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LOYOLA UNIVERSITY CHICAGO INTERNATIONAL LAW SYMPOSIUM KEYNOTE ADDRESS

THE LAW OF WAR IN THE WAR AGAINST TERRORISM

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My purpose in what I intend to be a brief keynote address is to provide the framework upon which the excellent panels to follow will no doubt amplify. I have little doubt that some of you in attendance would prefer to have a debate framed by the pointed rejoinder that there can be no war against terrorism; hence a discussion grounded in *jus in bello*[1] is inapposite and inevitably counterproductive. The logical retort would be that the conference organizers have set these topics and I merely respond to their stated desires. That, however, would obscure the fact that I am among those who believe that the corpus of *jus in bello* has been challenged in the post-9/11 era as never before. In fact, let me be plain at the outset. The understanding and compliance with the laws and customs of war is the very essence of American military professionalism. Our compliance with the normative constraints on the application of battlefield violence and the appropriate enforcement that should flow from violations of that professional ethos are, in my personal opinion, at the very core of our national identity and our ultimate effectiveness in accomplishing victory over our enemies. There is a reason that the courageous American men and women who deploy into harm's way to confront our enemies wear our flag on their right shoulders – they are the living exemplars of our values and our virtues. In fact, the yawning delta between the actions and ethos of a professionalized American military and the manner in which those actions are distorted by our enemies creates what may well be the most difficult counterinsurgency dilemma facing the force today. We must get the law right – and to win, we must succeed in demonstrating the utility of lawfully applied violence in the midst of an often skeptical and misinformed hostile population.

There is an indisputable space in which the established body of laws that we collectively term "the laws and customs of war" is in full effect as the forces of free societies confront their opponents on battlefields across the globe. The debates over the normative effect and overall applicability of the laws and customs of war have raged on both sides of the Atlantic, and perhaps most recently in the context of the NATO missions in the Afghanistan and Pakistan area of opera-

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[1] *Jus ad bellum* is the commonly used Latin reference that seeks to isolate the dimensions of international law analysis that address the circumstances under which war, or in some instances military force short of armed conflict, may be a lawful mechanisms for solving disputes between sovereign states.

tions. There have, however, been a number of significant opinions emanating from domestic courts[2] as well as international human rights bodies[3] that have spawned debate over the precise application and the contours of the applicable *jus in bello* regime. For those in attendance who believe that "terrorism is a tactic" and subscribe to the extension of that premise that to describe a war against a tactic is oxymoronic and unproductive, I ask only for your indulgence and patience both for the time allotted to my remarks and for the excellent slate of panels that lie ahead.

My duty this morning is to provide, in an altogether inadequate amount of time, an overview of the entire field of *jus in bello* by way of setting the context for the speakers to come. I shall proceed to do that by framing the legal concepts, primary points of tension, and highlighting some areas where I believe the normative structure should be clarified or in some cases reconceived in contradistinction to the modern supposedly "progressive" trends of legal developments around the world. Your very attendance this morning conveys that you are neither ignorant nor apathetic regarding the key issues of our day or the granularity of the legal debates that will shape your careers. I would add that these debates and their resolution will shape the destiny of our Republic and have an immeasurable impact on both our standing in the world and on our ability to effectively confront those enemies who would destroy the American way of life and undermine the values that we hold dear.

In this context, the understanding and application of the laws and customs of war in the modern era are no mere afterthought. The struggle to define the contours of the legal regime and to correctly communicate those expectations to the broader audience of civilians is a recurring problem that is integrally related to the current evolution of warfare. Shaping the expectations and perceptions of the political elites who control the contours of the conflict is perhaps equally vital. The paradox is that as the legal regime applicable to the conduct of hostilities has matured over the last century, the legal dimension of conflict has at times overshadowed the armed struggle between adversaries. As a result, the overall military mission will often be intertwined with complex political, legal, and strategic imperatives that require disciplined focus on compliance with the applicable legal norms as well as the most transparent demonstration of that commitment to sustain the moral imperatives that lead to victory. For example, in his seminal 1963 monograph describing French operations in Algeria, counterinsurgency scholar David Galula observed that if "there was a field in which we were definitely and

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[2] *See, e.g., Her Majesty the Queen v. Mohammed Momin Khawaja, Ontario Superior Court of Justice, in* TERRORISM: INTERNATIONAL CASE LAW REPORTER 319 (Michael A. Newton, ed, Oxford University Press, vol. 1 2008); *see also* Al-Skeini v. Sec'y of State for Def., [2007] UKHL 26, 3 WLR 33 (appeal taken from Eng.) (holding that British soldiers in Iraq who were thought to have unlawfully killed and tortured Iraqi civilians could be tried under domestic law as opposed to an automatic transfer of jurisdiction the International Criminal Court).

[3] Al-Skeini and Others v. The United Kingdom (Application No. 55721/07), 2011 Eur. Ct. H.R. 1093 (July 7), *available at* http://www.bailii.org/eu/cases/ECHR/2011/1093.html; Al-Jedda v. The United Kingdom (Application No. 27021/08), 2011 Eur. Ct. H.R. 1092 (July 7), *available at* http://www.bailii.org/eu/cases/ECHR/2011/1092.html.

infinitely more stupid than our opponents, it was propaganda."[4] The events at Abu Ghraib are perhaps the most representative of clear-cut violations of the laws and customs of war, and provide an enduring example of what General David Petraeus has described as "non-biodegradable events."[5] There are many other examples of events during conflict that strengthen the enemy even as they remind military professionals of the visceral linkage between their actions and the achievement of the mission. The United States doctrine for counterinsurgency operations makes this clear in its opening section:

> Insurgency and counterinsurgency. . .are complex subsets of warfare. Globalization, technological advancement, urbanization, and extremists who conduct suicide attacks for their cause have certainly influenced contemporary conflict; however, warfare in the 21st century retains many of the characteristics it has exhibited since ancient times. Warfare remains a violent clash of interests between organized groups characterized by the use of force. Achieving victory still depends on a group's ability to mobilize support for its political interests (often religiously or ethnically based) and to generate enough violence to achieve political consequences. Means to achieve these goals are not limited to conventional force employed by nation-states.[6]

In the decade since 9/11, the awareness of the legal contours of the laws and customs of war and the implicit linkage between those tenets and the American role in the world has been highlighted as never before in our history. Ten years ago when these debates first circulated in earnest at the highest levels of the U.S. Government, the circle of experts intimately familiar with the principles of this field and their relationship to the conduct of operations against terrorists was small indeed. There was an even smaller core of experts who could navigate the occasionally conflicting streams of jurisprudence that continue to flow from international and internationalized tribunals around the world, much less distinguish those precedents or dispel their errors as required. I am pleased to report that we are well advanced from that stage. We are, nevertheless, caught in a vortex between the tides of legal evolution and the imperatives of ongoing operations. One need only observe the international debates that resulted from the intentional targeting and successful operation to kill Osama bin Laden to appreciate the enormity of the present debates and the chasms of understanding between U.S. practitioners and our allies around the world.

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[4] DAVID GALULA, PACIFICATION IN ALGERIA 1956–1958 141 (RAND Corp. ed. 2006).

[5] *One-on-One with General David Petraeus: One of Our Most Powerful Military Leaders Talks About Iraq and Afghanistan*, VU Cast Vanderbilt University's News Network (Mar. 5, 2010), *available at* http://news.vanderbilt.edu/2010/03/watch-vucast-extra-one-on-one-with-general-david-petraeus-108942/; *see also* Uthman al-Mukhtar, *Local Sunnis Haunted by the Ghosts of Abu Ghraib*, SUNDAY HERALD, Dec. 26, 2010, http://www.heraldscotland.com/mobile/news/world-news/local-sunnis-haunted-by-the-ghosts-of-abu-ghraib-1.1076485; Joseph Berger, *U.S. Commander Describes Marja Battle as First Salvo in Campaign*, N.Y. TIMES, Feb. 21, 2010, http://www.nytimes.com/2010/02/22/world/asia/22petraeus.html.

[6] DEP'T OF ARMY, F.M. 3-24, COUNTERINSURGENCY, ¶ 1–1 (2006).

At the same time, I do not intend to artificially exaggerate the legal divisions in the western world as nations confront the common terrorist threat, and these divisions should not be exaggerated. There are many examples of normative consensus that coalesced around substantively identical positions among allies, but through very different legal routes and rationales. I have written in other contexts to debunk the notion that the refusal of the United States to ratify Protocol I to the 1949 Geneva Conventions represented an act of so-called "exceptionalism."[7] In fact, one can only put the U.S. rejection of Protocol I into proper perspective by identifying the substantively identical positions that became manifest in the wake of 9/11 as several of the most important multilateral terrorism treaties entered into force on the heels of a wave of state accessions. The United States was one of the most influential drivers in the promulgation of the principles regulating hostilities that define the lawful scope of participation in armed conflicts. This line of treaties, derived from the strong political and military support of the United States, ended during the negotiations for the 1977 Protocols to the 1949 Geneva Conventions.[8] Protocol I is applicable to armed conflicts of an international character, but the final text incorporated highly controversial changes to the types of conflicts that could legally be characterized as interstate wars. These politically motivated changes to the framework of humanitarian law sought to grant combatant immunity to a far broader class of persons. It is clear that many of the Protocol's substantive formulations are now well entrenched in the corpus of customary international law. However, the post 9/11 era has demonstrated the definitive rejection of efforts by many Third World nations, supported by the negotiating muscle of socialist states, that sought to hijack the Protocol to achieve explicitly political objectives. To be clear, the key changes inserted by some states into the treaty text served to endanger innocent civilians and to lend a fig leaf of legal credence to terrorist tactics. Protocol I is accordingly unique in having been described as "law in the service of terror."[9]

The United States concluded that the most controversial aspects of Protocol I represented an impermissible alteration of the cornerstone concepts of combatancy rather than a natural and warranted evolution of the laws of war. The U.S. rejection of Protocol I represented far more than hypocritical "exceptionalism" however, as the underlying policy position provided the template for sustained engagement with other nations. The overwhelming solidarity of states sharing the U.S. position that international law affords no protection for the crim-

[7] Michael A. Newton, *Exceptional Engagement: Protocol I and a World United Against Terror*, 42 TEX. INT'L L. J. 323, 348-50 (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1524301.

[8] Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts, Dec. 7, 1979, 1125 U.N.T.S. 3 (hereinafter "Protocol I"); *see also* Douglas J. Feith, *Law in the Service of Terror*, THE NAT'L INTEREST ON INT'L LAW & ORDER 183-84 (R. James Woolsey, ed., Transaction Pub., 2003) (discussing differences of opinion held by "Westerners" and "Socialists" during the negotiations for Protocol I and how arguments made by the United States ultimately did not prevail leading to their abstention from voting).

[9] Feith, *supra* note 8, at 36-37; *see also* Abraham Sofaer, *Terrorism and the Law*, 64 FOREIGN AFF. 901, 901–03 (1986) (stating that "At its worst the [international] law [applicable to terrorism] has in important ways actually served to legitimize international terror, and to protect terrorists from punishment as criminals.").

inal acts of terrorists became clear over more than two decades and was revalidated following the shock of 9/11. What might be pejoratively labeled U.S. "exceptionalism" in fact represented a principled policy decision based on national interests that provided the impetus for deeper engagement in shaping the legal norms applicable to terrorist acts. In other words, the U.S. position accurately reflected underlying community interests of states engaged in a struggle against terrorists and thus established the normative standards that prevented later attempts to blur the distinctions between terrorists and privileged combatants.

This, by the way, is one of the many reasons why you should love being international lawyers. Wherever you go in the world, and whatever language you find yourselves negotiating in, you may refer to the common body of underlying norms. The Geneva Conventions are ubiquitous and universal, despite the fact that the interpretation and application of those provisions will often be the subject of sharp debate and sustained lawyering. Anywhere you travel in the world, you will find a core of legal professionals prepared to pull out the Geneva Conventions and their supporting legal framework and discuss the applicability of common principles and values. You must always be aware, however, that even though we are speaking the same legal language using a common vocabulary, your enemies often import a dramatically different perspective onto those issues. In fact, in many instances, our enemies have neither the strategic constituency nor the simple intent to accurately characterize the correct state of the law related to *jus in bello*. The debate and continuing evolution over the linkage between the concepts of combatancy and direct participation drawn from the laws and customs of war and the scope of the crime of material support to terrorism illustrate only one aspect of these challenges.

Before I move to the categories of evolving norms, let me provide you another example of what I mean by the relative homogeneity of the modern laws and customs of war. Against the complicated backdrop of ongoing military operations and often conflicting perspectives, you cannot forget that one of the core objectives of the Assembly of States Parties to the Rome Statute is to create a system of universality that helps to "guarantee respect for and lasting enforcement of international justice."[10] As early as the 1907 Hague Regulations, civilized nations sought to capture the commonality of shared values in detailed provisions of the laws of war related to the rights and obligations assumed by persons and nations participating in conflict. For their era, the Hague Regulations encompassed the definitive range of applicable legal norms related to the lawful conduct of hostilities. However, the enforcement of those precepts in the military commissions following World War II was the essential step needed to bring life and substance to the legal principle that "the right of belligerents to adopt means of injuring the enemy is not unlimited."[11] In the same manner,

[10] U.N. Secretary-General, *Rep. of the International Criminal Court for 2006/07*, ¶ 41-42, U.N. Doc. A/62/314 (Aug. 31, 2007).

[11] Regulations annexed to Hague Convention (IV) Respecting the Laws and Customs of War on Land, art. 22, Oct. 18, 1907, *reprinted in* DOCUMENTATION ON THE LAWS OF WAR 73 (Adam Roberts & Richard Guelff eds., 3d ed. 2000); *see also* Protocol I, *supra* note 8 ("In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.").

international prosecutors at the International Military Tribunal at Nuremberg helped to create a universalized awareness of the need to enforce criminal provisions that initiated what Richard Falk has described as a "normative architecture."[12] Rest assured that nothing could be more central to the ongoing struggle against transnational terrorism than these formative principles. The modern framework of international criminal law is built on the core premise that the violation of individual human rights by any perpetrator[13] requires a criminal process that is a "fair and public hearing by a competent, independent and impartial tribunal established by law."[14] Nations around the world now have a distinctive and detailed set of principles that can be incorporated into domestic systems to maximize the uniformity of the substantive body of atrocity law.[15] The substantive criticisms of the International Military Tribunal at Nuremberg helped to facilitate recognition that the simple phrase "international criminal law" needed to have nearly ubiquitous applicability and content or lose its criminal enforceability by remaining too ill-defined and vague to have any practical meaning. The bare provisions of law would remain disembodied today unless effectuated through the proscription and effective enforcement of the most egregious crimes known to humanity – war crimes, genocide and crimes against humanity – while simultaneously balancing human rights norms, state sovereignty, and the interests of justice. To that end, Article 9 of the Rome Statute of the International Criminal Court requires elements of crimes that are designed to "assist the Court in the interpretation and application" of the modern body of crimes derived from international law.[16] Furthermore, the treaty stipulates that the Court "shall apply" the Elements of Crimes during its decision-making.[17] The United States joined a consensus on these elements along with every other nation that attended the negotiations subsequent to the Rome Conference, and thus it may truly be said that we share in the normative homogeneity of the law because it both reflects our common values and preserves and satisfactorily serves our sovereign prerogatives.

