standard of protection through use of general principles of reasonable necessity and proportionality that are applicable during war or in the context of self-defense outside of war. When engaging in permissible self-defense targetings, a state must comply with such general principles whether or not an armed conflict exists.

Textwriters and others disagree whether U.S. use of drones in Pakistan for the last several years has resulted in instances of indiscriminate use of armed force, reasonably necessary and proportionate targetings with incidental loss of civilian lives, or both. The mere listing of the number of overall “civilian” deaths does not provide full awareness of all relevant facts, but some of the alleged patterns of death are sufficient to raise concern and demonstrate the need for greater caution. Another issue involves the status of those who pilot predator drones. Under the law of war, combatant immunity for lawful acts of war is available for combatants during an international armed conflict (i.e., members of the regular armed forces) and is not available for most C.I.A. personnel or other civilians. An implied immunity for any person who engages in lawful acts of self-defense under the United Nations Charter in any context should be more clearly recognized by the international community. Additionally, all personnel who are permitted to engage in self-defense targetings should be adequately trained in the laws of war, especially with respect to proper application of the general principles of necessity and proportionality. More adequate training can save lives, assure U.S. compliance with international law, lessen the likelihood of criminal and civil liability of various U.S. nationals at home and abroad, support overall combat and anti-terrorist missions, and serve U.S. foreign policy interests.

THE DILEMMA OF DIRECT PARTICIPATION IN HOSTILITIES

ERIC CHRISTENSEN*

A universal and comprehensive definition of direct participation in hostilities (DPH) does not exist. Furthermore, modern warfare's tendency to blur the distinction between combatant and civilian necessitates a new interpretation of DPH. However, States have incentives to pursue narrow or broad interpretations of DPH, or even both. These contradictory strategies create a dilemma for policy-makers who seek to reinterpret the concept of DPH. Any revision is likely to put some group of individuals at risk; there is not a simple answer to the question of how to best revise DPH. Instead, a dramatic revision of DPH is needed. This Essay will briefly examine the law of armed conflict before exploring the merits of the interpretations of DPH adopted by the United States, Israel, and the International Committee of the Red Cross. Lastly, this essay will recommend a potential solution to the dilemma of DPH interpretation: a limited membership-based approach.

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INTRODUCTION

International Humanitarian Law, often called the Law of War or the Law of Armed Conflict (LOAC), is the collection of agreements between States that seeks to regulate the use of force during armed conflicts.¹ Contained within those agreements are a variety of terms and concepts that appear simple on the page but are vague in the heat of battle. DPH is one such concept. Found in Article 51(3) of the First Additional Protocol to the Geneva Conventions and Article 13(3) of the Second Additional Protocol to the Geneva Conventions, DPH is the notion that during international and noninternational conflicts, civilians should not be targeted “unless and for such time as they take a direct part in hostilities.”²

The uncertainty underlying the terms of DPH allows countries and groups to adopt various interpretations based on their respective goals. Interpreting the elements of DPH narrowly creates a high threshold, making it difficult to confirm if civilians are directly participating in hostilities and therefore difficult to justify targeting civilians.³ Unfortunately, this narrow interpretation of DPH might also encourage terrorists to hide within civilian populations.⁴ On the other hand, interpreting the elements of DPH broadly creates a low threshold, making it easier to confirm if civilians are directly participating in hostilities and therefore easier to justify targeting civilians, contractors, and terrorists.⁵ However, this interpretation of DPH might also encourage civilians to act cautiously and avoid any actions that may be perceived as DPH.⁶

1. Int'l Comm. of the Red Cross [ICRC], What Is International Humanitarian Law?, (July 2004), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/\\$File/What_is_IHL.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/$File/What_is_IHL.pdf).

2. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51(3), adopted on June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 13(3), adopted on June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

3. ICRC, *Summary Report: Third Expert Meeting on the Notion of Direct Participation in Hostilities*, at 60 (2005) [hereinafter ICRC, 2005 Report], available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/\\$File/2005-09-report-dph-2005-icrc.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/$File/2005-09-report-dph-2005-icrc.pdf).

4. See *id.*

5. Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511, 534–35 (2005) [hereinafter Schmitt, *Humanitarian Law*].

6. *Id.*

What was a difficult concept in 1977 has become even more difficult to interpret as warfare has advanced: front lines are disappearing, militaries are increasingly relying upon civilian employees and contractors, and terrorist groups are increasingly adopting non-state and trans-state structures.⁷ The changing nature of war has provided incentives for nations to argue for either narrow or broad interpretations of DPH (or sometimes both). Compounding this difficulty is the fact that the United States and Israel have not ratified the First or Second Additional Protocols.⁸ Nevertheless, many consider DPH to have attained the status of customary international law.⁹ That is, many would agree on a conceptual level that civilians should be protected from attack unless and for such time as they directly participate in hostilities. However, a comprehensive and universal definition of DPH does not exist.¹⁰

After the attacks of September 11, 2001, this issue became exceptionally relevant as the Bush Administration sought to develop an effective counterterrorism policy. The Bush Administration chose a unique approach to DPH, categorizing members of al-Qaeda not as civilians or combatants, but as “unlawful enemy combatant[s].”¹¹ This “third category” of individuals was essentially a special subset of combatants: unlawful enemy combatants that could be targeted and detained like combatants, but would not qualify as a prisoners of war (POWs).¹² Although the Obama Ad-

7. ICRC, *Summary Report: Direct Participation in Hostilities Under International Humanitarian Law*, at 5–7 (2003) [hereinafter ICRC, 2003 Report], available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res\\$File/2003-03-report-dph-2003-icrc.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res$File/2003-03-report-dph-2003-icrc.pdf), Michael N. Schmitt, “*Direct Participation in Hostilities*” and *21st Century Armed Conflict*, in *FESTSCHRIFT FÜR DIETER FLECK* 505, 510–19, 522–25 (Horst Fischer et al. eds., 2004) [hereinafter Schmitt, *Direct Participation*], available at www.michaelschmitt.org/images/Directparticipationpageproofs.pdf.

8. See ICRC, International Humanitarian Law - State Parties/Signatories, <http://www.icrc.org/IHL.nsf/WebSign?ReadForm&id=470&ps=P> (indicating that both the United States and Israel have not ratified AP I); ICRC, International Humanitarian Law - State Parties/Signatories, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=475&ps=P> (indicating that both the United States and Israel have not ratified AP II).

9. HARVARD UNIV. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, IHL AND CIVILIAN PARTICIPATION IN THE HOSTILITIES IN THE OPT, POLICY BRIEF 3 (2007), available at http://www.humansecuritygateway.com/documents/HPCR_CivilianParticipationInHostilities.pdf

10. See ICRC, *2003 Report*, *supra* note 7, at 3; ICRC, *2005 Report*, *supra* note 3, at 6 (“While it was not excluded that the clarification process may lead to the identification of certain abstract elements of the notion of ‘direct participation in hostilities’, it was generally regarded as unrealistic to achieve a comprehensive definition. . .”).

11. See Military Commissions Act of 2006, Pub. L. No. 109–366, § 3(a), 120 Stat. 2600, 2601 (codified at 10 U.S.C. 948a(1)(A) (2006)) (amending Subtitle A of title 10, United States Code to include the definition of “unlawful enemy combatant”).

12. Curtis A. Bradley, *The United States, Israel & Unlawful Combatants*, 12 GREEN BAG 2D 271, 273 (2009).

ministration has stated that it will no longer use the term “enemy combatant,” it has also indicated that it wishes to continue using a broad detention and targeting authority.¹³

Nevertheless, the Obama Administration continues to develop its unique interpretation of DPH. Concurrently, the International Committee of the Red Cross (ICRC) recently published an Interpretive Guidance on the Notion of DPH, with the goal of providing recommendations concerning DPH interpretation.¹⁴ Although the Guidance does clarify many aspects of DPH, it by no means settles the debate over how to best interpret DPH.

A universal and comprehensive definition of DPH would be tremendously valuable. On the one hand, that definition could be based on compromise language that seeks to appease advocates of both the narrow and broad interpretations. However, such a compromise will likely be just as vague as the original terms of DPH. On the other hand, the definition could choose one interpretation over the other, creating a risk that some nations will violate the LOAC unless they change their staffing and targeting policies. This is the dilemma of DPH interpretation. Like Alexander the Great cutting through the Gordian Knot, a dramatic rethinking of DPH is necessary to resolve this problem. A modern notion of DPH will most likely look very different from the classic understanding of DPH.

This Essay seeks to explore the dilemma of DPH interpretation, and I hope that my arguments will be useful for the Obama Administration and others as they seek to reinterpret DPH to meet the challenges of modern warfare. In Part II, I will briefly summarize the tenets of LOAC and DPH in particular. In Part III, I will further describe the Bush and Obama Administrations’ positions on DPH, before describing how the United States could seek to employ a broad interpretation for targeting terrorists, a narrow interpretation for military contractors and civilian employees, and the significance of those possible interpretations. In Part IV, I will describe how a recent Israeli Supreme Court case has established a fairly broad interpretation for the targeting of terrorists and the consequences of that decision. In Part V, I will describe how the ICRC’s Interpretive Guidance fails to resolve the dilemma of DPH. In Part VI, I will conclude after offering a limited membership-

13. *Id.* at 274 (quoting Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay at 8, *In re Guantanamo Bay Detainee Litigation*, No. 08–442 (TFH) (D.D.C. 2009) [hereinafter Respondents’ Memorandum], available at <http://www.usdoj.gov/opa/documents/memo-re-det-auth.pdf>)

14. ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* 9 (2009) [hereinafter ICRC, *DPH Guidance*], available at [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0990/\\$File/ICRC_002_0990.PDF](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0990/$File/ICRC_002_0990.PDF).

based approach to DPH as a potential solution to the dilemma and exploring the significance of that solution.

I. THE LAW OF ARMED CONFLICT AND DIRECT PARTICIPATION IN HOSTILITIES

A. *A Brief Summary of the Law of Armed Conflict*

The “Basic Rule” of LOAC is that combatants and military objectives will be distinguished from civilians and civilian objects, with force directed towards the former and away from the latter.¹⁵ This principle, known as distinction, is at the heart of DPH.¹⁶ Distinction is applicable in international armed conflicts and non-international armed conflicts and serves to prevent total war.¹⁷ However, in modern warfare, where civilians, combatants, civilian objects, and military objects are all in close proximity to one another, distinction has become very difficult to achieve.¹⁸

The traditional understanding of the principle of distinction is that it creates two mutually exclusive categories of individuals: combatants and civilians. In an international conflict (a conflict between two or more of the Geneva Conventions’ High Contracting Parties),¹⁹ combatants include “not only regular troops but may also comprise, under certain conditions, irregular groups that fight alongside them.”²⁰ Potential combatants, including militias and volunteer corps, must fulfill four conditions: “(a) [t]hat of being commanded by a person responsible for his subordinates; (b) [t]hat of having a fixed distinctive sign recognizable at a distance; (c) [t]hat of carrying arms openly; [and] (d) [t]hat of conducting their operations in accordance with the laws and customs of war.”²¹ In a non-international armed conflict (where the conflict takes place between the armed forces of one State and an armed group located inside that same State),²² armed groups that meet the above four

15. AP I, *supra* note 2, art. 48; AP II, *supra* note 2, arts. 13–14.

16. HELEN DUFFY, *THE “WAR ON TERROR” AND THE FRAMEWORK OF INTERNATIONAL LAW* 228–29 (2005).

17. *Id.*

18. J. Ricou Heaton, *Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces*, 57 A.F. L. REV. 155, 182 (2005).

19. Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

20. DUFFY, *supra* note 16, at 229; *see also* AP I, *supra* note 2, art. 43 (defining who is considered a member of a State’s armed forces).

21. Geneva Convention III, *supra* note 19, art. 4(A)(2).

22. *Id.* art. 3; *see* Rome Statute of the International Criminal Court art. 8(2)(f), July 12, 1998, U.N. Doc. A/CONF.183/9 (describing the elements of a non-international armed conflict).

conditions can be considered combatants and targeted at any time.²³ Some would agree that the definition of who is a combatant is almost identical to who qualifies for POW status.²⁴ However, the United States Supreme Court first recognized the term “unlawful combatant” in its 1942 *Ex parte Quirin* decision,²⁵ and the United States has continued to use this terminology over time, including the Bush Administration (as will be discussed later in this essay). Nevertheless, this third, or intermediate, category of individual is not recognized by international treaty and has been criticized by many.²⁶

Civilians are defined in the negative: all individuals not combatants are considered civilians.²⁷ Article 52 of Additional Protocol I defined military objectives as: “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”²⁸ All non-military objects are civilian objects.²⁹

Under international law, combatants and civilians are entitled to certain privileges. First, combatants are allowed to conduct hostilities, so they cannot be prosecuted by an enemy’s judicial system for such actions, unless those actions are war crimes.³⁰ Second, enemy forces can target combatants unless the combatants are *hors de combat* or religious or medical personnel.³¹ Third, when

23. ICRC, *Commentary on the Additional Protocols to the Geneva Conventions*, ¶ 4789 (Yves Sandoz et al. eds., 1987) [hereinafter ICRC, *Commentary*], available at <http://www.icrc.org/IHL.nsf/WebList?ReadForm&id=470&t=com>; see also Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 97 (Oct. 2, 1995), available at <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> (noting that the distinction between international armed conflict and non-international armed conflict “has gradually become more and more blurred . . .”).

24. Heaton, *supra* note 18, at 169.

25. *Ex parte Quirin*, 317 U.S. 1, 35 (1942).

26. See, e.g., ANTONIO CASSESE, *INTERNATIONAL LAW* 409 (2d ed. 2005) (stating that the idea of an “intermediate category” would contradict international humanitarian law); HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Israel, [2005] 46 I.L.M. 375 ¶¶ 11, 28, available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf.

27. AP I, *supra* note 2, art. 50.

28. *Id.* art. 52(2).

29. *Id.* art. 52(1).

30. DUFFY, *supra* note 16, at 398; David Kretzmer, *Civilian Immunity in War: Legal Aspects*, in *CIVILIAN IMMUNITY IN WAR* 89 (Igor Primoratz ed. 2007). This privilege is known as “combatant privilege.” DUFFY, *supra* note 16, at 398.

31. DUFFY, *supra* note 16, at 229–30, 398; Kretzmer, *supra* note 30, at 89; Mark David Maxwell & Richard V. Meyer, *The Principle of Distinction: Probing the Limits of Customariness*, *ARMY LAW*, Mar. 2007, at 1, 3.

The phrase “*hors de combat*” means literally “outside the fight.” See AP I, *supra* note 2, art. 41.

captured, combatants are given POW status.³² Civilians, in exchange for not participating in hostilities, are not to be made the object of attack.³³ When captured, civilians are not entitled to POW status;³⁴ however, they are entitled to other protections while in detention.³⁵

Although less important for DPH considerations, attacks are legal if they not only comply with the principle of distinction but also if they are proportional and required by military necessity. An attack on a legitimate military objective is prohibited when the expected “incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof . . . would be excessive in relation to the concrete and direct military advantage anticipated.”³⁶ Proportionality indicates that civilian immunity from attack is not absolute; collateral damage might be acceptable under certain circumstances.³⁷ Furthermore, proportionality is, at best, an uncertain estimation measured in good faith before the attack; therefore, should the estimate prove erroneous, it should be analyzed with *ex ante* information, not *ex post*.³⁸

Military necessity requires a commander to limit his attacks to targets whose destruction would provide a military benefit.³⁹ Additionally, the anticipated military advantage must be “concrete and direct,”⁴⁰ not speculative.⁴¹ Moreover, the commander must use only the weapons or means needed to achieve that benefit.⁴² Military necessity involves some subjectivity on the part of military commanders; moreover, the military necessity to attack facilities will increase and decrease over the course of the conflict.⁴³

B. Direct Participation in Hostilities

Civilians are entitled to immunity from being targeted “unless

32. Geneva Convention III, *supra* note 19, art. 4(A); DUFFY, *supra* note 16, at 398; Kretzmer, *supra* note 30, at 89.

33. AP I, *supra* note 2, art. 51(2); DUFFY, *supra* note 16, at 230; Kretzmer, *supra* note 30, at 89.

34. See Geneva Convention III, *supra* note 19, art. 4(A) (noting that, with few exceptions, civilians do not fall within the categories that qualify for POW status).

35. Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 27–37, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

36. AP I, *supra* note 2, art. 51(5)(b).

37. Kretzmer, *supra* note 30, at 100–01.

38. DUFFY, *supra* note 16, at 234; Kretzmer, *supra* note 30, at 101–02.

39. Heaton, *supra* note 18, at 180.

40. AP I, *supra* note 2, art. 57(2)(a)(iii).

41. DUFFY, *supra* note 16, at 234.

42. See *id.*

43. Heaton, *supra* note 18, at 181.

and for such time as they directly participate in hostilities.”⁴⁴ The concept of DPH involves three elements: hostilities, the notion of “direct,” and a temporal element indicated by the phrase “for such time.”⁴⁵ The element of “hostilities,” like the concept of DPH itself, is vague and imprecisely defined. In fact, no official definition of “hostilities” can be found in the LOAC.⁴⁶ The ICRC Commentary states that hostilities “should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces.”⁴⁷ On its face, this is a very narrow interpretation, similar to combat operations, and it would seem to exclude a terrorist attack on civilians.⁴⁸

In order to be “direct,” a civilian’s actions must have a “direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity takes place.”⁴⁹ This implies a “but for” causation between the act and the resulting harm, excluding all acts that are too removed from the resulting harm.⁵⁰ For example, civilians working in a munitions factory would not be directly participating in hostilities, while the civilian preparing weapon systems on the front line would be.⁵¹ A civilian providing strategic intelligence analysis would not be directly participating in hostilities, while the civilian providing tactical intelligence would be.⁵² The notion of direct is situational and must be judged on a case-by-case basis.⁵³

The final issue that must be discussed is the temporal nature of DPH. The ICRC Commentary states that DPH includes “preparations for combat and the return from combat,”⁵⁴ but that “[o]nce he ceases to participate, the civilian regains the right to the protection”⁵⁵ This language seems to indicate that a civilian can be a “farmer by day” and a “guerilla by night.”⁵⁶ This criticism, known as the “revolving door” approach, points out that the Commen-

44. AP I, *supra* note 2, art. 51(3); AP II, *supra* note 2, art. 13(3).

45. AP I, *supra* note 2, art. 51(3); AP II, *supra* note 2, art. 13(3).

46. ICRC, *2005 Report*, *supra* note 3, at 17.

47. ICRC, *Commentary*, *supra* note 23, ¶ 1942.

48. Kretzmer, *supra* note 30, at 91; W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 134 (1990).

49. ICRC, *Commentary*, *supra* note 23, ¶ 1679.

50. Schmitt, *Direct Participation*, *supra* note 7, at 508. *But cf.* ICRC, *2005 Report*, *supra* note 3, at 34 (stating that one expert felt “but for” causation was inappropriate).

51. Kretzmer, *supra* note 30, at 91; Schmitt, *Direct Participation*, *supra* note 7, at 508–09; Schmitt, *Humanitarian Law*, *supra* note 5, at 544–45.

52. Schmitt, *Direct Participation*, *supra* note 7, at 509; Schmitt, *Humanitarian Law*, *supra* note 5, at 543–44.

53. Schmitt, *Direct Participation*, *supra* note 7, at 508.

54. ICRC, *Commentary*, *supra* note 23, ¶ 1943.

55. *Id.* ¶ 1944.

56. Parks, *supra* note 48, at 119; Schmitt, *Direct Participation*, *supra* note 7, at 510.

tary's logic not only encourages terrorists to seek refuge among civilian populations but also limits armed forces' ability to fight terrorism.⁵⁷ Nevertheless, members of reserve components of the military or units such as the National Guard of the United States already operate under the "revolving door" approach: legal targets while on active duty, illegal targets when they return to civilian life.⁵⁸

In response, some experts have proposed a "membership approach," whereby known members of an armed group could be targeted at any time and civilians would have the burden of demonstrating affirmative disengagement from an armed group.⁵⁹ While this approach seems to contradict the "direct" and "for such time" elements of DPH, the membership approach does seem to be gaining in popularity and will be discussed throughout this essay and will be explored in depth in the Conclusion.

When a civilian directly participates in hostilities, several consequences follow. First, according to Article 51(3) of the First Additional Protocol, civilians can be targeted during such time as they directly participate in hostilities.⁶⁰ Second, civilians who directly participate in hostilities are not entitled to POW status upon capture.⁶¹ Third, civilians are not entitled to "combatant immunity," and may be tried by an opposing force's judicial system for actions taken while directly participating in hostilities.⁶²

Demonstrating that a civilian directly participated in hostilities requires a case-by-case analysis due to the subjective and sometimes vague elements of DPH.⁶³ However, that analysis will differ depending on who is conducting it and what interpretation of DPH is used. Therefore, having briefly summarized the basics of the LOAC and DPH and their respective grey areas, I will now describe how the United States, Israel, and the ICRC interpret DPH, as well as the policy implications of each interpretation. I will argue that each interpretation is driven by the respective goals of each country or group, creating a dilemma for policymakers who would reinterpret DPH.

57. See Parks, *supra* note 48, at 118–20.

58. *Id.* at 115& n.361.

59. ICRC, *2005 Report*, *supra* note 3, at 63–65.

60. AP I, *supra* note 2, art. 51(3).

61. Kretzmer, *supra* note 30, at 89; Schmitt, *Humanitarian Law*, *supra* note 5, at 519–20; see Geneva Convention III, *supra* note 19, art. 4(A) (noting that, with few exceptions, civilians do not fall within the categories that qualify for POW status).

62. DUFFY, *supra* note 16, at 398, 402; Kretzmer, *supra* note 30, at 89; Schmitt, *Humanitarian Law*, *supra* note 5, at 520.

63. Schmitt, *Humanitarian Law*, *supra* note 5, at 534.

II. THE U.S. INTERPRETATION OF DIRECT PARTICIPATION IN HOSTILITIES

A. Counterterrorism Operations

It was primarily because the United States thought the First Additional Protocol offered too many protections to fighters who fell outside the definition of combatant that it chose not to ratify the Protocols.⁶⁴ In his letter to the Senate, President Reagan stated that he believed that the First Additional Protocol “would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war.”⁶⁵ The same Senate document also contained a letter from Secretary of State George P. Schultz to President Reagan stating that the United States interpreted the Second Additional Protocol more broadly than other parties, allowing armed groups to be more easily targeted.⁶⁶

Accordingly, after the attacks of September 11, 2001, the Bush Administration developed and applied the concept of “unlawful enemy combatant” to the Global War on Terror.⁶⁷ The Military Commissions Act (MCA) defined “unlawful enemy combatant” in part as “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).”⁶⁸

Recall that under the relevant sections of the Third Geneva Convention described earlier in this essay,⁶⁹ members of al-Qaeda are unlikely to qualify as combatants.⁷⁰ Some would argue that such members of al-Qaeda should therefore be considered civilians, but this conclusion would have limited how the Bush Administra-

64. Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1093–94 (2008).

65. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE PROTOCOL II ADDITIONAL TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NONINTERNATIONAL ARMED CONFLICTS, S. TREATY DOC. NO. 100–2, at IV (1987) [hereinafter TRANSMITTING MESSAGE], available at http://www.loc.gov/r/frd/Military_Law/pdf/protocol-II-100-2.pdf.

66. Letter of Submittal from Secretary of State George P. Schultz to the President, in TRANSMITTING MESSAGE, *supra* note 65, at VII–VIII; Parks, *supra* note 48, at 220.

67. Military Commissions Act of 2006, Pub. L. No. 109–366, § 3(a), 120 Stat. 2600, 2601 (codified at 10 U.S.C. 948a(1)(A) (2006)).

68. *Id.* § 3(a).

69. *See supra* Part I.A.

70. *See* Geneva Convention III, *supra* note 19, art. 4(A).

tion could target such individuals. However, by creating a special third category, the Bush Administration argued that it could target members of al-Qaeda at any time (like combatants), but not grant them POW status when detained (like civilians).⁷¹

The Bush Administration's approach to DPH is very broad. Some have argued that this third category of unlawful enemy combatant goes well beyond the DPH standard described in the Additional Protocols, exceeding the scope of the LOAC.⁷² The language is so wide-ranging that individuals who would typically be considered noncombatants because of their position (e.g., financier, propagandist, or accountant) were still considered unlawful enemy combatants, despite any association with terrorist groups.⁷³ The MCA definition of unlawful enemy combatant seems to resemble that of a membership-based approach instead of a purely conduct-based approach. In fact, a recent report has found that most U.S. detainees were considered unlawful enemy combatants because of their association with terrorist groups, not because they had directly participated in hostilities.⁷⁴ It would appear that the Bush Administration may have used the concept of unlawful enemy combatant to broaden the scope of DPH too far, leading to criticism. Accordingly, the Obama Administration must decide whether to scale back its interpretation of DPH, and if so, how far.

The Obama Administration has only begun to develop its position regarding DPH, recently submitting a memorandum outlining the government's authority to detain terrorists.⁷⁵ Although not focused on the President's power to target terrorists, the memo is couched in a broad interpretation of DPH similar to that of the Bush Administration:

The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported

71. Bradley, *supra* note 12, at 273.

72. Ryan Goodman & Derek Jinks, *Reply to Congressional Authorization: International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653, 2657–58 (2005).

73. *Id.*

74. Chesney & Goldsmith, *supra* note 64, at 1112–13 (citing Mark Denbeaux & Joshua Denbeaux, *Report on Guantanamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data* (Seton Hall Pub. Law & Legal Theory Research Group, Research Paper No. 46, 2006), available at <http://ssrn.com/abstract=885659>).

75. Respondents' Memorandum, *supra* note 13, at 1–3.

hostilities, in aid of such enemy armed forces.⁷⁶

The memo goes on to say that, “[i]t is neither possible nor advisable, however, to attempt to identify, in the abstract, the precise nature and degree of ‘substantial support,’ or the precise characteristics of ‘associated forces,’ that are or would be sufficient to bring persons and organizations within the foregoing framework.”⁷⁷ The Obama Administration has abandoned the term “unlawful enemy combatant,” but has retained wide-ranging language similar to that used by the Bush Administration.⁷⁸

Although the memo does put forward a standard of “substantially supports” where the United States once argued for a standard of simply “supports,”⁷⁹ the difference is not terribly significant, considering that the government’s memo fails to provide any definition or example to help put “substantial” in context. Further, the government argues for a standard of “directly supported hostilities” instead of directly participated in hostilities.⁸⁰ This standard is also unclear but potentially includes a number of people that would normally fall outside of the DPH standard.⁸¹

Lastly, the government standard of “part of . . . [the] Taliban or al-Qaeda forces or associated forces” argues for a membership approach, but the memo is again unclear in its limits on membership. The government offered a few examples, such as taking a loyalty oath or training with al-Qaeda, but the government did not provide any examples of what fell outside its scope.⁸² Therefore, there is some concern that the Obama Administration’s proposed definition is too broad, again pushing towards a wide-ranging, membership-based approach. Accordingly, some fear it might subject a number of people to detention who did not directly participate in hostilities.⁸³

Currently, the Obama Administration’s position on DPH remains uncertain. While it is likely that the Obama Administration will retain some aspects of a membership-based approach, it is also

76. *Id.* at 2.

77. *Id.*

78. Bradley, *supra* note 12, at 274.

79. Hamdi v. Rumsfeld, 542 U.S. 507, 516 (2004) (citing Brief for Respondents at 3).

80. See, e.g., *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005), *vacated sub nom.* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), *rev'd*, 553 U.S. 723 (2008).

81. *Id.* (offering an example of a “little old lady” who donates money to a charity, unwittingly supporting al-Qaeda).

82. Respondents’ Memorandum, *supra* note 13, at 6–7.

83. Petitioners’ Joint Memorandum in Reply to Respondents’ Memorandum of March 13, 2009 at 8, *In re Guantanamo Bay Detainee Litigation*, No. 1:08-cv-00987 (JDB) (D.D.C. Mar. 27, 2009) (copy on file with the author) [hereinafter Petitioners’ Joint Memorandum].

likely that any position will also impose some limits so as to reflect more traditional notions of DPH. Accordingly, I will look at two recent counterterrorism operations and examine how they could be used by the Obama Administration to develop its interpretation of DPH.

In the first operation, which occurred on June 7, 2006, U.S. armed forces killed Abu Musab al-Zarqawi.⁸⁴ Zarqawi did not fall under the typical definitions of combatant. Although he was the leader of an armed group, al-Qaeda in Iraq, and “the mastermind behind hundreds of bombings, kidnappings and beheadings in Iraq,”⁸⁵ he failed to meet the requirements of combatant, so he could be considered a civilian.⁸⁶ After deciding that it would be too dangerous to attempt to capture him,⁸⁷ Zarqawi was killed.

Zarqawi was likely killed because of his command role, not necessarily because he was preparing to engage in an attack.⁸⁸ This is a broad interpretation of Article 51(3), based on a membership approach. He was targeted because of his status, not his behavior—this is the crucial distinction between the membership approach and the customary understanding of DPH. Nevertheless, the international community did not condemn this killing. In fact, the U.N. Secretary General Kofi Anan praised the attack.⁸⁹ The international community likely accepted the killing of Zarqawi for two reasons. First, Zarqawi was in a command position, making the “revolving door” issue less relevant. Second, Zarqawi was killed in Iraq, close to the scene of hostilities, making the “direct” issue more applicable. These important factors demonstrate that a membership-based approach to DPH can be constrained in ways that still allow the United States to prosecute an effective counter-

84. Ellen Knickmeyer & Jonathan Finer, *Insurgent Leader al-Zarqawi Killed in Iraq*, WASH. POST, June 8, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/08/AR2006060800114.html>.

85. *Id.*

86. Zarqawi’s armed group did not meet the four requirements of Article 4(A) of the Third Geneva Convention, discussed *supra* Part I.A. Furthermore, parties may have been reluctant to give his armed group combatant status, as it would imply that members of this group are immune from prosecution for their hostile acts and that they could not be interrogated.

87. See Jonathan Finer & Hasan Shammari, *Zarqawi Lived After Airstrike*, WASH. POST, June 10, 2006, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060900473.html> (quoting Maj. Gen. William B. Caldwell IV as stating, “If in fact U.S. military or coalition forces feel that, in the execution of a target, that it’s going to lead to exorbitant American or coalition forces losses, that we’ll use proportional force rather than put young men and women’s lives at risk”).

88. See Joel Roberts, *What’s Next After Zarqawi’s Death?*, CBSNEWS.COM, June 8, 2006, <http://www.cbsnews.com/stories/2006/06/08/iraq/main1692753.shtml> (emphasizing the leadership role of Zarqawi).

89. *Zarqawi’s Death Removes “Heinous and Dangerous Man” - Annan*, U.N. NEWS CENTRE, June 8, 2006, <http://www.un.org/apps/news/storyAr.asp?NewsID=18790>.

terrorism strategy.

The second operation occurred in November 2002, U.S. forces used a Predator unmanned aerial vehicle (UAV) to kill Qaed Salim Sinan al-Harethi, an al-Qaeda leader, in Yemen.⁹⁰ Al-Harethi was considered one of the top twelve members of al-Qaeda, and he held a leadership role in both the attack on the U.S.S. Cole and the 9/11 attacks.⁹¹ U.S. armed forces attacked al-Harethi in a manner similar to the attack on Zarqawi: reliable intelligence was used to target the individual; he was relatively isolated, thereby reducing the chances and scope of collateral damage; and a proportionate method was used.⁹² Similarly, al-Harethi was targeted due to his leadership status.⁹³ However, unlike Zarqawi's killing, this was a targeted killing that took place *outside* the theater of an armed conflict, and, this time, the international community did criticize the attack for just this reason.⁹⁴

Some have argued that to allow individuals such as Zarqawi and al-Harethi to remain protected as civilians unless directly attacking U.S. forces would be tantamount to rewarding terrorists for violating the LOAC.⁹⁵ Nevertheless, these killings should inform the Obama Administration. With respect to counterterrorist operations, although a membership approach to DPH is not without problems, such an approach is more acceptable if it retains some of the more traditional aspects of DPH. In distancing itself from the Bush Administration, the Obama Administration will have to accept some legal restraints if its policy is to be accepted by the international community.

B. Military Contractors and Civilian Employees

The Obama Administration has yet to develop its position on DPH with respect to contractors and civilian employees of the armed forces. Unlike potential counterterrorism policies, the Obama Administration is likely to avoid any broad interpretation of DPH in this context in order to create a high threshold and protect the contractors and civilian employees.

For as long as there have been militaries, there have been civi-

90. Albert S. Janin, *Engaging Civilian-Belligerents Leads to Self-Defense/Protocol I Marriage*, ARMY LAW., July 2007, at 82, 98.

91. Norman G. Printer, Jr., *The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 UCLA J. INT'L L. & FOREIGN AFF. 331, 335 (2003).

92. See *id.* at 91, at 336, 379–80; Knickmeyer & Finer, *supra* note 84.

93. See Printer, *supra* note 91, at 335; Knickmeyer & Finer, *supra* note 84.

94. Janin, *supra* note 90, at 98.

95. Printer, *supra* note 91, at 375.

lians who travel with those militaries. However, since the end of the Cold War, the number of civilians and the functions they perform have increased dramatically.⁹⁶ For example, during the first Gulf War, there were sixty military personnel for every contractor; today there are more contractors in Iraq than uniformed personnel.⁹⁷ Once the Cold War ended, defense budgets shrank, and the U.S. military downsized.⁹⁸ The new budget constraints led to a shift towards hiring civilians.⁹⁹ Civilians tend to be cheaper because they can be hired for discrete tasks, requiring less long-term training and overhead expenses.¹⁰⁰ Furthermore, under the label of “Transformation,” the U.S. military devoted its troops to combat functions, requiring civilians to perform support functions.¹⁰¹ Lastly, innovation in military technology has increased beyond the ability of the military to train operators and maintenance personnel.¹⁰² Consequently, the military uses contractors to maintain, repair, and sometimes operate the latest devices and technology.¹⁰³

As a result, civilian employees and contractors perform a variety of job functions. Civilian employees maintain weapons systems such as the F-117 Nighthawk fighter, the B-2 Spirit Bomber, M1 Abrams tank, and the Predator UAVs; handle logistics; and gather intelligence.¹⁰⁴ Contractors also provide security at forward locations and have fought against opposing forces.¹⁰⁵ U.S. Army regulations even allow some civilians to be issued uniforms, Kevlar helmets, and sometimes side arms.¹⁰⁶ Private security contractors are often armed, and many wear some type of uniform.¹⁰⁷

Although they sometimes perform similar jobs, there is a sig-

96. See Schmitt, *Direct Participation*, *supra* note 7, at 512–15; Schmitt, *Humanitarian Law*, *supra* note 5, at 512.

97. Geoffrey S. Corn, Op-Ed., *Murky “Blackwater” and the Direct Participation Dilemma*, JURIST, Oct. 2, 2007, <http://jurist.law.pitt.edu/forumy/2007/10/murky-blackwater-and-direct.php>.

98. Schmitt, *Direct Participation*, *supra* note 7, at 512; Schmitt, *Humanitarian Law*, *supra* note 5, at 517.

99. Schmitt, *Direct Participation*, *supra* note 7, at 512–13; Schmitt, *Humanitarian Law*, *supra* note 5, at 517–18.

100. Schmitt, *Direct Participation*, *supra* note 7, at 512–13; Schmitt, *Humanitarian Law*, *supra* note 5, at 517–18.

101. Schmitt, *Direct Participation*, *supra* note 7, at 513–15; Schmitt, *Humanitarian Law*, *supra* note 5, at 517–18.

102. Schmitt, *Direct Participation*, *supra* note 7, at 513; Schmitt, *Humanitarian Law*, *supra* note 5, at 518.

103. Schmitt, *Direct Participation*, *supra* note 7, at 513; Schmitt, *Humanitarian Law*, *supra* note 5, at 518.

104. Heaton, *supra* note 18, at 184; Schmitt, *Humanitarian Law*, *supra* note 5, at 512.

105. Heaton, *supra* note 18, at 186; Schmitt, *Humanitarian Law*, *supra* note 5, at 513–14.

106. Schmitt, *Direct Participation*, *supra* note 7, at 515.

107. Heaton, *supra* note 18, at 186–87; Schmitt, *Direct Participation*, *supra* note 7, at 515.

nificant difference in the degree of control over civilian employees and contractors. “Government civilian employees are subject to civil service disciplinary measures, but the system is administrative, not judicial.”¹⁰⁸ In contrast, contractors answer to the contracting officer, who only exercises supervisory control over the contractors and can only issue financial penalties on the firm.¹⁰⁹ In 2000, Congress passed the Military Extraterritorial Jurisdiction Act (MEJA), which subjects all persons employed by the military abroad (i.e., civilian employees and contractors) to federal criminal prosecution.¹¹⁰ However, because the MEJA does not subject individuals to military jurisdiction, the commanding officer cannot use it to compel action.¹¹¹

Civilian employees and contractors do not qualify as combatants. They are not members of the armed forces; they have not enlisted or been conscripted.¹¹² Civilian employees and contractors do not meet the four requirements of the Third Geneva Convention.¹¹³ Therefore, if civilian employees and contractors are not combatants, they must be civilians, immune from targeting, unless and for such time they directly participate in hostilities.

Therefore, in order to protect the military’s civilian employees and contractors, the Obama Administration should promote a policy with a narrow interpretation of DPH. The foundation of this opinion can be found in the Commentary to the First Additional Protocol, which seems to require a “direct causal relationship between the activity engaged in and the harm done” and that the acts be “intended to cause actual harm.”¹¹⁴ Moreover, in 2000, the United States offered a narrow interpretation of DPH, defining it as follows:

[I]mmediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct and causal relationship between the activity engaged in and the harm done to the enemy. The phrase “direct participation in hostilities” does not mean indirect participation in hostilities, such as gathering and

108. Schmitt, *Humanitarian Law*, *supra* note 5, at 516; *see also* Schmitt, *Direct Participation*, *supra* note 7, at 517.

109. Schmitt, *Direct Participation*, *supra* note 7, at 517; Schmitt, *Humanitarian Law*, *supra* note 5, at 516.

110. Schmitt, *Direct Participation*, *supra* note 7, at 517.

111. *Id.*

112. Schmitt, *Humanitarian Law*, *supra* note 5, at 524.

113. *See* Geneva Convention III, *supra* note 19, art. 4(A). However, it might be possible that some private military contractors might meet the four requirements of the Third Geneva Convention, thereby making them eligible for combatant status and POW protections.

114. ICRC, *Commentary*, *supra* note 23, ¶¶ 1679, 1942.

transmitting military information, transporting weapons, munitions and other supplies, or forward deployment.¹¹⁵

The United States Department of Defense Law of War Working Group argued that civilians directly participate in hostilities if there is: “1) geographic proximity of service provided to units in contact with the enemy, 2) proximity of relationship between services provided and harm resulting to the enemy, and 3) temporal relation of support to enemy contact or harm resulting to enemy.”¹¹⁶

Several experts also have argued for a narrow interpretation of DPH in the context of civilian employees and contractors. W. Hays Parks argues that the language of the First Additional Protocol requires an act similar to that of military operations or combat to qualify as DPH.¹¹⁷ Michael Schmitt agrees, contending that the civilian must be aware that his “participation was indispensable to a discrete hostile act or series of related acts.”¹¹⁸

It is in the interest of the Obama Administration to pursue a narrow interpretation so that its military can continue to hire civilians and contractors.¹¹⁹ Such an interpretation makes it very difficult for civilian employees or contractors to directly participate in hostilities, thereby maintaining immunity from targeting. Even the often-debated example of “Bob” the ammunition truck driver¹²⁰ would not be directly participating in hostilities under the U.S. definition of DPH. Civilian employees and contractors, who work some distance from the front lines, fail to meet the “immediate and actual action on the battlefield” and “geographic proximity” requirements.¹²¹ This would include personnel who act as trainers or repairmen. But under both a narrow and a broad definition of DPH, when contractors engage in a gun battle with opposing forces, they are directly participating in hostilities.¹²² However, an individual who is sitting in Florida, but firing a missile from a Predator drone in Iraq, presents an interesting case and something of a counterpart to the al-Harethi killing. His actions seem to qual-

115. MESSAGE FROM THE PRESIDENT TRANSMITTING TWO OPTIONAL PROTOCOLS TO THE CONVENTION ON THE RIGHTS OF THE CHILD, S. TREATY DOC. NO. 106-37, at VII (2000).

116. Janin, *supra* note 90, at 89 (quoting INT’L & OPERATIONAL LAW DEPT, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, U.S. ARMY, 2 INT’L & OPERATIONAL LAW I-10 (Sept. 2006)).

117. Parks, *supra* note 48, at 134.

118. Schmitt, *Humanitarian Law*, *supra* note 5, at 533.

119. Heaton, *supra* note 18, at 192-93.

120. ICRC, *2005 Report*, *supra* note 3, at 32-33.

121. *Id.* at 3, at 34-35; Heaton, *supra* note 18, at 194.

122. Heaton, *supra* note 18, at 193.

ify as DPH; although he is located thousands of miles away.¹²³

However, when “front lines” are disappearing and technology makes distance almost irrelevant, one wonders why the United States would retain a geographic proximity requirement.¹²⁴ When an entire country or group of countries can become a locus of hostilities, this requirement becomes less meaningful.¹²⁵ Consequently, any future DPH interpretation will likely emphasize causal proximity and membership over geographic proximity.