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[12] *See* Raymond M. Brown, *The American Perspective on Nuremberg: A Case of Cascading Ironies in* THE NUREMBERG TRIALS—INTERNATIONAL CRIMINAL LAW SINCE 1945 21 (Herbert R. Reginbogin & Christoph J.M. Safferling eds., 2006).

[13] After extensive debate over the relative merits of the terms "perpetrator" or "accused," the delegates to the Preparatory Commission (PrepComm) ultimately agreed to use the former in the finalized draft text of the Elements of Crimes. *See* U.N. Preparatory Comm'n of the Int'l Criminal Court, 4th and 5th Sess., Mar. 13-31, June 12-30, 2000, U.N. Doc. PCNICC/2001/1/Add.2 (Nov. 2, 2000).

[14] International Covenant on Civil and Political Rights, art. 14, ¶ 1, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

[15] For a listing of the domestic legislation of national implementing legislation for the crimes of most serious concern to the international community, see *A Universal Court with Global Support*, COALITION FOR THE INT'L CRIMINAL COURT, http://www.iccnow.org/?mod=romeimplementation (last visited Oct. 17, 2011).

[16] Rome Statute of the International Criminal Court, art. 9, ¶ 1, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

[17] *Id.* art. 21, ¶ 1(a).

Principles of Military Professionalism

Before I highlight three residual areas where I believe that legal professionals can usefully serve to clarify international misinterpretation, miscommunication, and mischaracterization, let me pause as requested to familiarize you with the non-derogable principles that form the bedrock of military professionalism the world over. The law of armed conflict developed as a restraining and humanizing necessity to facilitate commanders' ability to accomplish the military mission even in the midst of fear, moral ambiguity, and horrific scenes of violence. Military commanders and their lawyers do not approach the law of armed conflict as an esoteric intellectual exercise, and must always align operational imperatives with the normative bounds of the law. The need for military lawyers grew from the requirements of commanders across the world for legal guidance. The foundational principle of military necessity is, therefore, one of the cornerstones of legality in the proper application of force, but it cannot concurrently serve as a convenient rationale for any level of unrestrained violence in the midst of an operation. To be clear, commanders and their lawyers cannot artificially inject an element of military necessity into the law to support any operational whim. The legal regime itself already incorporates a wide range of legal and operational discretion that is intended to accommodate the good faith accomplishment of the military mission even as it constrains the lawful scope of those operations. In the modern era, for example, the White House press spokesman took pains to explain that the United States is treating all unlawful combatants in its custody "humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949."[18] Military lawyers and good commanders develop a very special relationship of trust precisely because the lawyer provides necessary technical advice that the commanders rely upon in solving some of the most complex problems posed by the military mission itself.

I would argue that this modern linkage between operational necessity and legality cannot be underemphasized. One of the enduring truths of any military operation is that any good commander must direct every operation towards a defined, decisive, and attainable objective. The principle of "Objective" derives from the basic principles of war recognized across the globe, and this principle is refined for the purposes of military operations into the "mission statement."[19]

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[18] *Status of Detainees at Guantanamo*, OFFICE OF THE PRESS SEC'Y (Feb. 7, 2002), http://dspace.wrlc.org/doc/bitstream/2041/63447/00208display.pdf.

[19] The Principles of War crystallized as military doctrine around the world around 1800. The accepted principles are: Objective, Offensive, Mass, Economy of Forces, Maneuver, Unity of Command, Security, Surprise, and Simplicity. THE OXFORD COMPANION TO AMERICAN MILITARY HISTORY 557 (John Whiteclay Chambers II ed., Oxford Univ. Press 1999). In unilateral operations, the mission statement reflects a relatively linear process of decision-making from the civilian command authorities through military command channels to the tactical force in the field. In multilateral operations, however, achieving consensus on an agreed and refined mission statement is much more difficult and complex. Reflecting this reality, U.S. Army doctrine warns that:

> [c]ommanders must focus significant energy on ensuring that all multinational operations are directed toward clearly defined and commonly understood objectives that contribute to the attainment of the desired end state. No two nations share exactly the same reasons for entering into a coalition or alliance. Furthermore, each nation's motivation tends to change during the situa-

Even today, there is an undercurrent of opinion amongst the rank and file that immediate operational or situational-dependent convenience can and should serve as a valid excuse for deviating from established legal standards and innate training. This translates into a sense that anything goes so long as it is intended to facilitate accomplishing the mission. Despite this superficial sense, the success or failure of the mission provides the yardstick for measuring the commander's success, and the legal dimension is intertwined as an indispensable strand of overall success or failure. Combat-readiness can be achieved only by melding individuals from disparate backgrounds into a disciplined unit with a fine-edged warrior ethos focused on overcoming any obstacle in order to accomplish the mission. Even in light of the nonnegotiable necessity for accomplishing the mission and the professional military culture that prizes selfless pursuit of shared duty, legal norms provide the glue that bonds individuals into effective operational entities. In the laws and customs of war, to say it plainly, there is simply no room whatsoever for an attitude that proclaims, "the ends justify the means."

You, the young lawyers of tomorrow, are an indispensable dimension of this effort. The detailed prescriptions of the law of armed conflict evolved in response to the demands of tactical and operational pragmatism and the impetus of changing technology, but your legal predecessors provided the necessary expertise in developing the norms that have come to define the very essence of military professionalism. Commanders must balance the need to accomplish the mission against an internalized awareness of the larger legal and ethical context for their actions. This is an important dimension of the discussion related to ongoing operations against transnational terrorism because international discourse tends to be dominated by debates over our differences. In this way, there is a common and altogether false assumption that any reported violation of the *jus in bello* provides disconfirming evidence that the entire legal field is defective and dysfunctional. It goes without saying that you cannot rely on media reports or the impressions of laypersons as the appropriate template for your legal advice. In the legal profession we must be focused on communicating very clearly what the law is, how it's been shifted, and how it's been shaped. As I said before, you cannot forget that there is so much more common ground with our friends and allies than there is conflict. Terrorists, on the other hand, define themselves and their operations in contradistinction to the established norms of international law and the expectations of civilized society.

By extension, international media outlets and laypersons tend to focus on the outliers and areas of disagreement. Indeed the occasional evidences of legal uncertainty and ambiguity are trumpeted as evidence of a disconfirming norm that there is no law at all. You've heard this in shorthand, for example, in reference to descriptions of the detention facility at Guantanamo Bay, Cuba as a "black

tion. National goals can be harmonized with an agreed-upon strategy, but often the words used in expressing goals and objectives intentionally gloss over differences. Even in the best of circumstances, nations act according to their own national interests. Differing goals, often unspoken, cause each nation to measure progress differently. Thus, participating nations must agree to clearly defined and mutually attainable objectives.

DEP'T OF ARMY, F.M. 100-8, THE ARMY IN MULTINATIONAL OPERATIONS, p. 1-2 (1997).

hole" where no law exists. This is simply an inaccurate caricature of the operations at Guantanamo Bay and the legal framework that governs the operations of United States armed forces. Because we share the normative structure of the law and customs of war with professionalized military forces all over the world, you will find rules of engagement written in a variety of languages that describe virtually identical operational guidance. Bangladeshi forces going into operations in Haiti had common rules of engagement written by American lawyers, yet they understood them and applied them correctly because they operated under the umbrella of military professionalism grounded in respect for the underlying laws and customs of war. ISAF forces in Afghanistan have often confronted radically differing interpretations and guidance regarding the application of jus in bello and occasionally conflicting treaty derived human rights obligations, but make no mistake about the fact that the vocabulary and training spring from a common corpus and share a common fidelity to the lawful accomplishment of the mission.

The challenge we confront as we conduct kinetic operations against terrorist cells or an individual terrorist is to use the existing framework of law to its fullest extent to accomplish the operational mission and to bring victory. These precepts date from the very beginning of military history in one way or another. Their roots run to the practices of the Greeks and Romans. In fact, the laws and customs of war originated from the unyielding demands of military discipline under the authority of the commander or king whose orders must be obeyed. Writing in 1625, Hugo Grotius documented the Roman practice that "it is not right for one who is not a soldier to fight with an enemy" because "one who had fought an enemy outside the ranks: and without the command of the general was understood to have disobeyed orders," an offense that "should be punished with death."[20] The modern law of armed conflict is nothing more than a web of interlocking protections and legal obligations held together by the thread of respect for humankind and a reciprocal expectation that other participants in armed conflict are bound by the same normative constraints. This explains its historical roots in conflicts between states and those acting under the authority of states. In practice, you must understand that the historical development of the laws and customs of war has been so infused in military practices that they are inherently designed to function appropriately in the field where people are under enormous personal and professional pressures, and in the midst of mind-numbing violence and operational uncertainty.

Remember that our goal is to win, but to do so in a manner that actually preserves long-term victory. The ancient prohibition against poisoning enemy water sources or mistreating enemies who have fallen into your custody are examples of these principles in that they are designed to facilitate a lasting period of peace upon the termination of hostilities. The modern extrapolation of human rights principles into the field of military operations provides a more current and

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[20] HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 788 (Francis W. Kelsey trans., Oxford Univ. Press 1925). Grotius explained the necessity for such rigid discipline as follows: "The reason is that, if such disobedience were rashly permitted, either the outposts might be abandoned or, with increase of lawlessness, the army or a part of it might even become involved in ill-considered battles, a condition which ought absolutely to be avoided." *Id. at 788-89.*

topical, if somewhat controversial, example. In this context, the core premises of the laws and customs of war originate in the Roman legions, and to be clear, predate any of the web of interlocking treaties that developed in modern times.

We have also seen these principles clouded somewhat in recent years by their migration down the spectrum of conflict to non-international armed conflicts. You would properly infer from the comments I just made that the laws and custom of war became solidified as comprehensive legal norms in the context of conflicts between states that began to be governed by positive bodies of treaty law. In that era, the law was rather simple as a positivist premise. One needed only to look at the applicable array of treaties for a specifically applicable prohibition or policy pronouncement. The past decade has witnessed an uneasy erosion of this certainty as we have seen the predominance of armed conflicts conducted by or between non-state actors. The migration of norms down the spectrum of conflict is exemplified by the inclusion of the criminal prohibitions in Article 8(2)(e) of the Rome Statute, but you should not be lulled into a sense of complacent confidence that the Rome Statute provides the all-inclusive guidance for modern conflict with transnational terrorist actors. In other words, any armed conflict that is not an international armed conflict between states will be governed by a definitive application of the laws and customs of war, yet the precise contours of that application are indistinct and evolutionary. As one of the Nuremberg prosecutors mused, "the law of war owes more to Darwin than to Newton."[21] Because the migration of those norms is ongoing, their specific application remains uncertain at times. In other words, there may be treaty principles, operational ambiguity, and comprehensive customary international law operating in the same battle space at the same time. The phraseology of the rules may be identical, but their application is inherently complex. I would be less than candid with you, however, if I tried to convince you the world needs more law regulating the conduct of hostilities—what we need is more intellectual honesty in articulating and applying the parameters of the existing norms, and more good faith discussions on these issues with our friends and allies.

You should also remember that in international law today there is no legal state known as a "transnational armed conflict" which might be defined to incorporate operations against non-state actors whether they be terrorists, transnational drug dealers, international criminal enterprises, or otherwise. This necessarily raises the question of how our current legal framework for regulating conflict interfaces with existing human rights regime. In other contexts, states confront the legal imprecision between the law of occupation derived from the Geneva Convention for the Protection of Civilians and the larger but distinct field of human rights. How do the established principles for targeting overlay in all operational contexts? I believe that we need to have these debates with friends and allies, but we cannot be dissuaded from the overall imperatives of lawful mission accomplishment or the quintessential role for governments to defend the lives and property of their citizens.

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[21] Thomas F. Lambert Jr., *Recalling the War Crimes Trials of World War II*, 149 MIL. L. REV. 15, 23 (1995).

We do indeed face a continuing tension between the law that we apply and the overall legitimacy of coalition operations. Nevertheless, the goal is ultimate and sustainable victory. The more festering legal imprecision that we permit the more uncertainty we create, which in turn endangers our long-term strategic objectives. Remember that the entire body and customs of war came from the desire to solidify long-term victory. It is no different in this modern struggle against transnational terrorists. In this context, I was struck recently by the characterization of U.S. armed forces as "modern day Mongols" who wreak destruction indiscriminately and without remorse. This is simply absurd in fact. On the other hand, the perceptions may be the most certain predictor of long-term victory in our current struggles. The professional soldier and the seasoned and informed international lawyer rebel against the mischaracterization of modern military professionals as modern day Mongols. In fact, if that perception becomes entrenched in many parts of the world it does not matter how lawful we are, nor how much we pride ourselves in our insular bubble on our respect for and enforcement of the laws of war. We must confront this lingering taint of delegitimization. This persistent subtext of illegitimate military conduct actually plants the seeds for sustained conflict. I simply do not want to see my grandchildren involved in an intractable struggle against transnational terrorist actors. To be plain about it, this linkage between law and legitimacy is absolutely vital for us to master if we are to achieve a sustainable peace.

Let me give you a concrete example of what I regard as normative imprecision and your correlative duty to confront those who would unduly inhibit lawful conduct of hostilities using ill-conceived artificialities and overly fine legal distinctions. As you know, the basic tenet of military necessity provides a touchstone for every act of military forces in every operational context. For every single tactical, operational, or strategic objective there is an accompanying and underlying articulation of core military necessity. This, incidentally, is infused into the class writings on the conduct of Just War Theory from which we derive our modern *jus ad bellum* concepts. In this light, it is not surprising at all that Article 23 of the 1899 Hague II Convention expressly stated that it was forbidden "[t]o destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." This same language showed up in Article 8(2)(b)(xiii) and 8(2)(e)(xii) of the Rome Statute of the International Criminal Court. Based on their belief that the concept of military necessity ought to be an unacceptable component of military decision-making, some civilian delegates sought to introduce a totally subjective threshold by which to second-guess military operations. They proposed a verbal formula for the Elements of Crimes that any seizure of civilian property would be valid only if based on imperative military necessity.[22] The Elements of Crimes are designed to document the overarching consensus on the precise details needed to substantiate war crimes allegations in modern practice.

[22] KNUT DÖRMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 249 (Cambridge Univ. Press 2002).

Requiring the on-scene commander to demonstrate a wholly inarguable "necessary military necessity" would have been contrary to the entire history of the law of armed conflict. The concept of military necessity is ingrained into the law of armed conflict already at every instance and in every article where it is warranted by practice; introducing such a gradation would have built a doubly high wall that would have had a paralyzing effect on military action that would have been perfectly permissible under existing law prior to the 1998 Rome Statute. This was in no way the intent of the drafters of the Rome Statute. Moreover, a double threshold for the established concept of military necessity would have clouded the decision-making of commanders and soldiers who must balance the legitimate need to accomplish the mission against the mandates of the law. Of course, any responsible commander and lawyer recognizes that because the corpus of humanitarian law enshrines the principle of military necessity in appropriate areas, the rules governing the conduct of hostilities cannot be violated based on an *ad hoc* rationalization of a perpetrator who argues military necessity where the law does not permit it. Such a subjective and unworkable formulation would have exposed military commanders to after-the-fact personal criminal liability for their good faith judgments based only on after-the-fact subjective assessments. The ultimate formulation translated the 1899 phrase into the simple modern formulation "military necessity" that every commander and military attorney understands. The military lawyers among the delegates were among the most vocal in defeating the suggestion to change the law precisely because the elements for such a crime would have been unworkable in practice. The military officers participating in the Elements of Crimes discussions were focused on maintaining the law of armed conflict as a functional body of law practicable in the field by well-intentioned and well-trained forces.