Nevertheless, it should be noted that while the civilians driving ammunition trucks, working in ammunition factories, and working in a repair depot far from the front lines should not be targeted due to their civilian status, the facilities in which they operate could be targeted as military objectives.¹²⁶ However, the presence of civilians within such facilities should be taken into consideration when determining proportionality.

C. Conclusion

The Obama Administration has incentives to pursue two seemingly contradictory interpretations of DPH. On the one hand, the United States could pursue a narrow interpretation to protect the military’s civilian employees and contractors. On the other hand, the United States could pursue a broad interpretation in order to attack terrorists. However, if the United States were to pick only one interpretation to follow, some group of individuals would be left at risk. That is, if the United States were to follow a narrow interpretation, targeting terrorists becomes more difficult, possibly increasing the chances of future attacks upon the United States. Nevertheless, if the United States were to follow the broad interpretation, civilian employees and contractors would be less protected from opposing forces.

Therefore, perhaps the Obama Administration will choose to pursue only a broad interpretation of DPH, lowering the threshold for what qualifies as direct participation. Under such an interpretation, the United States could continue to target terrorists. Furthermore, the increased risk to civilians and contractors might only be marginal because although many should be protected as civilians, their proximity to legitimate military targets already expos-

123. See ICRC, *2005 Report*, *supra* note 3, at 35 (noting that even under different definitions, such an individual would likely be directly participating in hostilities).

124. Schmitt, *Direct Participation*, *supra* note 7, at 511.

125. See *id.*

126. Heaton, *supra* note 18, at 197.

es them to a substantial degree of risk.¹²⁷

Alternatively, the Obama Administration might pursue a membership-based approach to DPH that includes two separate sets of rules. The first set of rules would apply to civilian employees and contractors, and the rules would conform to a narrow interpretation of DPH, similar to the definition described above. The second set of rules would apply to terrorists and affiliated groups, and these rules would conform to a broad interpretation of DPH, similar to the Obama Administration's memorandum also discussed above.

However, such a membership-based approach would not be without problems. First, it would cause the temporal aspect of DPH to virtually disappear. Members of terrorist organizations might be targeted at any time, much like combatants. Moreover, it is possible that individual members might be targeted despite a lack of actual participation in hostilities. Lastly, defining how individuals become members and disclaim their membership might prove difficult. For example, it is possible that an individual might visit a website supporting al-Qaeda, download all the information necessary to commit an attack and post threats on a bulletin board. That individual swore no oath and did not visit a training camp. It is unlikely that this person would qualify as a member of al-Qaeda, but he might still pose a threat. Should the Obama Administration decide to adopt a two-track membership-based interpretation of DPH, it is imperative that the policy contains clear boundaries and thresholds.

III. THE ISRAELI INTERPRETATION OF DIRECT PARTICIPATION IN HOSTILITIES

Like the United States, Israel did not ratify the First Additional Protocol.¹²⁸ Similarly, Israel chose not to do so because the First Additional Protocol would have awarded members of the Palestinian Liberation Organization combatant status.¹²⁹ Over time, Israel developed a broad interpretation of DPH in order to target terrorists. However, this interpretation came under some criticism.¹³⁰

The argument over Israel's policy eventually led to a case before the Israeli Supreme Court. The court ruled on the legality of

127. *Id.* at 174, 197.

128. Orna Ben-Naftali & Keren R. Michaeli, "We Must Not Make a Scarecrow of the Law": A Legal Analysis of the Israeli Policy of Targeted Killings, 36 *CORNELL INT'L L.J.* 233, 256 (2003).

129. *Id.*

130. *See, e.g., id.* at 233–35 (criticizing Israel's targeted killing policy on several grounds).

this policy, endorsing a broad interpretation of DPH. However, the court's decision also included some constraints on the Israeli Defense Forces (IDF). This essay will next discuss the context of that decision, the decision itself, and the criticism that the decision provoked. By detailing these issues, I hope to explore the contours of the Israeli interpretation of DPH before briefly comparing it to a broad interpretation that could potentially be used by the Obama Administration for counterterrorism purposes.

A. *Historical Background*

In order to better understand Israel's targeted killing policy, a bit of history is necessary. In 2000, the second Intifada began.¹³¹ The scope of violence on the part of the Palestinians was far more severe during the second Intifada than during the first: there were guns, missiles, and suicide bombings instead of rocks, Molotov cocktails, and knives.¹³² This escalation of violence culminated in the use of targeted killing by the Israelis, the first of which was announced by an IDF Spokesman on November 9, 2000.¹³³ The killings took place primarily against members of Tanzim/Fatah, Hamas, and Islamic Jihad.¹³⁴ Although generally seen as an effective policy,¹³⁵ several groups questioned the legality of the targeted killing policy.

B. *The PCATI v. Israel Decision*

Eventually this questioning led to a lawsuit, which reached the Israeli Supreme Court in a 2005 case, *The Public Committee Against Torture in Israel (PCATI) v. Israel*.¹³⁶ The petitioners argued that the targeted killing policy was completely illegal because Israel was compelled to operate under a law enforcement model when acting inside occupied territory.¹³⁷ The petitioners asserted that a self-defense claim was only viable against another state, which the Gaza Strip was not.¹³⁸ In the alternative, the petitioners contended that even if operating under the LOAC, the targets were

131. *Al-Aqsa Intifada Timeline*, BBC NEWS, Sept. 29, 2004, http://news.bbc.co.uk/2/hi/middle_east/3677206.stm.

132. Amos Guiro, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT'L L. 319, 320–21 (2004).

133. Ben-Naftali & Michaeli, *supra* note 128, at 238–39.

134. *Id.* at 247.

135. See Guiro, *supra* note 132, at 334 (describing comments by the Israeli media and Israeli Defense Forces).

136. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Israel, [2005] 46 I.L.M. 375.

137. *Id.* ¶¶ 3–4.

138. *Id.* ¶ 4.

civilians; therefore, they are immune from attack unless and for such time that they are taking a “direct and active part in hostilities.”¹³⁹ The petitioners argued for a very strict and narrow interpretation of DPH.¹⁴⁰ Lastly, the petitioners asserted that the targeted killing policy did not meet the requirements of proportionality.¹⁴¹

In response the respondents argued that Israel found itself in an armed conflict; therefore, Israel could use force against terrorists as self-defense.¹⁴² Furthermore, they contended that terrorists were parties to an armed conflict, and Israel was entitled to target them for the duration of the conflict.¹⁴³ However, the terrorists were not entitled to the rights of combatants; instead, they were “unlawful combatants.”¹⁴⁴ In the alternative, respondents argued that the terrorists could be targeted because they were civilians engaging in DPH.¹⁴⁵ The respondents further asserted that Israel’s refusal to ratify the First Additional Protocol allowed Israel to use a broad interpretation of DPH that included not only those committing hostile acts but also those who planned the acts.¹⁴⁶ Finally, the respondents argued that the targeted killing policy was indeed proportionate.¹⁴⁷

Citing precedents and LOAC scholars, the court noted that there existed an international armed conflict between Israel and various terrorist organizations that had been continuous since the first Intifada.¹⁴⁸ The court then turned to the combatant/civilian divide. The court stated that combatants are either members of a nation’s armed forces or they meet the four requirements of Article 4(A) of the Third Geneva Convention.¹⁴⁹ Noting that terrorists do not conduct their operations in accordance with the laws of war, the court declared that terrorists do not qualify for combatant status, POW status, or combatant immunity.¹⁵⁰ Therefore, the court reasoned that terrorists must be civilians.¹⁵¹ However, whether or not terrorists could be targeted depended on whether they directly

139. *Id.* ¶¶ 5–6.

140. *Id.* ¶ 8.

141. *Id.*

142. *Id.* ¶ 10.

143. *Id.* ¶¶ 10–11.

144. *Id.* ¶ 11.

145. *Id.* ¶ 12.

146. *Id.*

147. *Id.* ¶ 13.

148. *Id.* ¶ 16.

149. *Id.* ¶ 24. The four requirements were discussed in *supra* Part I.A.

150. Pub. Comm. Against Torture in *Isr. v. Israel*, ¶¶ 24–25.

151. *Id.* ¶ 26.

participated in hostilities.¹⁵² The court refused to recognize a third category of unlawful combatant, holding that existing law did not allow the court to create this third category.¹⁵³

The court then began an in-depth discussion of DPH. The Israeli government had argued that the temporal aspect of DPH was not customary international law, perhaps as a first step towards arguing for a membership-based interpretation of DPH.¹⁵⁴ However, the court declared that all aspects of DPH had indeed attained the status of customary international law.¹⁵⁵ The court then stated that when a civilian directly participates in hostilities, he does not cease being a civilian, but instead forfeits his immunity from targeting and does not receive the benefits of being a combatant.¹⁵⁶

When discussing hostilities, the court noted that hostilities should include not only acts that are intended to damage military objects but also civilians.¹⁵⁷ The court thereby expanded the concept described in the Commentary to the First Additional Protocol.¹⁵⁸ However, this is an important expansion, as it resolves any dispute regarding whether an attack on civilians qualifies as DPH.

Regarding the notion of “direct,” the court also took an expansive, broad stance. The court noted that a definition of direct that included only combat and active military options would be too narrow.¹⁵⁹ Alternatively, “extending it to the entire war effort would be too broad, as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly.”¹⁶⁰ When trying to find the proper middle ground, the court favored a broad interpretation of “direct” in order to encourage civilians to remain detached from hostilities.¹⁶¹

In order to provide guidance, the court then proceeded to offer examples that fell inside and outside its definition of direct. The court explained that individuals who sell food or medicine to terrorists, provide strategic intelligence or logistical support, donate money, distribute propaganda, or are employed in the armaments industry do not directly participate in hostilities.¹⁶² This interpretation was largely consistent with traditional interpretations of

152. *Id.*

153. *Id.* ¶ 28.

154. *Id.* ¶ 30.

155. *Id.*

156. *Id.* ¶ 31.

157. *Id.* ¶ 33.

158. *Id.*

159. *Id.* ¶ 34 (quoting ICRC, *Commentary*, *supra* note 23, ¶ 1679).

160. *Id.* (quoting ICRC, *Commentary*, *supra* note 23, ¶ 1679).

161. *Id.*

162. *Id.* ¶ 35.

DPH, but it contradicted the unlawful enemy combatant policy pursued by the Bush Administration.

However, the court did include a few surprises in its list of what qualifies as “direct.” The court stated that civilians who kill or take prisoners, gather tactical intelligence, operate a weapons system, supervise such operation, service such equipment (even if away from where the equipment is used), or transport terrorists to the site of an attack directly participate in hostilities.¹⁶³ This list would seem to indicate that many of the civilian employees and contractors would be considered to be directly participating in hostilities. The Israeli Supreme Court also stated that if “Bob” the ammunition truck driver were driving to the location where the ammunition would be used, then he would be directly participating in hostilities.¹⁶⁴ This is in contrast to the United States’ position described earlier in this essay. Moreover, the court stated that individuals who are terrorist recruiters, planners, and leaders directly participate in hostilities.¹⁶⁵ Such an interpretation would cover the United States’ attacks on Zarqawi and al-Harethi.

When considering the temporal element of DPH, the court expressed some concern, noting that there was no international consensus on how to interpret the temporal element of DPH.¹⁶⁶ On the one hand, a civilian who engaged in DPH once should not be targeted for his past act; on the other hand, a civilian who regularly engages in terrorist acts could be targeted at almost any time.¹⁶⁷ Therefore, it appears as if the court was unable to find a solution to the “revolving door” problem, instead holding that case-by-case analysis would be necessary.¹⁶⁸ Additionally, the court stated that a civilian would be directly participating in hostilities not only when attacking, but also while on his way to and from that location.¹⁶⁹ These statements, particularly when combined with the expansion of the “direct” element, seem to push Israel in the direction of a membership approach to DPH.¹⁷⁰ Such an approach would substantially decrease the uncertainties surrounding the temporal element.

In order to ensure that any target was directly participating in hostilities, and to ensure that any attack on that target was legal,

163. *Id.*

164. *Id.*

165. *Id.* ¶ 37.

166. *Id.* ¶ 39.

167. *Id.*

168. *Id.* ¶ 40.

169. *Id.* ¶ 34.

170. Kristen E. Eichensehr, Comment, *On Target? The Israeli Supreme Court and the Expansion of Targeted Killings*, 116 *YALE L.J.* 1873, 1875–79 (2007).

the court outlined a four-part test. First, good information is required in order to demonstrate that the target is directly participating in hostilities.¹⁷¹ Second, the target cannot be attacked if less harmful means—such as capture or arrest—can be employed; however, members of the military are not required to put their lives in substantial risk when performing such tactics.¹⁷² Third, after the target is attacked, the military must perform an independent *ex post* investigation into the accuracy of its information, paying compensation if appropriate.¹⁷³ Finally, the court described a proportionality “*stricto sensu*” test, which requires the military to estimate *ex ante* whether the collateral damage will be disproportionate to the military gain of attacking the target.¹⁷⁴

Not surprisingly, the *PCATI* decision produced much criticism. Critics believed that the court’s four-part test was either poorly defined or went above and beyond what was required under customary international law. In particular, critics considered the court’s least injurious and proportionality *stricto sensu* requirements to be too subjective and prone to exploitation because the court did not offer enough specific guidelines to help a military commander.¹⁷⁵ These criticisms tended to echo the arguments found in the Petitioners’ Joint Memorandum replying to the Obama Administration’s proposed definition of its authority to detain.¹⁷⁶ Critics also argued that the least injurious test was misplaced because it derives from another body of law.¹⁷⁷ Finally, critics argue that the court was in error when it expanded the temporal element of DPH, moving towards a membership approach.¹⁷⁸

C. Conclusion

The *PCATI* decision was a landmark case not only because it was the first time a court focused exclusively on clarifying the notion of DPH, but also because it was President Barak’s last decision before leaving the court.¹⁷⁹ The court adopted a broad inter-

171. Pub. Comm. Against Torture in *Isr. v. Israel*, ¶ 40.

172. *Id.*

173. *Id.*

174. *Id.* ¶¶ 40–46.

175. Amichai Cohen & Yuval Shany, Editorial Comment, *A Development of Modest Proportions: The Application of the Principle of Proportionality in the Targeted Killings Case*, 5 J. INT’L CRIM. JUST. 310, 314–16 (2007).

176. Petitioners’ Joint Memorandum, *supra* note 83, at 1.

177. Orna Ben-Naftali, Editorial Comment, *A Judgment in the Shadow of International Criminal Law*, 5 J. INT’L CRIM. JUST. 322, 330 (2007).

178. Eichensehr, *supra* note 170, at 1876–79.

179. Orna Ben-Naftali & Keren Michaeli, International Decision, *Public Committee Against Torture in Israel v. Government of Israel*, 101 AM. J. INT’L L. 459, 462 (2007).

pretation of “hostilities,” “direct,” and “for such time.”¹⁸⁰ Yet this opinion produces a very interesting result: on one hand, the court expands the power of the IDF while on the other, the court limits what the IDF can do. This limitation may be a sweetener, making the expansion of DPH more palatable to critics. Nevertheless, the court’s expansion of DPH, particularly because it echoes many of the reasons behind the broad U.S. interpretation of DPH, creates a sort of “united front” of strong military forces pushing for a broad interpretation of DPH in the context of counterterrorism.

However, this front may not be as united as it appears at first blush. The United States pushed for flexibility and latitude when targeting terrorists. Therefore, the Obama Administration might not look kindly upon some of the limitations placed on the IDF by the Israeli Supreme Court. Moreover, the Obama Administration might wish to “re-draw” the line that separates civilians who directly participate in hostilities from those who do not. It should be noted that although the *PCATI* decision could be used to support the U.S. counterterrorism strategy, the United States will likely strongly resist the application of the decision’s logic to U.S. civilian employees and contractors. Nevertheless, if in time the *PCATI* decision is seen as arguing for a membership approach to DPH, the United States might find it useful, if separate categories can be established for both terrorists and civilian employees and contractors.

IV. THE ICRC INTERPRETATION OF DIRECT PARTICIPATION IN HOSTILITIES

Recently, the ICRC, in association with the TMC Asser Institute, held a series of meetings to draft interpretive guidance on DPH. As of 2005, the experts decided that a unanimous definition of DPH did not exist.¹⁸¹ It appeared that a majority of the experts preferred narrow interpretations of DPH.¹⁸² Moreover, several experts were suspicious of a membership approach to DPH.¹⁸³ In 2009, the ICRC published its Interpretive Guidance (the Guidance), hoping to provide recommendations concerning DPH Inter-

180. Roy S. Schondorf, Editorial Comment, *The Targeted Killings Judgment: A Preliminary Assessment*, 5 J. INT’L CRIM. JUST. 301, 302 (2007).

181. ICRC, *2005 Report*, *supra* note 3, at 6, 85.

182. *Id.* at 19–20, 28, 34.

183. ICRC, *Summary Report: Second Expert Meeting on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 20 (2004), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res\\$File/2004-07-report-dph-2004-icrc.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res$File/2004-07-report-dph-2004-icrc.pdf).

pretation.¹⁸⁴

The Guidance states that in order to qualify as DPH, the act must 1) be likely to adversely affect military operations or military capacity or inflict death, injury, or destruction on protected persons or objects; 2) have a direct causal link to the resulting harm; and 3) must be designed to inflict harm to a party to the conflict on behalf of another party.¹⁸⁵ For international armed conflicts, “persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians.”¹⁸⁶ For non-international armed conflicts, “persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians.”¹⁸⁷ Civilians lose protection during each specific act amounting to DPH, as well as while preparing to execute the act, while deploying to it, and while returning from the it.¹⁸⁸ However, members of a non-State party’s organized armed groups are no longer considered civilians and “lose protection against direct attack, for as long as they assume their continuous combat function.”¹⁸⁹

The Guidance offers several examples of acts that do and do not rise to the level of DPH. Actions of a military nature have a lower threshold requirement. These include not only the death, injury, or destruction of military personnel or objects; but also guarding enemy prisoners to prevent their escape, clearing mines, hacking military networks, and transmitting tactical intelligence.¹⁹⁰ If no military connection exists, the threshold is higher: the “act must be likely to cause at least death, injury, or destruction.”¹⁹¹ There must also be some direct causation between the act and the harm; a temporal or geographic proximity to the harm is not necessary.¹⁹² Therefore, the use of mines, booby traps, missiles, UAVs, and timer-controlled devices can rise to the level of DPH.¹⁹³ This potentially wide-ranging list of activities could encompass many of the activities performed by contractors and civilians accompanying military forces. While this broad definition might displease some U.S. policymakers, it does not substantially deviate from the list contained in the *PCATI* decision.

184. ICRC, *DPH Guidance*, *supra* note 14, at 9.

185. *Id.* at 16.

186. *Id.*

187. *Id.*

188. *Id.* at 17.

189. *Id.*

190. *Id.* at 47–49.

191. *Id.* at 49.

192. *Id.* at 55.

193. *Id.*

When discussing organized armed groups, the Guidance focuses its attention on the military wings of non-State parties, excluding political or support units.¹⁹⁴ These groups must have a sufficient degree of military organization such that they can conduct hostilities on behalf of a party to the conflict.¹⁹⁵ According to the Guidance, those individuals sporadically or spontaneously directly participating in hostilities can only be targeted during the act, while preparing for it, or while returning from it.¹⁹⁶ However, individuals that adopt a “continuous combat function” (CCF) in an armed group on behalf of a non-State party can be targeted at any time until they no longer perform a CCF.¹⁹⁷ Such individuals could even be targeted before carrying out a hostile act.¹⁹⁸ The authors of the Guidance note that it is not only difficult to establish that individuals have adopted a CCF, but also difficult to determine when they have withdrawn from such a function.¹⁹⁹ Nevertheless, this division among members of an armed group is an important first step towards limiting a membership-based approach to DPH.

The Guidance authors also try to distinguish between those who recruit and train for an armed group in general (which does not amount to DPH) and those who recruit and train for CCF positions (which does amount to DPH).²⁰⁰ This portion of the Guidance seems to take another step toward a membership approach, but unlike the military versus political personnel distinction, this is a very fine line that will be difficult for commanders to comply with in the heat of battle.

The Guidance creates a very small group of individuals who can be targeted for actions that amount to DPH: only armed groups with a sufficient degree of military organization and only those individuals in a CCF. This definition might exclude network-or-cell based terrorist groups as well as sleeper cells. It also does not include all recruiters and trainers, unlike the *PCATI* decision. Such a narrow definition is also unlikely to be used by policymakers in the Obama Administration.

The authors of the Guidance state that the “great majority” of contractors and civilians accompanying military forces do not directly participate in hostilities.²⁰¹ First, these individuals “have not

194. *Id.* at 32.

195. *Id.*

196. *Id.* at 33–34.

197. *Id.*

198. *Id.* at 34.

199. *Id.* at 33, 72.

200. *Id.* at 34, 53.

201. *Id.* at 38.

been incorporated into State armed forces.”²⁰² Second, almost none of these individuals have adopted a CCF.²⁰³ Therefore, contractors and civilians can only be targeted during the brief time that they directly participate in hostilities, unless they (as a group) were to become “independent non-State parties to a non-international armed conflict,” in which case they would adopt a CCF and could be targeted at any time until such status changed.²⁰⁴ However, despite the separate, non-CCF position, many contractors and civilians perform actions that cross the three-part threshold of DPH outlined in the Guidance. Therefore, I believe the Guidance could result in far greater targeting of contractors and civilians than intended.

By requiring an *ex ante* determination of terrorist status along finely drawn lines, the authors of the Guidance may have intended to persevere the narrow interpretation of DPH, thereby limiting the targeting of civilians. However, in so doing, the authors have also moved towards a membership approach and have also made it easier to target terrorists, if the attacking force can make a CCF argument. The authors also seem to take a step towards the U.S. and Israeli interpretations of DPH with its three-part threshold. It appears as if the authors have made a bit of a hash of the situation. Therefore, I believe that further interpretation of DPH is needed—one that goes further in the direction of a membership-based approach, with less finely-drawn distinctions.

CONCLUSION

The dilemma of DPH will make any reinterpretation difficult. If DPH is reinterpreted narrowly, fewer civilians can be targeted, but terrorists will be encouraged to hide among those same civilians. If DPH is reinterpreted broadly, more civilians can be targeted, but such an interpretation might persuade civilians to avoid hostilities and terrorist groups. Compounding the difficulty of DPH reinterpretation is the fact that choosing one interpretation over the other risks pushing powerful States away from, or out of, the international system, thereby weakening the system as a whole. In addition, any reinterpretation of DPH risks damaging international consensus, forcing States to draft individual standards. It would appear that there are no good options when it comes to reinterpreting DPH.

202. *Id.*

203. *Id.*

204. *Id.* at 38–40.

Perhaps the only solution to this problem is a dramatic rethink of DPH, like Alexander's approach to the Gordian Knot. Perhaps the Obama Administration should adopt a limited membership-based approach. Although it would remove the temporal and "direct" elements of DPH, the "revolving door" problem would disappear. Moreover, demonstrating membership will undoubtedly prove difficult—experts will have to look for certain actions to qualify as proxies for intent. Will swearing a loyalty oath be sufficient? Would training? Living in an al-Qaeda safe house or associating with known members? As can be seen from these complications, drafting a membership-based concept of DPH will require very explicit rules. Moreover, these rules should incorporate some limits so as to avoid the sort of criticism leveled against the Bush Administration.

Thus, arguably two categories of membership are necessary, with civilian employees and contractors in one group and terrorists in the other. If the Obama Administration were to dramatically change the U.S. interpretation of DPH, it would be inviting controversy as it would create several "classes" of civilians, a move long resisted by some DPH experts. However, by defining two classes and defining how individuals would qualify under each class, the Obama Administration would force DPH to conform to modern circumstances instead of forcing soldiers to conform to an outdated interpretation of DPH. Those who would reinterpret DPH certainly have a difficult job before them. However, until such a reinterpretation is attempted, many will struggle with its application.

**TERRITORIAL BIAS IN INTERNATIONAL LAW:
ATTRIBUTION IN STATE
AND CORPORATE RESPONSIBILITY**

PÉTER D. SZIGETI*

Territory is ordinarily the basis for and the limit to law-making and law-enforcement: this is the legal meaning of the so-called “Westphalian system.” But territory also serves as a fallback for the determination of responsibility, and entities lacking in territory (such as multinational corporations) have a decided advantage in evading responsibility. This paper investigates the role of territory in state and corporate responsibility by looking at attribution. Attribution is the first phase of determining responsibility, wherein we ask whether the illicit acts committed can be attributed to the organization (be it a state or a corporation) that we want to hold liable. Attribution within hierarchical organizations, by most standards, requires both information about the will and knowledge of each relevant actor within the organization and an accepted definition of the limits of the organization. Because of the complexity and the possibility of loopholes in every form of institutional attribution, states’ failure to protect becomes a ground for attribution whenever an internationally illicit act takes place on state territory. A short comparison with the responsibility of transnational corporations (TNCs) shows us how TNCs can pass responsibility on to states, because TNCs are based on different national laws and have neither a set territory, nor undisputed organizational limits. Thus, territory leads both towards increased responsibility for states, especially decentralized and federal states, and to corporations which can always push responsibility either onto the states whose territory they are acting on, or onto subsidiaries they can separate from the mother company and discard.

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INTRODUCTION

This paper describes one particular bias in international law: the bias of territoriality.¹ Territory is often seen and described as crucial in international law; one scholar searching for the “constitution of the international order” has gone so far as claiming to have found it in the territorial division of states itself.² The birth of (modern) international law is also usually attributed to the birth of a lateral, territorially divided system, itself identified with the Treaty of Westphalia.³ Upon inspecting international practice and case-law, however, it is immediately apparent that extraterritoriality is much more the rule than the exception, not only in the field of antitrust and business regulation,⁴ but also in criminal law⁵ and even the law of force.⁶ The result is an increasingly global

1. The program of uncovering structural biases in international law dates from David Kennedy's and Martti Koskenniemi's groundbreaking works in the 1980s. See DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* (1987); MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (2005).

2. Bibó István, *A nemzetközi államközösség bénultsága és annak orvosságai. Önrendelkezés, nagyhatalmi egyetértés, politikai döntőbíráskodás.* [The Paralysis of the International Community and its Cures. Self-determination, Agreement of the Great Powers, Political Arbitration.] in 4 BIBÓ ISTVÁN, *VÁLOGATOTT TANULMÁNYOK* [Selected Writings] 1935-1979, at 307-09 (Magvető, Budapest, 1990), <http://mek.niif.hu/02000/02043/html/index.html> (translated by author).

3. Stéphane Beaulac, *The Westphalian Legal Orthodoxy – Myth or Reality?*, 2 J. HIST. INT'L L. 148, 148-49 (2000); Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 AM. J. INT'L L. 20, 28-29 (1948).

4. 15 U.S.C. §§ 78m-78ff (2006); *United States v. Aluminium Co. of Am.*, 148 F.2d 416 (2d Cir. 1945); *United States v. Imperial Chem. Indus., Ltd.*, 105 F. Supp. 215 (S.D.N.Y. 1952); P. J. Kuyper, *European Community Law and Extraterritoriality: Some Trends and New Developments*, 33 INT'L & COMP. L.Q. 1013, 1013-21 (1984); A.V. Lowe, *The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution*, 34 INT'L & COMP. L.Q. 724, 724-46 (1985); see also Mark Gibney & R. David Emerick, *The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards*, 10 TEMP. INT'L & COMP. L.J. 123 (1996).

5. Of note also are the traditional principles of extraterritorial criminal jurisdiction (active or passive nationality, effects principle, defensive principle), which in their entirety cover any act the state might have an interest in prosecuting. See, e.g., *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991); Lynda M. Clarizo, Case Note, *United States v. Yunis*, 681 F. Supp. 896 (1988), 83 AM. J. INT'L L. 94 (1989).

and effects-centered scope of action for all international actors, which is still, nevertheless, defined through territorial language.

The inverse of this development is the terrain of responsibility, which does not utilize territorially defined language, but is, in fact, controlled by the boundaries of state territory both on the international and transnational levels. This article is an exploration of this territorial bias within the regimes of international responsibility, or, more precisely, a contrasting of attribution in state responsibility with the responsibility of transnational corporations. State responsibility presents us with a “back door” to a functional definition of the state through the law of attribution, as well as the role of territory within the concept of the state, and the existence of territorial bias.

By “territorial bias,” I mean the concepts and images of territory (or the lack thereof) that steer the legal handling of power relations in different directions depending upon the use or non-use of territorial markers or even just metaphors, even though the issues and structures involved are similar.⁷ Territory is not only “found” in law, as when different water use regulations apply to arid lands as to water-rich lands, it is also constructed through land use and zoning laws, or road signs.⁸ One step further into the abstract, law also territorializes itself through the imposition of boundaries and jurisdictional issues, beyond which another law must be applied. Finally, law uses territory as a metaphor for legal relations which have no direct link with physical territory as exemplified in the “zoning” of “cyberspace.”⁹ When territory is used as a metaphor, the oppositions between abstract concepts and the physical counterparts they are assimilated to using the metaphor result easily in bias. Attributes of the physical object are projected onto the abstract concept, or vice versa, or crucial differences are ignored. Alternatively, place is not ignored and forgotten, but reified, that is treated as a fact of nature, an unquestionable given.¹⁰

6. It is interesting to note that a number of the acts categorized as aggression can be committed without violating the territory of the victim state at all; for example “peaceful” blockades or the support of insurgents within another country. G.A. Res. 3314 (XXIX), art. 3(e), (f), U.N. Doc. A/RES/29/3314 (Dec. 14, 1974).

7. Basic literature on law and geography, exploring these connections between geography, semiotics, politics, and the law includes: THE LEGAL GEOGRAPHIES READER: LAW, POWER, AND SPACE (Nicholas Blomley et al. eds., 2001); THE PLACE OF LAW (Austin Sarat et al. eds., 2003); Nicholas Blomley, *Landscapes of Property*, 32 LAW & SOC’Y REV. 567 (1998); Richard Ford, *Law’s Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843 (1999); Symposium, *Surveying Laws and Borders*, 48 STAN. L. REV. 1037, 1037-1429 (1995).

8. Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1201 (1995).

9. Richard Ford, *Against Cyberspace*, in THE PLACE OF LAW, *supra* note 7, at 147, 147-80.

10. Richard Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1857-60 (1994) (on space in law being conceived of either as an unques-

A very common example is a comparison of tangible private property with one type of intellectual property: copyrights. With tangible property, its location is a good indication of ownership. Things in someone's house are presumed by all to belong to him or her, and investigation into the ownership of these things is severely limited by privacy rules. Tangible objects in a trashcan are presumed to be abandoned, and anyone can appropriate them in good faith. With intellectual property, no such geographic signification exists. Copyrights are never presumed to be "abandoned," even though decades may have passed since their last utilization.¹¹ Therefore, with tangible objects, possession automatically leads to a presumption of ownership. Where we do not want this presumption to work, we individually identify and catalog the objects to prevent them from being appropriated even after being left in public places. Automobiles, for example, which are highly mobile, private, valuable, dangerous, and meant to be in public places a lot, are numbered and catalogued in numerous ways: license plate numbers, engine numbers, chassis numbers, and mileage meters. Place is thus a silent method of regulation; law acknowledges the location of an object as an important factor in deciding whom it belongs to and (less silently) even what laws apply to it. If it is to be overridden, special and, often meticulous, regulation must be used instead of place.

Territory is definitely a key notion in international law as well, but in what ways? International boundaries do not block national jurisdiction, but merely require a justification for it; they do not draw the line between intervention and freedom (consent does);¹² they do not have an effect on the lawfulness of state treatment of human beings. Territorial arguments in international law, if compared to property law, are mostly effects ("nuisance") type arguments (as opposed to trespass or ownership-type arguments).¹³

tionable fact of nature ("opaque"), or as a completely arbitrary, human decision ("transparent").

11. Although the specific example of abandonment is not mentioned, the disparities of copyright as property are widely discussed in LAWRENCE LESSIG, *FREE CULTURE* 139-47 (2004). A classic deconstruction of the concept of property from almost every angle (including reification and personification) is Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1954).

12. International boundaries do not even create a prima facie distinction between intervention and non-intervention, not even in military affairs: a "peaceful blockade," or the funding of rebel groups is an intervention even though it is wholly outside the borders of the blocked state, and most non-military forms of intervention (such as influencing political parties, passing laws having a negative, targeted effect) are verbal acts that can be made anywhere. See G.A. Res. 3314, *supra* note 6.

13. Of course, there is substantial case-law on boundary disputes. See, e.g., *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea* (Nicar. v. Hond.), 2007 I.C.J. 1 (Oct.8); *Frontier Dispute (Benin v. Niger)*, 2005 I.C.J. 90 (July 12);

These effects-type arguments are combined with the assigning of objects and people to nations, regardless of place, to create a map of jurisdictions and responsibilities.

Jurisdiction has been previously examined critically, both generally¹⁴ and within international law.¹⁵ I shall use this paper to examine another area where territorialization has a major impact on the functioning of the law: state responsibility, and compare it with the often discussed responsibility of transnational corporations (TNCs) under international law. Territorialization has not yet been discussed in this context for two reasons. The first reason is that language of state responsibility rests on notions of agency, entitlement and function, and never mentions territory outright. It is only through due diligence arguments that territory becomes a central notion of responsibility. The second reason, with regard to TNCs is that although territoriality immediately appears when discussing TNCs' responsibility,¹⁶ it is the inverse scenario that has been little explored, i.e. how would we or could we imagine a global system of closely regulated corporations.

In the first part of this paper, I will consider the rules of attribution to the state as the first step in assigning responsibility for violations of international law by states.¹⁷ I shall argue that acts can be attributed to the state on the basis of four distinct principles, each of which contains a number of rules: (i) acts are attributable where the sovereign (the government) has commanded, authorized, or acknowledged these acts; (ii) acts are attributable if they are committed by state officials as set forth in the laws of the state; (iii) acts are attributable if they are done by persons without official status, but who are performing public functions; and (iv) acts are attributable if the state failed in its duty to prevent or punish these acts. These four grounds present a gradually increasing standard of attribution, from a very narrow concept, in the case of

Temple of Preah Vihear (Cambodia v. Thailand), 1962 I.C.J. 6 (June 15); Fisheries (U.K. v. Norway), 1951 I.C.J. 116 (Dec. 18). This is still tiny in comparison with the plethora of jurisdiction-related arguments made every day in all the courts of the world.

14. Ford, *supra* note 7.

15. KENNEDY, *supra* note 1, at 151-66.

16. Because differences in national regulations and jurisdictions are what allow TNCs to exist and thereby dodge regulatory requirements through forum-shopping, incongruence between local regulations are always first on the agenda when discussing TNCs in the context of international law. See Dan Danielsen, *How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance*, 46 HARV. INT'L L.J. 411, 413-16 (2005).

17. "There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) [i]s attributable to the State under international law; and (b) [c]onstitutes a breach of an international obligation of the State." Articles on the Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, art. 2, U.N. Doc. A/RES/56/83 (Jan. 28, 2002) [hereinafter ILC Articles].

sovereign will, to an almost all-encompassing concept, in the case of failure in prevention. As all grounds of attribution should be examined in every case, the indeterminacy of attribution propels state responsibility to acknowledge attribution to the state in almost every case.

In the second part of the paper, I shall draw the ensuing conclusions from the preceding analysis of the four principles and determine that territorial borders are the only final arbiter of what can or cannot be held the responsibility of a said state. This leads to two further conclusions. First, that international law is not completely indifferent to the internal administrative structure of a state, but it prefers a state with a strong, centralized internal government over one with a federal structure or many autonomous institutions. And second, territory as the default basis for attribution means that anything that happens within a state and cannot be attributed to any other state will be the responsibility of the territorial state. This is particularly troubling with regard to entities that cause damage without being controlled by any state, such as transnational corporations ("TNCs").

The third part of this paper will explore the possibilities of imposing responsibilities on TNCs as unified entities by applying analogies to the four principles used in state responsibility. This experiment can only be unsuccessful because of: (i) the lack of an appropriate analogy to the principle of state unity; (ii) the lack of a conceptually stable "corporate function" to the analogy of "public function," that would not end limited liability for corporations; and (iii) the lack of any analogy to responsibility for acts taking place on state territory. The thought experiment ends either with elevating the TNC to a mini-state with generalized responsibilities, or reaching back to the state to provide ultimate oversight, and, thus, responsibility as well.

I. PRINCIPLES OF ATTRIBUTION

The law of attribution decides in which cases illegal actions should implicate the responsibility of the state. If an action is not attributable to the state, it will only implicate the individual who committed it, and it shall not entail her responsibility under international law. If, on the other hand, the illegal action is attributable to the state, it shall impute the responsibility of the entire state and that state shall be answerable before international tribunals as well (providing no circumstances precluding wrongfulness arise, like necessity, distress, *force majeure*, or consent).

To attribute an action to the state, we must have some idea

what the state is. On a theoretical level, the state could be quite a number of things: it could be the complete population of a defined territory; or those granted the status of citizens by the law of the territory; or all those entrusted with the powers of creating, interpreting, and enforcing the law within that jurisdiction; or those who seem to have this power; or only those who have so much of this power as to be responsible for and to the whole population. And so forth.

In Roberto Ago's words, "[I]t would not really be impossible, theoretically, to accept . . . that, for the purposes of international law, the acts of individuals who have no connection with State itself, other than, for example, the simple fact that they are in its territory, might also be attributed to the State . . ." ¹⁸ But international law nevertheless respects the division between the public and private domains, which is the central organizational idea of the modern liberal state. ¹⁹ This leads to a series of decisions determining what is public and what is private, in what situation and for what purpose.

It is somewhat difficult to present the principles guiding attribution and non-attribution clearly, coherently, and concisely at the same time. The starting point would definitely be the 2001 Articles on State Responsibility ("Articles") of the International Law Commission ("ILC"). ²⁰ Taking the ILC Articles in their definitive 2001 version would be a logical starting point, yet two circumstances make a thorough analysis of attribution difficult by reference to the Articles alone. On the one hand, the eight Articles detailing attribution are somewhat redundant. Articles 5 and 9, for instance, differ only in whether the "exercise of elements of governmental

18. Roberto Ago, *Fourth Report on State Responsibility: The Internationally Wrongful Act of the State, Source of International Responsibility (Continued)*, [1972] 2 Y.B. Int'l L. Comm'n 71, 96, U.N. Doc. A/Cn.4/264.

19. The opinion of the International Court of Justice states:

[T]he fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. That is true of acts carried out by its official organs, and also by persons or entities which are not formally recognized as official organs under internal law but which must nevertheless be equated with State organs because they are in a relationship of complete dependence on the State.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. & Herz. v. Serb. & Mont.), 2007 I.C.J. 91, 144, ¶ 406 (Feb. 26).

20. The International Law Commission is a subsidiary organ of the UN General Assembly (established under Article 22 of the UN Charter), with the role of "encouraging the progressive development of international law and its codification" G.A. Res. 174 (II), pmb., U.N. Doc. A/174(II) (Nov. 21, 1947). Basically, the ILC prepares draft articles for future codification in the form of international treaties. It is composed of thirty-four eminent international legal scholars of different countries, nominated by member states and elected by the General Assembly.

authority” mentioned in both Articles is validated by law or done only in fact. These two Articles could easily have been condensed into a single Article. Likewise, Articles 4 and 7 and Articles 6 and 11 are similar expressions of the same principles of attribution. By outlining principles of attribution instead of single Articles, the law of attribution can be stated much more clearly. On the other hand, the Articles derive their authority from the case law and the state practice cited in the commentaries, so, presumably, analyzing only the case law would give a more exact picture of attribution and state responsibility. However, this second approach would disregard the Articles’ role, which have acquired a certain authority of their own. It would also present serious practical difficulties, such as selecting a few dozen cases out of the hundreds of existing historical awards and analyzing them without reference to previous selective and analytical work by the ILC and other notable scholars.

I have, therefore, chosen to present the law of attribution as being based on four major principles of attribution and present the relevant articles alongside the case law that serves as their basis while sketching each principle. The four main principles are: (i) attribution through sovereign will and the rules of agency (encompassing Articles 6, 8, 10 and 11); (ii) attribution through the status of state agency as described in the laws of the state (Articles 4 and 7); (iii) attribution through any person fulfilling a public function (Articles 5 and 9); and (iv) attribution through control of the territory, which is not listed *per se* in the Articles, but can be linked to all of them but Articles 8 and 11. Certainly many other categorizations are possible, from Vattel’s basic “sovereign consent and knowledge = public / no consent and no knowledge = private,”²¹ through Gordon Christensen’s three-part attribution test,²² to the eight Articles of the 2002 ILC Articles and the eleven Articles of the 1996 ILC Articles.

The four principles correspond with four different and temporally disparate, but in many respects still existing, images of the state. Attribution through sovereign will harkens back to the be-

21. See *infra* notes 26-28 and accompanying text.

22. 1) Acts of agents or organs of a State are necessarily those of the State.

2) Acts of a non-State character, including acts of individuals, mobs, associations, unsuccessful insurgents, and ordinary criminals, are not those for which a State is responsible.

3) A State may be responsible for acts related to private or non-State conduct if it fails in its own duties regarding that conduct by an independent act or omission.

Gordon A. Christenson, *The Doctrine of Attribution in State Responsibility*, in *INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS* 321, 326 (Richard B. Lillich ed., 1983) (citations omitted).

ginnings of the modern state, the absolute monarchy of the eighteenth-century, as well as evoking the basic unity of the state. Attribution through laws and official state agents represents the nineteenth-century bureaucratic *Rechtsstaat*, reaching out to our times in the idea of the (formal) rule of law.²³ Attribution through public function represents the unity of state and people, in accordance with the twentieth-century appearance of nationalism in international law.²⁴ Finally, attribution through territoriality helps to reconcile all of the former modes of attribution and assure us of the possibility of coexistence without interference, through evoking the familiar image of the state as a colored area on a map.²⁵

The four principles, listed in this way, also represent a narrative of progress: starting from the restrictive interpretation of imputing only acts by persons authorized to wield public power by the laws of the state, the canon of attribution expands, rule by rule, to reasonable appearance of that power, then to persons having equivalent functions. The final step, by incorporating a duty to prevent and protect, is to incur an almost automatic attribution for all illegal acts that happen within the state's territory. Territory, from this point of view, is not a limit to attribution, but rather its limitless extension. Put another way, although nothing that happens outside the state can be attributed, everything that happens inside can.

A. Attribution Through Sovereign Will

The most ancient, and also the most restrictive answer to the question, "who is the state?" is: the ruler of the state, who has dominion over the land where the harm to the foreigner happened and who is the sovereign of the people who live there. In all fair-

23. JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 93 (2002) ("These rules [of attribution] are cumulative but they are also limitative. In the absence of a specific undertaking or guarantee, . . . a State is not responsible for the conduct of persons or entities in circumstances not covered by this Chapter.")

24. One example would be the first instance of a spontaneous gathering of people being granted equal status with state organs: the grant of combatant status to participants in a *levée en masse*. Convention Respecting the Laws and Customs of War on Land, art. 2, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539; see also Nathaniel Berman, "But the Alternative Is Despair": *European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792 (1993).

25. On the evolution of territorial jurisdiction as a (relatively modern) technique of power, see BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 170-78 (1991); Ford, *supra* note 7. This paper, aiming to disrupt the above listed categories, was written in the early twenty first-century, when our prior familiar conceptions of territoriality have been undermined, most forcefully by the Internet. See David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1995).

ness, the ruler can only be responsible for what she personally did or had knowledge of. As Vattel put it:

[I]t is impossible for the best governed State or for the most watchful and strict sovereign to regulate at will all the acts of their subjects and to hold them on every occasion to the most exact obedience; it would be unjust to impute to the Nation, or to the sovereign, all the faults of their citizens.²⁶

We see, therefore, that for Vattel, the responsibility of the state and the sovereign (ruler) is interchangeable, and that the sovereign's (or the state's) responsibility only arises with the approval and ratification,²⁷ or general tolerance of unjust acts. The state is thus identical to the sovereign person, and the preconditions of state responsibility mirror the demands of knowledge, will, and capacity familiar to us from private law. Indeed, it seems inherently plausible that state agency in international law should duplicate the structure of private law regarding agency and *respondeat superior*.²⁸

Nevertheless, stepping away from private law analogies, this rule seems antiquated, for one would think that the modern, democratic, and pluralistic state has nothing in common with the enlightened or less-enlightened absolutisms of the eighteenth-century. In particular, while sovereignty remains a central attribute of all independent states, the sovereign itself is hard to locate to the point of non-existence.²⁹ The proliferation of republican governments, the depersonalization of sovereign power, and increasing bureaucratization did not at all affect this basic rule of attribution for quite some time, but its limits are apparent in several late nineteenth-century cases. Roberto Ago recounts the story of Mr. Mix, "a United States national, who, it seems, complained [to the U.S. ambassador] that he had been the victim of an 'outrage' committed by Austrian officials,"³⁰ to whom Mr. Tripp, the

26. 3 EMER DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW: TRANSLATION OF THE EDITION OF 1758* bk. II, § 73, at 136 (Charles G. Fenwick trans., 1916).

27. *Id.* § 74, at 136.

28. Christenson, *supra* note 22, at 322.

29. [W]here the sovereign person is not identifiable independently of the rules, we cannot represent the rules in this way as merely the terms or conditions under which the society habitually obeys the sovereign. The rules are *constitutive* of the sovereign, not merely things which we should have to mention in a description of the habits of obedience to the sovereign.

H.L.A. HART, *THE CONCEPT OF LAW* 76 (2d ed. 1997).

30. Ago, *supra* note 18, at 75, ¶ 10.

U.S. minister, sent back a reply letter dated 11 October 1893, stating that:

A Government can only be held responsible when it sanctions the action of its officials, done in violation of law; it ought not to be held responsible for unauthorized acts which it promptly disowns upon being cognizant thereof; the responsibility in such case falls upon the offending official. Your remedy lies in a private action against the municipal officers who committed the outrage upon you willfully or through over-zeal in the performance of a supposed duty.³¹

If the private action failed, the state could not be held responsible for the action of the officials, as the state (meaning, the government of Austria, or possibly Emperor Franz Joseph himself) did know of it and did not order the action. The same arguments were used by the Colombian government in the *Star and Herald* case, where the United States sought an indemnity from Colombia for a Colombian general's, Santo Domingo Vila, banning of the *Star and Herald*, an American-owned newspaper for sixty days for what the general perceived as unfriendly opinions towards the government.³² Mr. Hurtado, speaking for Colombia, "announced his Government's position to be that it is under no liability to the claimants, because, as it is said, that Government distinctly disavowed General Vila's action. The only recourse of the claimants, Mr. Hurtado suggests, is against General Vila personally in the Colombian courts"³³

If, however, an act has to be sanctioned by the highest power to be an act of state, that means that lower authorities acting on their own initiatives are not necessarily part of the state. This possibility evokes the pre-Westphalian world order, without any dividing line between internal and international. Even today, there are, in fact, enough independent organs, creating transnational ties with other independent organs, for us to create an institutional map of the world order without nation states.³⁴ The principle of state unity, as stated in ILC Article 4,³⁵ not only formulates but

31. *Id.*

32. 6 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 775 (1906).

33. *Id.* at 778.

34. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER, 12-14 (2004); Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (2005); Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT'L L. 1 (2006).

35. The conduct of any State organ shall be considered an act of that State

also creates the unity of states.

Despite the fact that the responsibility of the state for any of its organs' actions has been the mainstay of attributability since at least the 1920s,³⁶ the doctrine of attribution through the knowledge and will of a slightly hazy sovereign is still present in several of the Articles agreed to by the ILC. For example, one such applicable rule is that a state is not responsible for the acts of any revolutionary movements that operate within its territory.³⁷ As the official commentary of the ILC puts it, this principle "is premised on the assumption that the structures and organization of the movement are and remain independent of those of the State."³⁸ Attribution changes radically, however, if the revolutionary movement achieves its goals of taking over the state or establishing a new state:

[W]here the movement achieves its aims and either installs itself as the new government of the State or forms a new State in part of the territory of the pre-existing State . . . it would be anomalous if the new regime or new State could avoid responsibility for conduct earlier committed by it.³⁹

Strikingly, the "it" that committed the conduct that can be complained of is a mobile personality that can fade into nothingness if the rebellion is quenched,⁴⁰ or assume the identity of the state even retrospectively, if the revolution triumphs.⁴¹

Second, there is the rule that attributed any action to the state if the state itself has acknowledged and adapted it as its own, embodied in Article 11 of the ILC Articles. The principle has been the ground for Iran's responsibility for the Iranian students' occupa-

under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

ILC Articles, *supra* note 17, art. 4(1).

36. *See infra* notes 50-52 (citing case law of mixed tribunals).

37. *See* ILC Articles, *supra* note 17, art. 10.

38. CRAWFORD, *supra* note 23, at 117.

39. *Id.*

40. *See, e.g.*, *Sambiaggio (Italy v. Venez.)*, 10 R.I.A.A. 499, 499-525 (Italy-Venez. Comm'n 1903).

41. The Tribunal is convinced that statements and acts of Ayatollah Khomeini are attributable to the new Government, as it is beyond doubt that he was the leading organ of the revolutionary movement which became the new Government. The Tribunal cannot make a finding, however, whether statements and acts of other persons are attributable to the new Government as well

Yeager v. Iran, 17 Iran-U.S. Cl. Trib. Rep. 92, 101 (1937).

tion of the United States' embassy in Teheran, as the embassy's continued occupation

was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. . . . The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State.⁴²

The same principle was relied on for the attribution of Eichmann's kidnapping by a few "volunteers" from Argentina to Israel.⁴³

Third, knowledge and will (rephrased as direction and control) are also bases of attribution when no (other) link to the state infrastructure is present. This is embodied in Article 8 of the ILC Articles, stating that "[t]he conduct of a person or group of persons shall be considered an act of a State . . . if [they are] in fact acting on the instructions of, or under the direction or control of that State"⁴⁴ This test has been interpreted in the *Nicaragua* case, and reaffirmed in the *Genocide* case, to mean a pretty high standard:

What the Court has to determine at this point is whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.⁴⁵

In other words, direction and control has to be so tight as to be indistinguishable from a state agency; except that many state agencies have a degree of liberty similar to the *contras*, who were provided with financial and informational assistance to the point that cessation of that aid would have meant the withering away of

42. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 35, ¶74 (May 24).

43. CRAWFORD, *supra* note 23, at 122; *see also* S.C. Res. 138, U.N. Doc. S/RES/4349 (June 23, 1960). For the events behind the resolution, *see* Helen Silving, *In re Eichmann: A Dilemma of Law and Morality*, 55 AM. J. INT'L L. 307, 311-17 (1961).

44. *See* ILC Articles, *supra* note 17, art. 8.

45. Military and Paramilitary Activities (Nicar. v. U.S.) 1986 I.C.J. 14, 62, ¶ 109. (June 27).

the *contras*.⁴⁶ The test is thus in fact much tighter than that required of a government agency in terms of control: the “eyes and hands of the government” have to be kept constantly on the group or entity for it to be considered as a *de facto* agent of the state. This has been affirmed in the *Genocide* case: the relationship between the state and the *de facto* agent has to be one of “complete dependence.”⁴⁷

A sensible (and post-medieval) rule of attribution would therefore find the state not in the will of a few persons exercising the highest powers in the state, but in all duly authorized agents for the government, as evidenced by the state’s own laws.

B. Attribution Through Legal Status

This is the basic ground rule, which was adopted in Article 4 of the International Law Commission’s Articles on State Responsibility, saying that “[t]he conduct of any State organ shall be considered an act of that State under international law . . .” and that “[a]n organ includes any person or entity which has that status in accordance with the internal law of the State.”⁴⁸ This is also arguably in line with the general rule articulated in the creation and recognition of statehood: that the state is free to “form and recruit itself”⁴⁹ in any way it wishes.

Generally, international tribunals have no difficulty in identifying the state organ or minor official in question. In most cases, the actor who causes the internationally wrongful act is either a judge,⁵⁰ a soldier,⁵¹ or a policeman.⁵² In many of the remaining cas-

46. In the view of the Court it is established that the *contra* force has, at least at one period, been so dependent on the United States that it could not conduct its crucial or most significant military and paramilitary activities without the multi-faceted support of the United States. . . . [L]ater the CIA asked that a particular person be made head of the political directorate of the FDN, and this was done. However, the question of the selection, installation and payment of the leaders of the *contra* force is merely one aspect among others of the degree of dependency of that force.

Id. at 63, ¶¶ 111-112 (emphasis added).

47. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bos. & Herz. v. Serb. & Mont.*), 2007 I.C.J. 91, 140-41, ¶¶ 392-93 (Feb. 26).

48. ILC Articles, *supra* note 17, art. 4.

49. See *infra* note 137 and accompanying text.

50. See the following cases of denial of justice: *Putnam* (U.S. v. United Mexican States), 4 R.I.A.A. 151 (Mex.-U.S. Gen. Cl. Comm’n 1927); *Roper* (U.S. v. United Mexican States), 4 R.I.A.A. 148 (Mex.-U.S. Gen. Cl. Comm’n 1927); *Faulkner* (U.S. v. United Mexican States), 4 R.I.A.A. 67 (Mex.-U.S. Gen. Cl. Comm’n. 1926).

51. See, e.g., *Falcón* (United Mexican States v. U.S.), 4 R.I.A.A. 104 (Mex.-U.S. Gen. Cl. Comm’n 1926); *García* (United Mexican States v. U.S.), 4 R.I.A.A. 119 (Mex.-U.S. Gen. Cl. Comm’n 1926); *Swinney* (U.S. v. United Mexican States), 4 R.I.A.A. 98 (Mex.-U.S. Gen. Cl. Comm’n 1926); *Youmans* (U.S. v. United Mexican States), 4 R.I.A.A. 110 (Mex.-U.S. Gen. Cl. Comm’n 1926).

es of state responsibility, the “act” that was found to be contrary to international law was a legislative act,⁵³ which by definition can only be an act of the state.

Attribution through status departs most radically from attribution through will in the case of responsibility for *ultra vires* acts of state organs. This means that “[t]he conduct of an organ of a State . . . shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.”⁵⁴ The fact that a state official was disobeying internal law as well as international law, that he was setting his own will in place of the government’s, has no impact on the responsibility of the state. Status (as embedded in law) is everything; will and knowledge are nothing.

The most famous example of this situation is the *Youmans* case, where a mob of Mexican tunnel construction workers, following a disagreement over wages, assaulted their American supervisors, George Arnold, John A. Connelly and Henry Youmans.⁵⁵ After the mayor of the town in Mexico heard that the Mexican workers had surrounded the American engineers’ house and fired shots at it, he ordered the local chief of police “to proceed with troops to quell the riot and put an end to the attack upon the Americans. The troops, on arriving at the scene of the riot, instead of dispersing the mob, opened fire on the house, as a consequence of which Arnold was killed.”⁵⁶ Subsequently, the mob set fire to the house and Connelly and Youmans were killed while trying to escape from the burning house⁵⁷. Mexico was found liable for the conduct of the soldiers despite the fact that the soldiers acted in direct contravention to received orders, and that the local chief of police, and all other officials senior to him in rank were blameless.⁵⁸ The tribunal found that if no act that exceeds the scope of an official’s competency could implicate the state, then “it would follow that no wrongful acts committed by an official could be considered as acts for which his Government could be held liable”⁵⁹—except perhaps

52. See, e.g., Mallén (United Mexican States v. U.S.), 4 R.I.A.A. 173 (Mex.-U.S. Gen. Cl. Comm’n 1927); Quintanilla (United Mexican States v. U.S.), 4 R.I.A.A. 101 (Mex.-U.S. Gen. Cl. Comm’n 1926); see also Neer (U.S. v. United Mexican States), 4 R.I.A.A. 60 (Mex.-U.S. Gen. Cl. Comm’n 1926); Janes (U.S. v. United Mexican States), 4 R.I.A.A. 82 (Mex.-U.S. Gen. Cl. Comm’n 1925).

53. E.g., S.D. Myers, Inc. v. Canada, 40 I.L.M. 1408 (NAFTA Arb. 2000); Phelps Dodge v. Iran, 10 Iran-U.S. Cl. Trib. Rep. 121, 130 (1986).

54. ILC Articles, *supra* note 17, art. 7.

55. *Youmans*, 4 R.I.A.A. at 111.

56. *Id.*

57. *Id.*

58. *Id.* at 116-17.

59. *Id.* at 116.

acts by members of the government themselves. Similarly, in the *Caire* case, a major and a first captain of Tomás Urbina's Northern Division of the Mexican Army demanded \$5000 from Jean-Baptiste Caire, and then arrested him and later shot him for not handing over the money.⁶⁰ The tribunal held Mexico responsible for the acts of its soldier, though they were clearly illegal by Mexican law as well as international law, for they were committed as acts of public officials.⁶¹

In all of these cases, the basis for identifying "the state" is the law—the state is identified with its own law. It does not matter whether the law creates a single, centralized hierarchy or sanctions the distribution of power to all sorts of independent, localized entities. "Official" becomes a synonym for "codified." This method is certainly more effective and democratic than trying to figure out the minds of state leaders. It also enhances certainty and stability in international relations, and it encourages governments to maintain order over their agents and subordinates. Plus, as changing its own law is well within the bounds of any state, the state can at least, in theory, always avoid situations where its own laws would lead it to infringing international law, by changing those laws.⁶²

However, the ever-present option of legislation is also a possibility for deregulation in order to avoid responsibility. If an activity is not regulated, but simply tolerated or ignored or supported unofficially, it does not qualify as state action under this approach. Furthermore, it is exactly these extreme situations where harm to foreigners and locals alike is most likely to happen—revolutions, riots, wars—that are least regulated in a state's laws. Also, the approach that equates the state with its own laws has a hard time accommodating private law—are actions that are licensed by the state but left to private initiative part of the state or not? They figure within the laws but would probably not be called "official organs" in accordance with Article 4 of the ILC Articles. On the other hand, most official organs are not labeled as such either, but are merely given powers and authority through the law.

C. Attribution Through Public Function

While status is modifiable at will by the state itself, perhaps

60. *Caire* (Fr. v. United Mexican States), 5 R.I.A.A. 516 (1929).

61. *Id.* at 530-31. Mexico's attempts to classify the acts of the soldiers as "brigandage," and have them exempted by reference to a treaty clause denying responsibility for bandits and brigands, was overruled by the commission. *Id.* at 527.

62. See *LaGrand* (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27); see also *infra* note 131 and accompanying text.

with a view to avoiding responsibility in the future, function is objective and ascertainable by the judge, who is not a party to the dispute at hand. To draw a correct line between private and public activity, perhaps what is needed is a more objective, universal standard, and one that is less open to manipulation by the state that is being investigated: that of function instead of status. Function also exists where written laws describing official state organs might not, and it might exist in times when the state is in turmoil and official organs have collapsed. Attribution through function can also correct excesses of the principle of attribution by status, for through this principle a government official acting off-duty, or without public powers, would not implicate the state but would stay as a private action.

Public function as grounds for state responsibility is stated in Article 5 (“The conduct of a person or entity which is not an organ of the State . . . but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law”)⁶³ and Article 9 (“The conduct of a person or group of persons shall be considered an act of a State . . . if [they are] . . . in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.”)⁶⁴ of the ILC Articles.

The concept of public function uncomfortably straddles the small space between attribution through sovereign will and attribution through official status. It is applicable where an entity’s actions are tolerated, accepted, or condoned without official recognition. Of course, to use the standard of public function as a viable method of attribution, one must have a relatively stable concept of what “elements of governmental authority” are. The hypothetical examples usually involve private security firms acting as prison guards, airline companies exercising immigration control duties, private railway companies that maintain a police force⁶⁵—in sum, private variants of the basic rule of responsibility for one’s police and armed forces. However, these are all exemplary hypotheticals. Very few such cases have arisen so far before an international forum, even for acts of today’s ubiquitous private security companies (undoubtedly also because of the rule requiring exhaustion of domestic remedies before moving on to international fora).⁶⁶ When

63. ILC Articles, *supra* note 17, art. 5.

64. *Id.* art. 9.

65. CRAWFORD, *supra* note 23, at 100-01.

66. *But see* Stephens (U.S. v. United Mexican States), 4 R.I.A.A. 265, 267 (Mex.-U.S. Gen. Cl. Comm’n 1927) (where an informal, local, non-uniformed militia was found to be an

acts of violence committed by private parties do come up in international cases, they are dealt with not under the principles of entitlement to exercise government authority, but as the failure of official authorities to maintain order.⁶⁷

The reason for this is that “public function” does not exist on the level of facts, outside of the legal context. This is explicit in the wording of Article 5, though missing from Article 9. According to Kelsen’s logic, a person giving money to another may be the victim of fraud, blackmail, robbery, or may just be presenting a gift, a loan, due wages, or repaying a loan.⁶⁸ The question cannot be decided at the level of facts, as the meaning of these acts cannot be interpreted without recourse to the law.⁶⁹ While this principle is supposed to apply to situations where the state “recedes into” the people of whom it is composed, it is very hard for a lawyer to tell in what instances do the actions of the people display the “true essence” of the state, as opposed to revolts and crimes which go against both the state and the people.⁷⁰

To give the term “public function” any meaning at all, recourse must be had to the law of the state where the illegal actions took place, to see whether the laws list a function as public or not. However, our goal in moving to function from status was precisely to avoid looking at the local laws, which could classify something as private in spite of being directed or influenced by the state. Examination of public function thus necessarily becomes an exercise in comparative policy: something is public if it would be classified as such under a Western nation-state, taking into regard what an ordinary citizen is supposed to and allowed to do, and what is beyond that sphere.

This is manifest in *Hyatt International v. Iran*,⁷¹ where Hyatt’s properties were taken by the Foundation for the Oppressed, an allegedly private religious foundation. However, the tribunal found

organ of Mexico):

Since nearly all of the federal troops had been withdrawn from this State and were used farther south to quell this insurrection, a sort of informal municipal guards organization—at first called “defensas sociales”—had sprung up, partly to defend peaceful citizens, partly to take the field against the rebellion if necessary. It is difficult to determine with precision the status of these guards as an irregular auxiliary of the army, the more so as they lacked both uniforms and insignia; but at any rate they were “acting for” Mexico or for its political subdivisions.

Id.

67. See *infra* Part I.D.

68. See HANS KELSEN, *PURE THEORY OF LAW* 2-3 (Max Knight trans., 1967).

69. *Id.*

70. Hence the confusion of interwar lawyers who were trying to integrate nationalism into the fabric of international law. See Berman, *supra* note 24.

71. *Hyatt v. Iran*, 9 Iran-U.S. Cl. Trib. Rep. 72 (1985).

that the foundation has certain special powers to

proceed with the use of tribunals, Komitehs (Revolutionary Committees), Revolutionary Guards, Local and State Police and all other bailiffs and the Revolutionary Courts and Tribunals for the discovery, seizure, removal, maintenance, inventory taking, assessment, change for the better, operation and every other action required for the management of the properties [of the former Shah].⁷²

The foundation was also audited by the government, and supervised by the prime minister. Therefore, not only was it public by function, but through links with different government authorities, it could also be held to be a state entity through status or through sovereign command. Public function is therefore one of the principles that enforce the global standard of Eurocentric states.

Clearly, however, public function was designed to integrate and incorporate informal but public-spirited activity and a major question is the applicability of attribution by public function in cases involving economic activity. Can profit-making be a public function? Command hierarchies and administrations, and even regulatory and adjudicative mechanisms are widespread in the market sector,⁷³ but this is not enough for acceptance of a public function. The question of *cui bono* is also not too helpful, as successful economic decisions result in wide-ranging positive externalities regardless of the intent to benefit only the makers of the decision or a whole community.

Regarding business enterprises, the tendency is the inverse of that regarding the use of violence: all actions and entities are presumed to be private, even if they are owned by the state.⁷⁴ The tip-

72. *Id.* at 89.

73. The judiciary? Mediation and arbitration play a widespread and increasing role. Police? Pinkertons are famous in our history; today every large company and school has its own security force, and private eyes continue to be hired for peephole duty; many highly innovating industries have their own secret service working in the world of industrial espionage. Welfare? Any listing of private, highly bureaucratized and authoritative welfare systems would be as long as it is unnecessary.

Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1137 (1980) (quoting Theodore J. Lowi, *THE END OF LIBERALISM: IDEOLOGY, POLICY AND THE CRISIS OF PUBLIC AUTHORITY* 44 (1969)).

74. The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that it is not subject to executive control—these are not decisive criteria for the purpose of attribution of the entity's conduct to

ping point, instead of control, is intent: is the private organization meant to advance something beyond profit-making, or not?

The long and winding road to finding a private company as having certain public powers is well illustrated in *Emilio Augusto Maffezini v. The Kingdom of Spain*.⁷⁵ Maffezini, an Argentinean national sought to invest in Spanish Galicia, and got different forms of aid (favorable interest rate loans, investment advice, office space, accounting services) from SODIGA, a company under Spanish private law but established by the Spanish government for the purpose of fostering economic growth in Galicia.⁷⁶ When Maffezini's investment, a chemical company initialed EAMSA, failed, he commenced arbitration proceedings against Spain, claiming that SODIGA was a government entity and that his investment failed due to bad advice and inappropriate action by SODIGA.⁷⁷

The tribunal found that, structurally, SODIGA was not part of the public administration, but belonged to "a variety of public entities that were governed by private law but which would occasionally exercise public functions that were governed by public law."⁷⁸ It agreed that such entities' "status always gave rise to great confusion."⁷⁹ The tribunal further found that "State commercial corporations[,] . . . although considered public entities from an economic point of view, are as a matter of law governed by private law, and not administrative law. But even here some activities of these commercial corporations, such as contracting for example, were governed by administrative law."⁸⁰ After concluding this structural investigation, the tribunal considers a functional one as well, to consider "the objectives and functions for which the company was created."⁸¹ According to the tribunal, "many of these elements point in the instant case to its public nature,"⁸² possibly because of the aforementioned goal of SODIGA to foster (general) economic growth:

[Most of the supported investments] were not quite

the State.

CRAWFORD, *supra* note 23, at 100.

75. *Maffezini v. Spain*, Case No. ARB/97/7, 5 ICSID (W. Bank) 419 (2002), *reprinted in* 16 ICSID REV.: FOREIGN INVESTMENT L.J. 207, *available at* <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded>.

76. *Id.*

77. *Id.*

78. *Id.* ¶ 48.

79. *Id.*

80. *Id.* ¶ 49 (citation omitted).

81. *Id.* ¶ 50.

82. *Id.*

successful from a financial point of view, although they contributed to the development of the industrial and business base of the region concerned. Important shortcomings that have been identified in this policy were the lack of a specific legal and fiscal framework, difficulties in recovering the investments made and the lack of professional expertise. These shortcomings were aggravated by political pressures to support investments of doubtful viability.⁸³

A further argument by the tribunal suggests that “[a] decision to increase the investment taken not by Mr. Maffezini but by the entity entrusted by the State to promote the industrialization of Galicia, cannot be considered a commercial activity. Rather, it grew out of the public functions of SODIGA.”⁸⁴

In *Maffezini v. Spain*, function is thus reduced to intent on the one hand (a decision is public if it is made with the intent to benefit a whole region, and not just the company itself), and prerogative on the other hand (an entity is public if it exercises powers that are not available to others). Function in this case again is retraceable to status (through special powers combined with government ownership) and will (through the exclusive or principal aim of fostering public good).

D. Due Diligence: From Omission to Territory

State entities, whichever way one goes about identifying them, can incur responsibility not only through their positive acts, but also through their omissions; according to C. F. Amerasinghe, “[t]his point is too obvious to require developing.”⁸⁵ It is not only obvious, it is also quite old; already in the eighteenth-century, Vattel mentioned that “[a] sovereign who refuses to repair the evil done by one of his subjects, or to punish the criminal, or, finally, to deliver him up, makes himself in a way an accessory to the deed, and becomes responsible for it.”⁸⁶

As Vattel’s excerpt shows, the responsibility for omissions widens the scope of liability considerably if the duties to act include

83. *Id.* ¶ 54.

84. *Id.* ¶ 79.

85. C. F. AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS 38 (1967); see also CRAWFORD, *supra* note 23, at 80 (“The French term ‘fait internationalement illicite’ is better than ‘acte internationalement illicite’, since wrongfulness often results from omissions which are hardly indicated by the term ‘acte.’”).

86. 3 VATTEL, *supra* note 26, § 77, at 137.

regulation of others' conduct.⁸⁷ Moreover, the duty to regulate others' acts is inherent in sovereignty, indeed in all political power. Therefore, attribution can in theory easily be extended to the limits of sovereignty. That is, to all events that take place within a state's territory. Ian Brownlie's opinion that "[i]n general a state is not under a duty to control the activities of private individuals (being its nationals) beyond the bounds of state territory,"⁸⁸ meshes perfectly with the holding of the ICJ in the *Corfu Channel* case, that "[it is] every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."⁸⁹ Judge Huber's opinion in the *British Property in Spanish Morocco* case provides the perfect summary: "responsibility and territorial sovereignty are mutually conditional of one another."⁹⁰

On the other hand, the responsibility to prevent injury cannot be absolute. That would quite obviously swallow up all other grounds of attribution, and even erase the law of attribution as such, to replace it with the simple doctrine of unconditional, objective responsibility for one's territory. Strict liability has been denied even when there was a plausible interpretation of a treaty between the parties that created strict liability. Thus, in the *Sambiaggio* case, where the Venezuelan government explicitly guarantee[d] by Article 4 of the treaty of 1861 "[t]he protection and security of person and property,"⁹¹ the opposing commissioner and the umpire wrote respectively that "governments are constituted to afford protection, not to guarantee it,"⁹² and that "[t]he ordinary rule is that a government, like an individual, is only to be held responsible for the acts of its agents or for acts the responsibility for

87. [T]he different rules of attribution stated in Chapter II have a cumulative effect, such that a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects. For example, a receiving State is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it.

CRAWFORD, *supra* note 23, at 92.

88. IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY PART I 165 (1983).

89. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Sept. 30).

90. Responsabilité et souveraineté territoriale se conditionnent réciproquement [*British Property in Spanish Morocco*] (U.K. v. Spain), 2 R.I.A.A. 615, 636 (1925) (translated by author).

91. *Sambiaggio* (Italy v. Venez.), 10 R.I.A.A. 499, 502 (Italy-Venez. Comm'n 1903) (opinion of Commissioner Agnoli); *id.* at 518 (The actual text of article 4 of the Italian-Venezuelan treaty discussed in the case declared that: "[t]he citizens and subjects of one state shall enjoy in the territory of the other the fullest measure of protection and security of person and property").

92. *Id.* at 511 (supplementary opinion of Commissioner Zuloaga).

which is expressly assumed by it.”⁹³ The umpire’s answer, of course, still begs the question, how expansively the term “acts” can be interpreted to include omissions and failings.

What is finally required of the state is a standard of due diligence in preventing injuries and righting wrongs. This basically calls for an evaluation of the knowledge of the state agents’ and the appropriateness of their actions:

[W]here the loss complained of results from acts of individuals not employed by the state, or from activities of licensees or trespassers on the territory of the state, the responsibility of the state will depend on a failure to control. In this type of case questions of knowledge may be relevant in establishing the omission or, more properly, responsibility for failure to act.⁹⁴

Therefore, the inquiry is directed back to the second ground of attribution: state agency as determined by the laws. In the ILC’s formulation, “[o]bligations of prevention are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur.”⁹⁵ This is also visible in the universal rejection of the idea of “indirect responsibility of state organs.”⁹⁶

If an illegal act has already been committed, a secondary arena of due diligence standards springs up in the courts of the territorial state, this time under the name of “denial of justice.”⁹⁷ Have the

93. *Id.* at 512 (opinion of Umpire Ralston).

94. BROWNLIE, *supra* note 88, at 45.

95. CRAWFORD, *supra* note 23, at 140.

96. Abby Cohen Smutny, *State Responsibility and Attribution: When is a State Responsible for the Acts of State Enterprises?* Emilio Augusto Maffezini v. The Kingdom of Spain, in *INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND INTERNATIONAL CUSTOMARY LAW* 17, 18 (Todd Weiler ed., 2005).

The State is not in any way “indirectly” responsible for the misconduct of its nationals, but only for its own acts or omissions [“]Only a failure on its part to perform duties incumbent upon it either prior to or subsequent to the commission of such acts will render it answerable to the other State.”

Id. (quoting ALWYN FREEMAN, *INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE*, 19-20 (1938)); *see also* Christenson, *supra* note 22, at 327-28 (“It is not helpful to analyze [state action], as we have seen, in terms of direct and indirect conduct, for that distinction implies vicarious liability for certain private acts when proper theory must classify all conduct for which a State is responsible as direct acts or failures of duty.” (citation omitted)).

97. *See generally* JAN PAULSSON, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* (2005).

courts of the state in which an illegal act has been committed failed in granting the injured party their due? The territorial state, it seems, has the possibility of redeeming itself in its own courts by admitting to the injury caused as illegal. Indeed, this possibility is a prerequisite to the engagement of international responsibility, also called the exhaustion of local remedies.⁹⁸ Denial of justice can therefore mean inappropriate administrative action, inaction, or an unjust reaction by the courts, or original violations of rights by the courts themselves. Denial of justice thus unites violations of due process with the substantive injustice of the judgments rendered. This aspect of due diligence is often referred to as “the duty to prevent and punish”—thereby implying that if a state punished the offender, the injured foreigner has no more complaints.

It is not certain though whether prevention and punishment are interchangeable obligations. Inflicting a just punishment can be imagined to completely clear the state of all responsibility for its failure in prevention, but the ICJ has ruled that “it is not the case that the obligation to prevent has no separate legal existence of its own; that it is, as it were, absorbed by the obligation to punish, which is therefore the only duty the performance of which may be subject to review by the Court.”⁹⁹ This may however refer only to genocide, or the obligations covered by the Genocide Convention. In previous cases, allegations of denial of justice were always considered together with the original illegal acts: the facts were presented as a single narrative, and the injuries were adjudged as one.¹⁰⁰

Regardless of the positions of the state agents whose acts are being considered, be they in the judiciary or the executive, whether the consideration of omissions along with positive actions enlarges the area of responsibility for a state depends mainly on how high the threshold of diligence is that a state has to show. This is what

98. International law attaches state responsibility for judicial action only if it is shown that there was no reasonably available national mechanism to correct the challenged action. In case of denial of justice, finality is thus a substantive element of the international delict. States are held to an obligation to provide a fair and efficient *system* of justice, not to an undertaking that there will never be an instance of judicial misconduct.

Id. at 100.

99. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bos. & Herz. v. Serb. & Mont.*), 2007 I.C.J. 91, 153, ¶ 427 (Feb. 26).

100. *E.g.*, *Stephens* (U.S. v. United Mexican States), 4 R.I.A.A. 265, 268, ¶ 8 (Mex.-U.S. Gen. Cl. Comm’n 1927) (“Apart from Mexico’s direct liability for the reckless killing of an American . . . the United States alleges indirect responsibility of Mexico on the ground of denial of justice. . . . Both facts are proven by the record, and reveal clearly a failure on the part of Mexico to punish wrongdoers.”); *see also Youmans* (U.S. v. United Mexican States), 4 R.I.A.A. 110 (Mex.-U.S. Gen. Cl. Comm’n 1926); *Janes* (U.S. v. United Mexican States), 4 R.I.A.A. 82, 82-90 (Mex.-U.S. Gen. Cl. Comm’n 1925).

generates the real ambiguity in state responsibility. This uncertainty is most clearly presented in the following two paragraphs of the *Corfu Channel* case:

It is true, as international practice shows, that a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation. It is also true that that State cannot evade such a request by limiting itself to a reply that it is ignorant of the circumstances of the act and of its authors. The State may, up to a certain point, be bound to supply particulars of the use made by it of the means of information and inquiry at its disposal. But it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof.

On the other hand, the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence.¹⁰¹

In other words, control over territory in itself does not establish *prima facie* responsibility; but lack of due diligence need not actually be shown, it can be inferred from a modicum of circumstantial evidence.¹⁰² This is a very high standard, as is readily ac-

101. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 18 (Sept. 30).

102. A similar rhetoric was used in *Asian Agricultural Products Ltd. v. Sri Lanka* to distinguish absolute responsibility from an extremely high standard (also leading to similar practical results of liability through inadequate prevention of harm):

[T]he addition of words like “constant” or “full” to strengthen the required standards of “protection and security” could justifiably indicate the Parties’ intention to require within their treaty relationship a standard of “due diligence” higher than the “minimum standard” of general interna-

knowledge by commentators: “due diligence can be measured by the average general standard of behavior of the ‘civilized’ or ‘well-organized’ State However, in some areas of international law . . . the effort required of the State must not be an ‘average’ level, but ‘good’ or even ‘excellent.’”¹⁰³

The standard is not described anywhere in more exact terms. All definitions are relative, and exist only in comparison to the “civilized,” “well-organized,” “good” state. In most cases, however, no standard of comparison is made explicit at all, and the actions of the state agents are examined in the aura of a general standard of reasonableness or correctness. They are compared to what alternative decisions they could have made in the same situation. This standard of reasonableness, vague to the point of non-existence and wildly dependent on the judge’s impression of what was possible or commendable in the situation known only from the presentations of the parties, can and does lead to squarely opposing findings of attributability and responsibility.

The standard of the most well-developed country was affirmed by the ICJ in the *Nicaragua* case. In debating whether Nicaragua was responsible for not preventing arms shipments from its territory to reach rebel groups in El Salvador, Nicaragua pleaded that a complete halt to weapons smuggling was impossible for a poor state with geographical conditions like Nicaragua.¹⁰⁴ The Court considered that:

[I]f the flow of arms is in fact reaching El Salvador without either Honduras or El Salvador or the United States succeeding in preventing it, it would clearly be

tional law. But, the nature of both the obligation and ensuing responsibility remain unchanged, since the added words “constant” or “full” are by themselves not sufficient to establish that the Parties intended to transform their mutual obligation into a “strict liability”.

Asian Agric. Prods. Ltd. v. Sri Lanka, Case No. ARB/87/3, 4 ICSID (W. Bank) 246, ¶ 50 (1990), reprinted in 6 ICSID REV.: FOREIGN INVESTMENT L.J. 526, 546-47 (1991); available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded>.

103. Riccardo Pisillo-Mazzeschi, *The Due Diligence Rule and the International Responsibility of States*, 35 GERMAN Y.B. INT’L L. 9, 45 (1993).

104. Nicaragua’s frontier with Honduras, to the north, is 530 kilometers long. Most of it is characterized by rugged mountains, or remote and dense jungles. Most of this border area is inaccessible by motorized land transport and simply impossible to patrol. . . . As a small underdeveloped country with extremely limited resources, and with no modern or sophisticated detection equipment, it is not easy for us to seal off our borders to all unwanted and illegal traffic.

Miguel d’Escoto Brockmann, Foreign Minister of Nicaragua, Declaration to the International Court of Justice (Apr. 21, 1984), cited in *Military and Paramilitary Activities (Nicar. v. U.S.)* 1986 I.C.J. 14, 81, ¶ 147 (June 27).

unreasonable to demand of the Government of Nicaragua a higher degree of diligence than is achieved by even the combined efforts of the other three States. In particular, when Nicaragua is blamed for allowing consignments of arms to cross its territory, this is tantamount, where El Salvador is concerned, to an admission of its inability to stem the flow.¹⁰⁵

This, however, is no clarification of the standard; it is just a reaffirmation that the standard is the same for Nicaragua, Honduras, El Salvador, and the United States. More revealing is the comment that if the U.S. was unable to pinpoint the flow of arms by using the sophisticated techniques employed for that purpose, then “a fortiori, it could also have been carried on unbeknown to the Government of Nicaragua, as that Government claims.”¹⁰⁶ The standard here is therefore the one available to the strongest and most well-ordered country examined, that of the United States. As the U.S. itself failed the test, in this case, the standard served the weaker country.

Finally, and contrary to all objections that an absolute standard would abolish the attribution doctrine *per se*, in some cases the obligation to prevent acts from happening is in fact described as absolute, encompassing the entire territory and apparatus of the state. This was the case in the *Velasquez Rodriguez* case, where the Inter-American Court of Human Rights had to decide whether the government of Honduras was responsible for supporting and endorsing the practice of kidnappings, torture, and extrajudicial detention and executions known as “disappearances” in the early 1980s.¹⁰⁷ The Court referred to Article 1(1) of the American Convention on Human Rights,¹⁰⁸ and interpreted it in the following way:

[t]he . . . obligation of the States Parties is to ‘ensure’ the free and full exercise of the rights recognized by

105. 1986 I.C.J. at 85, ¶ 157.

106. *Id.* at 85, ¶ 156.

107. *Velasquez Rodriguez Case*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988), reprinted in 28 I.L.M. 291 (1989).

108. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

Id. at 29, ¶ 161 (quoting Organization of American States, American Convention on Human Rights art. 1(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123).

the Convention to every person subject to its jurisdiction. . . . The obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation—it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights.¹⁰⁹

In the *American Manufacturing and Trading, Inc. v. Republic of Zaire* case, a similar stance was taken. When American Manufacturing and Trading's (AMT) investments in Zaire were ransacked by a rebel group, the tribunal held that Zaire's obligation:

[A]s the receiving state of investments . . . [is to] take all measures necessary to ensure the full enjoyment of protection and security of its investment[s] . . . [and that] [i]t has not done so, by mere recognition of the existing reality of the damage caused while designating SINZA [AMT's local subsidiary] as the victim and alleging that its own national legislation has exonerated Zaire from all obligations to make reparation . . . in the circumstances such as those giving rise to the present dispute.¹¹⁰

Finally, in the *Trail Smelter* case, the arbitration tribunal attributed the damages caused in U.S. territory to Trail Smelter (operating in Canada) by virtue of the principle of *sic utere tuo*—openly stating that territory was the only reason why the air pollution emitted by the smelter (wholly unconnected to the Canadian government or state machinery) was deemed to be Canada's responsibility.¹¹¹ The tribunal declared that “under the principles of international law . . . no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein”¹¹² This conclusion has also been interpreted to refer to pollution in general,¹¹³ but a similar conclusion is reached (without citing the *Trail Smelter* case) in a treatise on climate change and inter-

109. *Id.* at 30, ¶¶ 166-67.