The importance of this role will not diminish in the foreseeable future. Indeed, I would argue that continued ownership of the legal regime by military professionals is essential if we are to sustain the core professional identity system of military forces. Failure to keep the legal norms anchored in the real world of practice would create a great risk of superimposing the humanitarian goals of the law as the dominant and perhaps only legitimate objective in times of conflict. This trend could result in principles and documents that would become increasingly divorced from military practice and therefore increasingly irrelevant to the actual conduct of operations. The real challenge for us in modern practice is to translate many other norms from their 19th century context into the reality of 21st century conflicts. We must continue to develop and clarify legal principles that are applicable and which forestall the inevitable seeds of second-guessing. In passing, I should pause to note that if the proposed formulation had indeed become embedded as a modern legal principle, the effect would have produced an almost unattainable standard of military necessity and given terrorists and other non-state criminal actors a huge propaganda victory. Such a rule would have artificially generated the seeds of their own legitimacy. At the same time, let me reiterate that no responsible commander ever authorizes or intentionally targets civilians or civilian commanders. Ever. That's a binding core professional norm to which I will return in a matter of minutes. How many times can

you pick up the paper and the headline will be, "Allied forces killed X number of civilians"? The implication of that headline being of course it was an intentional target. The laws and customs of war never permit the intentional targeting of civilians or their property. This is the correct understanding of the enduring principle of distinction in armed conflicts, and you must be both the arbiters of that principle and its enforcers when it is contravened during conflicts.

Lastly, the principle of distinction does indeed raise another modern day wrinkle that we must understand and apply correctly in the context of modern operations against terrorists. The text of Protocol I employed a subtle means of appearing to define away the principle of unlawful combatancy. In attempting to gain the broadest possible protections for civilians, the text implicitly eroded the 1949 notions of combatancy by virtue of an exclusive dualist definition. For the first time in international law, Protocol I attempted to define the term "civilian" purely in contradistinction to the opposing status of combatant. Article 50 embodied this dualist view by defining a civilian as "any person who does not belong" to one of the specified categories of combatant.[23] This provision was intentionally inclusive in contrast to the categories of protected persons defined in the Fourth Geneva Convention of 1949. Thus, a literal reading of the plain text means that a civilian is anyone who is not a combatant. An unlawful combatant would therefore be legally equated to a civilian, and hence entitled to the panoply of protections accorded to that class of persons. This in particular explains the perspective from which many international pundits portray any use of force against terrorists as an unlawful application of military force, or any international killing of any terrorist as an unlawful premeditated murder.

In theory, the dualist view enshrined by the plainest reading of Protocol I would protect any non-state actor who elected to participate in hostilities from the effects of their misconduct. By definition, an unlawful combatant falls outside the traditional characterizations that would otherwise entitle him or her to prisoner of war status. Article 50 seems to embody a system in which there is no theoretical gap; a person is either a combatant or a civilian. This leads to the ineluctable presumption that an unlawful combatant who fails to qualify as a prisoner of war must be a civilian entitled to protection. Being legally classified as a civilian puts the military forces opposing terrorist activities into the quandary of either supinely permitting the planning and conduct of terrorist activities or violating the clear legal norm that the "civilian population as such, as well as individual civilians, shall not be the object of attack."[24] There is no middle ground if you look at the text of the protocol, and those of you who have even a passing familiarity in this field will recall that Protocol I applies, by its express terms, only to conflicts of an international character. This attempt to superimpose the principles derived from positivist treaty law applicable to conflicts between state actors in a rigid technocratic manner into the context of struggles against non-state entities is problematic to put it mildly. The modern challenge is to properly apply the principle of distinction in a non-international armed conflict

[23] Protocol I, *supra* note 8, art. 50, ¶ 1.

[24] Protocol I, *supra* note 8, art. 51, ¶ 2.

(or, what may be more properly thought of as armed conflict against transnational terrorist organizations). The attempt to create clean and mutually exclusive categories of civilians or combatants cannot be superficially imposed on this new kind of conflict, and in legal terms, such an attempt fails of its own logic because Article 75 of Protocol I implicitly recognizes the third category of unlawful participants in conflict, or in the modern but terminologically troublesome nomenclature, unlawful combatants. Thus, while the law is clear that civilians may never be intentionally attacked, the debates rage in international circles over the circumstances under which the protection may be forfeited and which the attacker may lawfully apply the other precepts of *jus in bello.*

The logical implication of this principle only becomes apparent when we comprehend the proper scope and articulation of the proportionality principle. The Rome Statute of the International Criminal Court embeds its modern incarnation in Article 8(2)(b)(iv). This is a perfect example of the modern practice of migrating the core normative formulations into the context of non-international armed conflicts as Article 8(2)(e)(iv) extrapolates precisely the same text into all conflicts. This articulation of the proportionality principle is commonly implicated in the context of drone strikes. Article 8(2)(b)(4) of the Rome Statute sets out the modern scope of the proportionality principle that evolved both from the reservations taken by NATO states as they ratified Protocol I and its consistent application by states in the context of actual armed conflicts.[25] Proportionality is a term of art grounded in the *jus in bello*, but derived from moral and philosophical roots.[26] You may not cause suffering or injury to non-combatants or civilian objects that would be clearly excessive in relation to the concrete and direct overall military advantage anticipated. In practice, operational mistakes are indeed an unfortunate reality that nonetheless cannot carry an automatic form of strict criminal culpability. Seldom, if ever, will the media describe the painstaking process employed by professionalized military practitioners to comply with *jus in bello.* At the same time, there is an inevitable tendency for practitioners to discount operational errors through the expedient of simply asserting that mistakes are made but that such errors are the regrettable exception given the high degree of legal technicalities. The public has a justifiable expectation of perfection when the ultimate assertion of governmental authority, *i.e* military force, is applied in the name of any modern sovereign state to achieve its purposes. The tendency to discount our inevitable errors and occasional oversights is overwhelming and unhealthy because it leads to an insulated military mindset. Blanket defensive assertions by military practitioners do little to convey a sense of confidence in the moral purpose of the attacker, and may actually strengthen the long-term sustainability of the terrorist/insurgent enemy.

In the criminal formulation of the Rome Statute, a violation of *jus in bello* is committed only through the *intentional* launching of an attack predictably anticipated to result in disproportionate and hence unlawful damage. For example, as

[25] Rome Statute of the International Criminal Court, *supra* note 16, art. 8, ¶ 2(b)(iv).

[26] Robert D. Sloan, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT'L L. 47, 75-76 (2009).

I've already noted this morning, no responsible commander intentionally targets civilian populations, and the law on this matter is clear and fundamental.[27] Nor would a responsible military commander ever launch an attack intentionally against civilians or civilian objects or against a target with reasonably anticipated disproportionate results. In the age of 24-hour news cycles, such a commander would foolishly imperil the overarching operational objectives but would also betray the core obligations of the military profession. So, let me pause while we reflect on these truths. If a media outlet or antagonist throws out numbers and press releases to report that a drone strike killed "X" number of people or damaged particular civilian property, the presumption cannot be automatically that those were disproportionate drone strikes. The war crime, the crime that defines the boundaries of professional practice, begins with the word intentionally. The key focus is not on the damage inflicted but on the information available at the time of the attack and the precautions taken by the commander. As an aside, I am proud that the Rome Statute language includes damage to the environment within the purview of the crime of intentionally launching an attack that can be anticipated to result in disproportionate damage. This extension of the law is entirely warranted and to me represents a concrete advancement in our legal understanding of the protections afforded by the applicable *jus in bello.*

From my perspective, States can make dramatic improvements to the overall credibility and operational effectiveness of operations if they are able to be forthright in articulating the positive legal rationales for their choice of targets as well as the means employed in striking a particular target. This is far more than a mechanistic defense of the military mindset; rather it recognizes the overarching operational imperative to show the world that the laws and customs of war are scrupulously recognized and followed. There is an unfortunate and unseemly assumption in many parts of the civilian culture that a professionalized military becomes lackadaisical in the use of deadly military force. This is a corrosive and absolutely unfounded slander in my view. I would argue that we need to be much more aggressive as a matter of national policy in conjunction with our allies and advocate affirmatively why we have complied with the law in every disputed circumstance. Compliance is inextricably linked to our legitimacy as an indispensable aspect of preserving the political and economic strategic support for the conduct of hostilities against terrorist actors.

Before we close by discussing the three modern trends that you should monitor, let's also focus on the phraseology "clearly excessive in relation to the overall concrete and direct overall military advantage." The words "clearly" and "overall" appear for the very first time in international law in the Rome Statute, though they are reflective of the reservations of NATO states in their instruments of ratification to Protocol I. That is the correct definitive statement of the law. In particular, I would point out that these concepts are not artificially constrained by geographic or temporal limitations, and the footnote to the Elements of Crimes for Article 8(2)(b)(iv), which as you will recall was adopted by international consensus of all states, expressly embeds that understanding. To put this in per-

[27] Protocol I, *supra* note 8, art. 52.

spective, we will engage in debate and searing analysis over the proper scope for the use of military forces under the *jus ad bellum* framework. However, within the context of *jus in bello*, once we are lawfully engaged in hostilities, the modern definition of proportionality very clearly says there are no automatic *a priori* temporal or geographic limits.

Of course, this principle cannot be understood or applied in isolation. The *jus in bello* factors we have discussed this morning operate as an integrated and completely inseparable legal template. In other words, *jus in bello* is best thought of as a complex pallet of legal obligations that are independent of context, convenience, or operational imperatives. They mark the dividing line between legitimacy and wholly inappropriate applications of force. For the military, they define the professional norm and suffuse compliant units with an indispensable unity of purpose and cohesion. Framed another way, ignorance or willful violation of these norms can bring nothing but shame, disregard in the eyes of our allies and friends, and ultimate ineffectiveness in the struggle against transnational terrorists.

Three Modern Trends

Let me close by briefly remarking upon the three key areas that I should think are vital for your further involvement in this field.

Firstly, there is a growing line of argument that human rights principles mandate an independent and impartial investigation of any alleged violation of the laws and customs of war. On its face, this principle is completely uncontroversial. As a legal practitioner conducting operations, you must be vigilant in identifying and investigating any shade of illegality in the conduct of operations. That is your legal duty, and is in fact one of the most important services that your expertise and insight can provide to commanders and to those warriors who are the essential components of victory over our enemies. Indeed, in the words of the Goldstone Report convened to examine Israeli operations in Gaza in 2009, "both international humanitarian law and international human rights law establish an obligation to investigate and, if appropriate, prosecute allegations of serious violations by military personnel whether during military operations or not."[28] The Report states the uncontroversial conclusion that Israel had the obligation to investigate allegations of grave breaches of the Geneva Conventions,[29] but goes on to postulate a parallel obligation to investigate actions in the midst of hostilities under international human rights law.[30]

Asserting an unspecified source of international common law, the Report refers to human rights jurisprudence drawn from regional tribunals (which of course is not binding on Israel as a matter of hard law) to assert that the responsibility to investigate "extends equally to allegations about acts committed in the

[28] Rep. of the United Nations Fact-Finding Mission on the Gaza Conflict, 12th Sess., ¶ 1804, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009).

[29] *Id.* ¶ 1851.

[30] *Id.* ¶ 1806.

context of armed conflict."[31] The Report then concluded that the use of operational debriefings does not satisfy the requirement for an independent and impartial tribunal.[32] Quite the contrary, in the view of the Commission, operational debriefings actually frustrate a genuine criminal investigation because they often occur only after the passage of some time, often result in destruction of the crime scene,[33] and delay the prompt commencement of an independent and impartial investigation.[34] The Report drew an artificial and wholly unsubstantiated conclusion that a delay of some six months from the operational debriefing to a full criminal investigation by the Military Police Criminal Investigation Division is excessive and, therefore, *per se* impermissible as a failure of the obligation "to genuinely investigate allegations of war crimes and other crimes, and other serious violations of international law."[35]

Thus,

> [t]he Mission holds the view that a tool designed for the review of performance and to learn lessons can hardly be an effective and impartial investigation mechanism that should be instituted after every military operation where allegations of serious violations have been made. It does not comply with internationally recognized principles of independence, impartiality, effectiveness and promptness in investigations. The fact that proper criminal investigations can start only after the "operational debriefing" is over is a major flaw in the Israeli system of investigation"[36]

The Israeli response announced on July 6, 2010, revealed that after investigating more than 150 incidents, of which nearly 50 resulted in formal criminal investigations, military officials decided to take disciplinary and legal action in 4 cases, including some that were highlighted by the Goldstone Report.[37] The subtlety that was lost on the Goldstone commissioners is that operational debriefings are an essential aspect of the ebb and flow of tactical operations and an entirely appropriate extension of the commander's obligation to ensure that operations are conducted in accordance with the intent of the orders given and within the boundaries of the law. In fact, the failure to inquire into relevant circumstances or allegations of unlawful uses of force might well be taken as an abdication of the inherent obligation of a commander to ensure the compliance and respect for *jus in bello* at all times in all operational contexts. The official Israeli response explains that the purpose of a preliminary command investigation, just like those employed by every professionalized modern military is to collect available infor-

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[31] *Id.* ¶ 1811.

[32] *Id.* ¶ 1959.

[33] *Id.* ¶ 1817. For example, ballistic evidence is not preserved as weapons used in the incident are not confiscated.

[34] *Id.* ¶ 1820.

[35] *Id.* ¶ 1823.

[36] *Id.* ¶ 121.

[37] Press Release, Israeli Defense Fund, IDF Military Advocate General Takes Disciplinary Action, Indicts Soldiers Following Investigations into Incidents during Operation Cast Lead (July 6, 2010), *available at* http://dover.idf.il/IDF/English/Press+Releases/10/07/0601.htm.

mation related to potential wrongdoing. It emphasizes that the operational debriefings do not replace a criminal investigation, but "serve as a means of compiling an evidentiary record for the Military Advocate General, and enabling him, from his central vantage point, to determine whether there is a factual basis to open a criminal investigation."[38] The advice of a military judge advocate is determinative of the ultimate disposition of a particular case rather than the preliminary commander's investigation.

This dimension of the Goldstone Report - despite my deep personal respect for Justice Goldstone - represents a pernicious expansion of international common law in a manner that would dramatically undermine military operations. You, the lawyers must conduct appropriate investigations, but do so within a tactically relevant framework. The Israeli Supreme Court, sitting in its capacity as the High Court of Justice, charged with protecting and vindicating human rights standards, concluded that command investigations are "usually the most appropriate way to investigate an event that occurred during the course of an operational activity."[39] Indeed, the essence of command authority is to understand the flow of battle and to take ameliorative actions swiftly when needed. Taken to its logical end, this human rights grounded perspective on investigation of alleged wrongdoing during hostilities would paralyze operations and erode the commander's ability to direct hostilities.