110. *Am. Mfg. & Trading, Inc. v. Zaire*, ICSID Case No. ARB/93/1, 5 ICSID (W. Bank) 14 (2002), reprinted in 36 I.L.M. 1534, 1548-49 (1997).

111. *Trail Smelter (U.S. v. Can.)*, 3 R.I.A.A. 1905 (1938).

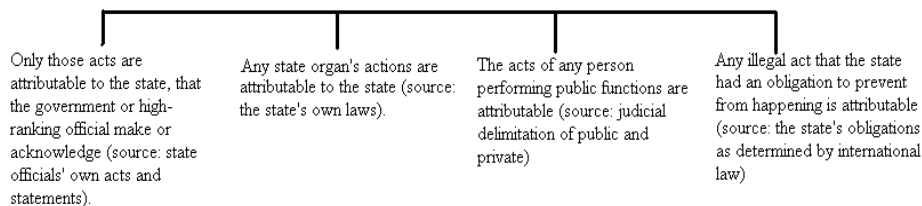
112. *Id.* at 1965.

113. Riccardo Pisillo-Mazzeschi, *Forms of International Responsibility for Environmental Harm*, in INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM 15, 29-30 (Francesco Francioni & Tullio Scovazzi eds., 1991).

national law.¹¹⁴ The method of imputing responsibility for all illegal acts that happen on a state's territory is nevertheless clearly available to all who care to use it, regardless of the field or domain in which the illegal acts happen.

II. INTERIM CONCLUSION: THE TILT TOWARDS TERRITORIALITY

The four basic principles outlined above are set forth in progression, from the most restrictive (all actions must be clearly traced back to the supreme will of the sovereign) to the most encompassing (any illegal action that has happened on the territory of the state, being a result of its failure to prevent illegal actions, engages the responsibility of the state). Nevertheless, it is clear that this progression is not a progression in time: basically both ends of the spectrum are present already in Vattel's work. Nor is it, or can be, a narrative of moral progress: letting illegal acts go unpunished because of a lack of clear connections to the highest government authorities is neither worse nor better than holding a state responsible for every illegal act, though prevention was practically impossible (even if it had such an obligation). One can depict the stages of responsibility thus:



On this spectrum, the first two principles are sovereignty-based in the sense that attribution does not depend on the judgment of the international judge or arbitrator, but on the declarations and legislative actions of the state party. The last two principles are supranational in the sense that they depend on an international standard of what is public and what is private, or what the obligations of the state in question are. The movement of rhetorical progress is from the local to the global: as the state tries to worm its way out of responsibility through delegating power to subsidiary state organs, controlling agents outside of the state hierarchy, and denying or erasing links to non-state agents, international lawyers have to adopt tighter and tighter standards of con-

114. RODA VERHEYEN, CLIMATE CHANGE DAMAGE AND INTERNATIONAL LAW: PREVENTION DUTIES AND STATE RESPONSIBILITY 238-40 (2005).

trol.¹¹⁵ Progress is illusory because there is virtually no change of standards in time: awards from the 1920s have already condemned states for not enforcing law and order in their territory,¹¹⁶ while some judgments from the 2000s have acquitted states on certain counts because the links between the state funding the paramilitaries and the soldiers committing massacres on the ground were not close enough.¹¹⁷

The line of apparent progress is also disturbed by references between the principles, from one to another. We have seen that responsibility for a state's territory is directed back to responsibility for state organs through the rejection of the doctrine of indirect responsibility.¹¹⁸ Likewise, responsibility for state organs leads us back to state will, as the status of state organs is only evident from the law of the state, itself an act of the sovereign will. Public function can only be determined if there is a link to the state, such as government ownership or delegation of government functions through law;¹¹⁹ and a rarely-used epithet to attribution through the actions of state agents mentions that this can only happen if the agent is acting in its public capacity, or appears to do so.¹²⁰

A revised diagram of attribution, including the possible rhetorical moves from one principle to another, would therefore look like this (the red arrows show the possible rhetorical moves):

115. In [cases of complete dependence from a state], it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. & Herz. v. Serb. & Mont.), 2007 I.C.J. 91, 140-41 ¶ 392 (Feb. 26).

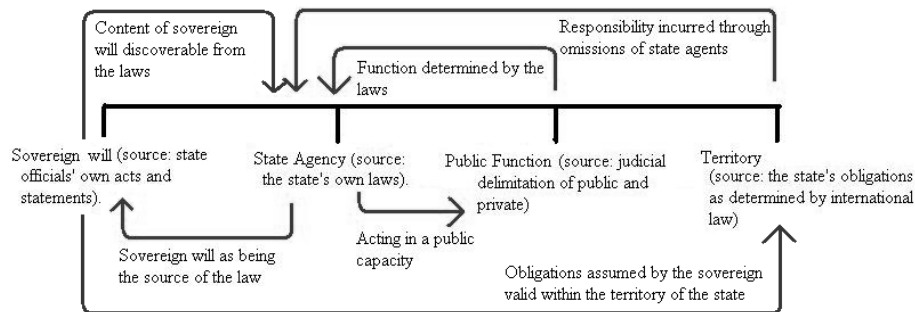
116. See *supra* notes 50-52, 66.

117. 2007 I.C.J. at 141.

118. See *supra* note 96.

119. See CRAWFORD, *supra* note 23, at 100.

120. The acts of public official who is acting in a "purely private capacity" (e.g., accepting bribes, or settling a personal score) will not be attributed to the state. See Mallén (United Mexican States v. U.S.), 4 R.I.A.A. 173, 173 (Mex.-U.S. Gen. Cl. Comm'n 1927); Yeager v. Iran, 17 Iran-U.S. Cl. Trib. Rep. 92, 95-96 (1937).



Some of these rhetorical moves are actually made in practice, while others only appear in this diagram as possibilities. The conceptual fuzziness of each principle of attributability is thus made clear; basically all of them can be described as the consequence of another principle. Because of the uncertain borderlines of each principle and their reducibility to one or two principles (or possible conflation to eleven rules), the end point of a judicial analysis of attributability is completely indeterminate. Rules have to be taken into account serially, one after the other, until attributability is found, as in the *Congo v. Uganda* case,¹²¹ the *Genocide* case,¹²² or the *Tehran* case.¹²³ The more rules we have, the wider the standard of attribution, through the mechanisms of responsibility for failure to prevent. However, the price of this clarity has been the expansion of attributability. If nothing else, taking all ILC Articles into account almost certainly results in an increased responsibility for failure to protect or punish. This is a near-objective standard of responsibility.

This does not seem to be a problem, at first sight. Setting a high standard of state responsibility seems logical and commendable both in terms of substantive and procedural law. States should be incentivized to maintain control over their territories and to enforce law and order. They should have no easy loopholes to get out of responsibility for their actions by entrusting or even acquiescing to private parties carrying out unlawful actions within their country. Furthermore, as it is not any easier to determine what hap-

121. See *Armed Activities on the Territory of the Congo (Congo v. Uganda)*, 2005 I.C.J.116, ¶¶ 160-65 (Dec. 19), (regarding Uganda's control over the Congo Liberation Movement (MLC)), ¶¶ 213-14 (regarding attribution of the acts of the Uganda Peoples' Defence Force (UPDF) to Uganda).

122. See 2007 I.C.J. 91, ¶¶ 377-78 (investigation of acknowledgement of conduct by Serbia), ¶ 385-95 (responsibility through the acts of state agents), ¶¶ 396-412 (responsibility through effective control of non-state agents), ¶¶ 425-50 (responsibility for breach of the duty to prevent and punish).

123. See *United States Diplomatic and Consular Staff in Tehran (United States. v. Iran)*, 1980 I.C.J. 3, 29-33, ¶¶ 57-68 (May 24), (attribution through failure to defend the Embassy premises), ¶¶ 69-79 (attribution through endorsement of the acts committed by the rioters).

pens exactly in the cabinet rooms of other states today than it was fifty years ago, it makes sense to maintain the ruling of the ICJ on the levels of proof required to prove attributability;¹²⁴ Other states (and tribunals) should have recourse to inferences of fact and law when determining what a state is or is not responsible for.

Nevertheless, the expansion of attribution makes the whole doctrine pointless. In the final count, the rule is that anything that happens within a state's territory incurs that state's liability. If the doctrine is not taken to this extreme (though as we saw, it can easily be), then the principles of attribution have a completely indeterminate scope of application, and the possible variations inherent in their combinations only make things worse.

Neither can the principles of attribution be fashioned into a cohesive order on the basis of the substantive obligations and breaches that they are trying to link. For example, it would be perfectly understandable if the state were held to a very strict standard regarding its duties in protecting human life; a less stringent one concerning environmental harm; and a considerably lighter one in the case of protection of property.¹²⁵ Yet clearly this is not the case. The *Trail Smelter* case, concerning environmental harm, had the most stringent standard of all the cases analyzed, while in the *Genocide* case, Serbia was released of all claims except one, the failure to prevent and punish one international crime, the massacre at Srebrenica, out of the dozens analyzed by the ICJ and the hundreds committed during the war in Bosnia. The *Velasquez-Rodriguez* case attributed responsibility to the complete state for failing to prevent or punish acts of torture and state-sponsored murder; the Mexican-U.S. Claims Commissions decided in several cases¹²⁶ that unprosecuted and unpunished murders did not establish the responsibility of Mexico (or the United States).

124. See *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (Sept. 30).

125. In effect, this approach has been advocated by Riccardo Pisillo-Mazzeschi, who has argued in several books and articles that strict liability applies in certain domains of the law; for example, the duty to abstain from harming aliens or foreign states via its own actions; and a lesser degree of fault liability or due diligence applies in other cases, for example to the duty to prevent environmental harm. See Pisillo-Mazzeschi, *supra* note 113, at 15-16; Pisillo-Mazzeschi, *supra* note 103, at 22:

[W]e should examine the role of diligence in international practice in relation to the various *substantive areas* of State obligations in which it actually appears to have played a role, instead of assessing such role in relation to the formal categories of wrongful acts traditionally dealt with in legal literature.

However, as case-law shows, responsibility is not attributed in wider or narrower circles depending on the obligations breached, but instead upon the identity of the actor.

126. See, e.g., *Garcia* (United Mexican States v. U.S.), 4 R.I.A.A. 119 (Mex.-U.S. Gen. Cl. Comm'n 1926); *Neer* (U.S. v. United Mexican States), 4 R.I.A.A. 60 (Mex.-U.S. Gen. Cl. Comm'n 1926).

The basic (and mostly unspoken) assumption in attribution that influences statehood is that governments can and should be in control of their population and territory so as to prevent internationally illicit actions. The tighter this control is, the greater a chance the government has of avoiding liability because of the acts of private persons. Thus, attribution is in contradiction with three other doctrines in international law, all of them outside of state responsibility: the doctrine of sovereign equality of states, the doctrine of non-interference with internal governance, and the emerging norm of fostering democracy and decentralization.

A. *The Ideal State Structure in International Law*

The ever-present possibility of requiring a firm control of national territory from any government renders strongly decentralized and federal states more liable than centralized states with strong governmental powers. While the unity of the state on the international plane is a basic principle of international law,¹²⁷ the constitution of any liberal democratic state is much more about distributing, allocating, and dispersing power than linking it together under the common denominator of “the state.” This includes the doctrines of separation of powers, and, where applicable, federalism or the acknowledgement of local autonomies. In many states, the police force is under no direct control by the government.¹²⁸ The on/off quality of statehood, so prevalent in international law, does not appear in constitutional law, as the state there is already the furthest horizon of possible ordering. The creation of separate domains of power within the state requires that international law assume the unity of the state through fictions of agency and empowerment: “A federal constitution may confer treaty-making capacity and a power to enter into separate diplomatic relations on the constituent members. In the normal case, the constituent state is simply acting as a delegate or agent of the parent state.”¹²⁹

Thus, no degree of autonomy or federalism may excuse the state for a violation of international law by any of its official organs, even though by the central administration’s understanding the organ in question is not “its own.”¹³⁰ One example for this is

127. See *supra* notes 34-35 and accompanying text.

128. BROWNLIE, *supra* note 88, at 136 mentions the United Kingdom as an example; the same is true to an even larger degree of the United States.

129. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 74 (5th ed. 1998).

130. *E.g.*, Pellat (Fr. v. United Mexican States), 5 R.I.A.A. 534 (Mixed Cl. Comm’n 1929).

the *LaGrand* case, where the United States was held responsible for failing to prevent Arizona from executing Walter LaGrand.¹³¹ Here, the ICJ had no choice but to “open up” the state and investigate what measures should have been done, or should be done in the future, to ensure compliance—therefore, break through the internal/external barrier and effectively penalize the state for having the wrong constitutional structure:

[T]he United States Supreme Court rejected a separate application by Germany for a stay of execution . . . Yet it would have been open to the Supreme Court, as one of its members urged, to grant a preliminary stay, which would have given it “time to consider, after briefing from all interested parties, the jurisdictional and international legal issues involved”¹³²

The complete independence of the state to “form and constitute itself” and adapt its own policies and laws is effectively overruled in cases such as *LaGrand* and many others where the acts of courts, or the procedures of administrative agencies are being examined.¹³³ It is possible in practically any case addressing denial of justice to agree with the United States’ contention in the *LaGrand* case that:

[Germany’s] submissions are inadmissible because Germany seeks to have this Court [the ICJ] “play the role of ultimate court of appeal in national criminal proceedings,” a role which it is not empowered to perform. The United States maintains that many of Germany’s arguments, in particular those regarding the rule of “procedural default”, ask the Court “to address and correct . . . asserted violations of US law and errors of judgment by US judges” in criminal proceedings in national courts.¹³⁴

If the U.S. were not a federal state (and also if Arizona did not have an independent Clemency Board as well as a governor not bound by the Board’s opinion¹³⁵), the President could easily have ordered the governor of Arizona to halt or at least postpone the ex-

131. *LaGrand* (F.R.G. v. U.S.), 2001 I.C.J. 466, 506-08, ¶¶ 110-15 (June 27).

132. *Id.* at 508, ¶ 114 (quoting *Germany v. United States*, 526 U.S. 111 (1999)).

133. *See supra* note 50.

134. *LaGrand*, 2001 I.C.J. at 485, ¶ 50.

135. *Id.* at 478-79.

ecution of LaGrand, and thus avoid an embarrassing diplomatic fiasco.¹³⁶

This is also true regarding the separation of powers; a state without a judiciary and an executive branch that are independent of one another can exercise full control and better “speak with one voice” than one which recognizes and implements the separation of powers. From the point of view of avoiding international responsibility, international law is most favorable to a strongly centralized state with extensive powers in regulating its citizens’ actions in general and its officials in particular.

Generally, as in Albert de Lapradelle’s submission, the principles of sovereign independence and freedom in internal affairs are emphasized in international legal materials dealing with the state:

The question of the creation of the state is fundamental to international law. But how does it regulate it? By leaving to the State the care of organizing itself: it is up to the State to decide how to form and recruit itself: it is up to the State to create its own substance, and then to develop it; it is up to the State to promulgate, by its power and to the extent of its power, its laws which stem from its growth and, consequently, from its life.¹³⁷

This view of pure freedom of self-organization within the realm of effectiveness is contrasted with another opinion, which demands that a state wishing to be recognized by the international community adopt human rights standards and a democratic form of government. Evidence for the emergence of this demand as a set rule of international law can be found in the universal non-recognition of Rhodesia as an independent state because of its declared policy

136. Bruno Simma & Carsten Hoppe, *The LaGrand Case: A Story of Many Miscommunications*, in *INTERNATIONAL LAW STORIES* 371, 383, 394-95 (John E. Noyes et al. eds., 2007).

137. KOSKENNIEMI, *supra* note 1, at 273 (quoting de Lapradelle’s submission in *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4 (Feb. 7) (author’s translation from the French original)):

[L]a question de la formation de l’Etat est-elle la question fondamentale du droit international. Mais comment la règle-t-il ? En laissant à l’Etat le soin de s’organiser lui-même: à lui de décider comment il se forme, et se recrute: à lui de créer sa propre substance, puis de la développer; à lui de promulguer, par la jeu de sa puissance et dans l’étendue de cette puissance, les lois qui sont celles de sa croissance et, par suite, de sa vie.

of apartheid upon secession from Great Britain in 1965;¹³⁸ the conditions of democratic governance set forth by the United States and the European Community before it would recognize any of the Yugoslav or Soviet successor states;¹³⁹ or the United Nations' commitment to reinstate President Aristide of Haiti after a military coup in 1994.¹⁴⁰ Democratic governance as an international legal norm has also been supported (and criticized) by a number of distinguished international legal scholars.¹⁴¹

On the other hand, many basic rules of international law have, or easily can have antidemocratic backlashes. In James Crawford's six-item list, these are: the executive's almost exclusive power over foreign affairs; the binding force of international law over even the most democratic domestic legislation; the powers of the executive regarding international remedies; the principle of non-intervention that protects non-democratic as well as democratic regimes; the possibility for a government to bind the state indefinitely for the future; and the limits to self-determination posed by the principle of *uti possidetis*.¹⁴²

Another one of these undemocratic, if not antidemocratic standards, unmentioned in Crawford's article on democracy and international law, is the law of attribution. Attribution definitely has an effect on the internal governance of a state, and Crawford, in his commentary to the ILC Articles, has trouble in reconciling the internal and the external viewpoints regarding state structure:

In determining what constitutes an organ of a State for the purposes of responsibility, the internal law and practice of each State are of prime importance. The structure of the State and the functions of its organs are not, in general, governed by international law. It is a matter for each State to decide how its administration is to be structured and which functions are to be assumed by government. But while the State remains free to determine its internal structure and functions through its own law and practice, in-

138. S.C. Res. 216, U.N. Doc. S/RES/216 (Nov. 12, 1965).

139. Sean D. Murphy, *Democratic Legitimacy and the Recognition of States and Governments*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 123, 130-39 (Gregory H. Fox & Brad R. Roth eds., 2000).

140. S.C. Res. 940, U.N. Doc. S/RES/940 (July 31, 1994).

141. *E.g.*, DEMOCRATIC GOVERNANCE IN INTERNATIONAL LAW, *supra* note 139; Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992). A critical study is SUSAN MARKS, *THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY AND THE CRITIQUE OF IDEOLOGY* (2000).

142. James Crawford, *Democracy and the Body of International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 139, at 91, 95-97.

ternational law has a distinct role. For example, the conduct of certain institutions performing public functions and exercising public powers (e.g., the police) is attributed to the State even if those institutions are regarded in internal law as autonomous and independent of the executive government.¹⁴³

The undisputed sovereignty of the state to arrange its internal administration in any way it sees fit must therefore be qualified in a similar way to the international rule on the attribution of citizenship, as derived from the *Nottebohm* case.¹⁴⁴ A state may devise its administrative organization in any way it pleases, but international law is not as indifferent to the effects of its self-organization as Albert de Lapradelle may claim. On the one hand, there is a strong push for more democratic states, and even for preferred treatment in international law for democracies.¹⁴⁵ On the other hand, a democratic state (which is divided internally and thus has more opportunities to violate international law through actions that do not reflect government policy) is in a weaker position internationally than a non-democratic one, where the state speaks with “one voice” internally as well as externally. In Christensen’s words, “[o]pen societies will be increasingly at a disadvantage because they cannot escape claims of responsibility as easily as police states can.”¹⁴⁶ The ideal state under international law, it seems, would not be “any state,” but one with an administrative structure like France: democratic, yet with a strong centralized government.

B. Territoriality and Responsibility

The difficulty of attribution under public function, and the last-instance responsibility of the territorial state means that the territorial state is liable for all private actions that take place on and in

143. CRAWFORD, *supra* note 23, at 92.

144. It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation. . . . This is implied in the wider concept that nationality is within the domestic jurisdiction of the State. . . . It does not depend on the law or on the decision of Liechtenstein whether that State is entitled to exercise its protection, in the case under consideration. To exercise protection, to apply to the Court, is to place oneself on the plane of international law. It is international law which determines whether a State is entitled to exercise protection and to seize the Court.

Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4, 20-21 (Apr. 6).

145. See, e.g., Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT’L L. 503, 503-38 (1995).

146. Christenson, *supra* note 22, at 342.

that state, even if they have been planned and coordinated from elsewhere, if no other state is involved.

The double perspective of the state as territory and/or hierarchy leaves certain entities and actions in “blind spots” that make attribution very difficult, manifestly unfair, or simply impossible. The two possible types of relations between the individual committing the illegal acts and the state that assumes responsibility for these acts—participation in a command hierarchy or presence on state territory—leaves out actions where a non-state actor commits harm to another country while not being directed, supported, or specifically encouraged by her home state. If this non-state actor is outside of the state where the harm is caused, responsibility for the illegal act is not attributed to any state. If the non-state actor is inside the state where the harm is caused (and possibly another foreigner is injured, too), the territorial state will have to assume responsibility, despite ties between the author of the act and another state.

The International Criminal Tribunal for the former Yugoslavia cited numerous judgments and awards where a high threshold of attributability was set or affirmed, in the case of “individuals or groups not organized into military structures,”¹⁴⁷ including the Diplomatic Staff in the *Tehran* case, the *Nicaragua* case regarding the acts of operatives directly controlled by the U.S., or the Short case.¹⁴⁸ This line of reasoning leads directly to the conclusion that “if, as in *Nicaragua*, the controlling State is *not the territorial State* where the armed clashes occur or where at any rate the armed units perform their acts, more extensive and compelling evidence is required to show that the State is genuinely in control of the units or groups”¹⁴⁹

So in these cases, who is responsible for the illegal acts perpetrated by the rebel movements in the country? Naturally the state, on whose territory the rebel movements operate is responsible, the one which has the obligation to uphold law and order and protect foreign investments within its territory. In the *AMT v. Zaire* case,¹⁵⁰ there was no mention of the exact rebel group which looted AMT’s manufacturing plant in Zaire/Congo¹⁵¹ (or their affiliation),

147. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 132 (July 15, 1999) (emphasis omitted).

148. *Id.* ¶¶ 133-37.

149. *Id.* ¶ 138.

150. Am. Mfg. & Trading, Inc. v. Zaire, ICSID Case No. ARB/93/1, 5 ICSID (W. Bank) 14 (2002), reprinted in 36 I.L.M. 1534 (1997).

151. The Republic of Zaire changed its name to the Democratic Republic of the Congo on May 29, 1997. EMIZET FRANÇOIS KISANGANI & F. SCOTT BOBB, HISTORICAL DICTIONARY OF THE DEMOCRATIC REPUBLIC OF THE CONGO 384 (3d ed. 2010).

but it seems unlikely that even if the group were found to have been supported by another country (as in the *Congo v. Uganda* case¹⁵²), Congo/Zaire would have escaped responsibility by pointing to Uganda, for instance. After all, the obligation to “take all measures necessary to ensure the full enjoyment of protection and security”¹⁵³ of foreign investments in its territory was Congo/Zaire’s and not Uganda’s.

III. COUNTERPOINT: ATTRIBUTION IN TRANSNATIONAL CORPORATE RESPONSIBILITY

Let us now examine a counterpoint to state responsibility, the widely disputed responsibility of transnational corporations (“TNCs”) under international law.¹⁵⁴ The TNC is not a legal concept. Unlike the municipal companies that constitute it, the TNC is not defined in any legal instrument (as opposed to “company,” “national” or “investment”¹⁵⁵). They are nevertheless united by a legal concept, which is the ownership of corporate stock—even though this ownership is defined and regulated by several jurisdictions. Not only are they governed by sometimes competing jurisdictions, but also no “objective” criterion can be found that would serve as the starting point for a debate about strongest ties. This lack of conceptual unity raises several questions: Is a TNC one entity or several? Does it include companies to which they have contractual ties, or only companies they own? This leads us back circularly to the lack of an accepted definition. In Vaughan Lowe’s description:

[while] human beings are present in one place at any given moment, [c]orporations are present nowhere. Their activities, through their agents, may be present everywhere; and the location of those activities may change almost instantaneously. Bank accounts may be moved to different jurisdictions; tele-sales depart-

152. *Armed Activities on the Territory of the Congo (Congo v. Uganda)*, 2005 I.C.J.116, ¶¶ 160-64 (Dec. 19).

153. *Am. Mfg. & Trading*, 36 I.L.M. at 1548.

154. *See generally* NON-STATE ACTORS AND HUMAN RIGHTS (Philip Alston ed., 2005); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001).

155. *See generally* Treaty Between the United States and Albania Concerning the Encouragement and Reciprocal Protection of Investments, U.S.-Alb., art. I, § 1(a)-(d), Jan. 11, 1995, S. TREATY DOC. NO. 104-19; Treaty with the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investments, U.S.-Czech Rep. & Slov., art. I, § 1(a)-(c), Oct. 22, 1991, S. TREATY DOC. NO. 102-31 (showing that these treaties do not contain definitions of TNC).

ments may be moved from the USA or the UK to India; and so on.¹⁵⁶

What, then, unites a TNC, if all its parts are so malleable? Steven R. Ratner, in his in-depth essay on corporate responsibility, states that “[t]he touchstone for determining the relevance of enterprise structures for duties must be the element of control.”¹⁵⁷ Control is more than just ownership, because it also comprises control through contractual means (for example, supplier, distributor, and franchise contracts, or voting agreements)—the constant possibilities for corporations to create more corporations, to outsource and out contract are what make control the necessary starting point instead of ownership.¹⁵⁸

Control, however, is not any more easily appraised in corporate settings than sovereign will in nation-states. And just like in states, the principle of subjective control (knowledge and will) must be augmented by a formal principle of prima facie attribution and *ultra vires* responsibility, based on status and hierarchy (laws and official status for states, ownership and officer structure for corporations) for those cases where control cannot be pinpointed.

However, the analogy to the principle of state unity is much weaker in corporate contexts. Like the lizard leaving behind its tail, the corporation can usually abandon its subsidiary and rely on its separate personality: “[a]ll courts agree that ‘control’ arising from 100 percent stock ownership and common identity of the parent’s and the subsidiary’s officers and directors is insufficient” as a justification for piercing the corporate veil.¹⁵⁹ The required test for a successful piercing of the corporate veil is that the subsidiary be a mere “instrumentality” or an “alter ego” of the mother corporation, where the subsidiary’s every action is decided in fact by the owner.¹⁶⁰ This test effectively negates status and leads us back to control.

Status is thus eliminated as a principle of responsibility for corporations; and because function depends on status (as shown above on page 15), so is function. A principle of corporate function, to the analogy of public function, would have to state that anyone acting in furtherance of corporate policy shall be imputed to be an

156. Vaughan Lowe, *Corporations as International Actors and International Law Makers*, 14 ITALIAN Y.B. INT’L L. 23, 37 (2004).

157. Ratner, *supra* note 154, at 519.

158. See Phillip I. Blumberg, *Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity*, 24 HASTINGS INT’L & COMP. L. REV. 297, 311-14 (2001) (for the U.S. federal interpretation of control in corporate contexts).

159. *Id.* at 305.

160. *Id.* at 304 n.17.

agent of the corporation. This test would need a definition of corporate policy that could always be imputed to the corporation, either in a formal/subjective way (for example, anything which furthers the goals or profit of the corporation in question) or in a substantive/objective way (for example, the following acts shall always be imputed to the corporation). Furthermore, to be applicable with regard to transnational corporations, the test itself should be defined within international law or accepted and applied worldwide. If such a definition were available and in use, it might achieve the same result that Steven Ratner and Hugh Collins wish for regarding their multifaceted control test.¹⁶¹ Such a test would end limited liability, and may grotesquely extend unlimited liability to acts outside the legitimate business goals of the company while guarding limited liability for ordinary business activity.¹⁶²

The implementation of corporate policy as a principle of attribution would therefore necessitate a general harmonization of corporate law worldwide. The alternative would be for one sufficiently powerful country to implement its own corporate responsibility laws through extraterritorial jurisdiction. This has been done in part through the U.S. Alien Tort Claims Act (ATCA), which grants foreigners jurisdiction in U.S. federal courts to sue anyone for violations of “the law of nations.”¹⁶³ While the ATCA extends jurisdiction to all torts under the law of nations anywhere in the world, another related doctrine, the doctrine of *forum non conveniens* gives courts the discretionary power to decide whether the litigation would be better conducted by the forum and under the law of

161. See *id.*; Hugh Collins, *Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration*, 53 MOD. L. REV. 731, 733-34 (1990).

162. The next question would be, of course, what constitutes an act or event that is sufficiently far from legitimate business activity as to justify extending corporate liability. Would ordinary torts for example suffice? See Blumberg, *supra* note 158, at 306.

163. 28 U.S.C. § 1350 (2006). For case-law based on the Alien Tort Claims Act, see generally *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003). Scholarly commentary on the ATCA includes: Ugo Mattei & Jeffrey Lena, *U.S. Jurisdiction over Conflicts Arising Outside of the United States: Some Hegemonic Implications*, 24 HASTINGS INT'L & COMP. L. REV. 381, 383-96 (2000) (clarifying the background and procedure of the Alien Tort Claims Act); Michael D. Ramsey, *Multinational Corporate Liability Under the Alien Tort Claims Act: Some Structural Concerns*, 24 HASTINGS INT'L & COMP. L. REV. 361, 362-70 (2001); Gregory G. A. Tzeuschler, *Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad*, 30 COLUM. HUM. RTS. L. REV. 359 (1998); Halina Ward, *Securing Transnational Corporate Accountability Through National Courts: Implications and Policy Options*, 24 HASTINGS INT'L & COMP. L. REV. 451, 457-58 (2001) (for an overview of non-U.S. examples of extraterritorial jurisdiction against TNCs); see also Tracy M. Schmidt, Comment, *Transnational Corporate Responsibility for International Environmental and Human Rights Violations: Will the United Nations' "Norms" Provide the Required Means?*, 36 CAL. W. INT'L L.J. 217, 223-32 (2005).

the place of the injury.¹⁶⁴ The local forum (i.e. the forum of the place of the injury) would logically be better equipped to find and evaluate evidence, and would also be a better guardian against imposition of foreign legal values onto the country of the injury. However, when the local forum cannot effectively reach the mother corporation, leaving justice to the local forum is likely a form of denial of justice, in fact.

Of course, the extraterritorial court usually justifies its decision not from a global perspective, but a national one. The question before the courts is not what would be best for the plaintiffs, but what would be best for the forum country.¹⁶⁵ Most corporate responsibility cases are better framed in terms of class or ideological interests rather than national interests, yet jurisdiction ordinarily requires a sufficiently substantial link to the forum state.¹⁶⁶ The few exceptions to this are those international crimes where universal jurisdiction is accepted. Therefore, acknowledging “corporate function” as a principle of attribution basically means universal jurisdiction for any state over TNCs, in the absence of an international court.

What about attribution through territory? TNCs of course have no territory, only an official address; even attributing them a place for jurisdiction may be problematic.¹⁶⁷ Nevertheless, TNCs often map themselves. TNCs’ world maps emulate political world maps, but instead of the four colors necessary to ensure that no neighboring countries are shaded in the same color, these corporate world maps are made up of only two colors: one to mark countries they are present in and another (usually a lighter shade of the same color) to mark the rest of the world.¹⁶⁸ The state of the corporate headquarters, or the holding company, is not shown in any different way than the other companies. Thus, one can see TNCs two ways: as unified entities (indicated by one color) or as a bunch of similar but separate groups (indicated by the boundary lines). No lines or color shades are used to indicate centers and peripheries, mother companies and subsidiaries. The unified shading can be

164. Malcolm J. Rogge, *Towards Transnational Corporate Accountability in the Global Economy: Challenging the Doctrine of Forum Non Conveniens in In Re Union Carbide, Alfa-
ro, Sequihua, and Aguinda*, 36 TEX. INT’L L.J. 299, 300-01 (2001).

165. Note, *Constructing the State Extraterritorially: Jurisdictional Discourse, the National Interest and Transnational Norms*, 103 HARV. L. REV. 1273, 1285-95 (1990).

166. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18-19, (Sept. 7, 1927).

167. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809-12 (1935); Lowe, *supra* note 156.

168. For sample interactive digital corporate maps, see BNP Paribas, Implantations, <http://maps.bnpparibas.com> (last visited Sept. 25, 2010); E.ON, A.G., Interactive Map, <http://www.eon.com/de/corporate/20920.jsp> (last visited Sept. 25, 2010); TESCO, P.L.C., Interactive Map, http://www.tescopl.com/plc/about_us/map/ (last visited Sept. 25, 2010).

interpreted to mean the equality of companies on the one hand, or total control on the other.¹⁶⁹

TNCs' maps thus lead us back to national boundaries and nation-states' jurisdictions—and thereby, to nation-states' responsibility to protect, prevent, and punish. No territorial attribution is possible for TNCs, because territorial attribution means general attribution. Holding TNCs responsible for their subsidiaries' acts worldwide, as described above, would necessitate creating international corporate law or extending one nation's corporate laws worldwide. Creating "corporate territories" would mean even more, basically granting sovereignty to corporations along with responsibility.

These discussions of corporate responsibility present the flip side of the bias towards territoriality: responsibility over physical territory means a general, last-instance responsibility, while lack of territorially defined competences means a possibility of weaseling out of responsibility for the detriment of the territorial sovereign.

CONCLUSION

Biases are hard to prove in international law "because the relationship between center and periphery is not written in the *content* of legal rules—indeed the international regime has progressed precisely by emptying itself of substantive content which might display a bias."¹⁷⁰ As David Kennedy describes the practice of emancipation through international law, "[a]re we not evenhanded in its application? If not, let us be. Is it not consented to by the post-colonial world? If not, let us put it to the vote. Is the Third World still excluded from participation in its institutional application? If so, let us invite them in."¹⁷¹ While an empirical demonstration of divergent practice regarding the center and the periphery in the application of certain rules or doctrines is necessary, it is not enough, for such evidence can always be brushed aside as evidence only of past imperialist tendencies.¹⁷² What must be proven is that

169. See A.A. Fatouros, *Transnational Enterprise in the Law of State Responsibility*, in INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS, *supra* note 22, at 361, 368-69 ("Instead of asserting that a TNE [transnational enterprise] has the nationality of each of the States in which it operates, one might treat the enterprise as foreign to each of these States, including its own home country.").

170. David Kennedy, *The Disciplines of International Law and Policy*, 12 LEIDEN J. INT'L L. 9, 100 (1999).

171. *Id.*

172. Also, such empirical evidence gathering is far from new. It basically hales back to the mid-19th century and the birth of the Calvo doctrine. One study collecting the discrepancies in the application of state responsibility between the Orient and the West is Yun-

“out of any number of equally ‘possible’ choices, some choices—typically conservative or *status quo* oriented choices—are *methodologically privileged* in the relevant institutions.”¹⁷³ David Kennedy argues that in order to find bias, we must prove that “the doctrine’s origin must have given it a structure, a virus of some sort, which continues to differentiate the center and the periphery however the doctrine mutates.”¹⁷⁴

The bias of territoriality is one such basic structural trait in international law. By (i) giving a unified personality to an intricate system of administrative and law-making organizations, partly hierarchical and partly independent of one another (the principle of the unity of the state); and (ii) assigning both supreme law-making power and ultimate responsibility within a specified territory to this personified state, international law creates an extremely efficient system for the assignment and management of responsibility. The efficiency of this system is even more obvious after comparison with transnational corporate responsibility, where neither principle exists, and responsibility can therefore always be left with either a contractor or subsidiary, or passed on to the territorial state.

The (territorial) nation-state has been described as a double-sided doctrine, as much a tool of protection, emancipation, and participation as the method of exclusion for those lacking a state or representation therein.¹⁷⁵ It has also been frequently asserted that the nation-state is a cultural phenomenon that is not suitable for non-European cultures,¹⁷⁶ or just for certain territories that have never effectively been united.¹⁷⁷ Nevertheless, while it exists, it exudes omnipotence within its carefully circumscribed boundaries, just like the colors used to indicate nation-states on political maps, which drench every city, mountain, plain, and river on the map in a uniform hue of belonging to one sovereign.

The Western Sahara opinion was a testament to the fact that not even the most careful historical analysis can provide a method for fusing the medieval system of tribes loosely tied together by feudal allegiance, military alliances, and “gifts” (personal alle-

Tan Tu, *State Responsibility for Injuries to Foreigners on Account of Mob Violence, Murder and Brigandage* (1927) (unpublished Ph.D. Thesis, University of Illinois) (on file with the Law Library, University of Illinois).

173. KOSKENNIEMI, *supra* note 1, at 610.

174. Kennedy, *supra* note 170, at 100.

175. KOSKENNIEMI, *supra* note 1, at 423-31, 444-49.

176. See, e.g., Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113, 1135-37 (1995).

177. Rosa Ehrenreich Brooks, *Failed States, or the State as Failure?*, 72 U. CHI. L. REV. 1159, 1167-68 (2005).

giance and jurisdiction) with the modern system of mutually exclusive territorial states, guided by the strictly binary code of independence versus component status.¹⁷⁸ The imposition of values and the skewing of historical situations is thus unavoidable: “We follow the [ICJ]’s search all over Western Sahara, Burkina Faso and Mali for territorial sovereignty, only to find that territorial sovereignty has emerged in The Hague, as the very optic through which the ICJ conducts its search.”¹⁷⁹ We are ourselves accustomed to perceiving the optic of the legislator, as well as the judge, as all-seeing, objective, central, and immutable. In the search for a just world order, we must nevertheless remind ourselves frequently to adjust our own optics to escape unworkable, simplistic and partial answers.

178. Western Sahara, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16) (compare ¶¶ 84-160 with ¶ 162).

179. Vasuki Nesiiah, *Placing International Law: White Spaces on a Map*, 16 LEIDEN J. INT’L L. 1, 5 (2003).

SOMETHING FOR EVERYONE: WHY THE UNITED STATES SHOULD RATIFY THE LAW OF THE SEA TREATY

SARAH ASHFAQ*

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INTRODUCTION

In April of 2009, newspapers across the nation printed the smiling face of Abduwali Abdukhadir Muse, a Somali teenager that hijacked a U.S. ship, taking its passengers hostage. Headlines proclaimed that Muse was captured, the hostages rescued and that justice would prevail. Federal prosecutors were quick to charge Muse with piracy among other crimes. Shortly thereafter, however, they would need to determine what constitutes piracy—a question that would determine the fate of Muse.

Muse is accused of piracy for taking control of a U.S. cargo ship off of the African coast and holding its captain, Richard Phillips, hostage. He is just one of hundreds of Somali pirates who have made a livelihood out of this criminal pastime. In modern times, the international community has turned a blind eye to piracy given the relatively few incidents that have occurred. However, in light of the rapid growth and emergence of strong-willed Somali pirates, states with interests at sea are reevaluating the safety and security they once took for granted.

The capture of Phillips attracted President Obama's attention, who vowed to "halt the rise of piracy."¹ This was not, however, the first time the new administration has considered U.S. interests on the high seas. President Obama and Senate leaders have looked forward to the long awaited ratification of the United Nations Convention on the Law of the Sea² (the "Convention"), which among other benefits also helps address piracy. This treaty, which provides broad ranging regulations, guidance and mechanisms for international cooperation on the open seas has long been a source of contention between conservative Republican lawmakers and most Democrats.³ Since its signing by President Clinton in 1994 and despite almost unanimous recommendations from the Senate Foreign Relations Committee on two occasions, the Convention has

1. Peter Baker, *Obama Vows to Stop Piracy's Rise Off the Coast of Africa*, N.Y. TIMES, Apr. 14, 2009, at A8.

2. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

3. See Elana Schor, *Republican Rightwingers Find and Iraq-on-Sea*, GUARDIAN.CO.UK, Oct. 25, 2007, <http://www.guardian.co.uk/world/2007/oct/25/usa.antarctica>.

failed to make it to the Senate floor for a full vote for ratification.⁴ This is in light of a plethora of analysis surrounding the Convention by scholars, journalists, government fellows, politicians and others.

Critics of ratification point to the sovereignty costs of the treaty to the United States and its socialist leanings—echoing the sentiments of President Reagan when the Convention was first introduced in the 1980s in the midst of the Cold War. In the 25 or so years since then, the world has changed dramatically and the reasons that the United States stood steadfast against ratification no longer hold true. Today, the United States should not only ratify the treaty because it stands to benefit, but it must ratify in order to best equip itself for the new challenges it faces.

In Parts Two and Three of this paper, the flawed U.S. approach to treaty ratification is discussed with a focus on the Convention. Part Two focuses on the United States' overstatement of sovereignty costs associated with the Convention. Part Three discusses why the costs of the Convention to the United States are miscalculated.

Part Four addresses three important strategic advantages that the Convention provides the United States. First, the Convention aids the United States in the capture and prosecution of pirates on the seas. Next, it counters the emerging military and economic threat that a powerful new China presents. And finally, by ratifying the treaty, the United States will be able to assert a viable claim over valuable resources that lie beneath the Arctic Seabed.

The final part of this paper discusses treaty ratification from a theoretical perspective. It analyzes three approaches to international agreements—rationalist, constructivist and functionalist—and discusses how the Convention would satisfy proponents of each.

It is in the interests of the United States to bring the Convention to the Senate floor for a vote immediately to protect its interests at sea. In addition to President Obama, Secretary of State Hillary Clinton expressed strong support for the treaty as well as President George W. Bush who also endorsed the Convention before he left office.⁵ With approximately 160 state parties to the

4. See Michael A. Becker, *International Law of the Sea*, 42 INT'L LAW. 797-98 (2008). See generally John A. Duff, *The United States and the Law of the Sea Convention: Sliding Back from Accession and Ratification*, 11 OCEAN & COASTAL L.J. 1 (2006) (discussing failed ratification efforts of the Convention).

5. Michael A. Becker, *International Law of the Sea*, 43 INT'L LAW. 915 (2009) (quoting President Obama's commitment to ratification of the Law of the Sea Treaty); *Contemporary Practice of the United States Relating to International Law—United States Hosts Antarctic Treaty Parties, Secretary of State Discusses Polar Issues*, 103 AM. J. INT'L L. 588, 588-89 (2009) (quoting Secretary of State Clinton's commitment to ratification of UNCLOS);

Convention,⁶ international cooperation on the seas is greater than ever. It is time for the United States to join the Convention and share in the benefits that it offers.

I. GROSS OVERSTATEMENT OF SOVEREIGNTY COSTS OF THE CONVENTION

This section will describe the United States' approach to international instruments, then define sovereignty and analyze the Convention by focusing on provisions that compromise sovereignty. It will point out the numerous provisions that the United States is already bound to as a party to other treaties with identical or similar provisions. Then it will analyze two provisions that are unique to the Convention with respect to governance on the seas: codification of the "common heritage of mankind" principle and a mandatory dispute resolution mechanism. The section concludes by explaining how the United States may be bound to the "common heritage of mankind" under customary law and why the costs of the Convention's dispute resolution provision are actually relatively minor.

A. *The United States' Approach to International Agreements*

The United States has resisted becoming party to many important international agreements, even where its staunchest allies are supporters,⁷ largely because of the perceived sovereignty costs associated with such agreements.⁸ These have included the Con-

Press Release, Office of the Press Secretary, President's Statement on Advancing U.S. Interests in the World's Oceans (May 15, 2007), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2007/05/20070515-2.html>.

6. United Nations, United Nations Convention on the Law of the Sea Status, http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en (last visited Aug. 18, 2010).

7. For example, the U.S. is one of the most vehement opponents of the Rome Statute and the International Criminal Court, whereas, Britain is perhaps its strongest proponent and a major U.S. ally. *See generally* Press Release, Coalition for the International Criminal Court, UK Ratifies ICC Treaty as US Considers Anti-ICC Legislation (Oct. 4, 2001), <http://www.iccnw.org/documents/10.04.2001UK%20Ratifies%20RS.pdf> (noting the important role the UK is to play in the development and success of the International Criminal Court. Further noting efforts in the United States to pass legislation whose effect would be to punish states that ratify the ICC treaty. Although these efforts did not succeed, this is illustrative of the strong anti-ICC sentiment that is pervasive in U.S. politics); *see also* Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 833-41 (2009) (discussing the United States' disengagement from international treaty law).

8. *See* Michael J. Kelly, *Charting America's Return to Public International Law Under the Obama Administration*, 3 J. NAT'L SECURITY L. & POL'Y 239, 250 (2009) (noting the United States' resistance to the Rome Statute under the Bush Administration was because they viewed it as "a significant threat to U.S. sovereignty"); Amnesty International USA, CEDAW, <http://www.amnestyusa.org/violence-against-women/ratify-the-treaty-for-the>

vention on Discrimination Against Women; the Convention on the Rights of the Child; the International Covenant on Economic, Social and Cultural Rights; the Mine Ban Treaty and the Rome Statute.⁹ Despite the United States' refusal to become party to many vital international agreements, its role in the international community is undisputed. Since 1776, the United States has been party to countless treaties¹⁰ covering a wide range of topics including agriculture, trade, finance, investment, postal matters, education, and military, in conjunction with almost every nation in the world.¹¹

As with many of the instruments discussed above, the United States has refused to ratify the Convention, citing sovereignty costs as its chief complaint.¹² When the Convention was introduced, President Reagan said "no nat[ional] interest of ours could justify handing sovereign control of two-thirds of the earth's surface over to the Third World."¹³ Over twenty years later, the same views are echoed by some in the Senate as well as private groups. U.S. Senator James M. Inhofe has denounced the Convention and believes that his colleagues in the Senate need "to understand the real dangers it poses to American sovereignty and security."¹⁴ During his remarks to the Senate, Inhofe claimed that "unless [there is] some great big international body, [the United States] shouldn't have any sovereignty, and that is exactly what [the Con-

rights-of-women-cedaw/page.do?id=1108216 (last visited Oct 25, 2010) (discussing the myth that "U.S. ratification of [the Convention on the Elimination of All Forms of Discrimination Against Women] would give too much power to the international community" and arguing that the United States' reluctance to sign the treaty is unnecessary as the language of the convention "upholds US sovereignty").

9. Marianna Quenemoen, Global Policy Forum, U.S. Position on International Treaties, (July 2003), <http://www.globalpolicy.org/component/content/article/154/26665.html> (noting that the United States is among a small minority of states that refuse to become party to several of these treaties. Since July 2003, the United States has become party to some of ten treaties highlighted).

10. See U.S. DEP'T OF STATE, TREATIES IN FORCE, A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON NOVEMBER 1, 2007: BILATERAL TREATIES (2007) [hereinafter BILATERAL TREATIES], available at <http://www.state.gov/documents/organization/83046.pdf>; see also U.S. DEP'T OF STATE, TREATIES IN FORCE, A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2007: MULTILATERAL TREATIES (2007) [hereinafter MULTILATERAL TREATIES], available at <http://www.state.gov/documents/organization/89668.pdf>.

11. See BILATERAL TREATIES, *supra* note 10; MULTILATERAL TREATIES, *supra* note 10.

12. See Elizabeth M. Hudzik, Note, *Treaty on Thin Ice: Debunking the Arguments against U.S. Ratification of the U.N. Convention on the Law of the Sea in a Time of Global Climate Crisis*, 9 WASH. U. GLOBAL STUD. L. REV. 353 (2010).

13. William P. Clark & Edwin Meese, *Reagan and the Law of the Sea*, WALL ST. J., Oct. 8, 2007, at A19 (alteration in original).

14. Senator James M. Inhofe, Press Room: Law of the Sea Treaty (Oct. 4, 2007), http://inhofe.senate.gov/public/index.cfm?FuseAction=PressRoom.Speeches&ContentRecord_id=ae6b61e3-802a-23ad-431c-19fcc771af03.

vention] does”, referring to the international seabed authority as the “great big international body.”¹⁵ In 2007, Frank Gaffney, Jr., President and Chief Executive Officer of the Center for Security Policy presented testimony before the Senate Foreign Relations Committee arguing for rejection of the Convention on sovereignty grounds.¹⁶ Gaffney argued that the Convention threatened sovereignty because it was at odds with U.S. security interests, imposed unprecedented environmental obligations as a result of its empowerment of an “unaccountable, unrepresentative international agency” to oversee it and because of what he referred to as tax collection.¹⁷

Given the vast number of international agreements to which the United States *is* a party, its aversion to sovereignty costs is not absolute. Critics of the Convention continue to cite the sovereignty costs that led to its rejection in the early 1980s. Today, these same costs are erroneously analyzed for two reasons. First, there is a gross overstatement of the sovereignty costs associated with the Convention. Second, these costs are misinterpreted—critics do not appreciate that the constraints imposed by the Convention ultimately work in favor of the United States.

B. What Are Sovereignty Costs?

States interpret sovereignty differently. In broad terms, sovereignty can be thought of as “the basic international legal status of a [s]tate that is not subject, within its territorial jurisdiction, to the governmental, executive, legislative or judicial jurisdiction of a foreign [s]tate or to foreign law other than public international law.”¹⁸ Some link sovereignty to a free market economy¹⁹ while others believe that sovereignty “means that the [s]tate has unlimited power and is subjected to only those rules of international law which it has expressly accepted.”²⁰ Sovereignty costs, thus, are those rules that restrict a state’s absolute control over its actions and affairs. States are reluctant to relinquish control where they can help it

15. 153 CONG. REC. S12695, 12712 (daily ed. Oct. 4, 2007) (statement of Sen. Inhofe).

16. *The United Nation’s Convention on the Law of the Sea: Hearing on Treaty Doc. 103-39 Before the S. Comm. On Foreign Relations*, 110th Cong. 75 (2007) (statement of Frank Gaffney Jr., President, Center for Security Policy) [hereinafter *UNCLOS Hearing*].

17. *Id.* at 88.

18. James D. Fry, *Sovereign Equality Under the Chemical Weapons Convention: Doughnuts over Holes*, 15 J. CONFLICT & SECURITY L. 45, 48 (2010) (quoting Helmut Steinberger, *Sovereignty*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rudolf Bernhardt, ed. 2000) 511).

19. *Id.*

20. Henry Schermers, *Different Aspects of Sovereignty*, in STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE 185 (Gerard Kreijen ed., 2002).

because of the potential for negative outcomes and “loss of authority.”²¹

C. Sovereignty Costs of the Convention to Which the United States Has Already Agreed

The sovereignty costs associated with the Convention are grossly overstated primarily because many of these costs have already been accepted by the United States. Provisions of the Convention that infringe upon sovereignty include limitations on unilaterally claiming territorial waters, limitations on economically exploitable areas on the seas, limitations on the continental shelf, revenue sharing provisions for exploitation of resources on the high seas, imposition of environmental obligations, and a mandatory dispute resolution mechanism.²² As will be discussed next, the United States has already agreed to most of these provisions through a variety of previously signed treaties.²³

Prior to governance on the seas, states could unilaterally claim as much of the open seas as territorial waters (those surrounding their territory) as they chose.²⁴ In theory, this meant that the United States could claim the entire open sea as its own. Likewise, so could its adversaries, allowing them control of waters that were merely a stone’s throw away. The Convention curtailed this practice by declaring a territorial sea limit of twelve nautical miles from coastlines (or other established baselines) which gave coastal states the sovereign right to a limited belt of sea around their state.²⁵

The Convention also codified the customary right of “innocent passage,” or travel that is “not prejudicial to the peace, good order or security of the coastal State” to ensure that states could continue to travel peacefully through one another’s territorial waters.²⁶

21. Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, in LEGALIZATION AND WORLD POLITICS 37, 53 (Judith L. Goldstein et al. eds., 2001).

22. UNCLOS, *supra* note 2, pts. II, § 2; V; VI; VII, § 2; XII & XV. These provisions impinge upon the sovereignty of parties because they preclude such party from acting independently and instead constrain it by what has been agreed to.

23. MARJORIE ANN BROWNE, CONG. RESEARCH SERV., IB 95010, THE LAW OF THE SEA CONVENTION AND US POLICY (2005).

24. United Nations Division for Ocean Affairs and the Law of the Sea, The United Nations Convention on the Law of the Sea (A Historical Perspective), http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm (last visited Aug. 24, 2010) [hereinafter Historical Perspective] (noting the conflicting and expansive claims to the seas made by states prior to the Convention and using as an example an agreement between Spain and Portugal to split the Atlantic Ocean in half among themselves).

25. UNCLOS, *supra* note 2, pt. II, § 2, art. 3.

26. *Id.* pt. II, § 3, arts. 17, 19.

This is important to states because it provides significant savings in time and transport expense when navigating the seas.²⁷

These two provisions impinge upon sovereignty because they preclude a state's absolute right to claim unlimited territorial seas and to create rules to restrict some forms of passage within their territorial seas. The Convention's codification of these principles, however, was not new. The United States was and is still party to the 1964 Convention on the Territorial Sea and Contiguous Zone, which provided limits on how much states may claim as their territorial seas and the right of innocent passage.²⁸

Economic jurisdiction under the Convention is established through "exclusive economic zone[s]" which give member states the exclusive right for purposes of exploring, exploiting, conserving and managing the resources of the area that comprises such state's territorial sea, typically 200 miles.²⁹ This was considered one of the most revolutionary and generous provisions³⁰ of the Convention because a great deal of valuable resources fall within these expansive zones.³¹ However, not only did this provision provide a free license for states to exploit within their exclusive economic zones, but it also imposed duties upon them to ensure conservation and responsible extraction of resources to avoid overexploitation.³² This imposition of affirmative obligations that a state would not otherwise be required to take on is a sovereignty cost, as is the limitation on where a state is free to exploit. The notion of exclusive economic zones in the Convention parallels a similar one in the 1966 Convention on Fishing and Conservation of the Living Resources of the High Seas which gave state parties the right to fish on the high seas, but also dictated that it was a duty of states to cooperate with one another in efforts to conserve the living resources of the sea.³³ The United States is a party to the Convention on Fishing

27. Historical Perspective, *supra* note 24 ("This means, for example, that a Japanese ship, picking up oil from Gulf States, would not have to make a 3,000-mile detour in order to avoid the territorial sea of Indonesia, provided passage is not detrimental to Indonesia and does not threaten its security or violate its laws.").

28. MULTILATERAL TREATIES, *supra* note 10, at 111-12; United Nations Convention on the Territorial Sea and the Contiguous Zone §§ 2-3, Sept. 10, 1964, 15 U.S.T. 1606, 516 U.N.T.S. 205.

29. UNCLOS, *supra* note 2, pt. V, arts. 56-57.

30. Parker Clote, Comment, *Implications of Global Warming on State Sovereignty and Arctic Resources Under the United Nations Convention on the Law of the Sea: How the Arctic is No Longer Communis Omnium Naturali Jure*, 8 RICH. J. GLOBAL L. & BUS. 195, 205 (2008) (noting the "unprecedented" exclusive economic zone the Treaty offered).

31. Historical Perspective, *supra* note 24 (noting that "87 per cent of all known and estimated hydrocarbon reserves under the sea fall under some national jurisdiction as a result" as well as "almost all known and potential offshore mineral resources" and finally "[t]he most lucrative fishing grounds too are predominantly the coastal waters").

32. UNCLOS, *supra* note 2, pt. V, art. 61-62.

33. United Nations Convention on Fishing and Conservation of the Living Resources

and Conservation of the Living Resources of the High Seas and thus already bound by these rules.³⁴

Another important area where the Convention dictates rules is with respect to the continental shelf. The continental shelf is

the seabed and subsoil of the submarine areas that extend beyond [a coastal state's] territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.³⁵

The delineation of the continental shelf was a closely watched and hotly contested issue, due in part to the potential wealth of resources within it. There were tensions between states with wide shelves and those with little or no shelves at all.³⁶ Since much of the seas that would be free for navigation and exploitation turned on the how the continental shelf was defined, it was in the interests of many states to have their voices heard on this issue.³⁷

Ultimately, the Convention settled on an outer limit for the continental shelf of 200 miles,³⁸ which satisfied many geographically disadvantaged states (those that do have a naturally wide shelf), but also allowed special considerations for states with naturally broad shelves by granting them a potentially deeper shelf of up to 350 miles instead of the standard 200.³⁹ With the exception of the special considerations, Convention provisions limiting the continental shelf echoed those in the 1964 Convention on the Continental Shelf which set the limit as 200 miles and gave coastal states exclusive rights over its continental shelf.⁴⁰ The United

of the High Seas, art. 1, Apr. 29, 1958, 17 U.S.T. 138, 559 U.N.T.S. 285 [hereinafter Fishing and Conservation Convention]; EUGENE H. BUCK, CONG. RESEARCH SERV., RL 32185, U.N. CONVENTION ON THE LAW OF THE SEA: LIVING RESOURCES PROVISIONS 7 (2009).

34. MULTILATERAL TREATIES, *supra* note 10, at 75.

35. UNCLOS, *supra* note 2, pt. VI, art. 76.

36. Historical Perspective, *supra* note 24.

37. *Id.*

38. UNCLOS, *supra* note 2, pt. VI, art. 76.

39. Historical Perspective, *supra* note 24 (stating that the extension of the continental shelf boundary was dependent on "certain geological criteria" and satisfied several nations with a broader shelf including Argentina, Australia, Canada, India, Madagascar, Mexico, Sri Lanka and France); *see also* Anthony Clark Arend, *Do Legal Rules Matter? International Law and International Politics*, 38 VA. J. INT'L L. 107, 147-53 (1998) (discussing how the Convention changed the identity of geographically disadvantaged states).

40. United Nations Convention on the Continental Shelf, art. 2, Jun. 10, 1964, 15 U.S.T. 471, 499 U.N.T.S. 311.

States is a party to the 1964 Convention on the Continental Shelf and thus bound by these limits.⁴¹ However, if the United States qualifies for the special considerations provided for in the Convention for states with naturally broader shelves, it has the potential to increase its continental shelf.⁴²

Another sovereignty-related issue that the Convention addresses is conservation and pollution on the seas, a pressing concern given the widespread exploitation of the sea and its resources.⁴³ Part XII of the Convention, entitled Protection and Preservation of the Marine Environment, imposes upon states the "obligation to protect and preserve the marine environment."⁴⁴ The Convention also includes detailed provisions that explicitly require state parties to take measures to prevent, reduce and control pollution.⁴⁵ States are required to cooperate with global and regional efforts in combating pollution by setting standards, rules, and recommended practices, many of these through appropriate international organizations.⁴⁶ Furthermore, the Convention requires states to take the affirmative step of implementing systems for monitoring and reporting the risks and effects of pollution to their marine environments.⁴⁷

Conservation and pollution provisions are included in the 1966 Convention on Fishing and Conservation of the Living Resources of the High Seas, to which the United States is also a party.⁴⁸ As mentioned previously, this convention permits high seas fishing while also requiring states take steps to conserve the seas' living resources.⁴⁹

The Convention on the Law of the Sea limits the right of states to assert ownership over unlimited territorial seas, defines the area within which state parties are free to exploit resources, and imposes rules for conservation and preservation, among others,

41. MULTILATERAL TREATIES, *supra* note 10, at 111.

42. United States Department of State, Defining the Limits of the U.S. Continental Shelf, <http://www.state.gov/g/oes/continentalshelf/> (last visited Sept. 16, 2010) (noting that the United States is working to secure evidence that would support the requirements for an extended continental shelf under the Convention).

43. Michael Parfit, *Diminishing Returns: Exploiting the Ocean's Bounty*, NAT'L GEOGRAPHIC, Nov. 1995, at 2; ENVTL. PROT. AGENCY, EPA-905-F-97-011, WATER POLLUTION PREVENTION AND CONSERVATION (1997), available at <http://www.epa.gov/reg5rcra/wptdiv/p2pages/water.pdf>.

44. UNCLOS, *supra* note 2, pt. XII, art. 192. The Convention addresses six sources of pollution: "land-based and coastal activities; continental-shelf drilling; potential seabed mining; ocean dumping; vessel-source pollution; and pollution from or through the atmosphere." Historical Perspective, *supra* note 24.

45. UNCLOS, *supra* note 2, pt. XII, art. 194.

46. *Id.* pt. XII, §2.

47. *Id.* pt. XII, §4.

48. MULTILATERAL TREATIES, *supra* note 10, at 75.

49. Fishing and Conservation Convention, *supra* note 33, art. 1.

that limit absolute sovereignty. However, the United States has recognized benefits from ratifying the 1964 and 1966 treaties—which parts of the Convention mirror—and relinquishing sovereignty on a wide range of issues embodied therein.

D. Sovereignty Costs of the Convention Where the United States is Not Already Explicitly Bound

The Convention encompasses additional areas that were not contemplated by the agreements discussed above. These include revenue sharing provisions and binding dispute resolution mechanisms, which are the source of great controversy. While these provisions undoubtedly pose greater sovereignty costs than those discussed earlier, they nevertheless can be easily discounted. The “common heritage of mankind” principle, which the revenue sharing provisions of the Convention codifies, can be deemed customary law that the United States is subject to under principles of international law. Furthermore, the dispute resolution mechanisms that the Convention provides for do not raise the concerns that the United States has with other external adjudication procedures which it strongly opposes.

Given the wide range of definitions that can correspond to notions of sovereignty, it is helpful to examine the sovereignty costs associated with these provisions through the spectrum of “legalization.” Hard legalization refers to legally binding treaties where sovereignty costs are highest, whereas soft legalization refers to those instances where states are not bound or are very loosely bound, and thus sovereignty costs are relatively low.⁵⁰ Not surprisingly, states are most resistant to hard legalization, which encompasses three dimensions: obligation, precision, and delegation.⁵¹ *Obligation* refers to the rule or commitments (or sets of rules or commitments) that states are bound by.⁵² *Precision* refers to the clarity by which rules define the conduct they speak to and *delegation* refers to the authority given to third parties to implement, interpret and apply the rules.⁵³ Of these, delegation imposes the greatest unexpected sovereignty costs by clearly and explicitly relinquishing decision-making authority to external authorities,

50. See Abbott & Snidal, *supra* note 21, at 53-54.

51. Kenneth W. Abbott et al., *The Concept of Legalization*, in LEGALIZATION AND WORLD POLITICS, *supra* note 21 at 17, 17. Because ratification of the Convention would likely be considered hard legalization, sovereignty costs discussed in this section will focus on the dimensions of hard legalization.

52. *Id.* at 17-18 (noting that obligation also refers to rules/commitments that parties other than states are bound by).

53. *Id.* at 17.

which may impact the state.⁵⁴

The subsections that follow will analyze the sovereignty costs of those provisions of the Convention that the United States is not explicitly bound by and classify those according to the dimensions of hard legalization.⁵⁵ The next section will point out why these costs are misinterpreted by the United States and are not in fact detrimental to sovereignty, but beneficial.

1. Common Heritage of Mankind

The “common heritage of mankind” principle refers to the idea that there are parts of the world that cannot belong to a single state and should be shared by all of mankind. The Convention declares that the seas fall within this category.⁵⁶ The Convention’s revenue sharing provisions address exploitation of non-living resources by coastal states in the continental shelf *beyond* their 200-mile territorial zone and try to bring the “common heritage” principle into practice.⁵⁷ The exploiting coastal state is required to pay a portion of the production of its resources within this area to the International Seabed Authority to be distributed to the parties to the Convention on the basis of “equitable sharing criteria.”⁵⁸ This provision can be classified as high on the scale of delegation because it imposes rules upon state parties and seeks to enforce them via an external third party.

Capitalist states like the United States have traditionally disliked this provision because of its “socialist”⁵⁹ nature and what some critics call its tax-like effect, which is to say, taxation on what they deem rightful exploitation. In his prepared remarks for the Senate in October of 2007, Senator James M. Inhofe of Oklahoma argued against ratification of the Convention, stating that

54. Abbott & Snidal, *supra* note 21, at 54.

55. Claire R. Kelly, *Realist Theory and Real Constraints*, 44 VA. J. INT’L L. 545, 552 (2004) (noting that the Convention is a “moderately (to highly) legalized . . . regime.” Thus, it could be classified as hard legalization); *see also* Peter B. Rutledge, Medellin, *Delegation and Conflicts (of Law)*, 17 GEO. MASON L. REV. 191 (2009) (discussing delegation debates, noting the role they have had in ratification of the Convention, and arguing that these delegation debates suffer from distortions).

56. UNCLOS, *supra* note 2, pt. XI, § 2, art. 136 (“The [seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction] and its resources are the common heritage of mankind.”).

57. *Id.* pt. VI, art. 82.

58. *Id.*

59. Zachary M. Peterson, *Critics Assail Law of the Sea Treaty*, NAVYTIMES, Oct. 4, 2007, http://www.navytimes.com/news/2007/10/navy_lawofthesea_071004w/ (“Critics of the Convention of the Law of the Sea argued at a hearing Thursday that signing the treaty was a ‘recipe for disaster,’ leading to the creation of ‘a socialist entity’ to police the world’s oceans.”).

private mining companies would have to apply to the International Seabed Authority and pay millions of dollars before they can attempt to extract the resources beneath the seabed.⁶⁰

However, the United States is likely already bound by the “common heritage of mankind” doctrine under principles of customary law.⁶¹ Customary law is generally thought of as widespread systematic practice that is backed by *opinio juris*, or the belief that one is acting in accordance with legal obligation.⁶² Because these are not objectively measurable qualities, customary law is not always easy to identify. The Convention, including its provisions regarding the “common heritage of mankind” principle, is considered to represent the customary law of the seas, supported in part by its widespread ratification.⁶³ Under general principles of international law, customary law is binding on all states, including the United States.⁶⁴ The United States, thus, is bound by those provisions of the Convention that are deemed customary law, which likely include the “common heritage of mankind” principle.

Additionally, the United States explicitly acknowledges the “common heritage of mankind” principle in its passage of the Deep Seabed Hard Mineral Resources Act.⁶⁵ The Deep Seabed Hard Mineral Resources Act notes that deep seabed minerals are the “common heritage of mankind” and establishes a temporary framework for the responsible and respectful mining of the deep

60. Senator James M. Inhofe, *supra* note 14.

61. See Anthony D’Amato, Editorial Comment, *An Alternative to the Law of the Sea Convention*, 77 AM. J. INT’L L. 281, 282-83 (1983) (arguing that the principle of the common heritage of mankind is a “generalizable” norm and represents customary law); see also Kenneth Mwenda, *Deep Sea-Bed Mining Under Customary International Law*, 7 MURDOCH U. ELECTRONIC J.L. (2000), <http://www.murdoch.edu.au/elaw/issues/v7n2/mwenda72.html>; Melissa L. Sturges, *Who Should Hold Property Rights to the Human Genome? An Application of the Common Heritage of Mankind*, 13 AM. U. INT’L L. REV. 219, 247-48 (1997) (noting that the U.N. has applied the common heritage principle to deep seabeds among other things).

62. See generally *The Paquette Habana*, 175 U.S. 677 (1900); *North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.)*, 1969 I.C.J. 3; 12 (Feb. 20).

63. Luke T. Lee, *The Law of the Sea Convention and Third States*, 77 AM. J. INT’L L. 541, 556-57 (1983) (“Accordingly, all of the provisions in the High Seas Convention ‘must therefore be taken *presumptively* to be declaratory of customary international law.’ Indeed, where the expressions ‘all States,’ ‘any States,’ etc., are used, the rules concerned may be regarded as expressing customary international law.” (citation omitted)); see also *Sarei v. Rio Tinto, P.L.C.*, 456 F.3d 1069, 1078 (9th Cir. 2006), *withdrawn*, *Sarei v. Rio Tinto, P.L.C.*, No. 02-56256, 2007 U.S. App. LEXIS 8387 (9th Cir. Apr. 12, 2007) (“[T]he [T]reaty has been ratified by at least 149 nations, which is sufficient for it to codify customary international law.”); Mwenda, *supra* note 61.

64. John Tasioulas, *Customary International Law and Global Justice*, in *THE NATURE OF CUSTOMARY LAW* 307, 308 (Amanda Perreau-Saussine & James Bernard Murphy eds., 2007) (“[W]hen [customary law] has come into existence, it is opposable against all states without exception . . .”).

65. 30 U.S.C. §§ 1401-1473 (2006).

seabed taking into account the interests of other nations.⁶⁶ That the Deep Seabed Hard Mineral Resources Act was intended as a temporary framework until the Convention could be agreed upon and ratified⁶⁷ further supports the United States' willingness to embrace the "common heritage of mankind," and ultimately the Convention which incorporates this principle.

Still others argue that the deep seabed and other areas that the "common heritage" principle applies to are not sovereignty concerns as they never belonged to the United States.⁶⁸ Furthermore, because customary international law "by itself is insufficiently clear and reliable and does not secure all the benefits that ratification of the [Convention] would provide," ratification is recommended, as the United States is likely already bound by these.⁶⁹

2. Dispute Resolution Under the Convention

The Convention encourages peaceful dispute resolution, giving disputing parties great discretion in choosing a suitable avenue to resolve their disputes, and in the absence of such, it provides one.⁷⁰ Dispute resolution likely falls on the highest end of the delegation dimension of legalization because it has the potential to delegate the most important element of sovereignty—enforcement.⁷¹ Thus, it is not surprising that the United States shies away from it.

Part XV of the Convention allows state parties in a dispute relating to the seas to choose from four options to resolve such disputes—all of which will result in a binding decision. These include arguing the case before the International Tribunal for the Law of the Sea, the International Court of Justice, an international arbitration body or a special arbitral tribunal subject to certain rules.⁷² There are, however, exceptions for certain situations that involve national sovereignty where the parties must submit to a concilia-

66. *Id.* § 1401.

67. BROWNE, *supra* note 23.

68. John Norton Moore, *UNCLOS Key to Increasing Navigational Freedom*, 12 TEX. REV. L. & POL. 459, 463 (2008) ("[The international seabed] is not an area that we own. This is not sovereignty. This is not an area that anyone has ever claimed as sovereign under the United States. In addition to that, the Congress of the United States recognized in legislation in 1980 that this area was not sovereign under the United States and that we had no legal rights to that area.")

69. David A. Koplow, *ASAT-isfaction: Customary International Law and the Regulation of Anti-Satellite Weapons*, 30 MICH. J. INT'L L. 1187, 1266 n.255 (2009) (citing comments of John B. Bellinger III, Legal Adviser to the Secretary of State).

70. UNCLOS, *supra* note 2, pt. XV; *see also* Andrew T. Guzman & Jennifer Landside, *The Myth of International Delegation*, 96 CAL. L. REV. 1693, 1716-1718 (2008) (discussing the flexibility in the dispute resolution mechanisms in the Convention).

71. Abbott et al., *supra* note 51.

72. UNCLOS, *supra* note 2, pt. XV, art. 287.

tion commission, in which case the decision of the commission will *not* be binding upon the state parties.⁷³

The United States has long resisted international agreements with dispute resolution mechanisms that remove jurisdiction to another country.⁷⁴ This resistance stems from claims that international courts (and bodies) are highly politicized and hostile towards the United States.⁷⁵ A binding dispute resolution provision encroaches on sovereignty because it takes control away from a state to adjudicate the claim wherever it wants—ideally its own courts where, presumably, it will receive favorable treatment.

Similarly, the United States has vehemently opposed the Rome Statute which establishes the International Criminal Court (ICC) as an independent body with its own legal personality.⁷⁶ Parties to the Rome Statute accept jurisdiction of the International Criminal Court over certain crimes committed by their nationals or which take place on their territory.⁷⁷ The United States refuses to ratify the Rome Statute and risk “politicized prosecutions of American service members and officials.”⁷⁸ That U.S. officials, personnel and nationals may be subject to international prosecutions imposes sovereignty costs greater than those the United States is willing to absorb.⁷⁹ In 2000, President Clinton authorized signature of the Rome Statute, despite initial opposition, and shortly thereafter President George W. Bush nullified the United States’ signature.⁸⁰ This is significant because it indicates explicit unwillingness to be-

73. *Id.* pt. XV, § 3; *see also* MALCOLM NATHAN SHAW, INTERNATIONAL LAW 570 n.383 (5th ed. 2003) (Three situations in which states may opt out of the compulsory settlement procedures include “delimitation and claims to historic waters; disputes concerning military and law enforcement activities, and disputes in respect of which the Security Council is exercising its functions”).

74. Nathan Read, Comment, *Claiming the Strait: How U.S. Accession to the United Nations Law of the Sea Convention Will Impact the Dispute Between Canada and the United States Over the Northwest Passage*, 21 TEMP. INT’L & COMP. L.J. 413, 427 (2007) (“The Senate has traditionally been hesitant to accept broad compulsory dispute settlement in treaties, stemming from the desire to control how U.S. interests may be challenged in international forums.” (citation omitted)).

75. *UNCLOS Hearing*, *supra* note 16, at 82 (“[Convention] advocates in the Bush Administration are right to be worried about international courts given the track record of such panels (particularly the ICJ) . . .”).

76. Rome Statute of the International Criminal Court art. 12, July 17, 1998, 2187 U.N.T.S. 90, U.N. Doc. A/CONF.183/9 (1998).

77. *Id.*

78. Curtis A. Bradley, *U.S. Announces Intent Not to Ratify International Criminal Court Treaty*, ASIL INSIGHTS, May 2002, <http://www.asil.org/insights/insigh87.htm>.

79. James Paul Benoit, *The Evolution of Universal Jurisdiction over War Crimes*, 53 NAVAL L. REV. 259, 306-10 (2006) (discussing the United States’ very strong opposition to the ICC).

80. Remigius Chibueze, *United States Objection to the International Criminal Court: A Paradox of “Operation Enduring Freedom”*, 9 ANN. SURV. INT’L & COMP. L. 19, 21-22 (2003).

come a party to the Convention or further its goals.

Criticism of the Rome Statute stems from concerns that the United States would compromise sovereignty by allowing others to prosecute its citizens without its consent, and potentially denying them basic constitutional rights and other domestic law protections.⁸¹ Proponents of the ICC contend that U.S. arguments against ratification of the Rome Statute fail in the face of facts.⁸² These arguments can be extrapolated and applied to the far less controversial dispute resolution provisions of the Convention. Among the most compelling arguments against a cooperative dispute resolution mechanism are assertions that a foreign body would have jurisdiction over U.S. citizens. Under the widely accepted principles of universal jurisdiction and territoriality, the United States already relinquishes a great deal of power over the fate of its citizens on trial.⁸³ Concerns of bias among the deciding party are also ill-founded. With respect to the International Criminal Court, there are a number of safeguards in place to guard against such fears.⁸⁴ The dispute resolution provisions in the Convention do not provide for prosecutions of U.S. citizens, but largely govern disputes over economic matters.⁸⁵ While there are costs associated with agreeing to a dispute resolution mechanism that is

81. Brett D. Schaefer, *Executive Memorandum #708: Overturning Clinton's Midnight Action on the International Criminal Court*, THE HERITAGE FOUND., Jan. 9, 2001 <http://www.heritage.org/Research/InternationalOrganizations/EM708.cfm>; see also Chibueze, *supra* note 80, at 31 (noting that the ICC may exercise jurisdiction "over a citizen of a non-party state if he or she commits a crime in the territory of a state party and the state party elects to surrender the accused to the jurisdiction of the Court rather than trying him or her in its national court.").

82. See generally Chibueze, *supra* note 80.

83. *Id.* at 34.

Similarly, U.S. legislative practice recognizes that the first and best established jurisdictional principle is 'territoriality.' Territoriality is considered the normal, and nationality the exceptional, basis for the exercise of jurisdiction. Also, U.S. legislative practice recognizes that a state may exercise universal jurisdiction to define and punish certain offenses of universal concern which are recognized by the community of nations, such as piracy, the slave trade, attacks on or hijacking of an aircraft, genocide, war crimes

Id. (citation omitted).

84. *Id.* at 37-45 (noting the safeguards to prevent politically motivated prosecutions include a pre-trial panel, Security Council intervention, principle of complementarity, and a very high threshold for the crimes to meet those triable by the ICC).

85. *The United Nations Convention on the Law of the Sea: Hearing Before the H. Comm. on International Relations*, 108th Cong., 21, 37 (2004) (statement of William H. Taft IV, Legal Adviser, U.S. Department of State) ("Disputes concerning military activities, including intelligence activities, will not be subject to dispute settlement under the Convention as a matter of law, or U.S. policy. . . . Most of [the things subject to the Convention's dispute resolution] will be economic, seeking compensation for damages that the other States have done, and that has been the record of the very small number of cases that have been brought by the existing parties to the treaty under the dispute resolution thing.").

not an American court, those costs are neither new nor absolute.⁸⁶ Furthermore, the underlying concern with the ICC, fear of prosecution of servicemen and women,⁸⁷ is not relevant in this context. In fact, the U.S. Navy and other military members support ratification of the Convention.⁸⁸ Finally, as discussed earlier, the dispute resolution provisions of the Convention contain an explicit carve-out for issues that infringe upon national sovereignty, among others.⁸⁹ Under those circumstances, parties to the Convention are not required to utilize any of the mechanisms enumerated, and can instead rely upon a non-binding option, thus softening the delegation aspect associated with dispute resolution.⁹⁰

There is no doubt that external dispute resolution infringes upon U.S. sovereignty and it is therefore not surprising that staunch advocates of sovereignty steadfastly oppose the Convention, in part due to its dispute resolution mechanisms. However, the costs associated with the Convention's dispute resolution provision are similar to those the United States is already subject to under principles of universal jurisdiction and territoriality. Furthermore, the Convention provides the United States with an escape from mandatory dispute resolution. In light of this, arguments against ratification of the Convention based upon sovereignty rooted in the dispute resolution mechanisms are outweighed by the benefits the Convention offers to the United States.⁹¹

II. U.S. MISINTERPRETATION OF CONVENTION COSTS RELATIVE TO OTHER STATE PARTIES

The costs associated with the Convention to the United States

86. Fishing and Conservation Convention, *supra* note 33, arts. 9-11 (outlining the dispute resolution provisions to which the United States has already agreed).

87. Arthur W. Rovine, *Memorandum to Congress on the ICC from Current and Past Presidents of the ASIL*, 95 AM. J. INT'L L., 967, 967 (2001).

88. Military endorsements of the Convention include: Admiral Mike Mullen, all members of the Joint Chiefs of Staff, General Michael Myers, Admiral Vern Clark, Admiral Jay Johnson, Admiral Thad Allen, Admiral Thomas Collins and several other members of the Navy and Coast Guard. OceanLaw.org, History of Navy Support for the Law of the Sea Convention (Apr. 21, 2008), <http://www.oceanlaw.org/index.php?module=News&func=display&sid=70>.

89. Read, *supra* note 74, at 443 ("Ironically, the Convention allows parties to escape its compulsory dispute resolution provisions by permitting 'agreements modifying or suspending the operation of provisions of this Convention.' "); see also Montserrat Gorina-Ysern, *World Ocean Public Trust: High Seas Fisheries After Grotius—Towards a New Ocean Ethos?*, 34 GOLDEN GATE U. L. REV. 645, 671 (2004) (noting that "conservation disputes arising from the exercise by coastal States of sovereign rights relating to the living resources of the [exclusive economic zone] are not subject to compulsory settlement of dispute mechanisms under UNCLOS.").

90. Guzman & Landside, *supra* note 70, at 1718.

91. See *infra* Parts II, III, IV.

compared with other state parties are significantly less for several reasons. The underlying principle is that the United States benefits when other states are also bound—especially its adversaries. The incremental cost to the United States of complying with the constraints that the Convention imposes is minimal in light of these benefits.

One reason the United States stands to benefit where other states are bound by the Convention is because of its relative stability.⁹² By ratifying the Convention, the United States is able to rely on the promises that each of the state parties has implicitly made by becoming party to the Convention. This ensures predictability and cooperation on the seas, an important consideration when confronted with states where power often changes hands and in ways that may be detrimental to U.S. interests.⁹³

Further, as discussed in Part Two, the United States already adheres to much of the Convention and thus stands largely to gain from ratification.

*A. Convention Ratification is Favorable to the United States
During Lags in Power*

Regimes are defined as:

[I]mplicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations. Principles are beliefs of fact, causation, and rectitude. Norms are standards of behavior defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choice.⁹⁴

Regime theory holds that regimes or international agreements such as treaties affect the behavior of states through the sense of obligation that they impose.⁹⁵ As such, the Convention can be con-

92. *Top 50: The Most Stable and Prosperous Countries in the World*, TIMES ONLINE, Mar. 25, 2008, <http://www.timesonline.co.uk/tol/news/world/article3617160.ece> (noting the United States as the 24th most stable nation in the world, closely following Canada).

93. See generally Ralph Peters, *Stability, America's Enemy*, PARAMETERS, Winter 2001-2002, at 5 (noting the importance of stability to the United States while arguing that it does not lead to beneficial ends).

94. Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in INTERNATIONAL REGIMES 1, 2 (Stephen D. Krasner ed., 1983).

95. *Id.*

sidered a regime.⁹⁶ Because “world politics is characterized by institutional deficiencies that inhibit mutually advantageous coordination,”⁹⁷ international regimes, such as the Convention, are essential. They facilitate coordination and improve cooperation by minimizing costs associated with negotiating and promoting efficiency.⁹⁸

International regimes provide predictability and expectations of cooperation from international actors.⁹⁹ “Typically, an international regime is established to regularize behavior not only among the members but also between them and outsiders.”¹⁰⁰

State parties to international regimes agree to comply with and internalize the norms that such regime represents. By doing this, states ultimately gain legitimacy—in that they will behave according to agreed upon norms.¹⁰¹ In fact, “[r]egimes offer one way to account for the persistence of behavior and outcomes even though basic causal factors associated with political power have changed.”¹⁰² This period during which distributions in power or other causal variables shift are referred to as lags.¹⁰³ In summary, regimes, such as the Convention, allow trust to be placed in norms that prevail over time—even as power, ideals, and priorities change.¹⁰⁴

96. Shirley V. Scott, *The LOS Convention as a Constitutional Regime for the Oceans in STABILITY AND CHANGE IN THE LAW OF THE SEA: THE ROLE OF THE LOS CONVENTION* 9 (Alex G. Oude Elferink, ed., 2005); Oran R. Young, *Commentary on Shirley V. Scott “The LOS Convention as a Constitutional Regime for the Oceans”*, in *STABILITY AND CHANGE IN THE LAW OF THE SEA: THE ROLE OF THE LOS CONVENTION*, *supra*, at 39 (supporting that the LOS Convention is a regime and questioning whether or not it is a typical regime).

97. Robert O. Keohane, *The Demand for International Regimes*, 36 INT’L ORG. 325, 335 (1982).

98. *Id.*

99. SUSAN J. BUCK, *THE GLOBAL COMMONS* 31 (1998) (“[A]lthough cooperation entails costs (especially transaction and monitoring costs), it also reduces economic uncertainty because international regimes provide predictability.”).