It is simply ludicrous to suggest that ongoing operations be halted at the slightest suggestion of impropriety to permit ballistics analysis of any weapons that might have been involved in the firefight and to subject all potentially involved personnel to full-blown criminal investigations as precondition for compliance with the laws and customs of war. Rather than striving to defeat a superior adversary on the field of battle, the enemy could literally disarm entire units merely by alleging violations on the part of an attacking force. The surge in spurious allegations surely would undermine the credibility of the legal norms in the minds and methodology of attacking forces. In fact, if every report of possible wrongdoing required operational commanders to freeze the fight, during which an enemy could resupply, refit, and retrench either figuratively or literally, a newly-imposed Goldstone-inspired investigative standard would actually create an almost overwhelming disincentive to report and document war crimes.

The laws and customs of war are designed to maximize respect for human dignity and humanitarian norms, even as they facilitate the lawful accomplishment of military objectives. The textual requirements of Protocol I already balance the need of the commander to effectively conduct military operations with the overriding duty to ensure compliance with the laws of war or to take appropriate remedial or investigative action.[40] Article 86, for example, represented a major development in the field as it gave textual formulation to the historically

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[38] *Id.*

[39] *See* Mor Haim v. Israeli Defence Forces, HCJ 6208/96 [1996] (Isr.) (addressing appropriate standards for investigating the circumstances of the death of a soldier during an IDF operation).

[40] *See generally* Protocol I, *supra* note 8.

developed doctrine of superior responsibility.[41] Paragraph 2 of Article 86 places investigative responsibility on the shoulders of responsible commanders by stipulating that a superior may be criminally liable for the crimes of a subordinate if three criteria are proven: (1) senior-subordinate relationship; (2) actual or constructive notice on the part of the commander of wrongdoing; and (3) failure to take measures to prevent the crimes.[42] It is the commander's obligation to take all "feasible measures" to prevent or to repress breaches of the laws of war.[43] Furthermore, the laws and customs of war expressly obligate the commander to prevent and "where necessary, to suppress and to report" violations to competent authorities.[44] Thus, the *per se* assertion that commanders do not have authority to investigate wrongdoing in their own units and that only full-blown criminal investigations conducted by external authorities are compliant with the international standards would erode the preexisting obligation and authority of the commander and undercut the obligations of humanitarian law. Such an untenable and unworkable extension of investigative principles into the context of conflict is both unwarranted and illegitimate.

Secondly, we need to reconceive the way that we apply the law of command responsibility. Although Nuremberg effectuated the 1907 Hague Regulations in a manner and spirit that created enduring truths and literally changed the world, some of its most signal achievements also represent its most threatened legacy. The principle of personal accountability is the very heart of the Nuremberg achievement, yet paradoxically it's most potent and politically controversial dimension. Herman Göring complained about the "damned court – the stupidity," and asked his American psychiatrist, "why don't they let me take the blame and dismiss these little fellows – Funk, Fritzsche, Kaltenbrunner? [I never heard of most of them until I came to this prison!]"[45] Justice Jackson recognized that a modern era of accountability would necessarily confront the dual realities of sovereign immunity and superior orders. He had enough insight to recognize that with the doctrine of official immunity or head of state immunity "usually is coupled another, that orders from an official superior protect one who obeys them. It will be noticed that the combination of these two doctrines means that nobody is responsible. Society as modernly organized cannot tolerate so broad an area of official irresponsibility."[46]

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41 Protocol I, *supra* note 8, art. 86.

42 Protocol I, *supra* note 8, art. 86(2); *see also* Commentary on Additional Protocols I and II, part V, art. 86, ¶ 3543 (June 8, 1977).

43 Protocol I, *supra* note 8, art. 86(2).

44 Protocol I, *supra* note 8, art. 87(1).

45 ROBERT GELLATELY & LEON GOLDENSOHN, THE NUREMBERG INTERVIEWS: AN AMERICAN PSYCHIATRIST'S CONVERSATIONS WITH THE DEFENDANTS AND WITNESSES 101 (2005).

46 *International Conference on Military Trials: London 1945, Report to the President by Mr. Justice Jackson, June 6, 1945*, THE AVALON PROJECT: YALE LAW SCHOOL, http://avalon.law.yale.edu/imt/jack08.asp (last visited Oct. 17, 2011) (going on to opine that "superior orders cannot apply in the case of voluntary participation in a criminal or conspiratorial organization, such as the Gestapo or the S.S. An accused should be allowed to show the facts about superior orders. The Tribunal can then determine whether they constitute a defense or merely extenuating circumstances, or perhaps carry no weight at all.").

Paraphrasing Justice Jackson's assessment of the International Military Tribunal at Nuremberg, "no history" of a modern conflict that includes mass atrocities will be "entitled to authority" if it ignores the factual and legal conclusions engendered by the work of a court that investigates and prosecutes the officials who orchestrate the power of the state into a concerted criminal enterprise.[47] The revocation of immunity stands for the principle that personal immunity flowing from the official position of an accused is property of the state and cannot be perverted into an irrevocable license to commit the most serious crimes known to mankind. Not only does a sovereign state have the right to revoke immunity flowing from constitution or statute, the Iraqi Cassation[48] decision upholding Saddam Hussein's death sentence even concluded:

> it is the duty of the state to exercise its criminal jurisdiction against those responsible for committing international crimes since the crimes of which the defendants are accused of in the Dujail case form both international and domestic crimes and committing them constitutes a violation of the International Penal Code and the Law of Human Rights while at the same time violating Iraqi laws.[49]

The same sentiment flows from the authority of the commander charged with supervising operations in accordance with the laws and customs of war. In perhaps the clearest jurisprudential statement regarding the specific liability attaching to authority figures during operations, the Cassation [or Appeals] Panel wrote that crimes committed while subject to a grant of immunity should be subject to more severe punishment. This principle is worthy of emulation in other tribunals as other nations strive to apply the substantive content of international law, and may over time represent the single most important legal concept to come out of the Al-Dujail verdicts. The cloak of official immunity is a factor for aggravating the sentence because in the words of the Iraqi jurists:

> a person who enjoys it usually exercises power which enables him to affect a large number of people, which intensifies the damages and losses resulting from commitment of crimes. The president of the state has international responsibility for the crimes he commits against the international community, since it is not logical and just to punish subordinates who execute illegal orders issued by the president and his aides, and to excuse the president who ordered and schemed for commitment of those crimes.

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[47] *Id.* (stating, "We have documented from German sources the Nazi aggressions, persecutions, and atrocities with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people.").

[48] Iraq's court of appeals.

[49] Iraqi High Criminal Court, Cassation Panel, decision No. 29/c/2006 of December 26, 2006, Al-Dujail Final Opinion (Iraq) *unofficial English translation available at* http://www.law.case.edu/saddamtrial/documents/20070103_dujail_appellate_chamber_opinion.pdf [hereinafter Al-Dujail Final Opinion]; *see also* THE POISONED CHALICE: A HUMAN RIGHTS WATCH BRIEFING PAPER ON THE DECISION OF THE IRAQI HIGH TRIBUNAL IN THE DUJAIL CASE, HUMAN RIGHTS WATCH 32 (June 2007) *available at* http://hrw.org/backgrounder/ij/iraq0607web.pdf (noting that the brevity and timing of the appeals decision has been the subject of heavy criticism).

> Therefore, he is considered the leader of a gang and not the president of a state which respects the law, and therefore, the head chief is responsible for crimes committed by his subordinates, not only because he is aware of those crimes, but also for his failure to gain that awareness.[50]

Because non-state actors, who by definition have these loose command structures, confront the coalition of civilized states, we must reframe our juridical approach to these issues. Terrorists by definition operate with loose operational structures, and in many instances, it will be impossible to trace a definitive linear hierarchal line of authority. That's the first problem. The second problem, of course, is that in many current operations coalition forces may actually be allied with those same kinds of groups—non-state actors and sub-state actors with very shady lines of authority. Lawyers must do all that is feasible to ensure that the commanders of these loose organizational structures use their authority to enforce the legal norms insofar as possible. We cannot permit the operations of professionalized forces or the overall strategic mission to be endangered by the conduct of coalition allies with such unconventional command structures. Conversely, anything less than our best efforts to educate forces and enforce compliance with the laws and customs of war would effectively immunize our enemy from the consequences of intentional disregard for the law.

There simply is no moral or legal equivalence between terrorist organizations and actors and the professionalized armed forces of the world. The skeptics among you might ask, "why would there be such a bright line intellectual and morally defensible distinction?" In my view, the reason derives from the very principle of the law of armed conflict. The underlying principle of law is the law of effective responsibility and effective control. On the one hand, the current formulations of the legal test for assessing effective control are a very westernized hierarchical line and block charts. Effective control is far more than a simple checklist of factors to be considered by a court. The current judicial template is too rigid and formulaic and jurists tend to cram situations into that template that do not fit. The world has changed. The methods for conducting and controlling operations have shifted. The law needs to change accordingly. You will be faced in practice with the challenge of reconceptualizing the scope of effective control by putting responsibility precisely where it lies most authoritatively. To be clear, the commander bears this responsibility. It is the commander in a transnational context that initiates and controls violence. Regardless of the form of the lines of authority, or the precise control over the actions of subordinates who may operate on another continent with little or no communication, the person who initiates violence and yet fails to institute mechanisms for compliance with the laws and customs of war should bear ultimate criminal responsibility for those acts. This is far more important than a simple application of criminal norms. The commander bears a near-sacred obligation to implement and enforce the laws and customs of war and therefore should face accountability for the willful failure to do so. In my view, it should be very close to a strict liability test because only the authoritative commander can constrain the use of force. That is

[50] Al-Dujail Final Opinion, *supra* note 49.

the very essence of command, and that is why commanders have the affirmative obligation under both human rights law, and the laws of body and customs of war, to sustain the application of that war in a lawful way. Some would say that means that terrorists who have initiated violent activities against civilians are always responsible for those acts, and to that I say, "Amen." That's the way it should be.

Finally, let me close by briefly mentioning the current disconnect between the law regulating the resort to force and the law that we have discussed which applies to the actual conduct of hostilities. We have in practice widely conflated the concepts governing the use of force and the law of *jus ad bellum* with the concepts and constraints embedded in the law regulating the actual conduct of hostilities, the *jus in bello*. I do not have the time to elaborate on all of the implications of this conflation. The panels to come today will describe many of the challenges posed by current operations. As only one example of the thicket of legal issues, a wide range of often-conflicting rationales will justify strikes against terrorists. Even if we can properly categorize a particular terrorist actor as a civilian entitled to protection under the laws and customs of war, it may well be legally possible to internationally target that terrorist. In this vein, I would urge us to revisit the law of reprisals. For those uncomfortable with the word reprisals because it implicitly carries the presumption of illegality in response to a prior wrong, let me characterize the concept as a "responsive use of force." There is no definitive basis in international law today to argue that a terrorist who internationally kills and maims innocents should be protected from the kinetic consequences of those crimes by an antiquated reluctance to engage in a limited form of reprisal. States have the appropriate right to use force to protect the lives and property of their citizens against the depredations caused by transnational terrorists. To be sure, such offensive acts must still conform to the larger legal regime imposed by the *jus in bello*. We must strive for a clear and internationally authorized conceptual basis for striking back against terrorist cells. The objective is to win in the strategic battlefield overseas and in the courts around the world. Conversely, a clear understanding of the consensus views related to the interrelationship between the jus ad bellum rights of states to exercise their inherent and sovereign self-defense using the appropriate *jus in bello* will prevent the manipulation of those norms or the inappropriate imposition of criminal liability based on politicized manipulation of the law itself. Until we can achieve international consensus in reframing the law of reprisals so that terrorists have every expectation of a swift and internationally uncontroversial military response, we will have surrendered the initiative forever to the terrorist enemy.

On that note, I thank you for your patience and for your presence. The panelists to come will no doubt amplify on some of these points, and raise other wrinkles. You are on the side of those who care about the law. You share a belief not only in the efficacy of law but in its larger nobility. I am reminded of the possibly apocryphal story recounted by Leslie Weatherhead from the Battle of the Bulge. In the midst of the German offensive, as American forces were pushed back in the bitter cold, a rifleman was mortally wounded some fifty yards in front of the sagging defensive positions. His buddy saw him lying wounded and im-

mediately left the safety of his foxhole to be at the side of his dying friend. He succeeded in dragging the body back to the friendly positions, but at the cost of a grievous and obviously fatal wound. The infantry company commander was incensed and berated the dying man. "Why did you do that! That was idiotic! It's not worth it – now I've lost two of my very best!" The dying infantryman looked back at the officer and replied, "Oh yes sir. It was worth it. When Jack looked up at me and said, 'I knew you'd come.' And then he died in my arms."

There is no doubt that you will confront enormous challenges and face sometimes daunting difficulties. At the risk of sounding maudlin, you must never forget that it is the fabric of adherence to the laws of war that provides a commonality of values that bind professional military forces all around the world. The current war against terror really does get back to an elemental struggle between those who believe in the rule of law and those who do not. As lawyers, you should stand in unwavering unity with those who support civilized societies. When the integrity of the law is challenged, and perhaps undermined to the operational advantage of transnational terrorists whose very premise is to ignore the law, you must confront that challenge. To the extent that we allow the framework of the laws and customs of war to be perverted in its core purpose by the enemy, we actually endanger the very vitality of law itself. That is why this Symposium is far more important than a simple ivory tower intellectual debate. This is why this discussion matters. You are collectively embarked on a noble calling that is grounded in the inherent power and legitimacy of strong legal grounding. This is not only admirable in an era of shallowness and flippancy, I would argue that it is not just a good idea, it is an absolute necessity in the 21st century. Thank you for your time and your attention.

A Social Justice Theory of Self-Defense at the World Court

James Kraska†

I. Introduction

This article offers a theory of social justice that helps to explain use of force or *jus ad bellum* jurisprudence at the World Court.[1] More precisely, the theory provides a prism for understanding the interpretation of Article 2(4) and Article 51 of the U.N. Charter in cases before the International Court of Justice (ICJ). The judgments and opinions of the ICJ offer an empirical basis for proposing that social justice rationale is a key driver of the Court's major decisions on analyzing questions of *jus ad bellum* in the law of armed conflict. Social justice is derived from critical theory and pragmatism, and the term is used here to mean the use of plenary or administrative power (or in the context of international relations, transnational, or global authority) to achieve equal or at least equitable distribution of scarce resources among many peoples or nations.[2]

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[1] This article uses the term "World Court" to mean the "International Court of Justice." Purists could note, however, that the term "World Court" may refer not only to the ICJ, but also to any of the other international courts located in The Hague, such as the International Criminal Court (ICC), the Permanent Court of Arbitration (PCA) and the Permanent Court of International Justice (PCIJ), an historical court established under the League of Nations.

[2] Jürgen Habermas, *Paradigms of Law*, *in* Habermas on Law and Democracy: Critical Exchanges: Philosophy, Social Theory, and the Rule of Law 14-15 (Michael Rosenfeld & Andrew Arato, eds., 1998).