100. Keohane, *supra* note 97, at 352.

101. Krasner, *supra* note 94, at 18 (“Patterned behavior accompanied by shared expectations is likely to become infused with normative significance: actions based purely on instrumental calculations can come to be regarded as rule-like or principled behavior. They assume legitimacy.”).

102. Stephen D. Krasner, *Regimes and the Limits of Realism: Regimes as Autonomous Variables*, 36 INT’L ORG. 497, 500 (1982).

103. Stephen D. Krasner, *Regimes and the Limits of Realism: Regimes as Autonomous Variables*, in *INTERNATIONAL REGIMES*, *supra* note 94, at 355, 359 (“Lags refer to situations in which the relationship between basic causal variables and regimes becomes attenuated.”).

104. William D. Baumgartner, *UNCLOS Needed for America’s Security*, 12 TEX. REV. L. & POL. 445, 449 (2008) (“Locking in favorable text in black and white is always preferable to relying upon understandings of customary international law.”); John E. Noyes, *The United States, The Law of the Sea Convention, and Freedom of Navigation*, 29 SUFFOLK TRANSNAT’L L. REV. 1, 23 (2005) (noting the Bush Administration’s support for “law of the sea rules that help create stable expectations”); John R. Stevenson & Bernard H. Oxman, *The Future of the United Nations Convention on the Law of the Sea*, 88 AM. J. INT’L L. 488, 492 (1994)

Providing a regulation mechanism during lags is important on the seas where the risk of unregulated activity could have serious long-term implications.¹⁰⁵ For example, powerful state parties could engage in exploitation that puts the resources of the sea at risk while profiting handsomely. Similarly, bad actors can engage in non-peaceful navigation threatening security and privacy on the seas. If these activities are grave enough, they may eventually warrant military action by other state parties, threatening the stability of the international community.

For the sake of legitimacy, or at the very least the appearance of legitimacy, parties to the Convention will likely continue to adhere to it through regime changes. Legitimacy is an important source of leverage in international politics.¹⁰⁶ If a state cannot be counted upon to keep its promises, others will be hesitant to engage it. Ratification is viewed advantageously because it indicates commitment, which is vital in an international context due to the lack of enforceability mechanisms.¹⁰⁷ The Convention, with approximately 160 state parties¹⁰⁸ evidences a commitment to laws governing the seas and assures a degree of predictability to safeguard U.S. interests.

Critics of the Convention may point to the sovereignty costs that the United States must absorb to give other state parties these same promises, rendering the U.S. weaker. Although the Convention equally constrains all state parties, the United States, with its wealth, power, and status (albeit declining) is still able to assert a greater degree of control and influence than other state parties.¹⁰⁹ This is important where the United States may seek to

(discussing why “a widely ratified Convention is a better guarantor of this long-term stability than customary international law”); Candace L. Bates, Comment, *U.S. Ratification of the U.N. Convention on the Law of the Sea: Passive Acceptance Is Not Enough to Protect U.S. Property Interests*, 31 N.C. J. INT’L L. & COM. REG. 745, 788-89 (2006) (noting that the Convention “creates an interdependence of nations with obligations affecting all marine areas and activities,” and that its effectiveness depends upon universal acceptance of the Convention).

105. Bernard H. Oxman, Current Development, *United States Interests in the Law of the Sea Convention*, 88 AM. J. INT’L L. 167, 170 (1994).

Every attempt to use the sea, particularly far from one’s shores, poses a potential problem with the claims of a foreign government to restrict or regulate uses of the sea. Every attempt to restrict or regulate uses of the sea, whether close to or far from one’s shore, poses a potential problem with the claims of a foreign government to use the sea.

Id.

106. Joseph S. Nye, Jr., *The Decline of America’s Soft Power*, FOREIGN AFFAIRS May-June 2004, at 16.

107. Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT’L L. 581, 592 (2005).

108. United Nations Convention on the Law of the Sea Status, *supra* note 6.

109. See NAT’L INTELLIGENCE COUNCIL, OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, NIC 2008-003, GLOBAL TRENDS 2025: A TRANSFORMED WORLD, at vi (2008), available at

amend the Convention or otherwise negotiate to meet its needs.

Additionally, ratification of the Convention will soften the United States' image and signal much needed goodwill to the international community.¹¹⁰ It has been noted that “[a]nti-Americanism has increased in recent years, and the U.S.’ soft power—its ability to attract others by the legitimacy of U.S. policies and the values that underlie them—is in decline as a result.”¹¹¹ Commitment to the Convention, which engages much of the international community, would be emphasized by U.S. ratification.¹¹² It also allows other states to place their trust in the U.S. and thus its actions on the seas. This is essential for the United States to maintain its legitimacy and ultimate leverage in the international arena.¹¹³

1. Cost Reduction

The Convention provides a pre-formulated universal mechanism¹¹⁴ to govern interactions between states on issues related to the seas, resulting in vast cost savings. By creating such a me-

http://www.dni.gov/nic/PDF_2025/2025_Global_Trends_Final_Report.pdf (noting that the United States will remain the world's single most dominant power, even though its status may decline in the future). *But see* Nye, *supra* note 106 (noting that United States' soft power is in decline).

110. See Christopher Shiraldi, Comment, *U.S. National Security Implications of the U.N. Convention on the Law of the Sea*, 27 PENN ST. INT'L L. REV. 519, 544 (arguing that United States ratification of the Convention “will be a positive step in showing the international community that the United States is willing to cooperate and work with others toward a common goal”). *see generally* Susan Sachs, *Poll Finds Hostility Hardening Towards U.S. Policies*, N.Y. TIMES, Mar. 17, 2004 at A3 (reporting attitudes from Britain, France, Germany, Russia, Jordan, Morocco, Pakistan, Turkey and the United States towards U.S. policies and noting overall negative attitude towards U.S. international policies). This is especially important given the United States' history of opening treaties for negotiation, forcing other parties to concede to its demands and then failing to ratify. *See* David J. Scheffer, Speech, *Advancing U.S. Interests with the International Criminal Court*, 36 VAND. J. TRANSNAT'L L. 1567, 1578 (2003).

111. Nye, *supra* note 106, at 16.

112. *See* Raustiala, *supra* note 107.

113. Nye, *supra* note 106, at 17.

Soft power, therefore, is not just a matter of ephemeral popularity; it is a means of obtaining outcomes the United States wants. When Washington discounts the importance of its attractiveness abroad, it pays a steep price. When the United States becomes so unpopular that being pro-American is a kiss of death in other countries' domestic politics, foreign political leaders are unlikely to make helpful concessions (witness the defiance of Chile, Mexico, and Turkey in March 2003). And when U.S. policies lose their legitimacy in the eyes of others, distrust grows, reducing U.S. leverage in international affairs.

Id.

114. William J. Aceves, *Institutionalist Theory and International Legal Scholarship*, 12 AM. U. J. INT'L L. & POL'Y 227, 244-45 (1997) (noting that institutions reduce costs by providing a framework for negotiations).

chanism (or institution), these costs are reduced in a number of ways:

First, they reduce the costs associated with the negotiation of agreements. . . . Second, institutions reduce the costs of maintaining agreements once they have been reached by providing an organizational framework, an administrative staff and a forum for meetings. Third, institutions minimize the consequences of incomplete agreements by sketching the broad “rules of the game and then delegat[ing] the authority to apply and adapt these rules to specific cases.”¹¹⁵

The political scholar Robert Keohane illustrates how interrelated issues focused in a comprehensive and effective mechanism such as the Convention¹¹⁶ help to reduce transaction costs:

[I]n dense policy spaces, complex linkages will develop among substantive issues. Reducing industrial tariffs without damaging one’s own economy may depend on agricultural tariff reductions from others; obtaining passage through straits for one’s own warships may depend on wider decisions taken about territorial waters; the sale of food to one country may be more or less advantageous depending on other food-supply contracts being made at the same time. As linkages such as these develop, the organizational costs involved in reconciling distinct objectives will rise and demands for overall frameworks of rules, norms, principles, and procedures to cover certain clusters of issues—that is, for international regimes—will increase.¹¹⁷

The Convention exemplifies the kind of regime that Keohane discusses by incorporating two essential elements: a wide range of interrelated issues¹¹⁸ and participation by many state parties.¹¹⁹

115. *Id.* (quoting Geoffrey Garrett, *International Cooperation and Institutional Choice: The European Community’s Internal Market*, 46 INT’L ORG. 533, 557 (1992) (alteration in original) (citations omitted)).

116. *Id.* at 257 (“By establishing regularized patterns of behavior, treaties promote efficiency.”).

117. Robert O. Keohane, *The Demand for International Regimes*, in INTERNATIONAL REGIMES, *supra* note 94, at 141, 156.

118. See International Foundation for the Law of the Sea, *The Constitution*, <http://www.iflos.org/en/background/the-constitution.aspx> (last visited Sept. 19, 2010) (“The

Because the United States engages with virtually all states, it stands to gain a great deal of savings by reaping benefits in the form of transaction and other costs for which the Convention inherently provides.

III. PRESSING STRATEGIC NEEDS THAT SUPPORT RATIFICATION

While the Convention undoubtedly imposes some sovereignty costs on the United States, these costs are incorrectly analyzed by Convention critics. They should be considered in light of the benefits the Convention provides.

Specifically, there are three important areas where the United States would be strengthened by ratification of the Convention. The first is in countering piracy, which has rapidly risen in recent years. The second is containing emerging superpowers, such as China, that pose a threat to the United States.¹²⁰ The third involves potential claims the United States has to the valuable resources beneath the Arctic Seabed. This section will explore each in turn.

A. Modern Threat of Piracy

In April 2009, the captured Somali pirate Abduwali Abdukhadir Muse, accused of hijacking the Maersk Alabama off of the coast of Africa, arrived in New York.¹²¹ At the time, the United States declared that Muse would “face justice.”¹²² As Muse’s trial was set to begin, questions surrounding successful prosecution arose. Two potential issues that had to be resolved were which definition of piracy the court could use and whether the United States had ju-

Convention on the Law of the Sea is still to be seen as the most comprehensive and significant multilateral agreement under the auspices of the United Nations in the history of international law. It replaces the four 1958 Geneva Conventions on law of the sea and regulates almost all fields of international maritime law.”).

119. United Nations Convention on the Law of the Sea Status, *supra* note 6.

120. Parag Khanna, *Waving Goodbye to Hegemony*, N.Y. TIMES MAG., Jan. 27, 2008, at 34 (noting a shift in the distribution of the world’s power from the United States to the European Union and China, but dismissing Russia and India as frontrunners in the new global power structure); Ian Bremmer, *New Cold War for U.S. with Russia or China Not on Horizon*, REALCLEARPOLITICS, Apr. 3, 2007, http://www.realclearpolitics.com/articles/2007/04/new_cold_war_for_us_with_russi.html (“Even China and Russia, the two prime suspects as potential counterweights to America’s global influence, represent fundamentally new sorts of challenges for U.S. policymakers.”).

121. Press Release, Dep’t of Justice, *Somalian Pirate Brought to U.S. to Face Charges for Hijacking the Maersk Alabama and Holding the Ship’s Captain Hostage* (Apr. 21, 2009) (quoting Acting United States Attorney Lev L. Dassin) available at <http://newyork.fbi.gov/dojpressrel/pressrel09/nyfo42109.htm>.

122. *Id.*

risdiction to try Muse in its domestic courts.¹²³ Ratification of the Convention would have provided favorable answers to both.¹²⁴

Piracy on the open seas has increased at a rapid pace in recent years. As of May 2009, the number of pirate attacks off of the coast of Somalia exceeded the total number of pirate attacks in all of 2008, and with it the total number of hostages taken increased as well.¹²⁵ When the capture of a U.S. ship became front-page news, the United States turned its attention to the issue of piracy.¹²⁶

Muse's trial has drawn attention to U.S. piracy laws, or the lack thereof. In prosecuting Muse or in similar potential prosecutions in the future, the following federal statute underlies the United States' case: "[w]hoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life."¹²⁷ By allowing piracy to be defined by the "law of nations," prosecutors face a plethora of ambiguity.¹²⁸ Defense attorneys for pirates have reason to argue that their clients' actions do not constitute piracy because there is no clear definition of piracy under U.S. law. While the United States has several means to remedy this, ratification of the Convention is a simple, albeit small,¹²⁹ step in the right direction. The Convention defines piracy as:

(a) any illegal acts of violence or detention, or any act

123. See Complaint at 1, *United States v. Muse*, No. 09-MAG-1012 (S.D.N.Y. Apr. 21, 2009) (noting that Count One of the complaint filed against Muse states that the crime was piracy "as defined by the law of nations" and that the crime was committed "beyond the outer limit of the territorial sea of any country").

124. On May 18, 2010, Muse pled guilty to kidnapping, hostage taking and hijacking. See *Somali Pirate Pleads Guilty in Manhattan Federal Court to Maritime Hijackings, Kidnappings, and Hostage Takings*, PRNEWswire.COM, May 18, 2010, <http://www.prnewswire.com/news-releases/somali-pirate-pleads-guilty-in-manhattan-federal-court-to-maritime-hijackings-kidnappings-and-hostage-takings-94204744.html>. His case is used here as an illustrative example only.

125. *Pirate Attacks off Somalia Already Surpass 2008 Figures*, INT'L CHAMBER OF COM., May 12, 2009, http://www.icc-ccs.org/index.php?option=com_content&view=article&id=352:pirate-attacks-off-somalia-already-surpass-2008-figures&catid=60:news&Itemid=51 ("In 2008, a total of 815 crew members were taken hostage from vessels hijacked in the Gulf of Aden and off the east coast of Somalia. The total number of hostages taken in these regions during 2009 already stands at 478.").

126. See generally Baker, *supra* note 1.

127. 18 U.S.C. § 1651 (2006).

128. See *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820) (noting that the law of nations "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law.") Compare § 1651 (defining piracy abstractly) with UNCLOS, *supra* note 2, pt. VII, § 1, art. 101 (providing a broad, specific definition of piracy which encompasses a range of activities).

129. Joseph M. Isanga, *Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes*, 59 AM. U. L. REV. 1267, 1281-94 (2010) (pointing out the shortcomings of the Convention in addressing piracy).

of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

- (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
- (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).¹³⁰

Under this definition, Muse's actions, if proven, surely would have constituted piracy.¹³¹ Additionally, the "law of nations" or international law, as defined by the Statute of the International Court of Justice, declares treaties and other bilateral agreements between sovereign nations as primary sources of international law.¹³² As such, the Convention, with approximately 160 sovereign parties,¹³³ can be relied upon to provide a definition of piracy.¹³⁴ Ratification by the United States would solidify its intention to rely upon the definitions in the Convention and provide a foundation for the prosecution of criminals on the seas that attack U.S. ships.¹³⁵

A second question that Muse's prosecution may have raised is whether the United States has jurisdiction to try him, and other

130. UNCLOS, *supra* note 2, pt. VII, § 1, art. 101.

131. Press Release, Dep't of Justice, *supra* note 121 (noting that Muse was charged with:

- (1) piracy under the law of nations; (2) conspiracy to seize a ship by force; (3) discharging a firearm, and aiding and abetting the discharge of a firearm, during and in relation to the conspiracy to seize a ship by force; (4) conspiracy to commit hostage taking; and (5) brandishing a firearm, and aiding and abetting the brandishing of a firearm, during and in relation to the conspiracy to commit hostage taking.).

132. Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1031, 33 U.N.T.S. 993.

133. United Nations Convention on the Law of the Sea Status, *supra* note 6.

134. *But see* Rosemary Collins & Daud Hassan, *Applications and Shortcomings of the Law of the Sea in Combating Piracy: A South East Asian Perspective*, 40 J. MAR. L. & COM. 89 (2009) (arguing that the Convention's definition of piracy is narrow and outdated). While the Convention's definition of piracy faces criticism, it is, nevertheless, an improvement from that which the United States currently utilizes.

135. Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, 33 TUL. MAR. L.J. 1, 15 (2008) ("President Bush cited [the Convention] with approval when he defined 'piracy' in a memorandum on 'Maritime Security (Piracy) Policy.'").

similarly captured pirates, in a domestic court. Universal jurisdiction “provides that national courts can investigate and prosecute a person suspected of committing a crime anywhere in the world regardless of the nationality of the accused or the victim or the absence of any links to the state where the court is located.”¹³⁶ The basis for universal jurisdiction is the idea that the crimes committed are so grave that they constitute crimes against all of humanity, and thus any state is entitled to prosecute the perpetrators. While the crimes that can be tried by a foreign state on the basis of universal jurisdiction may be controversial, most agree that piracy qualifies.¹³⁷ In fact, the Second Circuit likened torturers to pirates in the 1980 case *Filartiga v. Pena-Iralain*, articulating that, like pirates, torturers have committed crimes against all of humanity and thus fall under the purview of all states.¹³⁸ Since Muse was tried in the Second Circuit, there was a strong argument that the United States had universal jurisdiction to try him.¹³⁹ From the perspective of domestic law, the United States cited 18 U.S.C. § 3238 which allows offenses on the high seas to be tried in the district where the accused is first brought.¹⁴⁰ Nevertheless, if Muse had raised a jurisdiction defense, the Convention could have been invoked to overcome it. Article 105 of the Convention gives the state whose ship captures a pirate ship the discretion to choose the penalty that should be imposed.¹⁴¹ This provision also gives such state the right to seize and arrest the property and persons on board a pirate ship.¹⁴² Article 105, agreed to by approximately 160 state parties,¹⁴³ leaves few states that would contest U.S. jurisdiction to prosecute captured pirates.

Not only does the Convention provide a clear definition of piracy and basis for capture and prosecution of pirates, it also imposes an affirmative obligation upon parties to make efforts to curtail

136. Amnesty Int'l, *Universal Jurisdiction: Questions and Answers*, AI Index IOR 53/020/2001, Dec. 2001, available at <http://www.amnesty.org/en/library/info/IOR53/020/2001/en>.

137. See generally Joseph Goldstein, *Makin' 'Em Walk the Plank*, A.B.A. J., July 2009, at 16.

138. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

139. Muse was charged in federal court in the Southern District of New York, where appeals would be heard by the Second Circuit. See Patricia Hurtado, *Maersk Pirate Escapes Hanging in New York Prosecution*, BLOOMBERG.COM, Apr. 29, 2009, http://www.bloomberg.com/apps/news?pid=20601070&sid=aukE_muBBgcI; see also Eugene Kontorovich & Steven Art, *An Empirical Examination of Universal Jurisdiction for Piracy*, 104 AM. J. INT'L L. 436, 437 (2010) (noting that piracy is the original universal jurisdiction crime).

140. Complaint at 1, *United States v. Muse*, No. 09-MAG-1012 (S.D.N.Y. Apr. 21, 2009).

141. UNCLOS, *supra* note 2, art. 105.

142. *Id.*

143. United Nations Convention on the Law of the Sea Status, *supra* note 6.

piracy.¹⁴⁴ Critics of the Convention argue that it actually impedes the United States' ability to chase and capture pirates because a ship must cease pursuit if the ship it is chasing enters its own or a third state's territorial waters.¹⁴⁵ They assert that this provision provides pirates with a safe haven to retreat to undeterred, and that the Convention prevents non-territorial state ships from pursuing the pirates.¹⁴⁶ This is troubling largely because of the strong presence of Somali pirates.¹⁴⁷ For example, under this provision, Somali pirates can attack ships and if they risk getting captured, rush back into their own state's territorial waters where they would be safe. Somalia, a nation plagued by its own problems of lawlessness and poverty, is in no position to apprehend these criminals.¹⁴⁸

In such a circumstance, however, the United States can assert that Article 100 of Part VII of the Convention, which imposes upon member parties the duty to cooperate in the repression of piracy, gives it the authority to continue pursuit.¹⁴⁹ Somalia is a party to the Convention and where it cannot assist in apprehending and trying pirates, it must cooperate with others who can. This includes permitting states that are working to repress piracy by pursuing pirates to do so within Somalia's territorial waters.¹⁵⁰ Furthermore, a December 2008 United Nations Security Council resolution called upon states to actively assist in combating piracy off

144. UNCLOS, *supra* note 2, pt. VII, art. 100.

145. *Id.* pt. VII, art. 111; *see also* William F. Jasper, *Somali Pirates: An Excuse to Ratify LOST?*, THE NEW AM., Apr. 9, 2009, <http://www.thenewamerican.com/index.php/world-mainmenu-26/africa-mainmenu-27/985>.

146. Jasper, *supra* note 145.

147. INT'L CHAMBER OF COM., INTERNATIONAL MARITIME BUREAU, PIRACY AND ARMED ROBBERY AGAINST SHIPS - ANNUAL REPORT 2008, at 5-6 (Jan. 2009) (on file with author) (noting that of the 293 actual and attempted pirate attacks in 2008, 92 of those took place in the Gulf of Aden and were attributed to Somali pirates. By comparison, the region with the next highest incidence of pirate attacks was off of the coast of Nigeria with 40 actual and/or attempted attacks).

148. *See generally* Jeffrey Gettleman, *Somalia's Pirates Flourish in a Lawless Nation*, N.Y. TIMES, Oct. 30, 2008, at A1.

149. *But see* Collins & Hassan, *supra* note 134, at 104 (arguing that the provisions in Article 100 of the Convention are too ambiguous and flexible to impose a meaningful cooperation requirement on all state parties). While Ms. Collins and Mr. Hassan note important practical problems that arise from the language of the Convention, the United States still has a strong argument for remaining in Somali territorial waters based upon the Convention and the Security Council resolution discussed *infra*, note 151.

150. Lawrence Azubuike, *International Law Regime Against Piracy*, 15 ANN. SURV. INT'L & COMP. L. 43, 57 (2009) ("The Security Council Resolutions encourage states to cooperate with the Transitional Federal Government of Somalia (TFG) to repress piracy, and, for that purpose, after notifying the Secretary General of the United Nations, may enter the territorial waters of Somalia to exercise any rights in order to repress piracy.") The author, however, argues that neither this approach nor other measures are sufficient to solve the problem of global piracy and offers suggestions for larger scale, structural responses that address the shortcomings of current approaches, including the Convention. *Id.* at 58-59.

of the coast of Somalia and gives them the authority to “undertake all necessary measures ‘appropriate in Somalia’ ” in furtherance of this end for a period of one year.¹⁵¹ In April of 2010, the United Nations Security Council adopted a resolution that calls upon states to criminalize piracy under their domestic law and consider prosecution of and imprisonment of apprehended Somali pirates.¹⁵² This resolution also seeks a report from the Secretary General of the United Nations to present options for purposes of “prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia.”¹⁵³ Given this explicit guidance to counter piracy coupled with the Convention’s anti-piracy provisions, criticism that the Convention would preclude apprehending pirates does not hold up.

B. Countering an Emerging and Potentially Dangerous China

China’s growing economic influence and covert plans to expand its military power, namely on the seas, threaten the dominant position the United States has secured in the international community. Given the historically unstable relationship between China and the United States, this is particularly alarming from a national security perspective.¹⁵⁴ Ratification of the Convention would allow the United States to mitigate and contain the Chinese threat—at least on the seas—in a systematic manner with the support of the international community.

The tumultuous political history between the United States and China forces both parties to be on the offensive when dealing with one another.¹⁵⁵ Because of the potential dangers, the United

151. Press Release, Security Council, Security Council Authorizes States to Use Land-Based Operations in Somalia, As Part of Fight Against Piracy Off Coast, U.N. DOC. SC/9541 (Dec. 16, 2008) available at <http://www.un.org/News/Press/docs/2008/sc9541.doc.htm>.

152. S.C. Res. 1918, U.N. Doc. S/RES/1918 (Apr. 17, 2010).

153. *Id.* ¶ 4.

154. John T. Oliver, *National Security and the U.N. Convention on the Law of the Sea: U.S. Coast Guard Perspectives*, 15 ILSA J. INT’L & COMP. L. 573, 578 (2009) (“The U.S. Navy is concerned about apparent government attempts in China and Iran, for example, to assert excessive control over foreign operations within the [exclusive economic zone] as an ‘anti-access or sea denial strategy.’ ”); see also James Kraska, *The Law of the Sea Convention: A National Security Success—Global Strategic Mobility Through the Rule of Law*, 39 GEO. WASH. INT’L L. REV. 543, 544-45, 556-60 (2007) (noting China’s failure to conform to the Convention and influence the Convention’s interpretation, and pointing out various industry experts that are in support of the Convention, including for security concerns).

155. Ying Ma, *China’s Stubborn Anti-Democracy*, POL’Y REV, Feb. & Mar. 2007, at 3. Historically the United States has been sympathetic towards Taiwan, a territory of China, with whom China has tenuous relations. In 2001, the U.S. struck a weapons deal with Taiwan, for defensive purposes, to be used against China if the need should arise, allowing Taiwan to maintain some sovereignty against China. This is beneficial to the United States because Taiwanese accession into China would shift the balance of power in the region by

States watches closely over Chinese military growth,¹⁵⁶ including the aggressive expansion of its capabilities on the seas.¹⁵⁷

Militarily, the Convention provides the United States with a key strategic advantage that its armed services rely upon. That advantage is “the ability to navigate freely on, over, and under the world’s oceans.”¹⁵⁸ In an urgent situation, the United States would be free to enter the territorial sea of any party to the Convention, including China, without losing momentum by halting to obtain permission, enter into negotiations, or weigh the benefits of violating international law.¹⁵⁹

This is increasingly important given the recent skirmish between China and the United States on the seas. In March of 2009, U.S. ships were collecting information in what China claimed was an illegal manner in its exclusive economic zone.¹⁶⁰ Chinese and U.S. naval ships had a brief standoff that was peacefully resolved. Because “such incidents can be expected in the future,” U.S. ratification of the Convention is essential.¹⁶¹ If the United States were a party to the Convention, it could argue that it was freely navigating—an activity that *is* permissible in China’s exclusive economic zones under the Convention.

Critics of ratification argue that U.S. military flexibility under the Convention is compromised because it will need to bend to the will of Convention guidelines.¹⁶² As discussed above, however, Convention provisions enhance flexibility by allowing access to a

further strengthening China. Ray Suarez & Huang Suey-Sheng, *NewsHour with Jim Lehrer: Arming Taiwan*, (PBS television broadcast, Apr. 24, 2001) (transcript available at http://www.pbs.org/newshour/bb/asia/jan-june01/taiwan_arms.html) (“Legally the U.S. is committed . . . ‘to provide Taiwan with arms of a defensive character.’” (quoting the Taiwan Relations Act, Pub. L. No. 96-8, 93 Stat. 14 (1979)).

156. Edward Cody, *China Boosts Military Spending*, WASH. POST, Mar. 5, 2007 at A12; see also Edmund Klamann, *U.S. Urges Transparency in China Military Strategy*, REUTERS, Mar. 1, 2008, <http://www.reuters.com/article/idUSSHA14085920080301>.

157. Chris Buckley & Ben Blanchard, *China Shows Off its Expanding, Modernizing Navy*, REUTERS, Apr. 23, 2009, <http://www.reuters.com/article/worldNews/idUSTRE53M36R20090423>.

158. Letter from Senator Richard G. Lugar, Chairman of the Senate Foreign Relations Comm., to his Senate Colleagues, Mar. 8 2004 (on file with author).

159. Jonathan I. Charney, *Entry Into Force of the 1982 Convention on the Law of the Sea*, 35 VA. J. INT’L L. 381, 385-86 (1995) (discussing the mobility assured to United States armed forces over the seas by the Convention).

160. Mark Thompson, *Behind the Sea Spat Between the U.S. and China*, TIME, Mar. 12, 2009, <http://www.time.com/time/world/article/0,8599,1884724,00.html>.

161. *Id.*

162. David A. Ridenour, *Ratification of the Law of the Sea Treaty: A Not-So-Innocent Passage*, NAT’L POL’Y ANALYSIS, Aug. 2006, <http://www.nationalcenter.org/NPA542LawoftheSeaTreaty.html> (noting that critics of ratification point to Article 20 of the Convention, which requires “submarines and other underwater vehicles . . . to navigate on the surface and to show their flag” to argue against military flexibility). See generally Oliver, *supra* note 154 (discussing benefits and drawbacks of the Treaty from a national security perspective).

vast array of territorial seas.¹⁶³ Additionally, the U.S. military enthusiastically supports the Convention, giving it perhaps the strongest endorsement in the interest of national security.¹⁶⁴ Admiral Vern Clark, Chief of Naval Operations, in 2004 stated, “I fully support the Convention because it preserves our navigational freedoms, provides the operational maneuver space for combat and other operations for our warships and aircraft, and enhances our own maritime interests.”¹⁶⁵ Furthermore, the Vienna Convention, which governs international treaties, provides that where a state’s national security is threatened (or circumstances fundamentally change) it may suspend its obligations under a treaty.¹⁶⁶ In the unlikely event that the Convention inhibits the United States from ensuring national security, the U.S. would be no worse off since it would not be bound by the Convention in those instances.

Finally, the Convention also offers the United States a diplomatic and political solution should a dispute with China arise.¹⁶⁷ Although the United States traditionally resists dispute resolution mechanisms, it would be in its interest to embrace them here. As a non-party to the Convention, a potential dispute between China and the United States could escalate into an explosive situation. By ratifying the Convention, the U.S. will have the support of the international community to exert pressure on China—either for peaceful dispute resolution or to adhere to the provisions of the Convention that it too has ratified.¹⁶⁸

163. Oliver, *supra* note 154, at 576-78.

164. See, e.g., GlobalSecurity.org, Advance Questions for Admiral Michael G. Mullen, USN Nominee for the Position of Chief of Naval Operations, http://www.globalsecurity.org/military/library/congress/2005_hr/050419-mullen.pdf (last visited Sept. 22, 2010) (“I support the United States’ accession to the [United Nations] Law of the Sea Convention, and I believe that joining the Convention will strengthen our military’s ability to conduct operations.”); *Arctic Melt Gets U.S. to Move on Sea Treaty*, MSNBC, Oct. 4, 2007, <http://www.msnbc.msn.com/id/21131181/> (“The United States needs to join the Law of the Sea Convention, and join it now,” Deputy Defense Secretary Gordon England told senators recently. He stressed that it would give legal clarity to U.S. naval operations.”).

165. Letter from Admiral Vern Clark, U.S. Navy, to Senator John Warner, Chairman, Senate Armed Servs. Comm. (Apr. 13, 2004), available at http://www.oceanlaw.org/downloads/references/military/CNO_Clark_to_Warner_2004.pdf.

166. Vienna Convention on the Law of Treaties arts. 61-66, May 23, 1969, 1155 U.N.T.S. 331.

167. Kraska, *supra* note 154, at 571 (noting that the Convention serves United States interests, including conflict avoidance).

168. See generally Sean D. Murphy, *Senate Testimony Regarding U.S. Adherence to Law of the Sea Convention*, 98 AM. J. INT’L L. 173, 175 (2004) (discussing advantages to U.S. ratification of the Convention, which include a stronger U.S. position and the availability of additional methods to resolve disputes).

C. *The Race for Arctic Resources*

The resource race of the 21st century requires that nations seek resources from every corner of the globe to meet growing demand.¹⁶⁹ The seas—long considered valuable sources of minerals, food, and now, energy—are no exception.¹⁷⁰

Not surprisingly, nations are racing to stake a claim to these resources.¹⁷¹ Russia made a bold move in August of 2007 by planting a flag on the Arctic Seacap at the North Pole in an attempt to reinforce claims it has been making since 2001 that it owns the resources on the floor of the Arctic Ocean.¹⁷² The Arctic Seacap is an especially sought after area since it “may hold billions of gallons of oil and natural gas—up to 25 percent of the world’s undiscovered reserves”¹⁷³ and is rapidly melting, making it navigable for the first time.¹⁷⁴ Russia’s actions met immediate resistance from members of the international community, and have sparked debate over the resources the sea holds and who their lawful owner is.¹⁷⁵ In fact, one journalist commented that “[t]he polar dive was part publicity stunt and part symbolic move to enhance [Russia’s] disputed claim to nearly half the Arctic seabed.”¹⁷⁶

Although the seas have been declared to be among the “common heritage of mankind,”¹⁷⁷ and thus free for all, a state is en-

169. See generally Andrew Van Wagner, Comment, *It’s Getting Hot in Here, So Take Away All the Arctic’s Resources: A Look at a Melting Arctic and the Hot Competition for its Resources*, 21 VILL. ENVTL. L.J. 189 (2010).

170. See generally Andrew C. Revkin, *Hints of Oil Bonanzas Beneath Arctic Ocean*, N.Y. TIMES, Jun. 1, 2006, at A21.

171. See generally Meagan P. Wilder, Comment, *Who Gets the Oil? Arctic Energy Exploration in Uncertain Waters and the Need for Universal Ratification of the United Nations Convention on the Law of the Sea*, 32 HOUS. J. INT’L L. 505 (2010).

172. C.J. Chivers, *Eyeing Future Wealth, Russians Plant the Flag on the Arctic Seabed, Below the Polar Cap*, N.Y. TIMES, Aug. 3, 2007, at A8; see also Becker, *supra* note 4, at 801-02 (discussing the “[s]cramble” for underseas resources, specifically in the Arctic).

173. Richard A. Lovett, *Arctic Oil Rush Sparks Battles Over Seafloor*, NAT’L GEOGRAPHIC NEWS, Aug. 23, 2007, <http://news.nationalgeographic.com/news/2007/08/070823-arctic-oil.html>.

174. Michael Byers & Suzanne Lalonde, *Who Controls the Northwest Passage*, 42 VAND. J. TRANSNAT’L L. 1133, 1135-1136 (2009) (“The Arctic Climate Impact Assessment reported that the average extent of sea-ice cover in summer had declined by 15%-20% over the previous thirty years These trends were expected to accelerate such that by the end of the twenty-first century, there might be no sea-ice at all in the summer.” (citations omitted)).

175. *Arctic Sovereignty an “Important Issue”*: Harper, CTV.CA, Aug. 2, 2007, http://www.ctv.ca/CTVNews/MSNHHome/20070802/arctic_claim_070802/ (noting response to Russia’s flag drop by Peter MacKay, Canada’s foreign minister, “[T]his isn’t the 15th century. You can’t go around the world and just plant flags and say ‘We’re claiming this territory’”).

176. William J. Broad, *Russia’s Claim Under Polar Ice Irks American*, N.Y. TIMES, Feb. 19, 2008, at A1.

177. See *supra* Part I.D.1.

titled to exploit the resources within its territorial waters for its own benefit.¹⁷⁸ This can be 200 nautical miles from a state's coastlines or it can extend up to 350 miles depending upon other considerations, such as how far a state's continental shelf extends.¹⁷⁹ Parties to the Convention that want to assert a claim to territorial seas greater than 200 miles must submit evidence in support of this to the Commission on the Limits of the Continental Shelf, who then advises the state party.¹⁸⁰ After this, the state party establishes the limits of its continental shelf on the basis of the recommendations it receives from the commission.¹⁸¹ Disputes over these limits are governed by the Convention or international law and resolved by the dispute resolution mechanisms addressed in Part XV of the Convention.¹⁸²

By planting a flag on the Arctic Seacap, Russia is asserting that this area is within its territorial waters, most likely on the basis of *terra nullius*. Under this principle, any territory that is not occupied by a civilized nation is free to be claimed for ownership by a continuous and peaceful display of authority over that territory.¹⁸³

Other nations, however, may also have a claim to the Arctic Seacap under the Convention, including Canada and Denmark.¹⁸⁴ Under the rules of the Convention, parties interested in unclaimed underwater territory must map their claims and how far their territory reaches and submit it to the Commission on the Limits of the Continental Shelf.¹⁸⁵ Like Russia, since both Canada and Denmark are parties to the Convention,¹⁸⁶ it is not likely that Russia can simply plant a flag and call the Arctic Seacap its own under the principle of *terra nullius*, especially in light of international law moving away from this principle.¹⁸⁷

Denmark may be in a position to assert a viable claim over the Arctic Seacap if it can find evidence to link an underwater moun-

178. UNCLOS, *supra* note 2, pt. XI, § 2, art. 136.

179. *Id.* pt. VI, art. 76.

180. *Id.*

181. *Id.*

182. *Id.* pt. VI, art. 83.

183. *See* Island of Palmas (U.S. v Neth.), 2 R. Int'l Arb. Awards 829 (Perm. Ct. Arb. 1928).

184. *See* Doug Struck, *Russia's Deep-Sea Flag-Planting at North Pole Strikes a Chill in Canada*, WASH. POST, Aug. 7, 2007, at A8. *See generally* Rebecca M. Bratspies, *Human Rights and Arctic Resources*, 15 SW. J. INT'L L. 251 (2009) (discussing the claims of other states, including Canada and Denmark, to the Arctic).

185. *See* Bratspies, *supra* note 184, at 266.

186. United Nations Convention on the Law of the Sea Status, *supra* note 6. Canada became party to the Treaty in 2003, Denmark in 2004, and the Russian Federation in 1997. *Id.*

187. *See generally* Bratspies, *supra* note 184.

tain range that extends from its territory to the Arctic Sea.¹⁸⁸ It is currently undertaking an expedition with this end in mind.¹⁸⁹ Canada is also conducting underwater mapping in conjunction with Denmark in an effort to link its own territory to the Arctic Seacap.¹⁹⁰ In the meantime, however, Russia is working to secure evidence, likely to be presented to the Commission on the Limits of the Continental Shelf, to link the North Pole zone to the Siberian platform, which would ultimately result in that area falling within its continental shelf.¹⁹¹

The United States has also taken steps to tie its continental shelf to the Arctic Seacap in an effort to claim some of the resources beneath it.¹⁹² The most recent U.S. expedition may have found evidence to extend the continental shelf north of Alaska 100 miles from where it was originally thought to be.¹⁹³ This could provide a challenge to Russia, Denmark and even Canada's claims to the territory in the Arctic Seacap.

However, as a non-party to the Convention, the United States has limited recourse for its claim.¹⁹⁴ As a party, the United States may (and likely would) submit evidence of its expansive continental shelf to the Commission on the Limits of the Continental Shelf and conclusively establish the outer limits of its territorial sea in the Arctic.¹⁹⁵ Should another state try to infringe upon these lim-

188. *United States Explores the Seabed of the Arctic Ocean to Bolster its Claims to the North's Strategic Resources*, CANADIAN AM. STRATEGIC REV., Sept. 2007, <http://www.casr.ca/id-arctic-empires-3.htm> ("A Danish expedition is seeking evidence that the Lomonosov Ridge, an underwater mountain range, is attached to the Danish territory of Greenland. That data would open the way for a Danish claim that could stretch Greenland's EEZ all the way to the North Pole.")

189. *Id.*

190. Struck, *supra* note 184 ("Russia, the first of the Arctic nations to ratify the treaty, has undertaken extensive mapping using its huge nuclear-powered icebreakers. Norway and Denmark have also conducted undersea mapping. Canada, which ratified the treaty in 2003, is cooperating with Denmark on the ice northeast of Ellesmere Island, setting off explosives to seismically map the ground under the Lincoln Sea region of the Arctic Ocean.")

191. *United States Explores the Seabed*, *supra* note 188.

192. Scott J. Shackelford, *The Tragedy of the Common Heritage of Mankind*, 28 STAN. ENVTL. L.J. 109, 134 (2009).

193. *Continental Slope Off Alaska 100 Nautical Miles Further Off Coast Than Assumed*, SCI. DAILY, Feb. 12, 2008, <http://www.sciencedaily.com/releases/2008/02/080211134449.htm>.

194. Shackelford, *supra* note 192, at 134 ("American claims on the Arctic are, however, burdened by the fact that the Senate has yet to ratify UNCLOS."); Matin Rajabov, Comment, *Melting Ice and Heated Conflicts: A Multilateral Treaty as a Preferable Settlement for the Arctic Territorial Dispute*, 15 SW. J. INT'L L. 419, 436 (2009):

Since the United States is not a party to UNCLOS, it cannot initiate a settlement through any of the dispute settlement prescribed by UNCLOS and, accordingly, it does not have a right to intervene as a third party state. Therefore, if the parties use the UNCLOS dispute settlement systems, the United States can easily be outflanked.

195. Bratspies, *supra* note 184.

its, the United States would have evidence supported by international law to protect itself. The states most likely to pose a threat to the United States in the Arctic—Denmark, Canada and Russia—are all parties to the Convention and therefore must adhere to the findings of the Commission on the Limits of the Continental Shelf. Absent ratification of the Convention, the United States could have taken Russia's approach. In the unlikely event that *terra nullius* is found to be an acceptable method for claiming territory on the seas, this action, nevertheless, would have been futile since Russia was the first to assert a claim over the Arctic.

Alternatively, the United States always has the option of asserting a claim to the Arctic seabed using brute force, international pressure or a combination of both. These methods—even if effective—will not further U.S. diplomacy abroad and are not likely to be utilized by the Obama administration.

Ratification of the Convention is an urgent matter. Although a state has up to ten years after it has ratified the Convention to map and submit proposed limits of its continental shelf to the Commission on the Limits of the Continental Shelf, by that time it may be too late.¹⁹⁶ Global climate change has caused parts of the Arctic Seacap to begin melting, making it navigable for the first time.¹⁹⁷ While this is promising for underwater mining industries, these environmental effects have attracted a great deal of attention and the international community is cooperating to reverse them.¹⁹⁸ Instead of engaging in fruitless political battles with its strategic adversaries, the United States should move quickly to ratify the Convention and focus its energy on extracting the resources beneath the Arctic as quickly as possible.¹⁹⁹ Ratification

196. Struck, *supra* note 184 (“Global warming has added a sudden urgency to the process by thinning the Arctic ice cap, making drilling and shipping more feasible.”).

197. James Graff, *Fight for the Top of the World*, TIME, Sept. 19, 2007, <http://www.time.com/time/world/article/0,8599,1663445,00.html>:

This summer, however, saw something new: for the first time in recorded history, the Northwest Passage was ice-free all the way from the Pacific to the Atlantic. The Arctic ice cap's loss through melting this year was 10 times the recent annual average, amounting to an area greater than that of Texas and New Mexico combined. The Arctic has never been immune from politics; during the Cold War, U.S. and Soviet submarines navigated its frigid waters. But now that global warming has rendered the Arctic more accessible than ever—and yet at the same time more fragile—a new frenzy has broken out for control of the trade routes at the top of the world and the riches that nations hope and believe may lie beneath the ice.

198. *Id.*

199. Oliver, *supra* note 154, at 581-82 (“Only by becoming party to UNCLOS and participating in its processes, however, can the United States obtain secure title to these vast resources”); Wilder, *supra* note 171; see generally Marta Kolcz-Ryan, Comment, *An Arctic Race: How the United States' Failure to Ratify the Law of the Sea Convention Could*

“would allow full implementation of the rights afforded by the convention, [allowing member nations] to protect coastal and ocean resources.”²⁰⁰

IV. CONVENTION RATIFICATION: THEORETICAL PERSPECTIVE

Finally, examining the Convention from a theoretical perspective also supports ratification. States have several options when faced with the possibility of being bound by international instruments, which include treaties, accords or other agreements.²⁰¹ Under the U.S. Constitution, the President has the power to sign or enter into a treaty, but it is not binding upon the United States until it is ratified by the Senate.²⁰² Although signing does not bind the state to the instrument, it does include an intent to ratify and, at the very least, a willingness *not* to frustrate the purpose of the instrument.²⁰³ Ratification, on the other hand, signals a state’s intent to be bound by the instrument, which includes accepting responsibility for consequences upon breach by the ratifying state.²⁰⁴ The terms signatory and party are used to identify these positions respectively.²⁰⁵

Because the implications of international agreements can have widespread effects, a host of considerations from a range of interests are taken into account before a state signs or ratifies.²⁰⁶ Three approaches that can be used to analyze state decision-making will be discussed with regards to ratification of the Convention: ratio-

Adversely Affect Its Interests in the Arctic, 35 U. DAYTON L. REV. 149 (2009).

200. *United States Explores the Seabed*, *supra* note 188 (alteration in original).

201. Gable F. Hackman, Comment, *Slipping Through the Cracks: Can We Hold Private Security Contractors Accountable for their Actions Abroad?*, 9 LOY. J. PUB. INT. L. 251, 265-66 (2008).

202. U.S. CONST. art. II, § 2.

203. See United Nations Office of Legal Affairs, Treaty Reference Guide, <http://untreaty.un.org/ola-internet/Assistance/guide.pdf> (last visited Sept, 23, 2010) (noting that where a signature is subject to ratification it does not establish consent to be bound. Further defines a signature as “authentication [that] expresses the willingness of the signatory state to continue the treaty-making process. The signature qualifies the signatory state to proceed to ratification, acceptance or approval. It also creates an obligation to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty.”).

204. The Vienna Convention on the Law of Treaties is looked to as the ultimate authority that governs treaties. It defines ratification as “the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty.” Vienna Convention on the Law of Treaties, *supra* note 166, art. 2, §1(b).

205. See *id.* art. 2, § 1(g).

206. See Raustiala, *supra* note 107, at 587 (“International law is a tool that governments employ with care. . . . [Governments] do not accidentally or cavalierly choose between pledges and contracts when negotiating agreements.”). Raustiala focuses his discussion on soft law and the inherent legality of it—even though state parties do not necessarily acknowledge it as such. This highlights the importance of legality in international agreements for state parties.

nalism, constructivism and functionalism.

A. *Rationalist Advantages of Ratification of the Convention*

Rationalists favor ratification of international agreements using an interest-based approach, viewing the relevant actors or states as motivated primarily by material interests.²⁰⁷ Rationalists “understand contracts as operating by changing incentives or other material features of interactions, such as iteration, reciprocity, information, or the influence of particular interest groups, or through enforcement.”²⁰⁸ The Convention satisfies states that utilize a rationalist approach for two reasons: reciprocity and widespread support of domestic interest groups.

1. Reciprocity

Reciprocity is an ambiguous term with political and academic dimensions.²⁰⁹ It “can refer either to a policy pursued by a single actor or to a systematic pattern of action.”²¹⁰ The concept of reciprocity essentially holds that “‘actions . . . are contingent on rewarding reactions from others that cease when these expected reactions are not forthcoming.’”²¹¹ Reciprocity serves an important diplomatic function in the international community by placing trust in the promises that states make. By ratifying the Convention, the United States is guaranteed the protections of the Convention and predictable behavior on the seas by the other states parties—in exchange for its promise to do the same.²¹²

Among the provisions of the Convention that provide for reciprocity are those that allow states to freely navigate within territorial seas, equal rights to exploit the resources of the open seas,

207. Abbott & Snidal, *supra* note 21, at 40; *see also* Noyes, *supra* note 104, at 4 (“[A]ny state will join a treaty if it objectively promotes that state’s ‘interests.’”).

208. Abbott & Snidal, *supra* note 21, at 40-41.

209. *See* Robert O. Keohane, *Reciprocity in International Relations*, 40 INT’L ORG. 1 (1986).

210. *Id.* at 3.

211. *Id.* at 5-6 (quoting PETER BLAU, *EXCHANGE AND POWER IN SOCIAL LIFE* 6 (1964)).

212. *See* Marian Nash, *U.S. Practice: Contemporary Practice of the United States Related to International Law*, 88 AM. J. INT’L L. 719, 737 (1994) (noting that the United States is able to assert influence over ocean policy without entering into treaties with other states, but that “costs of this approach, however, would grow over time, and long-term United States interests in stable and predictable rules concerning uses of the oceans would be best served by entry into force of a widely acceptable convention.”); *see also* Francesco Parisi & Nita Ghei, *The Role of Reciprocity in International Law*, 36 CORNELL INT’L L.J. 93, 115 (2003) (noting that the U.S. diplomacy has essential elements for reciprocity “role reversibility and repeat interactions. Each state can be on either end of the transaction and undertakes similar transactions repeatedly. Thus, any attempt to cheat today is likely to rebound tomorrow when the State finds itself on the other side of the transaction” (citation omitted)).

and universal standards of environmental protection.²¹³ For example, the United States does not need to be concerned that its efforts at restoring and maintaining the environment are futile because other states do not have similar rules in place. The Convention imposes standards for environmental protection on all state parties, which is essential because it is a collective effort at protecting the environment that no state alone could achieve.²¹⁴

Since the 18th century, the United States has sought reciprocity with other states and continues to demand it in most commercial treaties today.²¹⁵ The Convention is no exception and if ratified, would provide reciprocity to the United States on important issues that relate to the seas.

2. Influential Interest Groups Support Ratification of the Convention

The United States has many domestic interest groups seeking to benefit on the seas. These include military, private industry, government and not-for-profit organizations. Rationalist observers look towards the influence of interest groups when examining international agreements.²¹⁶

Given its two expansive coastlines on the Eastern and Western seaboard coupled with those along the Hawaiian, Micronesian, and Alaskan archipelagos,²¹⁷ the United States has ample reason to take a keen interest in maritime policy. With a coastline of 19,924 kilometers, the U.S. ranks eighth globally in coastline length.²¹⁸ Some factors that are important in considering whether to adopt a maritime or coastal policy include

a country's military position and needs, its level of economic development, whether a country has a broad or narrow continental shelf, whether it has a long or short coast or none at all, whether it lies ath-

213. See *supra* Part I.C.

214. Patricia C. Bauerlein, Comment, *The United Nations Convention on the Law of the Sea & U.S. Ocean Environmental Practice: Are We Complying With International Law?*, 17 LOY. L.A. INT'L & COMP. L.J. 899, 923 (1995) ("The United States also must cooperate globally, rather than unilaterally, to achieve and not impede the goal of world environmental protection.").

215. Keohane, *supra* note 209, at 3 (noting that the first United States commercial treaty, signed in 1778 with France, contained reciprocity provisions).

216. *Id.*

217. Ann L. Hollick, *Bureaucrats at Sea* in NEW ERA OF OCEAN POLITICS 1, 1 (1974).

218. Central Intelligence Agency, World Factbook, Field Listing: Coastline, <https://www.cia.gov/library/publications/the-world-factbook/fields/2060.html> (last visited Sept. 23, 2010).

wart a significant international strait or has valuable offshore resources (living or nonliving), whether a national or private participant is primarily a producer or importer, a seller or consumer, a user or a supplier of ocean resources and space.²¹⁹

Given the wide range of factors that are at play and the combined size of the coast, the United States is rightfully concerned with the laws of the sea and the varying interests involved.²²⁰

The debate over whether to ratify has been characterized as one between “interests with varying degrees of political and economic power.”²²¹ Historically, the competing interests have been domestic private industries, such as petroleum, fishing, and hard minerals, government arms, such as the military and defense department, and also scientific communities.²²²

Today, the Convention enjoys widespread support from virtually all groups that have an interest on the seas, including American business groups, various military defense officials and groups, environmental and public interest organizations, high level administration officials, and legal and research bodies, satisfying rationalist observers that the right influences are in favor of the Convention.²²³

B. Constructivist Advantages of Ratification of the Convention

Constructivists, on the other hand, view international agree-

219. Ann L. Hollick & Robert E. Osgood, *Introduction*, in *NEW ERA OF OCEAN POLITICS*, *supra* note 217, at viii.

220. In fact, President George W. Bush supports ratification of the Treaty. He has said: Joining [the Convention] will serve the national security interests of the United States, including the maritime mobility of our armed forces worldwide. It will secure U.S. sovereign rights over extensive marine areas, including the valuable natural resources they contain. Accession will promote U.S. interests in the environmental health of the oceans. And it will give the United States a seat at the table when the rights that are vital to our interests are debated and interpreted.

Press Release, Office of the Press Secretary, *supra* note 5.

221. Hollick, *supra* note 217, at 8.

222. *See generally* Hollick, *supra* note 217.

223. *See* Citizens for Global Solutions, *The United States and the Law of the Sea: Time to Join* (Oct. 29, 2007), http://www.globalsolutions.org/in_the_beltway/united_states_and_law_sea_time_join (noting support for the Convention from business, military, environmental and public interest, administrative and legal groups); *see also* David R. Andrews et al., *Former Legal Advisers' Letter on Accession to the Law of the Sea Convention*, 98 AM. J. INT'L L. 307 (2004) (an open letter from former legal advisers of the United States Department of State advocating ratification of the Convention); Duff, *supra* note 4, at 33 (“[A] wide range of business, environmental and government figures urged U.S. accession in a letter to Senate majority Leader Bill Frist on August 31, 2005.”).

ments as embodying shared norms and understandings²²⁴ and pledges, or “nonlegal agreements”²²⁵ with only “political or moral obligations”²²⁶ as “operating through persuasion, imitation, and internalization to modify inter-subjective understandings of appropriate behavior, interests, and even identities.”²²⁷ The Convention has been called “a constitution for the oceans”²²⁸ which expresses universally accepted norms on the seas. As will be discussed below, the Convention satisfies constructivist observers through the United States’ power of persuasion and the effect of solidifying norms and reinforcing custom on the seas that U.S. ratification provides.²²⁹

1. U.S. Power of Persuasion over the Convention

Persuasion is an essential element in negotiating any agreement, including the Convention.²³⁰ For years after it was adopted in 1986, the United States expressed great discontent with the Convention. Several years later, in 1994, the United States was able to persuade the governing body to reopen the Convention for amendments and additional agreements.²³¹ The United States’ ability to have the Convention reopened and revised to meet its needs is demonstrative of the authority that the United States has

224. Abbott & Snidal, *supra* note 21, at 41.

225. Raustiala, *supra* note 107, at 582.

226. *Id.* at 586.

227. *Id.* at 41; *see also* James Fearon & Alexander Wendt, *Rationalism v. Constructivism: A Skeptical View* in HANDBOOK OF INTERNATIONAL RELATIONS 52, 57-58 (Walter Carl-sanes et al. eds., 2002). Professors Fearon and Wendt identify four characteristics of constructivism:

First, constructivism is centrally concerned with the role of ideas in constructing social life. . . . Second, constructivism is concerned with showing the socially constructed nature of agents or subjects. . . . Third, constructivism is based on a research strategy of methodological holism rather than methodological individualism. . . . Finally, what ties the three foregoing points together is a concern with constitutive as opposed to just causal explanations.

Id.

228. United Nations, Division for Ocean Affairs and the Law of the Sea, Overview—Convention & Related Agreements (July 21, 2010), http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm.

229. Kelly, *supra* note 55, at 561 (noting constructivist elements in the Convention).

230. Donald J. Kochan, *The Soft Power and Persuasion of Translations in the War on Terror: Words and Wisdom in the Transformation of Legal Systems*, 110 W. VA. L. REV. 545, 553-59 (2008) (discussing the importance of the soft power of persuasion).

231. Senator Richard G. Lugar, Address at the Brookings Institution: The Law of the Sea Convention: The Case for Senate Action, (May 4, 2004), (transcript available at http://www.brookings.edu/speeches/2004/0504energy_lugar.aspx) (“In 1990, President George H. W. Bush initiated further negotiations to resolve U.S. objections to the deep seabed mining regime. These talks culminated in a 1994 agreement that comprehensively revised the regime and resolved each of the problems President Reagan identified in 1982.”).

over negotiations such as these.²³² This authority supports the United States' strong power of persuasion that would meet constructivist ideals.

2. U.S. Ratification Helps Solidify Norms and Reinforces Custom

The Convention also helps further reinforcement of custom on the seas by explicitly codifying generally accepted laws of the sea. The widespread acceptance and adherence to the Convention²³³ signals that the laws embodied in it are custom or likely to become customary in the future. Constructivists seek to identify norms inherent in international agreements.²³⁴ Norms are described in terms of behavior.²³⁵ The Convention impacts state behavior, specifically with respect to fishing, mining, navigating and profiting on the seas, thus creating and enforcing norms.²³⁶

U.S. ratification of the Convention will further it as customary or international law.²³⁷ Although custom is typically considered a source of law, it can also be a consequence of law.²³⁸ Scholars have demonstrated that "the growth of law often stimulates the growth of customary conventions."²³⁹ Since law begets custom, by ratifying the Convention, the United States would play an important role in creating norms because nations imitate the behavior of other nations.²⁴⁰ Ratification of the Convention will thus satisfy constructivist observers who seek internalization of norms which would be reinforced by the creation and codification of custom.²⁴¹

232. Shiraldi, *supra* note 110, at 543 (noting that by ratifying, the United States would be able to "ensure input in the decision making process [related to the Convention] and attempt to ensure new policies and laws coincide with U.S. interests").

233. United Nations Convention on the Law of the Sea Status, *supra* note 6.

234. Abbott et al., *supra* note 51, at 41.

235. Ann Florini, *The Evolution of International Norms*, 40 INT'L STUDIES Q. 363, 364 (1996).

236. Kelly, *supra* note 55, at 593 (arguing that the Convention "provides an example of a regime which . . . reveals a normative commitment which has evolved and been codified through state practice").

237. Stevenson & Oxman, *supra* note 104, at 499 (noting that "the law of the sea has been a significant part of the fabric of modern international law," and the widespread impact of a widely ratified Convention.); *see also* Murphy, *supra* note 168, at 175.

238. James Bernard Murphy, *Habit and Convention at the Foundation of Custom*, in THE NATURE OF CUSTOMARY LAW, *supra* note 64, at 53, 67.

239. *Id.*

240. Tessa Mendez, Note, *Thin Ice, Shifting Geopolitics: The Legal Implications of Arctic Ice Melt*, 38, DENV. J. INT'L L. & POL'Y 527, 546 (2010) (noting that "[l]egitimacy relies on the internalization of external standards to substantiate the belief by an actor that a rule or institution ought to be obeyed" in connection with the Convention).

241. *See* Harold Hongju Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623, 641-42 (1998) (arguing that the Convention "demonstrates that a nation's repeated participation in transnational legal process is internalizing, normative, and constitutive-of-identity"; further noting that "repeated transactions among nations within the law of the

C. Functionalist Advantages of Convention Ratification

Functionalists identify soft law, or non-binding agreements, as advantageous because they offer increased flexibility, are considered preliminary rather than precedential, and because they rarely require additional implementing steps such as ratification or other legislative action.²⁴² Soft law offers an alternative to the uncertainty that hard law imposes—states can “try out” a law and observe its effects without being subject to its rules.²⁴³ Additionally, soft law facilitates compromise and mutually beneficial cooperation among actors with different interests and values.²⁴⁴ Although there are a number of advantages associated with pledges, an examination of those benefits reveals that they can either be achieved by ratification or are not applicable to U.S. ratification of the Convention.

Critics of ratification that point to the flexibility that the United States’ current status allows should consider that the U.S. has experienced a “trial period” of over fifteen years as “pledgee” to the Convention and over twenty since it was first introduced.²⁴⁵ This should be ample time to consider the costs and benefits associated with the Convention.

Still others suggest that pledges rather than contracts facilitate compromise and cooperation among state actors with different interests.²⁴⁶ The Convention provides evidence that this is not uniformly applicable. The Convention currently has approximately 160 state parties whose interests vary dramatically.²⁴⁷ Although pledges allow states to engage in negotiations and discuss the possibility of ratification, this is merely one step in the process of international diplomacy, and not the end result.

sea regime generated interpretations of a legal rule that affected future interactions, not just among the parties to the Convention, but also interactions with nonparties, such as the United States” (emphasis omitted)).

242. See Raustiala, *supra* note 107, at 591. “When the potential for opportunism is high, uncertainty low, or preferences broadly aligned, contracts are favored. But when uncertainty is high, opportunism low, preferences highly divergent, or speed or confidentiality is of the essence, pledges are favored.” *Id.* at 592-93.

243. Abbott & Snidal, *supra* note 21, at 39.

244. *Id.*

245. This trial period has lasted since the time the United States signed the Convention in 1994. See Duff, *supra* note 4.

246. Raustiala, *supra* note 107, at 593.

247. State parties to the Convention include states which are very developed as well as highly impoverished; landlocked states and those that are surrounded by water; and democracies, monarchies and communist states. See United Nations Convention on the Law of the Sea Status, *supra* note 6 (noting state parties that include Botswana, Czech Republic, Ireland, Monaco and China).

Finally, the time and expense associated with implementing steps such as ratification is minimal for the United States with respect to the Convention, which has already been extensively debated and vetted since the early 1980s.²⁴⁸ Former President George W. Bush called for ratification of the Convention and now President Barack Obama and Secretary of State Hillary Clinton state that ratification of the Convention is a priority.²⁴⁹ While not guaranteed, rapid ratification is promising if the Convention makes it to the Senate floor for a full vote. Functionalists, therefore, should be satisfied that the time associated with ratification is negligible since the Convention has already undergone an extensive trial period.

The United States' status as mere signatory to the Convention does not fully avail it of the benefits that it would receive as a party. Although pledges initially appear attractive, the Convention is unique in overcoming the benefits that pledges offer because of its inherent flexibility, the lengthy period the United States has been a signatory, and the lack of domestic difficulty and expense associated with U.S. ratification.

Some scholars assert that a state is neither wholly rationalist nor constructivist but instead that it is "both an interest-based and a normative enterprise."²⁵⁰ Where this is the case, as discussed, both functionalists and constructivists can be satisfied by the terms of the Convention.

CONCLUSION

Today, the United States is among the last holdouts to the Law of the Sea Convention. While the United Nations contemplates methods for countering Somali piracy, the United States can ensure safety, security, and prosperity on the seas by ratifying the Convention. The flawed U.S. approach towards the Convention has grossly overstated and miscalculated the sovereignty costs associated with it. These costs prove to be minimal and are ultimately outweighed by the benefit to the United States of similarly constraining other state parties.

248. The Convention was first extensively debated under the Reagan Administration. In the 1990s, the Clinton revived the debate over whether to ratify the Convention, which led to the United States signing the Convention. Most recently, in October 2007, the Convention went to a vote in the Senate Foreign Relations Committee, where it was passed by a 2 to 1 margin. The Convention is now expected to go to a vote in the full Senate. No date has yet been set. See Kevin Drawbaugh, *U.S. Senate Panel Backs Law of the Sea Treaty*, REUTERS, Oct. 31, 2007, <http://www.reuters.com/article/latestCrisis/idUSN31335584>.

249. See sources cited *supra* note 5.

250. Abbott & Snidal, *supra* note 21, at 41.

A changing global landscape, where piracy is rampant and China is emerging as a leader, requires the United States to take action to confront these threats. The Convention provides mechanisms to do so, while also providing a legal basis for claims to valuable resources. Finally, the Convention appeases three distinct international observers—rationalists, constructivist, and functionalists—further proving to be a broad ranging, comprehensive instrument that meets the diverse needs of the United States. The Obama administration should act immediately to capitalize on the signal of goodwill and commitment to the international community that ratification would provide.

The Senate composition is currently in favor of ratification by its balance of Democrats to Republicans.²⁵¹ “A widely ratified Convention would protect and advance U.S. security, economic, and environmental interests as well as provide a stable legal basis for peaceful dispute resolution.”²⁵²

251. Becker, *supra* note 5 (discussing “Democratic gains in the U.S. Senate” and what this means for the Convention); *see also* The Green Papers, 2009 General Election, <http://www.thegreenpapers.com/G09/Senate.phtml> (noting the composition of Senate at the time).

252. Oxman, *supra* note 105, at 178.

USING DISABILITY LAW TO PROTECT PERSONS LIVING WITH HIV/AIDS: THE INDIAN AND AMERICAN APPROACH

PAMELA KOEHLER*

HIV/AIDS in India continues to be a growing problem for the subcontinent as well as for the rest of the world. Because India has emerged as a global economic player and is the second most populous country in the world, devastation from HIV/AIDS in the region could have far-reaching global ramifications. The protection of civil liberties and elimination of discrimination is critical to any sustainable public health strategy. This article looks specifically at India's Persons with Disabilities Act (PWDA) as a potential tool in addressing HIV/AIDS discrimination. Disability law, as a mechanism for protecting persons living with HIV/AIDS, remains relatively unexplored and underutilized. Currently India stands at an important crossroads in regards to both its disability laws and its fight against HIV/AIDS. As noted in the paper, India's recent ratification of the UN Convention of Rights of Persons with Disabilities (UNCRPD) obligates India to make a complete overhaul of its disability laws and adopt a rights-based approach. In this article, I recommend reforming India's PWDA to expand its protections to not meet only its international obligation but also as a public health strategy. In order to reform its disability law, this paper looks to the American example. This paper will look specifically at the protections afforded in India's Persons With Disabilities Act (PWDA) and compare it to the Americans with Disabilities Act (ADA). While the rights guaranteed under the PWDA are limited and narrowly construed, the ADA is broadly construed and was amended in January 2009 to statutorily protect the rights of people affected with HIV/AIDS. Ultimately, by analyzing both systems, this paper hopes to give guidance to India in reforming PWDA to not only meet its international obligation but also to serve as an effective mechanism against the epidemic.

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INTRODUCTION

For close to three decades, HIV/AIDS has plagued our human race. Since the early 1980s, over 20 million people have died from AIDS-related illnesses.¹ UNAIDS and the World Health Organization estimate that approximately 33.2 million people currently live with HIV worldwide.² By claiming millions of lives, the disease undermines “education and health systems, economic growth, micro enterprises, policing and military capabilities, political legitimacy, family structures, and overall social cohesion.”³ Because of

1. Avert, World Wide HIV/AIDS Statistics Including Deaths, <http://www.avert.org/worldstats.htm> (last visited May 16, 2010).

2. Joint U.N. Programme on HIV/AIDS [UNAIDS] & World Health Organization [WHO], *AIDS Epidemic Update*, 1, U.N. Doc. UNAIDS/07.27E/JC1322E (Dec. 2007), available at http://data.unaids.org/pub/EPISlides/2007/2007_epiupdate_en.pdf.

3. MARK SCHNEIDER & MICHAEL MOODIE, CTR. FOR STRATEGIC & INT'L STUDIES, THE DESTABILIZING IMPACTS OF HIV/AIDS 1 (2002), available at <http://www.kaisernetwork.org/>

this epidemic, “[c]hildren are orphaned, communities are decimated, fields go untended, and the risk of famine grows.”⁴

Much of Africa has already felt the destabilizing impacts of the AIDS pandemic. In Africa, the pandemic has curtailed economic growth, undermined national security, and encouraged political illegitimacy.⁵ “Second wave” countries such as India, Russia, and China are now being threatened with similar socio-economic and political destruction from AIDS.⁶ Because both India and China have emerged as global economies and are the two most populous countries in the world, devastation in these regions could have far-reaching global ramifications. Public health experts have warned that without sustainable HIV/AIDS interventions in these countries, the pandemic could threaten international security and devastate the global economy.⁷

This paper focuses specifically on the HIV/AIDS epidemic in India. The country’s large population coupled with its weak public health infrastructure, complex social structure, and high mobility (both nationally and internationally) make India particularly vulnerable to an uncontrollable and devastating epidemic. Next to South Africa, India has the second largest number of infections in the world.⁸ Therefore, developing a sustainable public health strategy in India is critical.

Despite India’s attempts to address the epidemic, deep-rooted HIV/AIDS stigma hampers sustainable public health efforts. The lack of education and open discourse perpetuate misconceptions and encourage prejudice against affected populations. Additionally, complicated social norms and conservative attitudes increase stigmatization, making the fight against HIV/AIDS even more difficult. The marginalization of HIV/AIDS patients encourages infection to be driven underground, as individuals are less likely to seek treatment and testing.⁹ Additionally, because of systematic discrimination, people with HIV/AIDS are denied medical treatment, education, and employment opportunities, further exacerbating their plights.¹⁰

health_cast/uploaded_files/Destabilizing_impacts_of_AIDS.pdf.

4. *Id.* at 3-4.

5. *Id.* at 4-8.

6. *Id.* at 9-11.

7. *See id.* at 3-4.

8. Mitra Primit, *India at the Crossroads: Battling the HIV/AIDS Pandemic*, WASH. Q., Autumn 2004, at 95, 95.

9. Mead Over et al., WORLD BANK HUMAN DEVELOPMENT NETWORK HIV/AIDS TREATMENT AND PREVENTION IN INDIA 25 (2004), available at <http://siteresources.worldbank.org/INTINDIA/Resources/IndiaARTReport1.pdf>.

10. Joint U.N. Programme on HIV/AIDS [UNAIDS], *India: HIV and AIDS-Related Discrimination, Stigmatization and Denial*, 9, U.N. Doc. UNAIDS/01.46E (Aug. 2001) (*pre-*

Social rights play an important role in protecting public health by preventing discrimination.¹¹ In order to effectively address HIV/AIDS, governments must recognize and enforce the civil rights of affected populations.¹² Anti-discrimination disability laws are “one critical, but often overlooked, tool” for addressing HIV discrimination through protecting social rights.¹³ Although many different countries have anti-discrimination laws that protect disabled populations, only a handful of countries specifically include HIV/AIDS within the disability protection.¹⁴ Countries such as the United States and the United Kingdom have explicit statutory civil right protections for HIV affected individuals in their disability laws.¹⁵ However, in many parts of the world the protection of rights for persons with HIV/AIDS under anti-discrimination disability law remains largely unexplored and underutilized.¹⁶

This article looks specifically at India’s Persons with Disabilities Act (PWDA)¹⁷ as a potential tool in addressing HIV/AIDS discrimination. India has demonstrated a commitment to combating discrimination against persons with disabilities by passing the Persons with Disabilities Act (PWDA) and by signing the UN Convention of Rights of Persons with Disability (UNCRPD).¹⁸ Although India appears to be committed to disability protection, the PWDA’s narrow construction of disability couple with viewing disability scientifically hinders the protections the country could otherwise provide. Because the UNCRPD mandates signatories to adopt an expansive rights-based approach to disability protection, India will have to restructure the PWDA to conform to the requirements of the international agreement they’ve signed.

pared by Shalini Bharat), available at http://data.unaids.org/Publications/IRC-pub02/JC587-India_en.pdf.

11. See Paul Farmer & Nicole Gastineau, *Rethinking Health and Human Rights*, in PERSPECTIVES ON HEALTH AND HUMAN RIGHTS 73, 73-75 (Sofia Gruskin et al. eds., 2005).

12. INTER-PARLIAMENTARY UNION, JOINT U.N. PROGRAMME ON HIV/AIDS [UNAIDS] & U.N. DEV. PROGRAMME [UNDP], TAKING ACTION AGAINST HIV AND AIDS: A HANDBOOK FOR PARLIAMENTARIANS 85-95 (2007) [hereinafter TAKING ACTION], available at <http://www.ipu.org/PDF/publications/aids07-e.pdf>.

13. S. Yee, Abstract, *Developing Disability Non-Discrimination Law and Policy as a Legislative, Social, and Advocacy Tool for People with AIDS*, 15 INT’L CONF. AIDS (2004).

14. *Id.*

15. Disability Discrimination Act, 1995, c. 50, sched. 1 (U.K.); ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified at 42 U.S.C. §12101 et. seq. (Supp. II 2008)).

16. Yee, *supra* note 13.

17. Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, No. 1 Acts of Parliament, 1996, available at <http://www.ccdisabilities.nic.in/page.php>.

18. United Nations Convention on the Rights of Persons with Disabilities, Mar. 30, 2007, 46 I.L.M. 443 [hereinafter UNCRPD], available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en;

In this article, I recommend reforming India's PWDA to expand its protections to not only meet its international obligation but also as a mechanism to combat HIV/AIDS discrimination. As a suggested template for reforms to India's disability law, this paper looks to the American example. In many ways, the Indian experience with HIV/AIDS discrimination is reminiscent of the struggle that the United States faced during the 1980s when HIV/AIDS first came on to the American scene. During the emergence of the AIDS epidemic in America, American society approached the disease with similar attitudes of fear and prejudice. Similar to India, stigmatization in America arose, in part, because the first cases of HIV/AIDS were associated with homosexuals and drug users, groups that were already highly stigmatized. Furthermore, initial political denial and inaction fostered a lack of understanding, which created greater fear and discrimination.

The discrimination against persons with HIV/AIDS encouraged Congress to pass the Americans with Disabilities Act (ADA) in 1990.¹⁹ The ADA's purpose is to protect qualified individuals from discrimination based on their disability in employment and in the enjoyment of public goods and accommodations.²⁰ Although the legislative discussions prior to passage of the Act signaled a commitment to protect the civil rights of persons living with HIV/AIDS,²¹ the original language of the statute did not explicitly guarantee such protection. As a consequence, parties have hotly contested the status of HIV/AIDS as a disability under the statute, and many courts have interpreted the ADA as providing much less protection than originally anticipated by Congress.²² To alleviate

19. *Americans with Disabilities Act of 1988: Joint Hearing on S. 2345 Before the Subcomm. on the Handicapped of the S. Comm. on Labor and Human Resources and the Subcomm. on Select Education of the H. Comm. on Education and Labor*, 100th Cong. 11-16, 39-41 (1988) [hereinafter *Hearing*] (statement of Rep. Tony Coelho (noting that many people suffer from hidden disabilities such as HIV and that the federal government should protect persons with disabilities against discrimination) and statement of Adm. James Watkins, Chairperson, President's Comm'n on the Human Immunodeficiency Virus Epidemic (noting that "HIV-related discrimination is impairing this Nation's ability to limit the spread of the epidemic" and that the ADA needs to protect against HIV discrimination)).

20. See Americans with Disabilities Act of 1990 § 2, 42 U.S.C. § 12101 (2006).

21. See *Hearing*, *supra* note 19, at 13 (statement of Rep. Tony Coelho, noting that the passage of the ADA could protect persons with HIV from discrimination).

22. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553 (2008) (codified at 42 U.S.C. §12101 et. seq. (Supp. II 2008) (referring to *Sutton v. United Air Lines*, 527 U.S. 471 (1999) and *Toyota Motor Mfg, Ky., Inc. v. Williams*, 534 U.S. 184 (2002) as cases that "narrowed the broad scope of protection intended to be afforded by the ADA"). See, e.g., *Blanks v. Sw. Bell Commc'ns, Inc.*, 310 F.3d 398, 401-02 (5th Cir. 2002) (holding that plaintiff with HIV is not disabled under the ADA because he did not establish that he is substantially limited in a major life activity); *Runnebaum v. NationsBank of Md., N.A.*, 123 F.3d 156, 171-172 (4th Cir. 1997) (holding HIV/AIDS is not a disability under the ADA).

some of this confusion, Congress amended the Americans with Disabilities Act in 2008 to unambiguously include HIV/AIDS as a disability.²³ The amendment only became effective after January 1, 2009;²⁴ therefore, it is not clear how courts will interpret and apply this new framework.

This paper will look specifically at the protections afforded in India's Persons With Disabilities Act (PWDA) and compare it to the Americans with Disabilities Act (ADA). In comparison with the PWDA, the ADA statutorily protects the rights of people affected with HIV/AIDS. Notwithstanding this explicit protection, ADA protections may still be avoided via the various loopholes in the statute. By examining the PWDA and comparing it to the treatment of HIV/AIDS under the ADA, this paper hopes to reveal not only the infirmities in the Indian law but also to analyze the methods by which laws can still be circumvented even with statutory protections. Ultimately, by analyzing both systems, this paper hopes to give guidance to India in reforming the PWDA to make it an effective mechanism for combating HIV discrimination.

I. AIDS IN INDIA: A MULTI-LAYERED PROBLEM

A. *Epidemiology*

In 1986, the first case of HIV in India was diagnosed in the state of Tamil Nadu.²⁵ Since then, the number of HIV/AIDS cases has drastically increased. The National HIV/AIDS Control Organization of India (NACO) estimates that there are as many as five million people living with HIV in India,²⁶ making India second only to South Africa for the highest number of absolute infections in the world.²⁷ Furthermore, the Indian HIV prevalence rate rose from 0.1 percent in 1986 to 0.8 percent in 2001.²⁸ Because of the large

23. ADA Amendments Act; *see also* 154 CONG. REC. H8279, 8297 (daily ed. Sept 17, 2008) (statement of Rep. Baldwin) ("Although the ADA clearly intended to protect people living with HIV from being discriminated against based on having HIV, many have had their lawsuits derailed by disputes over whether they meet a narrowly interpreted definition of the term 'disability.'").

24. ADA Amendments Act § 8.

25. E.A. Simoes et al., *Evidence for HTLV-III Infection in Prostitutes in Tamil Nadu*, INDIAN J. OF MED. RES. 335, 335 (1987); THE WORLD BANK, HIV/AIDS IN INDIA (2007), <http://siteresources.worldbank.org/INTSAREGTOPHIVAIDS/Resources/HIV-AIDS-brief-Aug07-IN.pdf>.

26. MARK LOUDON ET AL., UNICEF INDIA, BARRIERS TO SERVICES FOR CHILDREN WITH HIV POSITIVE PARENTS 1 (2007), http://www.unicef.org/india/The_Barrier_Study.pdf.

27. KAISER FAMILY FOUND., HIV/AIDS POLICY FACT SHEET 1 (2005), *available at* http://www.kff.org/hiv/aids/upload/7312_02.pdf.

28. OXFAM, HIV/AIDS WORK WITH TRUCK DRIVERS IN ORISSA 1 (2006), <http://www.oxfam.org/sites/www.oxfam.org/files/orissa.pdf>.

population in India, each 0.1 increase in the prevalence rates means that the number of people living with HIV/AIDS increases by over half a million.²⁹ In 2005, approximately thirteen percent of the world's HIV cases resided in India.³⁰

B. Reasons for Discrimination

Although India has the second highest number of HIV cases worldwide, the majority of Indian society remains in denial.³¹ As in many other countries, HIV/AIDS in India disproportionately affects poor and marginalized populations.³² As a consequence, society has labeled HIV/AIDS “a disease of ‘others.’”³³ The disease is highly stigmatized because it is commonly misperceived that only those that engage in risky and morally questionable behavior are affected.³⁴ However, in reality, being a married monogamous woman is one of the biggest risk factors for contracting the virus.³⁵ In fact, data from a sexually transmitted disease (STD) clinic in Mumbai, India, showed that seventy percent of the women infected were housewives who contracted the virus from their husbands.³⁶ Moreover, the idea of HIV/AIDS as a disease of “others” exacerbates lack of awareness in the general population.³⁷ Many people in society resist learning about HIV/AIDS because of its immoral connotation and continue to believe myths about methods of infection.³⁸

This social resistance present in India is similar to the resistance that the American society faced during the 1980s. For example, because the first cases of AIDS were mostly diagnosed in the gay population, the American public labeled AIDS as a “gay disease,” which exacerbated homophobia and denial of an epidemic.³⁹ Additionally, the lack of information regarding transmission led people to believe the myth that HIV could be spread through ca-

29. *Id.*

30. KAISER FAMILY FOUND., *supra* note 27, fig. 1.

31. UNAIDS, *supra* note 10, at 9.

32. MARIA EKSTRAND ET AL., AIDS POLICY RESEARCH CTR., COUNTRY AIDS POLICY ANALYSIS PROJECT: HIV/AIDS IN INDIA 71 (2003), available at <http://ari.ucsf.edu/programs/policy/countries/India.pdf>.

33. UNAIDS, *supra* note 10, at 7.

34. *Id.* at 8-9.

35. Physician for Human Rights, Sex Trafficking and the HIV/AIDS Pandemic, <http://physiciansforhumanrights.org/library/2003-06-25.html> (last visited May 17, 2010).

36. N Chatterjee, *They Have Not Heard of AIDS: HIV/AIDS Awareness Among Married Women in Bombay*, 113 PUB. HEALTH 137, 137 (1999).

37. *See id.*

38. UNAIDS, *supra* note 10, at 7.

39. *See* NAN D. HUNTER, ACLU, EPIDEMIC OF FEAR: A SURVEY OF AIDS DISCRIMINATION IN THE 1980S AND POLICY RECOMMENDATIONS FOR THE 1990S, at 2, 14, 17 (1990).

sual contact, increasing the fear of AIDS.⁴⁰

Both the American and Indian examples show us that the misperception of HIV/AIDS as a disease that only affects a small subset of society results in systematic discrimination and stigmatization against affected populations, affecting adults and children alike. Not only does discrimination victimize HIV positive individuals, it also affects HIV negative people who are closely associated with persons who have HIV/AIDS, such as children of HIV positive parents.⁴¹

C. Types of Discrimination

In developing a law that effectively addresses HIV/AIDS discrimination, we must first understand the different types of HIV/AIDS discrimination that currently exist in society. For example, when Congress was considering passage of the ADA, some individuals who testified in hearings noted that health care workers, educators, and employers were denying services to persons living with HIV/AIDS.⁴² In considering this discrimination, some feel that Congress enacted the ADA to specifically target this type of maltreatment.⁴³ Similarly, India must also consider the HIV/AIDS discrimination that exists within its society in order to effectively restructure its anti-discrimination laws.

1. Discrimination and Education

Children in India who are affected by HIV/AIDS face many significant barriers to obtaining education.⁴⁴ Although the Indian Constitution recognizes education as a fundamental right and obligates the states to provide education to all children aged six to fourteen,⁴⁵ children who are either HIV positive or closely associated with someone who is infected are often separated from other

40. *Id.* at 2, 23-24.

41. LOUDON ET AL., *supra* note 26, at 18-29.

42. *Hearing, supra* note 19, at 13 (statement of Rep. Coehlo and Adm. James Watkins); 154 CONG. REC. H8279, 8297 (daily ed. Sept 17, 2008) (statement of Rep. Baldwin); *see* *Bragdon v. Abbott*, 524 U.S. 634, 631 (1998) (holding that HIV as a disability under the ADA is consistent with legislative intent).

43. *See* Lisa Keels, "Substantially Limited." *The Reproductive Rights of Women Living with HIV/AIDS*, 39 U. BALT. L. REV 389, 412 (2010).

44. HUMAN RIGHTS WATCH, *FUTURE FORSAKEN: ABUSES AGAINST CHILDREN AFFECTED BY HIV/AIDS IN INDIA* 36-37 (2004), available at: <http://www.hrw.org/sites/default/files/reports/FutureForsaken.pdf>.

45. INDIA CONST. art. 21A: inserted by the Constitution (Eighty-sixth Amendment) Act, 2002.

students or denied admission to the school.⁴⁶ Furthermore, HIV positive children risk expulsion due to health related absences when the school does not tolerate special accommodations.⁴⁷ Additionally, when children lose family members to AIDS, they are often unable to afford school fees and related expenses, forcing them to withdraw from school.⁴⁸ Thus begins the cycle of misfortune.