This article focuses on three ICJ cases involving the use of force by one state against another: *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, (Apr. 19); *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, (June 27); and *Oil Platforms* (Iran v. U.S.) 2003 I.C.J. 161, (Nov. 6). In the first case, the ICJ conducted analysis that provides a glimpse into the reasoning of the Court on *jus ad bellum*. In the latter two cases, the Court passed judgment on the issue of the use of force. The United States was a litigant in the two most important cases regarding the relationship between armed aggression and self-defense, opposing Nicaragua and Iran.[3] Both Nicaragua and Iran were authoritarian states at the time the cases against the United States were before the Court. Similarly, the United Kingdom faced a totalitarian communist nation, Albania, in the *Corfu Channel* proceedings. The United States and the United Kingdom have litigated more cases before the Court than any other countries (22 and 13, respectively). As the progenitors for rule of law in contemporary international politics, it is perhaps unsurprising that the two liberal democracies would utilize the mechanism of the World Court to resolve disputes. Yet, the social justice analytical model for use of force tends to resolve findings of fact and issues of law against the two English-speaking nations. Whereas some scholars have claimed that the judgments of the ICJ are politically-motivated, this article suggests that it may be more accurate to say the judgments of the Court, at least in cases concerning the use of force between states, are philosophically-motivated, but in a way that tends to disadvantage powerful states.[4]

II. Background

Like the issues that come before the U.N. Security Council, the cases that appear before the ICJ are among the most politically salient among states.[5] The relationship between Article 2(4) of the U.N. Charter, proscribing the aggressive use of force, and Article 51 of the U.N. Charter, concerning the inherent right of self-defense, may be called the Charter paradigm—the rule set governing *jus ad bellum*. Professor John Norton Moore concludes the fundamental purpose of the Charter paradigm—the prevention of coercion as a modality of state interaction—simply prohibits the aggressive use of force among nations.[6] The Charter paradigm replaced two thousand years of law and practice rooted in the Just War paradigm. The Just War paradigm grew out of Roman philosophy and Catholic theology, and was based on the notion that initiation of warfare was permissible only if the conflict met certain criteria of political justice, religious doctrine, or

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[3] *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, (June 27). *Oil Platforms* (Iran v. U.S.) 2003 I.C.J. 161, (Nov. 6).

[4] Davis R. Robinson, *The Role of Politics in the Election and the Work of Judges at the Int'l Ct. of Justice*, 97 PROC. AM. SOC'Y INT'L L. 277, 277-93 (2003); Michael Reisman, *Review of Metamorphoses: Judge Shigeru Oda and the Int'l Ct. of Justice*, 33 CAN. Y.B. INT'L L. 185, 185-221 (1995).

[5] ABRAM CHAYES & ANTONIA H. CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INT'L REGULATORY AGREEMENTS 46, 205 (1998).

[6] John N. Moore, *The Use of Force in Int'l Relations: Norms Concerning the Initiation of Coercion, in* NATIONAL SECURITY LAW 69, 112 (John N. Moore & Robert F. Turner eds., Carolina Acad. Press, 2d ed. 2005).

philosophical ethics. The Charter paradigm, on the other hand, shifted analysis toward less subjective factors, while also banning the use of force by states except in self-defense. While a handful of other situations remain in the U.N. Charter era in which states are entitled to use force, such as pursuant to a U.N. Security Council resolution under Chapter VII, or perhaps in fulfillment of regional arrangements under Chapter VIII, the rule against the aggressive use of force dramatically changed the legal, philosophical, and political space in which questions on the use of force were considered.

Under the Charter paradigm, armed attack—or more accurately, armed aggression (*aggression armee* in the equally authoritative French translation)—is made illegal.[7] While the 1928 Kellogg-Briand Pact prohibited the conduct of "war" as an instrument of state policy, the U.N. Charter proscription is much broader. With the Charter, the threat to use force is as much a violation of Article 2(4) as is an actual use of force, foreclosing even minor uses of covert coercion.[8] A complementary bedrock Charter principle is that all nations possess an inherent right of self-defense. Article 51 reflects the customary principle. The two articles—2(4) and 51—constitute the core provisions of *jus ad bellum.* Additional provisions of the Charter and a handful of ICJ decisions complement the two articles. Article 1(1), for example, states, "acts of aggression or other breaches of the peace constitute armed aggression."[9] This text suggests not only that an actual breach of the peace is *prima facie* evidence of aggression, but also that "other breaches of the peace," that are distinct from "acts of aggression," may be considered "armed aggression."[10] Article 39 provides further detail, stating ". . .the Security Council shall determine the existence of any threat to the peace, a breach of the peace, or act of aggression," thereby suggesting that the three terms of art are discrete separate categories.

The "legislative" function of the Charter and the "judicial" function of the Court is relatively contained and limited, so grasping ICJ *jus ad bellum* jurisprudence requires consideration of only a handful of articles from the Charter and judgments of the Court. One goal in delivering opinions of the Court is to provide a guidepost for nations and leaders. Each decision ought to serve not only to resolve conflicts at hand, but also to stand as an authoritative interpretation of the U.N. Charter that can be applied by third parties in conflict settings unrelated to the actual opinion. Surprisingly, however, the ICJ has not done a great job in this regard, and the judges have created widespread confusion over how the Court approaches the most important issues of war and peace.[11] Commentators, scholars, and diplomats have tried to fill the void.[12] In common law countries, law-

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[7] UN Charter, art. 2, para. 4.

[8] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 27-28 (June 27).

[9] U.N. Charter art. 1, para 1.

[10] *Id.* art. 2, para. 4.

[11] JAMES A. GREEN, THE INT'L CT. OF JUSTICE AND SELF-DEFENSE IN INT'L LAW 24-27 (2009).

[12] *See, e.g.*, Josef L. Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872, 878 (1947); *see also,* MYRES S. MCDOUGAL & FLORENTINO P.

yers attempt to reconcile cases by identifying common streams of legal thought that flow through court decisions. But this approach has not proved altogether useful for shedding light on the ICJ's approach to *jus ad bellum* because the Court treats parties that are similarly situated in different ways, revealing a gap between legal doctrine and judicial opinion. This social justice theory attempts to fill that lacuna.

Much of the debate over interpretation of the Charter paradigm pivots on the fundamental purpose of public international law. While the modern state system and classic scholarship concerning the use of force in international law was predicated on war avoidance and conflict prevention—in short, stability—post-modern and contemporary visions expound a different goal, one that has all of the trappings of international social justice. Political scientist Quincy Wright captured the conventional view, when he wrote, "[t]hose who have sought to make. . .aggression identical with injustice have misconceived the function of the term in the Charter and in international law. It is a rule of order, not justice."[13] The idea that international law should be designed to maintain a stable international order is a European concept that was the product of the unfathomable horrors of two world wars—conflagrations that taught the West that the ends of war rarely eclipse the horrendous costs of the fight.

But by the 1960s and 1970s, a fresh vision of international law emerged from newly independent states. Centuries of colonialism, apartheid, foreign oppression, and foreign control of many Third World states influenced the independent states to adopt a different calculus for the purpose of international law, which reduced the preference for systemic and regional stability in favor of achieving a more socially just international system. Market-based international political economy was challenged by the claims of neo-colonialism and dependency theory, and radical ideas for a New International Economic Order.[14] Global media was rejected in favor of a New World Information and Communication Order.[15] The watchword was decolonization and a shift in power and authority from North to South, rather than the maintenance of systemic durability hopelessly rigged in favor of the global North. Much more subtly, but no less real, was an analogous development in international law. While the movement for Third World Approaches to International Law[16] was germinating, the ICJ was already tacitly ap-

FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 232-241 (1961); *see also,* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 182-207 (4th ed. 2005).

[13] QUINCY WRIGHT, THE ROLE OF INT'L LAW IN THE ELIMINATION OF WAR 14 (1961).

[14] The Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (S-VI), U.N. Doc. A/RES/S-6/3201(May 1, 1974), *reprinted in* 13 I.L.M. 715 (1974); Programme of Action on the Establishment of a New International Economic Order, G.A. Res. 3202 (S-VI), U.N. Doc. A/RES/S-6/3202 (May 1, 1974), *reprinted in* 13 I.L.M. 720 (1974); *see also* Introduction to the Rep. of the Secretary-General on the Work of the Organization, 55th Sess. June 16 1973-June 15, 1974, U.N. Doc. A/55/1, *reprinted in* 11 U.N. MONTHLY CHRON. 115, 119 (Aug.-Sept. 1974).

[15] *See, e.g.,* Mustapha Masmoudi, *The New World Information Order*, 29 J. OF COMM. 172, 172-79 (1979).

[16] Referred to as "TWAIL," Third World Approaches to International Law constitutes a revisionist stream of international law scholarship that seeks "to construct alternative visions of modernity and development. . .." BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE 3 (2003); *see also* M. Mutua, *What is TWAIL?,* 94

plying social justice in its judgments.[17] The resulting confusion over ICJ jurisprudence on the use of force has created a vacuum, underscoring the need for a unified theory.

This article unveils a theory of ICJ *jus ad bellum* jurisprudence that is informed by the philosophy of the late John Rawls. Rawls is the key to understanding the ICJ's philosophical approach or a legal theory behind *jus ad bellum* decisions in cases concerning the use of force. This Rawlsian approach to the ICJ constitutes an entirely new methodology to understanding past ICJ decisions, and perhaps offers some guide to predicting the outcome of future disputes before the Court. Although the ICJ still delivers judgments that use conventional language concerning stability and order, the philosophical assumptions implicit in the judgments, and the doubts that are resolved in favor of weaker states, make a convincing case that the Court prefers outcomes that promote a conception of world social justice.

This theory is not normative; I am not necessarily suggesting that the ICJ should in fact approach *jus ad bellum* questions from a Rawlsian perspective. Rather, this approach is empirical. The goal of any theory is to offer some predictive value. Legal theory separates attorneys, who are experts in the law and have the goal of predicting legal outcomes, from legal philosophers, who are free to dream, regardless of the aftermath or actual outcome. Lawyers are paid to advise clients in a predictive manner that optimizes the client's current position and informs the likely course of future decisions. Since this analysis is not normative or doctrinal, it is also not prescriptive. The analysis brings to the surface for closer inspection a number of interesting questions about the nature of the jurisprudence at the ICJ on the use of force. I refrain from teasing out what may prove to be some of the repercussions of the legal theory, and instead set forth the model, and then step away so that readers may form their own ideas concerning whether the evidence supports the hypothesis, and if so, what impact it may have.

This model suggests that we can better understand the ICJ use of force jurisprudence by applying the social justice theory. "Social justice" means the considerations of equity and the division of social and political costs and benefits in society. How are the institutions in a local community or global society structured? These rights and duties are apportioned in a domestic setting through the machinery of executive governance, the legislature, and the courts. The anarchic nature of the international system, of course, lacks the well-developed institutions that inhere to a domestic society. In domestic society, courts exercise plenary jurisdiction over the general public. In international relations, the ICJ, although not competent to adjudicate cases without the consent of the parties, still serves a role in crafting authoritative decisions. In all cases, however, the goals of social

ASIL PROCEEDINGS 31 (2000); *see also* K. Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 WISC. INT'L L. J. 353 (1998); U. Baxi, *What may the Third World Expects from International Law?*, 27 THIRD WORLD Q. 713 (2006).

[17] *See, e.g.*, RICHARD FALK, PREDATORY GLOBALIZATION: A CRITIQUE 14-15 (1999); *see also,* Christine Gray, *The Charter Limitations on the Use of Force: Theory and Practice*, *in* THE SECURITY COUNCIL AND THE USE OF FORCE 86, 87-89 (Vaughn Lowe et al, eds., 2008).

justice are to consider how advantages and liabilities, costs and benefits, are distributed within a polity.

After World War II, social justice seeped into international law and institutions for two reasons. First, the retributive peace at Versailles was largely blamed for the "twenty years' crisis" that led to World War II, so notions of justice became intertwined with security. Second, the process of decolonization exposed the long-standing injustices that fomented wars from Algeria to Vietnam. Much of the U.N. system began to take into account social justice equities in daily operations and long-term planning. The United Nations Educational, Social, Cultural Organization, the U.N. Environment Program, the International Monetary Fund, and the World Bank, for example, were, in large part, created specifically to generate a more just, verdant, and equitable world order. Nations pay dues to the United Nations based upon the size of each member state's economy - with some exceptions that inure to the benefit of developing states, such as China - exceptions that only prove the rule of socially conscious planning at the United Nations.[18] Thus, social justice issues have become a useful lens through which to view some aspects of the international system and international institutions. It is curious then, that the geometry of social justice has not been a greater part of the conventional legal analysis of *jus ad bellum.* The recognition of how the ICJ applies social justice theory to questions of *jus ad bellum* is long overdue.

What informs ICJ *jus ad bellum* jurisprudence? Certainly, the provisions of the U.N. Charter provide underlying authority, but the high level of generality of the articles more often beg the question than provide an answer. The paucity and inconsistency of the ICJ case law on the use of force means that a conventional common law analysis is unlikely to be productive. There are some scenarios that represent clear-cut cases. There is no doubt, for example, that the German invasion of Poland in 1939 is a classic violation of the rule against armed aggression. Since the end of World War II, however, the cases of aggression have been much more ambiguous, typically involving attacks by irregular forces, armed non-state groups, and sundry militant and terrorist organizations. The Vietnamese National Liberation Front or Vi?t c?ng in Indochina, the *Fuerzas Armadas Revolucionarias de Colombia* or Revolutionary Armed Forces of Colombia (FARC) in South America, the Iranian Revolutionary Guard Corps (IRGC) in the Persian Gulf, the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka, the Party of God or Hezbollah in Lebanon, and the *?arakat al-Muqâwamat al –Islâmiyyah* or Islamic Resistance Movement (Hamas) in Gaza are just a small number of the sub-state groups that have conducted concerted low-intensity warfare against member states of the United Nations. These groups are often supported, supplied, or working in direct concert with rogue governments in order to shield states from responsibility for their aggression.

[18] Erskine Childers and Brian Urquhart, Renewing the United Nations System 150-51 (1999).

III. Social Justice and the Use of Force Jurisprudence

Nearly every judge on the ICJ appears to tacitly apply a Rawlsian analysis of *jus ad bellum*. The iconic philosopher John Rawls viewed social justice as fairness, and his model of the social contract builds on the works of John Locke in the *Second Treatise on Government* (1690), Jean Jacques Rousseau's *Of the Social Contract* (1762), and Emmanuel Kant's profound exegesis *Foundations of the Metaphysics of Morals* (1785) and his essay of 1795, *Perpetual Peace*.[19] These great works establish the canon of social contract theory, an approach associated with a humanitarian ethic that forms the foundation for constitutional government and human rights. In social contract theory, free and equal people possess moral authority in society, and all people are entitled to defend their natural rights. Individual security and happiness are universal values, and the government is enlisted in the service of providing these public goods to citizens. If the government fails in delivering the public goods, individuals may resist encroachment of their human rights by challenging the government.

In his effort to build a better social contract, Rawls sought to obtain a "realistic utopia."[20] Rawls provided a roadmap to achieve the goals of the political philosophers by arguing that all rules in a society specify a certain system of cooperation that is supposed to advance mutual benefit and the common good. All participants in the system receive benefits from cooperation in the compact. But systemic friction is inevitable, and "each legal system also is marked by conflict and a clash of interests."[21] The participants in the system are occupied with shaping the system in order to optimize the distribution of benefits they receive and reduce the costs apportioned to them. "What is just and unjust, however, is usually in dispute."[22] Inevitably, a Byzantine legal-political structure thwarts communitarian interests and further distorts the social contract.

Rawls uses the heuristic device of "original position" to redraw the map of political and economic geography.[23] The original position constitutes those principles that "free and rational persons concerned with their own interests would accept in an initial position of equality as defining the fundamental terms of their association."[24] The broad principles regulate all subsequent legal relationships in society, providing the parameters for political, governmental and economic interaction. Rawls calls this regard for the principles of justice as "justice as fairness." Justice as fairness requires each participant in the system to fashion a notion of justice without first knowing their initial status, power, or fortune in society. The naturally occurring distribution of assets and abilities, strengths and weaknesses, and the vagaries of fortune are all assumed to be unknown. Rawls even assumes that the participants do not know their own "conceptions of good"

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[19] JOHN RAWLS, THE LAW OF PEOPLES 10 (1999).

[20] *Id.* at 4-7.

[21] JOHN RAWLS, A THEORY OF JUSTICE 3 (1971).

[22] *Id.* at 3-4.

[23] RAWLS, THE LAW OF PEOPLES, *supra* note 19, at 30-32.

[24] RAWLS, A THEORY OF JUSTICE *supra* note 21, at 4.

or even their own "psychological propensities." "The principles of justice," Rawls argues, are selected, "behind a veil of ignorance."[25]

This condition of imposed ignorance prepares participants to ponder and develop rational and mutually disinterested rules to govern society in a manner that is most equitable or fair. Rawls argues that since the choices are made behind a "veil of ignorance" concerning the original position of each actor, persons naturally:

> would choose two rather different principles: the first requires equality in the assignment of basic rights and duties, while the second holds that social and economic inequalities, for example inequalities of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society.[26]

All persons would gravitate toward this conception of justice as a way to protect themselves from the prospect of being cast in an unfortunate, weak, or vulnerable original position. The concept of justice as fairness nullifies the accidents of natural fortune in original position, benefiting all the participants in the system. The theory departs from most systems of political economy, Rawls suggests, because classic political economy benefits only the fortunate few.

The apportionment of rights and duties, and of costs and benefits, creates clashes or conflicts in society, and Rawls argues that the best way to resolve these conflicts is to shape a system where the distribution of costs and benefits are apportioned in order to benefit, or resolve any doubts, in favor of those in the least desirable original position.[27] The veil of ignorance forces participants to think about how to create a system in which benefits inure to all, and the only way to design such a system is to protect the weakest members of society.

John Rawls expanded his *Theory of Justice* and the concept of original position beyond individuals in a domestic polity to states operating in an international system.[28] Countries may be evaluated based on their original position within the international system, and the benefits or detriments of each state could be accommodated to level the global "playing field." Rather than focusing exactly on the state as a level of analysis, Rawls shifted from a Westphalian view of a international society based on states to a broader focus on "peoples"—groups bound together by common kinship, tribal or religious affiliation, or nationhood.[29] Peoples share common sympathies and conceptions of justice, and subscribe to a unified moral code.

Unlike a state, Rawls claimed that the idea of peoples has a moral content, and he suggested that peoples are generally reasonable and may be expected to honor

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[25] RAWLS, THE LAW OF PEOPLES, *supra* note 19, at 30.

[26] RAWLS, A THEORY OF JUSTICE *supra* note 21, at 7-15.

[27] *Id.*

[28] RAWLS, THE LAW OF PEOPLES, *supra* note 19, at 23-27.

[29] *Id.* at 23-24.

fair terms of cooperation.[30] Because peoples are not states, they are unwilling to impose their political or social ideals on other reasonable peoples.

The Rawlsian approach can and has been applied to international relations, with states rather than individual people sitting in an original position, serving as the subjects of the thought experiment. Like humans in a national society, countries in the global system find themselves in varying conditions of original position. The contemporary world is filled with nations that are well endowed with accidental fortune, or others seemingly cursed with disadvantage. Many of the differences in original position are exposed by a North-South relief map. Whereas Iceland has abundant "green" energy, and Canada and Russia are awash in oil, natural gas and minerals, Bangladesh and Somalia struggle with inhospitable geography—the former drenched in seasonal torrents of rain and the other perpetually arid. Japan has virtually no natural resources, but plenty of fresh water and access to the sea. Agriculture in Egypt has been dependent upon a single river for four millennia. European tribes coalesced into empire and state, leaving incongruent multicultural principalities littered throughout the Balkans. The straight lines that cut modern states from the map of colonialism separated clans and tribes in Asia, Africa and Latin America, without any consideration for the social or cultural fabric of society. The truism that "life is not fair," reflects that people enter this world with vastly different capacities and conditions; the same is true for nations. The accidents of original position in the international system influence how the ICJ views the use of force, in ways that are both subtle but dispositive. The tacit application of a Rawlsian vision of *jus ad bellum* is evident in inconsistencies in how the ICJ deals with the issue in cases in which one of the primary issues involves the use of force.

A. Protecting the Global Commons: The Corfu Channel Case

One of the earliest examples of ICJ use of force jurisprudence is the *Corfu Channel* Case.[31] The case arose out of a dispute over British naval transits through the Corfu strait in the Adriatic Sea. Although the case most commonly is cited for the proposition that all nations enjoy the right of transit through international straits, the decision on the merits also raised important issues in dicta that provide a glimpse of the direction of *jus ad bellum* jurisprudence at the ICJ.

In the first few years following World War II, the Royal Navy used the Corfu Channel to provide aid to the beleaguered Greeks, who were engaged in a struggle against a large and gathering communist insurgency. The People's Republic of Albania spread throughout the eastern side of the Corfu Channel. At the time, the government in Tirana had turned the tiny nation into a hard line communist enclave. The Greek island of Corfu lies on the western side of the channel. The Royal Navy swept the Channel clear of mines in 1944 and 1945 and declared the waterway safe. At its narrowest point, the Channel closed to only three nautical miles, and Albania and Greece could claim a territorial sea out to the median line.

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[30] *Id.* at 23-27.

[31] Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, ¶ 35 (Apr. 19).

Because of the rocky seabed of the Corfu Island side of the channel, however, ships using the route were forced to navigate within a mile of the Albanian coast as they negotiated the narrow channel off the port of Saranda in southeastern Albania.[32]

There were three separate events involving Albanian attacks on Royal Navy ships using the Channel of Corfu.[33] During the first incident, Royal Navy ships came under fire from Albanian shore battery fortifications. In the second incident, Royal Navy ships struck mines while transiting the channel. The third incident, which gave rise to the ICJ case, occurred when the Royal Navy was conducting mine-clearing operations in the Corfu Channel, but in Albanian territorial waters. Albania complained to the United Nations that the British mine countermeasure operations violated Albanian sovereignty over the coastal state's territorial seas.

On May 15, 1946, two Royal Navy ships transited the Corfu Channel and came under fire from Albanian shore batteries, but the warships suffered no casualties.[34] The British protested the attack, but Albania charged that the warships were violating Albanian sovereignty.[35] On October 22, 1946, another British Navy flotilla composed of the cruisers HMS *Mauritius* and *Leander* and the destroyers HMS *Saumarez* and HMS *Volage*, proceeded through the Medri channel area of the Corfu Strait.[36] The narrow passage previously had been swept for mines.[37] The *Saumarez* struck a mine at 14:53, however, and the blast caused severe damage to the ship and produced dozens of casualties.[38] *Volage* closed on *Saumarez* and took her into tow stern first.[39] At 16:06, a mine exploded near the *Volage*, severing the towline.[40] While working damage control in the forward spaces, which were damaged by the mine, *Volage* reconnected the tow to *Saumarez* and both ships proceeded stern first, arriving at Corfu Roads at 03:10 the next morning.[41] The Royal Navy suffered 44 dead and 42 injured in the mine strikes.[42]

The British then took operational, diplomatic, and legal action. Determined that it would re-sweep the Channel for mines in order to make the waterway safe, and to obtain evidence of state responsibility, the Royal Navy began "Operation Retail" to clear mines from the strait. Although the Corfu Channel was a strait used for international transit, it also constituted Albanian territorial seas. The

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[32] Stuart Thomson, *Maritime Jurisdiction and the Law of the Sea*, *in* THE ROYAL NAVY AND MARITIME POWER IN THE TWENTIETH CENTURY 148-49 (Ian Speller, Ed., 2005).

[33] *Id.* at 149, 154.

[34] *Corfu Channel*, 1949 I.C.J. at 13-14.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

dual nature of the strait created legal issues for the international law of the sea. As stated, historically, the *Corfu Channel Case* has stood for the proposition that all states enjoy the right of transit through international straits overlapped by coastal state territorial seas, and the decision still serves as valuable precedent for that rule, even after adoption of the United Nations Convention on the Law of the Sea in 1982. The ICJ decision also, however, presages later views emanating from the Court on what level of coercion triggers the use of force by one nation, and the permissive boundaries of self-defense.[43] The case also colored Great Britain's policy toward Albania, as London cut off discussions with Tirana over the initiation of diplomatic relations. Diplomatic ties between the two nations were restored only after the fall of the Berlin Wall.

Soon after the mine strikes, the United Kingdom brought a case against Albania in the ICJ. Albania threw up numerous procedural maneuvers to delay the hearing, but ultimately the Court rendered a decision in 1949. The ICJ found that the laying of the minefield was the proximate cause of the explosions on October 22, 1946, and "could not have been accomplished without the knowledge of the Albanian Government."[44] The Court also noted Albania's "complete failure to carry out its [search and rescue] duties after the explosions," and the tribunal in the Netherlands was nonplussed at the "dilatory nature of [Albania's] diplomatic notes" concerning the issue.[45] The Court ordered Albania to pay £875,000 in compensation to Great Britain, or the equivalent of more than £20 million today.[46]

But the Court was not entirely supportive of the British position, either, stating that in order to "ensure respect for international law," the World Court "must declare that the [mine sweeping operation] of the British Navy constituted a violation of Albanian sovereignty."[47] The Court rejected the United Kingdom's argument that "Operation Retail" was a method of self-protection or self-help, because "respect for territorial sovereignty is an essential foundation of international relations."[48] Further scolding the British government for demining the Corfu Channel, the judgment stated:

> The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful

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[43] *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27); *see also* Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, ¶ 77 (Nov. 6).

[44] Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 19).

[45] *Id.* at 35.

[46] *Id.* at 11.

[47] *Id.* at 35.

[48] *Id.*

> States, and might easily lead to perverting the administration of international justice itself.[49]

The case is an early indication of the direction of the Court's jurisprudence on matters of aggression and self-defense, and is the first omen of disparate legal standards governing the use of force between wealthy and powerful states and impoverished and weak states. The Court implicitly began to soft-peddle low-level aggression, which is the tool of weaker states, while at the same time strongly repudiating direct and robust measures taken in self-defense by the stronger nations. In this case, the measures in self-defense that the British took were both non-kinetic, and offered a free public good to the international community, but the Court could not forgo the opportunity to condemn "Operation Retail." This was the first international judicial case following World War II that illustrated that in the annals of war and peace, all states are not treated precisely the same, but rather the costs and burdens of international tension are tilted slightly against the more powerful nations.

B. Defining Aggression Up in the Post-Colonial Era

The next major case concerning the use of force, aggression, and self-defense is the landmark decision *Military and Paramilitary Activities in and against Nicaragua* of 1986.[50] The case arose out of warfare ignited by Sandinista aggression throughout Central America, and the efforts by the U.S. administration of President Ronald Reagan to simultaneously strengthen more moderate regional partners, while exposing the Sandinista regime to a U.S.-funded insurgency as a means of leveling the playing field. But even before the war in Central America reached an apex in the early-1980s, the General Assembly was active in rearranging the conventional understanding of aggression and self-defense to make it easier for non-state insurgents to topple states. The U.N. General Assembly adopted Resolution 3314 in 1974 that attempted to capture an updated definition of aggression.[51]

The General Assembly resolution set forth that the use of armed force by a state constitutes aggression. Moreover, the definition of aggression is without prejudice to the right of self-determination and the "rights of peoples under colonial or racist regimes or other forms of alien domination, or that are involved in struggles toward that end, and that seek or receive support in accordance of [*sic*] the principles within the Charter."[52]

Disagreement over the issue of how to characterize an armed band leaving one state and entering into another for the purpose of conducting low-intensity warfare constituted one of the major difficulties in reaching consensus on the definition of aggression. Agreement was finally reached, however, by narrowing the

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[49] *See id.*

[50] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

[51] G.A. Res. 3314 (XXIX), art. 3(d), U.N. Doc A/RES/3314 (Dec. 14, 1974).

[52] *Id.*

language from earlier proposals. The final text limited aggression to the "sending" of organized groups into another state, rather than activities that merely serve to organize and support such irregular forces in another state. Furthermore, the armed bands or groups have to carry out acts "of such gravity" as to be tantamount to more traditional acts of warfare that are considered aggression under the resolution, such as (a) invasion of a state by the armed forces of another state, (b) "bombardment by the armed forces of a state against the territory of another state," (c) blockade of ports or coasts by one state against another state, (d) an attack by one state on another against the "land, sea, or air forces, or marine and air fleets," of another state, (e) the use of the armed forces of one state, "which are within the territory of another state with the agreement of the receiving state, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory," and, (f) one state allowing its territory to be used by another state to perpetuate an act of aggression against a third state. Article 5 of the Definition continues: "No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression." Finally, Article 7 takes away with the left hand what already was given by the right, in stating: "Nothing in this Definition, and in particular Article 3, could in any way prejudice the right of self-determination, freedom and independence . . . of peoples forcibly deprived of that right. . .. Particularly peoples under colonial and racist regimes or other forms of alien domination. . .."[53]

The resolution bought some interesting issues to the surface. The cardinal distinction between Article 2(4) of the U.N. Charter and U.N. General Assembly resolution 3314 of 1974 is that the General Assembly resolution does not recognize the threat of force as a type of aggression. In the view of the General Assembly, an actual use of armed force is required. The Security Council never endorsed resolution 3314, but the social justice approach to thinking about aggression by anti-Western insurgencies persisted. The provisions of Article 7 of the definition of aggression virtually exempted acts of warfare by those supporting groups violently seeking to overthrow "colonial or racist regimes." Subsequent decisions by the ICJ implicitly adopted resolution 3314, and thereby restricted the scope of what would be considered "aggression" through the tint of social justice, while imposing a corresponding limit on the scope of actions that could be taken in self-defense by (typically Western) states.

C. Paramilitary Activities: The Nicaragua Case

The 1986 ICJ Nicaragua judgment, for example, constricted the right of El Salvador, Honduras and Guatemala to resist Nicaraguan-funded insurgents, while attempting to prevent the United States and its allies from low-intensity warfare to pressure the Nicaraguan Sandinista regime. Importantly, the Court did not only draw the line between conventional and irregular warfare, forbidding the former and looking the other way at the latter, but it also drew a jurisprudential

[53] *Id.*

line that left unconventional attack largely outside of the ambit of unlawful aggression.