Even if an HIV/AIDS affected child is able to obtain an education, these students are often discriminated against by their teachers and peers.⁴⁹ The discrimination is a result of the societal view that HIV positive children are the product of immoral behavior and a lack of understanding about modes of transmission.⁵⁰ Many teachers actively discriminate against HIV positive children by avoiding, neglecting, or abusing them, physically or verbally.⁵¹ For example, a number of teachers use [the children's] "parents' status and supposed transgressions to humiliate these children in class."⁵² If the HIV status of a child or a parent of a child is known, other children and administrators in the school have excluded the affected child from extracurricular activities and even forbade the student from using water fountains and toilets.⁵³

2. Discrimination and Employment

The Indian Constitution protects employees from discrimination by their employers. Article 14 of the constitution prohibits states from depriving citizens of "equality before the law or . . . equal protection."⁵⁴ Furthermore, Article 16 requires "equality of opportunity for all citizens in matters relating to employment or appointment."⁵⁵ Despite these protections, persons with HIV/AIDS face discrimination in the workplace.⁵⁶ They are often ostracized for their condition.⁵⁷ Recently, however, an Indian High Court took important strides to address HIV/AIDS related discrimination in the work force. In the landmark judgment of the Bombay High

46. HUMAN RIGHTS WATCH, *supra* note 44, at 63.

47. *Id.* at 63, 66.

48. *Id.* at 78-83.

49. *Id.* at 75-76; LOUDON ET AL., *supra* note 26, at 23-26.

50. See HUMAN RIGHTS WATCH, *supra* note 44, at 118-122; LOUDON ET AL., *supra* note 26, at 30.

51. LOUDON ET AL., *supra* note 26, at 23.

52. *Id.*

53. *Id.*

54. INDIA CONST. art. 14.

55. *Id.* art. 16(1).

56. Navin Paul, Letter to the Editor, *Discrimination Against People Living with HIV/AIDS in India: Educated Persons as Perpetrators*, 54 J. INFECTION 103, 103 (2007).

57. *Id.*

Court, the court held that an HIV positive person could not be denied employment if the person is otherwise fit for work.⁵⁸ The court noted that if a person were fired from his employment solely because of his or her HIV positive condition, it would be condemning a person to “virtual economic death.”⁵⁹ Moreover, in 2004, the Bombay High Court directed New India Assurance Company to employ an HIV positive individual after she was denied employment because she tested positive on an employer-required HIV test.⁶⁰ The court ruled that denial of employment on the grounds of HIV status was discriminatory and a violation of human rights.⁶¹

Although these court cases have made a positive change for addressing employment discrimination against HIV positive individuals, HIV/AIDS sufferers still face discrimination in the workplace and are forced to quit because of mistreatment by employers and co-workers. Therefore, in order to quell the epidemic, India must require greater employment protections for HIV/AIDS affected individuals.

3. Discrimination and Access to Health Care

In addition to discrimination in education and employment, many HIV positive individuals are unable to receive regular access to health care because of discrimination within the health care sector.⁶² UNAIDS India conducted a study about HIV/AIDS discrimination and found that nine out of ten medical service providers confirmed encountering cases of children of HIV-positive parents being denied of care by physicians and other health care workers in Maharashtra, a high prevalence state.⁶³ The type of mistreatment varies. For examples, physicians or nursing staff may overtly refuse to render care to HIV/AIDS affected individuals by turning them away because of their status.⁶⁴ Additionally, physicians and nurses may passively mistreat HIV positive individuals by making them wait for treatment, charging them more than other patients, placing them in separate waiting rooms, or giving them substandard care.⁶⁵ In labor and delivery procedures, some report that doctors have refused to perform Caesarean sections or help in the procedure when the physician knows that the mother is HIV posi-

58. *MX vs. ZY*, 1997 A.I.R. (Bom.) 406.

59. *Id.*

60. *G v. New India Assurance Co. Ltd.*, Bombay H.C. (2004).

61. *Id.*

62. UNAIDS, *supra* note 10, at 18-33.

63. LOUDON ET AL., *supra* note 26, at 27.

64. UNAIDS, *supra* note 10, at 25-26.

65. *Id.* at 27-33.

tive.⁶⁶ Similarly, nursing staff sometimes refuse to give HIV patients necessary injections, dress wounds, or dispose of used bandages out of fear of infection.⁶⁷ Additionally, many HIV positive individuals receiving treatment in hospitals are ridiculed because of their status, attended to less frequently by the nurses and physicians, and are forced to stay in filthy rooms.⁶⁸

Confidentiality in the health care sector is also a major issue for HIV/AIDS affected individuals. Often, medical staff will publicly announce the HIV/AIDS status of an individual, making them more subject to discrimination.⁶⁹ Policies in India require physicians to provide the names and addresses of persons testing positive for HIV/AIDS and exempt them from the requirement of confidentiality.⁷⁰ Because there is no requirement for confidentiality with regards to HIV/AIDS patients, the International Labor Organisation noted that some Indian hospitals publish names in local newspapers of people who test positive for HIV/AIDS.⁷¹

D. Effects of Discrimination on the Epidemic

The stigmatization and discrimination against persons with HIV/AIDS hinders effective public health interventions on many different levels.⁷² For example, persons who experience discrimination are more likely to suffer from depression, which can hasten disease progression and mortality.⁷³ Furthermore, when individuals believe that they will be discriminated against because of their HIV status, they are less likely to get tested and seek treatment.⁷⁴ People who conceal their status not only increase the risk of infection but also increase the financial burden on the household.⁷⁵ Without treatment, HIV affected households are more prone to HIV related illness and mortality, which consequently reduces their economic productivity.⁷⁶

66. Katherine Heine, *AIDS Moves Beyond High Risk Groups in India*, REUTERS ALERTNET, Dec. 11, 2003, <http://www.alertnet.org/thefacts/reliefresources/107115648816.htm>.

67. UNAIDS, *supra* note 10, at 27-33.

68. *Id.* at 16-19.

69. *Id.* at 23-25, 29-30.

70. U.N. Dev. Programme [UNDP], Regional HIV and Development Programme for Asia-Pacific, *HIV-Related Stigma and Discrimination in Asia: A Review of Human Development Consequences* 8 (2007) (prepared by Jeanette R. Ickovics et al.), available at http://www.undprc.lk/Publications/Publications/HIV/HIV_Related_Stigma.pdf.

71. Heine, *supra* note 66.

72. TAKING ACTION, *supra* note 12, at 85.

73. UNDP, *supra* note 70, at 2, 4, 10-11.

74. HUMAN RIGHTS WATCH, *supra* note 44, at 9.

75. *Id.* at 11.

76. DAVID E. BLOOM ET AL., AUSAID, HEALTH, WEALTH, AIDS AND POVERTY 9-10

Moreover, denying educational and employment opportunities also exacerbates the epidemic through increasing poverty. People in poverty are less likely to know about HIV/AIDS and consequently are less likely to engage in safe sex practices.⁷⁷ Furthermore, people in poverty may be forced to take high-risk jobs. Men, for example, may enter into the trucking industry because of the lack of other employment opportunities and risk spreading infection along India's highways.⁷⁸ Similarly, women may be forced to enter into the commercial sex trade because of the lack of other employment opportunity.⁷⁹ In fact, economic distress is cited as the primary reason that women enter into the sex trade because commercial sex becomes "their only means to obtain desperately needed money."⁸⁰

E. India's Current Attempt to Address HIV/AIDS Discrimination

Although discrimination in education, employment, and health care is rampant, the government has made minimal attempts to address discrimination against persons with HIV/AIDS. However, in 2003, the National AIDS Control Organization (NACO) directed the Lawyers Collective HIV Unit (LCHAU) to draft an HIV/AIDS bill to address discrimination.⁸¹ In 2006, NACO presented this bill to the Indian Parliament.⁸² Although NACO envisioned this bill to be an important component to India's response to the HIV/AIDS epidemic, the Indian Parliament has demonstrated much resistance in passing the bill.⁸³ Parliament has delayed review of this bill and recommended changes that would greatly curtail protection.⁸⁴

As originally drafted by the Lawyers Collective HIV/AIDS Unit, the bill precludes discrimination against persons affected by

(2001), available at http://www.ausaid.gov.au/publications/pdf/health_wealth_poverty.pdf.

77. Multivariate analyses demonstrated that rural, uneducated, and poor women "are the least likely to be AIDS-aware and if aware, have the poorest understanding of the syndrome." Deborah Balk & Subrata Lahiri, *Awareness and Knowledge of AIDS Among Indian Women: Evidence From 13 States*, 7 HEALTH TRANSITION REV. 421, 421 (1997); see also BLOOM ET AL., *supra* note 76, at 8-9.

78. Mohammad Khairul Alam, *Aids in India: Sex Workers and Truck Drivers Playing Vital Roles*, <http://globalhealth.org/reports/report.php?id=257> (last visited May 18, 2010).

79. Ushma D. Upadhyay, *India's New Economic Policy of 1991 and Its Impact on Women's Poverty and AIDS*, FEMINIST ECON., Nov. 2000, at 105, 112.

80. *Id.*

81. Lawyers Collective, *Draft Law on HIV*, <http://www.lawyerscollective.org/hiv-aids/draft-law> (last visited May 18, 2010).

82. *Id.*

83. See Lawyers Collective, *Update on the HIV/AIDS Bill*, <http://www.lawyerscollective.org/hiv-aids/draft-law/update> (last visited May 18, 2010).

84. *Id.*

HIV/AIDS in education, employment, health care, travel, residence, and insurance both in the public and private sphere.⁸⁵ The bill not only covers persons living with HIV/AIDS but also those closely associated with the epidemic, such as friends and families of HIV infected persons, sex workers, injecting drug users, truckers or migrants.⁸⁶ Furthermore, in order to address discrimination in the health care sector by alleviating the risk of occupational exposure, the bill requires health care institutions to provide universal precautions and training for health care workers.⁸⁷

With regards to HIV testing and treatment, the HIV/AIDS bill requires the testing and/or treatment site to obtain informed consent.⁸⁸ Moreover, when the HIV status of an individual is known, the bill mandates confidentiality but notes that there are exceptions such as spousal notification.⁸⁹ Nevertheless, in order to prevent domestic violence in response to notification, the bill stipulates the circumstances and procedures for disclosure.⁹⁰ The HIV/AIDS bill also guarantees the right to access comprehensive HIV-related medical treatment.⁹¹ The services include voluntary testing, counseling, anti-retroviral treatments, and nutritional supplements.⁹² In addition, the bill contains many prevention-centered provisions. For example, it calls for public health strategies for risk reduction irrespective of whether the underlying activity targeted is illegal.⁹³ The bill also proclaims the importance of “information, education and communication” as a component to successful HIV containment strategies.⁹⁴ “It obliges the [g]overnment to frame their messages on the basis of evidence and not myth and prejudices.”⁹⁵ Additionally, for enforcement purposes, the bill provides for a “Health Ombud” in every district to ensure easy access to medical treatment should a person with HIV/AIDS be discriminated against or denied treatment.⁹⁶ Additionally, the bill also includes special procedures in the judicial

85. Draft HIV/AIDS Bill 2006 § 4 (2006), available at <http://www.lawyerscollective.org/sites/default/files/hiv-2006-for-naco.doc>.

86. Draft HIV/AIDS Bill 2006 § 2; see also ANAND GROVER, KAISER FAMILY FOUND., LAWS ARE NECESSARY TO PROTECT RIGHTS OF POSITIVE PEOPLE: INDIA'S HIV/AIDS BILL YET TO BECOME A LAW, HIV/AIDS Reporting Manual 21, 22 (2008), available at <http://www.kff.org/hiv/aids/upload/7408-02Sec4.pdf>.

87. Draft HIV/AIDS Bill 2006 § 20.

88. *Id.* § 8.

89. *Id.* § 13.

90. *Id.*

91. *Id.* § 17.

92. *Id.*

93. *Id.* § 25(2); see also GROVER, *supra* note 86, at 22.

94. Draft HIV/AIDS Bill 2006 § 75(2); see also GROVER, *supra* note 86, at 22.

95. GROVER, *supra* note 86, at 22; see Draft HIV/AIDS Bill 2006 § 24.

96. Draft HIV/AIDS Bill 2006 § 26; see also GROVER, *supra* note 86, at 23.

system such as confidentiality of identity and speedy resolution of cases.⁹⁷

Despite the momentous steps that this bill proposes to take to address discrimination against persons living with HIV/AIDS, the government insists on narrowing its protections. For example, the Ministry of Health has recommended deleting provisions regarding strategies for risk reduction, expeditious grievance procedures, access to treatment, and access to information, education, and communication.⁹⁸ Additionally, provisions pertaining to discrimination, informed consent, and confidentiality have also been greatly curtailed.⁹⁹ Instead of protecting the rights of HIV affected persons, the Ministry of Health has attempted to impose draconian measures like mandatory testing and the tracing and isolation of persons with HIV/AIDS.¹⁰⁰ NACO has objected to these measures as violations of personal rights and contrary to effective public health strategies.¹⁰¹

Consequently, whether the HIV/AIDS bill can effectively address discrimination against persons living with the disease is questionable. Because the Ministry of Health has recommended changes to the bill, it is very unlikely that the bill will pass in its original form. If the bill passes with the recommended changes, it will do very little good for fighting the epidemic. In fact, if the draconian provisions requiring mandatory testing and disclosure are incorporated into this bill, the legislation may in fact increase stigmatization and discourage effective HIV/AIDS interventions. India, therefore, currently remains without an adequate solution for addressing the discrimination that persons living with HIV/AIDS face. Without an effective means to address discrimination, India will not be able to successfully combat the epidemic. With the HIV/AIDS bill severely curtailed, India must consider other ways to address discrimination against persons living with the disease. In this regard, disability law may be an effective tool, as India has already shown a commitment to protecting the rights of persons with disabilities.

97. Draft HIV/AIDS Bill 2006 §§ 26; 50(3); *see also* GROVER, *supra* note 86, at 23.

98. *Restore Original HIV/AIDS Bill of 2006: NACO*, DECCAN HERALD, Dec. 9, 2008, <http://archive.deccanherald.com/Content/Dec92008/state20081209105607.asp> (last visited May 18, 2010).

99. *Id.*

100. *Id.*

101. *Id.*

II. THE INDIAN APPROACH TO DISABILITY LAW: THE PERSONS WITH DISABILITIES ACT

A. *India's Commitment to Disability Protection*

When India adopted its constitution, very few disability protections existed. In fact, one of the only references to disability protection in the Constitution is article 41, which is a non-enforceable provision directing the states within their economic and development capabilities to “make effective provision[s] for securing the right to work, to education and to public assistance in cases of . . . old age, sickness and disablement.”¹⁰² However, in 1992, India signed the Proclamation on the Full Participation and Equality of People With Disabilities in the Asian and Pacific Region, signaling its active commitment to protection of people with disabilities.¹⁰³ To comply with its international obligation, in 1995 the Indian Parliament passed the Persons with Disabilities Act (PWDA), which recognizes disability as a civil rights issue and guarantees access to certain public goods.¹⁰⁴

In 2007, India ratified the UN Convention on the Rights of Persons with Disabilities (UNCPRD).¹⁰⁵ This convention obligates parties to the agreement “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”¹⁰⁶ The Convention mandates that the principles and rights explicated in the Convention be reflected in each country’s relevant laws.¹⁰⁷ Therefore, in order to comply with its international obligations, India must ensure that its disability laws reflect the protections and purposes espoused in the UNCRPD.

B. *The Protections of the PWDA*

Section 2(i) of the PWDA defines disability as blindness, low vision, hearing impairment, locomotor disability, mental retardation, and mental illness. Under the statute, in order to be a person with a disability, the individual must be “suffering from not less than forty [percent] of any disability as certified by a medical au-

102. INDIA CONST. art. 41.

103. See Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, No. 1 Acts of Parliament, 1996.

104. See *id.*

105. UNCRPD; *supra* note 18; U.N. Enable, Ratifications, <http://www.un.org/disabilities/countries.asp?navid=12&pid=166> (last visited May 18, 2010).

106. *Id.* art. 1.

107. *Id.* art. 32, § 1.

thority.”¹⁰⁸ The definition of disability adopted by the PWDA is problematic to the HIV epidemic. The enumerated list forecloses the possibility of including HIV/AIDS as a disability. Moreover, the statute endorses a mathematical approach by using percentages to define disability.¹⁰⁹ An Indian court has interpreted the forty percent provision to mean that disability is to be determined through a quantitative comparison to an individual of “ordinary faculties”.¹¹⁰ Because HIV infection often remains asymptomatic for many years until the infection progresses to AIDS, the individual may not qualify as a person with disability.

Because persons living with HIV/AIDS suffer discrimination in education and employment, the PWDA can serve as an effective framework for protecting the social rights of this population. Under this statute, if a person is disabled, the PWDA prohibits discrimination in education and employment and requires access to public accommodations. With regards to education, the PWDA requires “that every child with a disability has access to free education in an appropriate environment [until] he attains the age of eighteen years.”¹¹¹ In order to address educational cost, the PWDA requires government to provide “every child with [a] disability [with] free of cost special books and equipment[] needed for his education” as well as making scholarships and grants available so that disabled students can attend schools and universities.¹¹² Moreover, PWDA also requires all “[g]overnment educational institutions and other educational institutions receiving aid from the [g]overnment” to reserve at least three percent of the seats for persons with disabilities.¹¹³ Because many children affected by the HIV/AIDS are denied educational opportunities and can face significant financial hurdles, these protections will be important to addressing HIV/AIDS discrimination.

Similar to the educational provision, the employment protections guaranteed under the PWDA require corporations or any entity receiving public money to reserve three percent of positions for persons with disabilities.¹¹⁴ The statute, however, makes an exception; if the employment position cannot be filled by a suitable person with a disability, then it can be offered to a person without a disability, contingent upon the government’s approval.¹¹⁵ Addi-

108. Persons with Disabilities Act, ch.1, § 2(t).

109. *Id.*; see also Gopal v. Andhra Bank, 2003 II-LLJ 916 (Andhra Pradesh).

110. Gopal, 2003 II-LLJ 916.

111. Persons with Disabilities Act, ch. 5, § 26(a).

112. *Id.* ch. 5, §§ 27(f), 30(a)-(d).

113. *Id.* ch. 6, § 39.

114. *Id.* ch. 6, § 33.

115. *Id.* ch. 6, § 36.

tionally, if a person develops a disability during his or her time of employment, the PWDA prohibits entities from demoting or firing a person because of that disability.¹¹⁶ If the individual can no longer perform the functions of his or her position, the employer is required to try to shift the person to another position with similar pay and benefits.¹¹⁷ The Act also explicitly prohibits the denial of promotion “merely on the ground of his disability.”¹¹⁸ These employment provisions are important to addressing HIV/AIDS discrimination because they preclude employers from denying employment based on disability status. Consequently, if disability protection is expanded to include HIV/AIDS, employers will be prohibited from discriminating against HIV positive employees.

C. Enforcement of the PWDA and the HIV Epidemic

Even with statutorily guaranteed protections, society will continue to perpetuate discriminatory practices unless the government provides for adequate enforcement. To ensure compliance, the PWDA requires the state and national government to appoint commissioners to monitor and enforce the statute.¹¹⁹ When a violation is alleged, the PWDA does not explicitly provide for private causes of action. Rather, aggrieved parties can file a complaint with either the Chief Commissioner or the state commissioner.¹²⁰ If the aggrieved is not satisfied with the Commissioner’s decision, an appeal may be filed with the judicial courts.¹²¹ Despite the process available under the PWDA, judicial courts in India are plagued with inefficiencies.¹²² Consequently, India must consider methods to streamline the judicial process and ensure timely access to the courts.

Notwithstanding the judicial inefficiencies, a number of courts have ruled on issues regarding violations of the PWDA. While the majority of cases concerned disabilities that were explicitly defined under the statute such as visual, auditory, and locomotor disabilities, a few cases involved illnesses such as heart disease and cancer.¹²³ The fact that the courts have considered other illnesses un-

116. *Id.* ch. 8, § 47(1).

117. *Id.*

118. *Id.* ch. 8, § 47(2).

119. *Id.* ch. 12, §§ 57-65.

120. *Id.* ch. 12, §§ 59, 62.

121. *See, e.g.*, Gupta v. Ahirwar, A.I.R. 2007 S.C. 3136.

122. *Report: Indian Court is 466 Years Behind Schedule*, USA TODAY (Feb. 2, 2009); available at http://www.usatoday.com/news/world/2009-02-12-india-court_N.htm.

123. *See, e.g.*, Singh v. Airports Auth. of India, 2005 V AD 513 (Del.); Kumari v. Karunashanker, A.I.R. 1988 MP 232 (2005) (Madhya Pradesh).

der the PWDA demonstrates that courts are willing to take an expansive approach to disability. In the *Airports Authority* case, the court extended the protection of the PWDA to a person who suffered from heart disease.¹²⁴ In *Karunashanker*, the court held that disability law applied to cancer because it characterized malignancy as a physical handicap.¹²⁵ The court stated, “malignancy . . . is a physical disability as it has the tendency to reduce or impair functional capacity. Such a person must be held a ‘physically handicapped person’ within the meaning of the [Madhya Pradesh Accommodation Control Act].”¹²⁶ Although none of the high court cases specifically dealt with HIV/AIDS, the judicial interpretation of the statute to include other illnesses not explicitly enumerated demonstrates the courts’ overall liberalization. Similar to the reasoning in *Karunashanker*, HIV/AIDS also greatly impairs and reduces functional capacity. Thus, expanding the PWDA to include HIV/AIDS is well within the courts’ interpretation of disability

D. Disability Protection under the UN Convention

The restrictive statutory language of the PWDA is problematic for India. The ratification of the UNCRPD requires countries to take a rights based approach to disability and view disability broadly. While India defines disability via an enumerated list, Article 1 of the UNCRPD defines disability as individuals “who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”¹²⁷ The Convention requires countries to recognize disabled persons’ right to marriage and family,¹²⁸ ensure access to primary, secondary, “tertiary education, vocational training, adult education and lifelong learning,”¹²⁹ provide equal rights to employment,¹³⁰ and protect a right to the “highest attainable standard of health without discrimination on the basis of disability.”¹³¹

The rights-based approach to disability that the UN endorses is contrary to the approach furthered in the PWDA. The PWDA views disability through a scientific lens and justifies its protections based on the idea that disability is an individual defect in

124. *Singh*, 2005 V AD 513.

125. *Karunashanker*, A.I.R 1998 MP 232.

126. *Id.*

127. UNCRPD, *supra* note 18, art. 1.

128. *Id.* art. 23.

129. *Id.* art. 24.

130. *Id.* art. 27.

131. *Id.* art. 25.

need of social compensation. In contrast, the Convention recognizes that the social limitations of disabled persons are not the result of their impairment but the result of the discrimination that people with disability face. Rather than viewing persons with disability as incapable or handicapped, the UN recognizes that disabled persons can be fully functioning members of society if their rights are properly protected.

Because the UNCRPD mandates that India reform its disability law to be more expansive, India should consider reforming the PWDA to not only remove the social compensation view of disability that resonates throughout the statute but also to include protections for persons living with HIV/AIDS. The recognition of civil rights and protection against discrimination is paramount to creating sustainable public health interventions. If reformed correctly, India's disability law may become an effective weapon in the fight against the HIV/AIDS epidemic.

III. THE AMERICAN APPROACH TO DISABILITY: AMERICANS WITH DISABILITIES ACT

A. *The History and Transformation of the ADA*

Similar to the UN Convention, the ADA endorses a rights-based approach and views disability protection in terms of preventing unwarranted discrimination rather than compensating for a physical limitation. Therefore, the ADA can serve as a useful framework for India to restructure its laws. Although the ADA can serve as a helpful example, we must not forget the important distinction between the American and Indian commitment to protection of persons with disabilities. By understanding the important distinctions, we are more able to grasp the difficulties that India might face in trying to pass a disability law similar to the ADA.

One important distinction that exists between India and America is their respective views of disability. The Indian Parliament, for example, has only viewed disability protection from the lens of social compensation.¹³² The reason for passing disability protection in India hinged on this idea that persons with disability are less competent or functional, and therefore, require social protection.¹³³ Congress, on the other hand, noted that its impetus for passing the ADA was the recognition that disability did not diminish a per-

132. See SEEMA TIWARI, CTR. FOR LEGISLATIVE RESEARCH AND ADVOCACY, CLRA POLICY BRIEF FOR PARLIAMENTARIANS: INDIAN DISABILITY LAW - AN OBSOLETE PICTURE 1 (2008), available at <http://www.clraindia.org/include/DPbriefno5.pdf>.

133. *Id.*

son's right to fully participate in all aspects of society, but disabled individuals were frequently precluded from participating in different aspects of society because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers.¹³⁴ Congress passed the Americans with Disabilities Act "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and provide broad coverage.¹³⁵

Additionally, in contrast to the Indian Parliament, some members of Congress recognized the importance of guaranteeing the rights of persons living with HIV/AIDS when discussing passage of the ADA.¹³⁶ Despite the commitment expressed by some members of Congress, the courts have disagreed on whether HIV is a disability under the statute. The controversy of HIV as a disability under the ADA began in 1998 when the Supreme Court held that HIV was a physical impairment but refused to determine whether HIV/AIDS was a *per se* disability.¹³⁷ After this Supreme Court case, a number of lower courts refused to consider HIV as a *per se* disability and looked at a number of factors to determine whether persons living with the disease were guaranteed protections under the ADA.¹³⁸

In 2008, Congress amended the ADA to clarify the definition of disability and thus overturn Supreme Court decisions that narrowed the scope of protections under the ADA.¹³⁹ More specifically, the amendment rejected the Supreme Court's mitigating measures analysis that required disability to be considered in light of wheth-

134. See 42 U.S.C. § 12101(a),(b).

135. 42 U.S.C. § 12101(b)(1).

136. See 154 CONG. REC. H8279, 8297 (daily ed. Sept. 17, 2008) (statement of Rep. Baldwin).

137. *Bragdon v. Abbott*, 524 U.S. 624, 647, 655 (1998) (holding that HIV was a disability in this case because "it is an impairment which substantially limits the major life activity of reproduction").

138. See, e.g., *EEOC v. Lee's Log Cabin Inc.*, 546 F.3d 438, 445-46 (7th Cir. 2008) (holding that HIV infection is not a *per se* disability and therefore plaintiff must show how the infection substantially limited her life); *Blanks v. Sw. Bell Commc'ns, Inc.*, 310 F.3d 398, 401 (5th Cir. 2002) (holding that plaintiff did not show how he was substantially limited by his HIV infection and thus was not disabled under the ADA definition); *Carter v. Taylor*, 540 F. Supp. 2d 522, 527-28 (D. Del. 2008) (holding that HIV is not a *per se* disability and plaintiff must allege more than that he suffers from HIV); *St. John v. NCI Bldg. Sys., Inc.*, 537 F. Supp. 2d 848, 861 (S.D. Tex. 2008) (holding that HIV is not a *per se* disability and plaintiff was not substantially limited because infection was asymptomatic); *Carrillo v. AMR Eagle, Inc.*, 148 F. Supp. 2d 142, 145 (D.P.R. 2001) (refusing to find HIV as a *per se* disability and holding that plaintiff failed to show how HIV substantially limits a man's ability to reproduce); *Gutwaks v. Am. Airlines, Inc.*, No. 3:98-CV-2120-BF, 1999 WL 1611328, at *5 (N.D. Tex. Sept. 2, 1999) (holding that HIV is not a *per se* disability).

139. ADA Amendments Act § 2 (Congress noted that the ADA amendment was to overturn *Sutton v. United Airlines*, 527 U.S. 471 (1999) and *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002)).

er mitigating measures were available.¹⁴⁰ In rejecting these cases, the amendment notes, “the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures” and states that the use of medication cannot be used to assess disability.¹⁴¹ Furthermore, the amendment overturned the notion that the ADA required a “demanding standard” for the definition of disability.¹⁴²

In broadening the definition of disability, the amendment clearly classifies HIV/AIDS as a disability under the statute.¹⁴³ The amendment notes that the definition of disability “shall be construed in favor of broad coverage”¹⁴⁴ and includes functions of the immune system as a major life activity.¹⁴⁵ The amendment clarifies that the individual’s impairment needs to substantially limit only one life activity to be considered a disability.¹⁴⁶ Moreover, the amendment also revised the ADA to explicitly state “[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”¹⁴⁷ Based on this language, HIV/AIDS does not have to be symptomatic in order for an individual to be protected under the ADA.

The transformation of the ADA can show us two important things. First, the transformation demonstrates that even with a commitment to protecting persons with HIV/AIDS, courts and other social institutions may still try to narrow its protection. Additionally, the history of the ADA also shows us that rights protection for persons living with HIV/AIDS could be codified because Congress had a long-standing commitment to such protection. For India, codifying rights protection for persons living with HIV/AIDS will be more difficult because parliament has not demonstrated an equivalent commitment to protection of these individuals. Furthermore, India must also recognize the necessity of explicit language in guaranteeing the rights of persons with HIV/AIDS to prevent courts from curtailing protection.

140. See *Sutton v. United Airlines*, 527 U.S. at 481.

141. ADA Amendments Act § 4.

142. The *Toyota Motor* case required the definition of disability to be strictly interpreted and held that a person is qualified under the statute only if their impairment “severely restricts the individual from doing activities that are of central importance to most people’s daily lives.” 534 U.S. at 198.

143. 154 CONG. REC. H8297 (daily ed. Sept 17, 2008) (Statement of Rep. Baldwin) (“Due to . . . narrow court interpretations, people with HIV who have been fired, not hired, or suffered other adverse employment actions have been denied the protection of the ADA.”).

144. ADA Amendments Act § 4.

145. *Id.*

146. *Id.*

147. *Id.*

B. The Protections of the ADA: A Comparison to the PWDA

Some of the protections under the PWDA are similar to the protections guaranteed under the ADA. For example, the ADA provides civil rights protections in employment, education, and freedom from discrimination. The ADA, however, extends much further in its protections than India's PWDA. Unlike the PWDA, the rights guaranteed under the ADA extend to private schools and health care entities. Furthermore, though the PWDA defines disability by an enumerated list, the ADA defines disability more broadly. The ADA defines disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."¹⁴⁸ Because the UNCRPD mandates signatories to adopt a broad definition of disability, India should consider adopting a similar definition.

Title I of the ADA prohibits employment based discrimination.¹⁴⁹ The statute prohibits employers with 15 or more employees from discriminating based on disability in "job application procedures, the hiring, advancement, or discharge or employees, employee compensation, job training, and other terms, conditions and privileges of employment."¹⁵⁰ Unlike the PWDA, the ADA does not reserve a certain percentage of the workforce for disabled individuals. Rather, the ADA generally prohibits discrimination and adverse employment actions based on a person's disability. The ADA's approach endorses a much more rights-based strategy to disability protection than the PWDA. By reserving a certain percentage of the workforce for the disabled, India once again seems to be viewing disability as a condition that requires social compensation.

Both the ADA and the PWDA require employers to make accommodations for disability. The ADA requires employers to make reasonable accommodations to persons with disabilities such as restructuring the job functions, increasing flexibility in work schedule, granting leniency with sick leave, and providing special equipment.¹⁵¹ In addition to making reasonable accommodation, the statute also prohibits employers from making medical inquiries based on disability.¹⁵² When institutions make medical inquiries, the statute requires that medical information be treated con-

148. Americans with Disabilities Act, 42 U.S.C. § 12102 (1990).

149. *Id.* § 12112(a).

150. *Id.* § 12112(a).

151. *Id.* §§ 12111(9), 12112(b)(5)(A); see *EEOC v. Yellow Freight Systems, Inc.*, 253 F.3d 943, 950-952 (7th Cir. 2001).

152. 42 U.S.C. § 12112(d)(4)(a).

fidentially.¹⁵³ This type of privacy protection is absent from the PWDA. The PWDA does not mention medical inquiries or confidentiality. Privacy protection and limitations on medical inquiries, however, are paramount to addressing HIV/AIDS epidemic. Without such protection, institutions will continue to discriminate against HIV/AIDS affected individuals by forcing medical evaluations and disclosing status. As a consequence, HIV/AIDS affected individuals may avoid employment opportunities altogether or be ridiculed and ostracized by others if their status is disclosed.

Title II and III of the ADA prohibit education and health care discrimination.¹⁵⁴ Title II and Title III apply to public and private institutions, respectively.¹⁵⁵ Similar to the employment provisions, health care and educational institutions must make reasonable accommodations in order to avoid the exclusion and discrimination of persons with disabilities.¹⁵⁶ Although all provisions of the ADA require reasonable accommodations, the ADA does not specifically define or include examples of reasonable accommodations within Title II and III.¹⁵⁷ By not defining the term, the ADA focuses on the reasonability of the accommodation and remains flexible in determining whether the entity did in fact provide appropriate accommodations. This flexibility allows parties to argue the propriety of the accommodation and allows courts to determine on a case-by-case basis whether the entity's response was adequate to the specific disability.

Title II and III protections in the ADA differ from the PWDA in three important respects. First, the PWDA does not apply to private institutions. This is extremely problematic for the HIV/AIDS epidemic because most of the education and health care in India occurs through the private sector. Second, although India requires accommodations, some of the accommodations mentioned in the PWDA deny disabled individuals equal opportunity. For example, the PWDA's educational accommodations include removing mathematical examinations for blind individuals and limiting hearing-impaired students to the study of only one foreign language.¹⁵⁸ These accommodations endorse the social compensation view of disability. They assume that disability generally makes the individuals incapable of normal cognitive ability and therefore requires compensation. Lastly, unlike the ADA, the PWDA does not

153. *Id.* § 12112(d)(3)(B).

154. *Id.* § 12131; § 12181.

155. *Id.* § 12132; § 12182(a).

156. *Id.* § 12182(b)(2)(a)(ii).

157. *Id.* § 12111.

158. Persons with Disabilities Act, § 30(f)-(h).

include any protection for discrimination within the health care sector. In order to address the HIV/AIDS epidemic, India must also include provisions regarding discrimination in the health care sector. Many health care institutions in India deny services to HIV affected individuals, which increases morbidity and discourages testing.¹⁵⁹ Moreover, in order to be in compliance with the UNCRPD, India should extend disability protection to the health care sector.

The ADA, therefore, can serve as a good example for India in restructuring its disability laws. The protections in the ADA do not focus on the disability itself. Rather the ADA focuses on the social response to disability and endorses a rights based approach. The ADA also includes HIV/AIDS as a disability. By adopting a rights-based approach similar to the ADA and expanding the PWDA to include HIV/AIDS, India will not only comply with the UNCRPD but also will create an effective framework to combat its own HIV/AIDS epidemic.

C. Judicial Treatment of HIV Under the ADA and the Various Loopholes

Although Congress always intended to protect persons affected with HIV/AIDS with the ADA,¹⁶⁰ courts remained reluctant to interpret the ADA to grant such protection. The 2008 amendment resolves the conflict as to whether the ADA includes HIV/AIDS as a disability. Notwithstanding, the statute may still be circumvented.¹⁶¹ For example, defendants may discriminate based on disability when the disability poses a direct threat to the health and safety of others and reasonable modifications cannot eliminate the threat.¹⁶² Because many jurisdictions only require a theoretical, unrealized risk, the direct threat standard for HIV/AIDS may not be difficult to prove when bodily fluid contact is possible. In fact, courts have found that HIV positive prisoners,¹⁶³ health care workers,¹⁶⁴ and martial art students¹⁶⁵ were not qualified under the sta-

159. See LOUDON ET AL., *supra* note 26, at 26-27.

160. See ADA Amendments Act § 2.

161. See 42 U.S.C. §§ 12113, 12182(b)(3).

162. *Id.* § 12182(b)(3).

163. *Onishea v. Hopper*, 171 F.3d 1289, 1299, 1303 (11th Cir. 1999) (noting that the violence, drug use, and sex in prisoners made HIV positive inmates a direct threat and that hiring more police guards was not a reasonable modification because it “would place an undue financial and administrative burden on the already strapped prison system”); *Smith v. McFarland*, No. 3:06-CV-592-WKW, 2008 WL 606986 at *3 (M.D. Ala. Feb. 29, 2008) (holding that HIV positive prisoners are not qualified individuals under the ADA because they pose a significant risk to the rest of the prison population).

164. *Waddell v. Valley Forge Dental Assocs., Inc.*, 276 F.3d 1275, 1281 (11th Cir. 2001)

tute because their HIV infection posed a direct threat to others. Moreover, defendants may also avoid application of the ADA if they are able to show that accommodating the disability is not reasonable or appropriate.¹⁶⁶ With regards to employment actions under the ADA, HIV positive individuals may also face difficulties in proving discriminatory practices by the employers because the plaintiff will have to show that the employment action was adverse and motivated solely by disability-based discrimination.¹⁶⁷

Although claiming these exceptions in certain circumstances may be reasonable, direct threat and undue burden standards may also become loopholes. Therefore, if India follows the U.S. example and adopts similar exceptions, India must be cognizant of the possibility that courts may use these provisions to improperly circumvent the statute. As a result, India must clearly include HIV/AIDS as a disability and narrowly define any exceptions.

RECOMMENDATIONS AND CONCLUSION

The HIV/AIDS affected population in India, like much of the rest of the world, confronts discrimination in education, employment and access to health care. The refusal to treat, educate, and accommodate has led to worse health outcomes for persons suffering from HIV/AIDS and greater infection rates. As HIV affected populations become more and more alienated because of discrimination, people are less likely to get tested, seek treatment, and receive social support.

India's ratification of the UNCRPD gives the country a unique opportunity to reform its laws. In order to reform its law, India should not only expand the definition of disability to reflect the United Nation's broad definition but also include HIV/AIDS as a disability. Because the UNCRPD defines disability as a long term

(holding that a dental hygienist posed a direct threat to patients); *Mauro v. Borgess Med. Ctr.*, 137 F.3d 398, 407 (6th Cir. 1998) (holding that a surgical technician posed a direct threat to patients).

165. *Montalvo v. Radcliffe*, 167 F.3d 873, 877 (4th Cir. 1999) (holding that a HIV positive student denied admission to a martial arts school posed a direct threat).

166. 42 U.S.C. § 12111(b); *EEOC v. Yellow Freight Sys. Inc.*, 253 F.3d, 943, 950-52 (holding that an unlimited number of sick days without being penalized is not a reasonable accommodation).

167. *Brown v. Pension Bds.*, 488 F. Supp. 2d 395, 405 (S.D.N.Y. 2007) (holding that plaintiff failed to show that discharge was discriminatory because the board members did not know of the HIV status and the employee violated the call-into work policy); *Swatzell v. Sw. Bell Tel. Co.*, No. 7:00-CV-193-R, 2001 WL 1343429, at *5 (N.D. Tex. Oct. 31, 2003) (holding that forcing an individual to take long term disability after disclosing HIV status was an adverse employment action).

physical, mental, or intellectual impairment, clearly HIV/AIDS can qualify as a long-term physical impairment under the Convention.

Furthermore, India should also include access to health care and confidentiality standards in the PWDA. Not only are these requirements mandated by the UNCRPD, but they are critical to effective HIV/AIDS interventions. With an access to treatment provision, health care professionals will no longer be able to discriminate against persons affected by HIV/AIDS and deny necessary treatment. Additionally, because much of healthcare and education occurs through the private sector, the act should be extended to private institutions such as schools and health care facilities.

More importantly, the inclusion of HIV/AIDS as a disability will not be sufficient to address discrimination unless India adopts the rights-based approach to disability that is mandated by the UNCRPD. In fact, India's current view of disability as a defect in need of social compensation may, in actuality, lead to greater discrimination. Viewing disability as a condition of inferiority further stigmatizes and alienates disabled populations. Therefore, the PWDA should specifically recognize the right of disabled persons to be full-functioning members of society and acknowledge the importance of equality. Furthermore, the government should remove provisions in the PWDA that deny persons with disabilities equal opportunity.

The Americans with Disabilities Act may serve as a good example for India as it restructures its laws, because the ADA is a rights-based law that extends protections to HIV/AIDS affected individuals. Similar to the discrimination in India, HIV/AIDS discrimination was rampant in the United States during the early years of the epidemic. In part, to address this discrimination, Congress passed the ADA. Therefore, the evolution of the ADA may be useful to understanding India's own transformation. In considering the American example, India should be cognizant of how U.S. courts have treated HIV/AIDS under the ADA to avoid any loopholes and narrowly define any exceptions.

While the ADA is a useful example to India, India faces great challenges in reforming the PWDA into an effective public health strategy. First, the political will in India remains weak. Unlike Congress, the Indian Parliament has not demonstrated a united commitment to addressing HIV/AIDS discrimination. Therefore, passing a law similar to the ADA may be difficult. Moreover, in order for the reform to be effective, there must be corresponding HIV/AIDS awareness and speedy judicial resolution of cases. In the United States, for example, much of the systematic HIV/AIDS discrimination subsided because of increasing social awareness

about the disease and modes of transmission. In addition to reforming the PWDA, India must also correspondingly increase HIV/AIDS discourse and education in order to reduce discrimination.

Unless the epidemic is effectively curtailed, India will face economic and political devastation from HIV/AIDS. In order to avoid national and global destabilization, India must quickly address its epidemic. The PWDA is an invaluable tool for India in its fight against the epidemic. The PWDA guarantees civil rights to vulnerable populations. Further, by signing the UNCRPD, India obligated itself to reform the PWDA to be more expansive. India, therefore, has an incredible opportunity to reform the law to not only comply with its international obligation but also as a public health strategy. The PWDA will not be a complete answer to the epidemic, but it will serve as an important and necessary component of a successful Indian response. The protection of civil rights is the foundation of any sustainable public health intervention.