The *Frente Sandinista de Liberación Nacional* (Sandinista Front for National Liberation—FSLN) came to power on July 19, 1979, with the overthrow of the regime of Anastasio Somoza Jr. Shortly thereafter, the Nicaraguan regime was conducting communist guerilla operations throughout Central America.[54] Nicaragua was bent on a campaign of "international liberation," supporting terrorism in Honduras, El Salvador and Costa Rica, and sponsoring a Marxist guerilla movement in El Salvador.[55] Nicaragua launched clandestine attacks against neighboring El Salvador in an effort to destabilize the country and replace the government in San Salvador with a compliant communist regime.[56] In April, 1980, U.S. Ambassador Robert White sent a cable recounting Nicaragua's support for El Salvadoran guerilla fighters, including arms, ammunition, money, combat training, provision of border sanctuaries, and command and control circuits. Nicaraguan assistance was dispositive in transforming the nature of the conflict in El Salvador from a "prerevolutionary" protest movement into a bona fide national insurgency.[57] By 1981, the Washington Post was reporting that Nicaragua's "guerillas have proven they can mount coordinated actions virtually anywhere in this overcrowded Central American country and operate almost freely in the rural areas."[58]

In response, the United States and some other nations began to fund *la contrarrevolución* or Counterrevolution *(Contras).* On January 4, 1982, President Reagan enacted National Security Decision Directive 17 (NSDD-17), which authorized the Central Intelligence Agency to recruit and support Honduras and El Salvador with nearly $50 million in military funding, including $19 million in military aid to the Contras.[59] Support for the Contras was one element of the Reagan doctrine, championing anti-communist movements to overthrow Soviet-supported communist dictatorships. The violence affected civilian populations throughout Central America, and reports of atrocities were levied at both sides.[60] The Sandinista regime was brought to the negotiating table in 1987 by military successes of the Contras. In 1988, elections were held. A relatively free vote of the people deposed FSLN leader Daniel Ortega.[61] On April 25, 1990, Violeta

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[54] ROBERT F. TURNER, NICARAGUA V. UNITED STATES: A LOOK AT THE FACTS 98-108 (1987).

[55] Id.

[56] Christopher Dickey, *U.S. Adds 'Lethal' Aid to El Salvador,* WASH. POST, Jan. 18, 1981, at A1.

[57] *The World: El Salvador Tilts Further Toward Full Civil War,* N.Y. TIMES, Apr. 6, 1980, at 2E.

[58] Dickey, *supra* note 56.

[59] President Ronald Reagan, National Security Decision Directive on Cuba and Central America, January 4, 1982, *available at* http://www.fas.org/irp/offdocs/nsdd/nsdd-017.htm; WILLIAM C. BANKS AND PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 58 (1994).

[60] James LeMoyne, *Peasants Tell of Rights Abuses by Sandinistas,* N.Y. TIMES, June 28, 1987, http://www.nytimes.com/1987/06/28/world/peasants-tell-of-rights-abuses-by-sandinistas.html.

[61] Mark A. Uhlig, *Turnover in Nicaragua; Nicaraguan Opposition Routs Sandinistas; U.S. Pledges Aid, Tied to Orderly Turnover,* N.Y. TIMES, Feb. 27, 1990, http://www.nytimes.com/1990/02/27/world/turnover-nicaragua-nicaraguan-opposition-routs-sandinistas-us-pledges-aidtied.html?pagewanted=all&src=pm.

Barrios Torres de Chamorro took office as president of Nicaragua, after a 55.2% to 40.8% landslide victory over Ortega, with Chamorro winning 68% of the rural vote.[62]

But in 1984, the government of Nicaragua brought suit against the United States before the ICJ, arguing that U.S. action in supporting the Contras, including mining the ports in Nicaragua, was a violation of the country's sovereignty.[63] The United States countered that the operations were in support of collective self-defense under Article 51 of the U.N. Charter. The Court disagreed. By a vote of 15 to 0, the judges held during an interim decision that the U.S. should "immediately cease and refrain from any action restricting, blockading, or endangering access to Nicaraguan ports, and, in particular, to the laying of mines."[64] Similarly, by a vote of 14 to 1, the Court ruled that Nicaragua's right to sovereignty should be fully respected, and may not be jeopardized by U.S.-supported military or paramilitary activities.[65] The ICJ concluded that the United States was "under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations."[66] In reaching this decision, the Court had found that "training, arming, equipping, financing and supplying [of] the Contra forces" was a violation of international law.[67]

The ICJ rejected the argument that Nicaragua's efforts to fuel insurgency against its neighbors justified actions taken against the Sandinista regime as a form of self-defense. The distinction between U.S. efforts and Nicaraguan efforts in the conflict pivoted on whether Nicaragua or the United States exercised "effective control" of the insurgent attacks. The United States was found to have exercised "effective control" over laying the sea mines in Nicaraguan waters, whereas the ICJ found that the Sandinista regime lacked the same level of control over the communist insurgents that were destabilizing other Central American governments. The ICJ's idea of "effective control" was amplified in the 2007 Genocide Case, when the Court reaffirmed it, and flirted with the criterion of "overall control."[68] The concept of effective control ultimately was integrated

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62 Susan Benesch, *Nicaragua Opposition Winds Soundly; Ortega Concedes*, ST. PETERSBURG TIMES, February 27, 1990, at A11; Linda Diebel, *Nicaraguans Pin Big Hopes on Chamorro*, THE TORONTO STAR, April 24, 1990, at A14.

63 HOWARD S. LEVIE, MINE WARFARE AT SEA 163-64 (1992).

64 Provisional Measures, Order of 10 May 1984, Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.) 1984 I.C.J. 169, 186-87.

65 *Id.*

66 Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 149 (June 27).

67 *Id.* at 146.

68 Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. and Montenegro), 2007 I.C.J. 91 (Feb. 26). The test of overall control is set forth in the UN Secretary-General Reports to the General Assembly on East Timor. U.N. Secretary-General, *Situation of Human Rights in East Timnor: Rep. of the Secretary-General*, UN doc A/54/660 (Dec. 10, 1999).

into the Draft Articles on State Responsibility for Internationally Wrongful Acts.[69]

A requirement of armed attack as interpreted by the ICJ means there is a gap between a minor violation of Article 2(4) against a state and the requirement that a violation must amount to an armed attack before the victim state can lawfully defend itself under Article 51. Nearly a quarter century ago, John Norton Moore criticized the paradox created by the Court. The ruling meant that a member state of the United Nations could be faced with a situation of defensive necessity, but not be lawfully entitled to respond under Article 51.[70] Another case in point is the U.S.-Iran "tanker war" of the 1980s.

D. Irregular Maritime Warfare: The Oil Platforms Case

In July 1987, the United States began "Operation Earnest Will," which was the largest naval convoy operation since World War II. American warships shepherded re-flagged Kuwaiti tankers through the Persian Gulf.[71] In September 1987, the Iranian ship *Iran Ajr* was caught clandestinely laying mines; the vessel was captured by U.S. naval forces and scuttled. On October 16, 1987, the re-flagged Kuwaiti supertanker *Sea Isle City* was struck by a silkworm anti-ship cruise missile. The missile was launched from the al-Faw peninsula, the Iraqi sandspit tucked between Iran and Kuwait, which was occupied at the time by Iranian military forces. The tanker was not carrying oil, as it was maneuvering in Kuwaiti waters to be loaded. The missile struck the wheelhouse and crew quarters of the ship, blinding the ship's master, a U.S. citizen, and wounding 18 crewmembers. Since the ship was so close to shore, it was not under the protection of U.S. escort warships. The vessel was heavily damaged by the missile strike, and it took four months to repair the ship. Three days after the attack, the United States launched "Operation Nimble Archer," destroying two oil platforms in the Rostam oil field.[72] The offshore structures were not in production and were being used as tactical communication relay points by Iranian military forces.

It was not until April 1988, however, when the U.S. Navy frigate USS *Samuel B. Roberts* (FFG-58) struck an Iranian mine that American involvement in the "tanker war" entered a major combat phase. On April 14, Iranian sea mines nearly sank the *Roberts*. Four days later, U.S. naval forces began "Operation

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[69] Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. Doc. A/56/49 (Vol. 1)/Corr.4, art. 28(1) (Dec. 12, 2001), *available at* http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf.

[70] John Norton Moore, *The Nicaragua Case and the Deterioration of World Order*, 81 AM. J. INT'L L. 151, 152 (1987); *see also*, Robert F. Turner, *Peace and the World Court: A Comment on the Paramilitary Activities Case*, 20 VAND. J. TRANSNAT'L L. 53, 55 (1987).

[71] The use of the term "Persian Gulf" rather than "Arabian Gulf" does not imply a political judgment, but rather reflects the historic term for the semi-enclosed body of water adjacent to the Arabian Sea. The historical name "Persian Gulf," has been used by the United Nations, and the term "Arabian Gulf" is another term for the "Red Sea." On the other hand, the Arab League uses the term "Arabian Gulf," and in Arabic documents submitted to the United Nations.

[72] LEE ALLEN ZATARAIN, TANKER WAR: AMERICA'S FIRST CONFLICT WITH IRAN, 1987-1988 155 (2008).

Praying Mantis," which resulted in the sinking of the Iranian warships *Sablan* and *Sahand* and several smaller Iranian offshore missile patrol boats.[73] The Court later noted that if the U.S. response to the 1987 missile attack on the *Sea Isle City* had been shown to be necessary, it might have been considered proportionate.

The U.S. response to the mine strike against the *Roberts* was the extensive "Operation Praying Mantis." "Operation Praying Mantis" involved attacks on several Iranian oil platforms, but also the destruction of two Iranian frigates and a number of other Iranian naval vessels and aircraft.[74] "Operation Praying Mantis" is still the largest naval surface action conducted by the U.S. Navy since World War II. Three Navy surface action groups (SAGs) comprised of three ships each went into battle on April 18. Two of the SAGs went after derelict Iranian oil platforms, destroying the Siri and Sassan platforms. Iranians stationed on both of the oil platforms resisted after being warned that they would be attacked, but U.S. naval and helicopter gunfire overpowered the forces. Marines and Navy SEALs captured the two rigs, set demolition charges on them, and departed unscathed. A third SAG sought out the *Sabalan*, and aided by aircraft from the aircraft carrier USS *Enterprise*, sent the Iranian frigate to the bottom of the sea.

To avenge the morning actions against their two oil platforms, the Iranians sent the *Sahand*, sister ship of the *Sabalan*, to attack nearby oil platforms owned by United Arab Emirates. A U.S. Navy A-6E Intruder attack aircraft from the *Enterprise* intercepted the *Sahand*. The *Sahand* launched surface-to-air missiles at the Navy aircraft, and U.S. jets responded with the release of two Harpoon missiles and four laser-guided bombs, which struck the Iranian ship. The guided-missile destroyer USS *Joseph Strauss* arrived shortly thereafter, and fired another Harpoon missile into the *Sahand*, sinking the Iranian frigate.

The government of Iran brought suit against the United States in the ICJ. The Court found that although a mine strike by one country against a single warship of another nation may be sufficient to give rise to the inherent right of self-defense, in this case the Court was unwilling to attribute the attack to Iran. The Court mused that even if the attack on *Samuel B. Roberts* was attributable to Iran, it did not necessarily follow that such aggression would cross the gravity threshold entitling the United States to take military action in self-defense.

On November 6, 2003, the ICJ ruled by 14 votes to two, that the series of retaliatory attacks by the U.S. Navy against Iranian oil platforms in the Persian Gulf in 1987 and 1988, constituted an unlawful use of force.[75] The ICJ also rejected, by 15 votes to one, the U.S. counterclaim seeking a finding of Iranian

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[73] Patrick E. Tyler, *Gulf Rules of Engagement a Dilemma for U.S.; American Ship Commander Operate in Increasingly Dangerous War Zone*, THE WASH. POST, July 4, 1988, at A1; *see also* ZATARAIN, *supra* note 72, at 206-09.

[74] Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, ¶ 77 (Nov. 6).

[75] *Id.* ¶ 125. Interestingly, the Court first determined that the attacks did not violate a 1955 commerce treaty between the United States and Iran since the attacks did not adversely affect freedom of commerce between the territories of the two treaty partners. The judges from Egypt and Jordan dissented on this issue, finding that the attacks did violate the terms of the Treaty of Commerce. The Court's rejection of the U.S. actions as a means of self-defense were entirely gratuitous, as it was not necessary to answer the question before the court, which focused on whether either party had violated the commerce treaty.

liability for interfering with the freedoms of commerce and navigation in the Gulf by attacking international civil and naval shipping with missiles and mines.[76] The Court was unwilling to attribute any of the attacks by missiles or mines to Iran.

Furthermore, the Court speculated that even if Iran had committed the attacks, the violence did not rise to the level of an "armed attack." Because there was no "armed attack," the level and extent of violence was below the threshold of sufficient gravity that would warrant the right of self-defense on the part of the United States or other nations injured. The judgment stated, "[t]hese incidents do not seem to constitute an armed attack on the United States."[77]

In further considering the mine strike against the *Samuel B. Roberts*, the ICJ ruled that the mining of a single warship might actually be sufficient to cross the gravity threshold, but since the floating mines could not be attributed to Iran, the point was moot. The Court placed the burden on the United States to show that the attacks on its vessels "were of such a nature as to be qualified as 'armed attacks' within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force."[78] But the Court was not satisfied that the U.S. attacks of 1987-1988 were necessary to respond to the shipping incidents in the Gulf more generally, or that they constituted a proportionate use of force in self-defense. The holding did, however, raise a troubling issue—that unprovoked violence against a warship might constitute and "armed attack," but that a similar unprovoked attack on a merchant ship—a civilian object protected from attack by the law of nations—could not constitute an "armed attack." This approach contradicts the U.N. General Assembly's determination that an attack on the land, sea or air forces or marine or air fleets of another country qualifies as armed aggression.[79] From a policy perspective, it might be considered disconcerting that civilian persons and objects are cloaked with less protection against armed attack than warships and military personnel.

IV. Conclusion: Realizing a Social Justice Theory

Scholars have scrutinized the judgments of the ICJ, arguing that for practical reasons, members vote the interests of the states that appoint them. Statistical methods have raised the charge that member judges of the ICJ tend to favor states that appoint them, and favor states that have a level of wealth that is close to that of their own states.[80]

A traditional common law analysis of the most important *jus ad bellum* cases that have been decided by the ICJ suggests that the Court condemns attacks based upon the "gravity" of the aggression. Gravity is the primary distinguishing

[76] *Id.* ¶¶ 72, 125.

[77] Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, ¶ 64 (Nov. 6).

[78] *Id.* ¶ 51.

[79] G.A. Res. 3314 (XXIX), art. 3(d), U.N. Doc A/RES/3314 (Dec. 14, 1974).

[80] Eric A. Posner & Miguel F. P. de Figueiredo, *Is the International Court of Justice Biased?* 34 J. LEG. STUD. 599, 615-617 (2005).

feature of an armed attack, differentiating something more than a "mere frontier incident."[81] Analysis of the gravity of an attack focuses on its scale and effects.[82] Only the more grave assaults constitute an armed attack. Typically, "gravity" is a shortcut for whether the attack was attributable to a state, and, particularly, a large and powerful state. Armed aggression by irregular or guerilla forces are regarded as falling below the gravity threshold—unless, however, the insurgents are acting on behalf of a powerful state, such as the Contras in Central America. In the Nicaragua decision, the Court determined that the provision of weapons or provision of logistical or other support by Nicaragua to communist revolutionaries working to overthrow the governments in El Salvador and Honduras could be regarded as insufficient to qualify the activity as an "armed attack," even though it might constitute an "unlawful use of force," or at least a "breach of the principle of non-intervention."[83]

The rule that a state that suffers an armed attack enjoys the right of self-defense, but only if the aggression is of sufficient gravity, restrains states acting in defense while empowering non-state organizations conducting aggression. Furthermore, as the facts of the *Paramilitary Activities Case* and *Oil Platforms Case* illustrate, proportional and low-intensity responses by wealthy and powerful protagonists against a Third World antagonist throws a wrinkle into the Court's "gravity" analysis. In such cases, the gravity of the attack gives way to an outcome-oriented reasoning that appears to preference a vision of equity based on state power, with the Court putting its thumb on the scale in favor of the weaker nation.

The use of force by means of secret war against neighboring countries, as conducted by Nicaragua and Iran, including the clandestine sowing of sea mines in international shipping lanes, are not condemned by the Court as "armed attacks" since they lack sufficient gravity. But U.S.-funded counter revolution, the sowing of mines in the harbor of Puerto Sandino in Nicaragua, and destruction of inoperable oil platforms that are serving as surveillance and sea bases for Iranian Revolutionary Guard Corps Navy forces were rejected by the Court as violations of the U.N. Charter. In the case of Nicaragua, Robert F. Turner's classic study concludes:

> U.S. support for the Contras [was] a virtual mirror-image of Nicaraguan support for Salvadoran insurgents—albeit on a smaller scale and with greater regard for human rights—and that the primary objective of [the U.S.] program [was] to persuade Nicaragua to abandon its efforts to engineer the overthrow of neighboring governments by armed force.[84]

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[81] GREEN, *supra* note 11, at 33-38.

[82] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 101, ¶ 191 (June 27).

[83] *Id.* at 543 (Jennings, J., dissenting).

[84] TURNER, *supra* note 54, at xiii.

In this respect, U.S. assistance to the Contras was proportional and necessary to meet the threat of Nicaragua's attempt to export violent revolution.[85]

Likewise, U.S. missions against Iran were designed to contain conflict in the Gulf. Similar to the U.K. de-mining of the Corfu Channel, "Operation Praying Mantis" was focused on neutralizing manifest but protracted and low-intensity threats to the maritime commons. In each case, however, the weaker aggressor states employed irregular or asymmetrical naval warfare to impede shipping lanes used for international navigation. The random and unannounced sowing of sea mines in an international strait (*Corfu Channel*) and on the high seas (*Oil Platforms*) was treated no worse than defensive naval patrols conducted by the Royal Navy and the U.S. Navy. Although Western sea power stood at risk to protect international public infrastructure and sea lines of communication—in both cases, the Court repudiated the effort.

The full implication of the Court's Rawlsian approach has yet to play out. In the major use of force cases, the ICJ's *jus ad bellum* rationale suggests that weaker states that seek to make adjustments in the international system in their favor through the use of asymmetric and irregular attacks will find a rather compliant Court. The decisions thus far would tend toward reducing deterrence by the international community against such states. On the other hand, the United States and the more powerful nations, which serve as the patrons of the world system, might expect to receive unfavorable consideration by taking robust and concerted responses to such attacks. By raising the judicial (and thereby the political) cost of a defensive response, the Court reduces the likelihood that the United States and other status quo states will reply to asymmetric attacks with decisive armed force. This finding tends to suggest that the United States and its friends and allies face an unfriendly legal environment within which to protect and nurture global stability.

[85] *Id.* at 132-39.

THE SOMALI PIRACY CHALLENGE: OPERATIONAL PARTNERING, THE RULE OF LAW, AND CAPACITY BUILDING

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I. Introduction

With rocket-propelled grenades propped on their shoulders and AK-47s on their hips, pirates operating off the coast of Somalia on November 5, 2005, were poised to strike. A luxury cruise ship en route to Kenya on a quiet Saturday morning presented an opportune target. While the crew of the Seabourn Spirit successfully thwarted the attack, the attempted hijacking highlighted the vulnerability of ships in the Gulf of Aden and presaged a modern resurgence in piracy. Between 2006 and 2010, nearly 1,600 ships were attacked worldwide, illicitly securing hundreds of millions of dollars in both ransom payments and stolen cargo.[1]

Beyond the financial implications, dozens have been killed, including four Americans on the S/V Quest in 2011.[2] There are an estimated 70 camps where

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[1] *See Hostage-taking at Sea Rises to Record Levels, Says IMB,* ICC COMMERCIAL CRIME SERVICES (Jan. 17, 2011, 11:33 AM), http://www.icc-ccs.org/news/429-hostage-taking-at-sea-rises-to-record-levels-says-imb; *see also 2009 Worldwide Piracy Figures Surpass 400,* ICC COMMERCIAL CRIME SERVICES (Jan. 14, 2011, 00:00 AM), http://www.icc-ccs.org/news/385-2009-worldwide-piracy-figures-surpass-400. IMB statistics, as well as data compiled by the International Maritime Organization (IMO), reflects piracy and armed robbery against ships as well as attempts. According to the IMO, there have been 5,716 incidents of piracy or armed robbery against ships from 1984 through 2010. The methods of pirates vary throughout the world: Somali pirates operate by holding a vessel until a ransom payment is made; pirates in other parts of the world also seek ransom as well as illicitly re-flag vessels, steal the vessel's cargo and/or money and property from passengers.

[2] *U.S. Forces Respond to Gunfire Aboard the S/V Quest,* NAVY LIVE (Feb. 22, 2011), http://navylive.dodlive.mil/index.php/2011/02/22/u-s-forces-respond-to-gunfire-aboard-sv-quest/. The International Maritime Bureau reported that worldwide from 2006-2010, 49 were killed in piratical attacks, 189 injured and 35 are missing. Seven were killed in the first six months of 2011. *See* ICC INTERNATIONAL MARITIME BUREAU, PIRACY AND ARMED ROBBERY AGAINST SHIPS REPORT FOR THE PERIOD OF 01 JANU-

Somali pirates recruit, plan, and organize their strikes, often displaying a sophisticated infrastructure.[3] Ships are drawn to the area, in part, because of the Bab El-Mandeb Strait, a critical chokepoint for global trade that connects the Mediterranean and Indian Ocean.[4] U.S. President Barack Obama declared that piracy off the Somali coast represents a threat to national security.[5]

Somali dependence on revenue that organized criminal networks secure through hijackings is increasing.[6] Piracy is not the only transnational maritime security threat that involves organized criminal networks.[7] Drug trafficking, human smuggling, oil poaching and the transport of weapons of mass destruction also occur in the maritime domain.[8] Confronting these threats involves navigating complex legal, jurisdictional, and operational obstacles, and requires international partnering and cooperation.

The oceans are particularly susceptible to illicit transnational activity because of its vast expanse and anonymity. The ability of criminal networks to exploit gaps in authority, capability and capacity is directly linked to their success. Each threat is uniquely challenging, but Somali piracy has dominated recent focus because of a historical fascination with this crime, the notoriously open aspect of their attacks, and the large number of countries affected. This article examines

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ARY – 30 JUNE 2011 (July 2011), *available at* http://www.icc-deutschland.de/fileadmin/icc/Meldungen/2011_Q2_IMB_Piracy_Report.pdf [hereinafter IMB REPORT].

[3] U.N. Secretary-General, Report of the Secretary-General on Possible Options to Further the Aim of Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery at Sea off the Coast of Somalia, ¶ 7, U.N. Doc. S/2010/394 (July 26, 2010) [hereinafter *Possible Options*].

[4] The Bab El-Mandeb Strait is one of the most significant maritime chokepoints, or corridors, on earth. *See World Oil Transit Checkpoints,* U.S. ENERGY INFO. ADMIN. [EIA] (Feb. 2011), http://www.eia.gov/cabs/World_Oil_Transit_Chokepoints/Full.html (last visited October 24, 2011). The EIA defines chokepoints as, "narrow channels along widely used global sea routes, some so narrow that restrictions are placed on the size of vessel that can navigate through them. They are a critical part of global energy security due to the high volume of oil traded through their narrow straits." The EIA also discussed the Bab El-Mandeb Strait as being "18 miles wide at its narrowest point." *Id.*

[5] Exec. Order No. 13536, 75 Fed. Reg. 19,869 (April 12, 2010), *available at* http://www.treasury.gov/resource-center/sanctions/Documents/13536.pdf ("The deterioration of the security situation and the persistence of violence in Somalia, and acts of piracy and robbery at sea off the coast of Somalia. . .constitute an unusual and extraordinary threat to the national security and foreign policy of the United States. . .."). The national emergency declared in Exec. Order No. 13536 was continued for one year on April 7, 2011, by President Obama. *See* Notice of April 7, 2011, Continuation of the National Emergency With Respect to Somalia, 76 Fed. Reg. 19,897 (April 8, 2011).

[6] *See* Possible *Options*, *supra* note 3, ¶ 7; *see also* U.N. OFFICE ON DRUGS AND CRIME (UNDOC), THE GLOBALIZATION OF CRIME: A TRANSNATIONAL ORGANIZED THREAT ASSESSMENT, at 199, U.N. Sales No. E.10.IV.6, *available at* http://www.unodc.org/documents/data-and-analysis/tocta/TOCTA_Report_2010_low_res.pdf (stating there are two main piracy networks in Somalia, "one in the semi-autonomous northern Puntland in the Eyl district and another group based in Haradheere in Central Somalia).

[7] United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc. A/RES/55/25 (Nov. 15, 2000), *available at* http://www.unodc.org/documents/treaties/ UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf. Article 2(a) defines an organized criminal group as, "a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit." *Id.*

[8] *See* Jeremy Haken, *Transnational Crime in the Developing World,* GLOBAL FINANCIAL INTEGRITY (Feb. 2011), http://transcrime.gfip.org/, for an exceptional study of transnational illicit trade.

the trajectory of Somali piracy, the legal issues associated with countering piracy, and the international response.

II. Background: The Trajectory of Somali Piracy

The dramatic increase in Somali piracy over the past five years has spawned a lucrative and organized criminal enterprise involving thousands of people, eroding navigational freedoms, and illicitly securing as much as $400,000,000.[9] From 2008 through the first three months of 2011, approximately 2,000 people have been held hostage in 150 separate hijackings.[10] Though the success rate of piracy declined in the first six months of 2011 compared with previous years, ships remain vulnerable to attack.[11]

The 17,000 ships annually navigating the Suez Canal also pass through the narrow Bab El-Mandeb Strait in the Gulf of Aden,[12] and as many as 16,000 other ships navigate this high-risk area annually.[13] Thus, vessels carrying nearly ten percent of the world's daily oil supply[14] pass in close proximity to the crushing poverty, famine, ungoverned areas and rampant violence in Somalia.

Operating on simple fishing boats, dhows, or from hijacked vessel known as "mother ships", the pirates generally lack sophisticated equipment and most often do not have large or varied weapons.[15] As such, piracy in the Horn of Africa[16]

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[9] Estimates vary regarding the total amount of ransom payments secured by pirates. *See* Stephen L. Caldwell & John H. Pendleton, Director of Homeland Security and Justice Issues & Director of Defense Capabilities and Management, respectively, Testimony before the Subcommittee on Coast Guard and Maritime Transportation, Committee on Transportation and Infrastructure, House of Representatives (Mar. 15, 2011), *in* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 11-449T, MARITIME SECURITY: UPDATING U.S. COUNTERPIRACY *Action plan* Gains Urgency as Piracy Escalates off the Horn of Africa 1 (2011), *available at* http://www.gao.gov/new.items/ d11449t.pdf (stating, "since 2007, 640 ships have reported pirate attacks in this area, and Somali pirates have taken more then 3,150 hostages and, according to the Department of Defense (DOD), received over $180 million in ransom payments"); *see also* Anna Bowden, et. al, *The Economic Cost of Maritime Piracy* (One Earth Future Working Paper, Dec. 2010), http://www.oneearthfuture.org/index.php?id=120&pid=37&page=Cost_of_Piracy (asserting that $238 million was paid to Somali pirates in ransom payments in just 2010).

[10] Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, transmitted by letter dated Jan. 24, 2010 from the Secretary General, addressed to the President of the Security Council, ¶16, U.N. Doc. S/2011/30 (Jan. 25, 2011) *available at* http://reliefweb.int/sites/reliefweb.int/files/resources/C3368F7BFEF0D4E98525783 800796871-Full_Report.pdf [hereinafter Lang Rep.].

[11] In the first six months of 2011, there were 92 reported attempts or firings upon vessels by Somali pirates, of which 20 were hijacked. *See* IMB REPORT, *supra* note 2.

[12] *2010 Annual Report*, SUEZ CANAL AUTHORITY, http://www.suezcanal.gov.eg /Files/Publications/ 58.pdf (last visited Sept. 23, 2011).

[13] Andrew J. Shapiro, Assistant Sec'y of State, Remarks to the Global Maritime Information Sharing Symposium, National Defense University, Washington, DC: Taking Diplomatic Action Against Piracy (Sep. 16, 2009), *available at* http://www.state.gov/t/pm/rls/rm/129258.htm (stating that the total number of commercial ship transits in the Gulf of Aden is estimated to be 33,000, "making it one of the world's busiest shipping lanes.").

[14] *See* THE GLOBALIZATION OF CRIME, *supra* note 6, at 198 ("The U.S. Department of Energy estimated that, as of 2006, as many as 3.3 million barrels of oil per day were transiting the Bab El-Mandeb strait between the Gulf of Aden and the Red Sea.").

[15] The NATO Shipping Centre defines a mothership as "a vessel captured by pirates by on the high seas or within Somali TTW (territorial waters) which will be used predominantly for the purpose of committing acts of piracy (IRT Art 103 UNCLOS). Pirates remain on board and are in full control of the

has become an international concern not because of the weapons or the gear used in attacks, but rather, as a result of the sanctuary Somalia provides to pirates, coupled with a seemingly unlimited supply of potential recruits.[17] Even though thousands of pirates have been captured since 2008,[18] the illicit business model continues.[19] If other organized criminal networks sought to replicate the success of Somali pirates, they would similarly need the capacity to conduct illicit operations, an abundant supply of recruits, and a base of operations that is either ungoverned, or not effectively controlled.

Forward deployed naval vessels, private armed security teams, and the significantly increased use of preventative measures by merchant ships have favorably altered the situation. The success rate of Somali pirates has plummeted from greater than 60 percent in 2007, to below 20 percent in 2011,[20] with hundreds of attacks being thwarted between 2008-2010.[21] While these trends are positive, pirates were nevertheless able to board, hijack, and secure increasingly higher ransoms (some were approximately $10 million) from dozens of ships.[22] In

vessel and the crew." *Terminology,* NATO SHIPPING CTR., http://www.shipping.nato.int/operations/OS/Pages/Definitions.aspx (last visited October 24, 2011). Furthermore, weapons used by pirates have included, "pistols, Kalashnikov-pattern assault rifles, PKM light machine guns or equivalent, and rocket propelled grenade(s) (RPG). . .In March 2010, the European Union Naval Force (EU NAVFOR) seized 18 Chinese-manufactured 40 mm type-69 rockets . . . in four separate counter-piracy operations in the Indian Ocean." Rep. of the Monitoring Group on Somalia and Eritrea pursuant to S.C. Res. 1916 (2010), ¶¶ 101-03, U.N. Doc. S/2011/433 (July 18, 2011) [hereinafter Rep. of the Monitoring Group on Somalia and Eritrea].

[16] The European Union describes the *Horn of Africa* as the geographic area of East Africa encompassing Djibouti, Ethiopia, Eritrea, Kenya, Somalia, Sudan and Uganda. *A regional policy partnership for the Horn of Africa*, EUROPA, http://europa.eu/legislation_summaries/development/african_caribbean_pacific_states/r13004_en.htm (last visited October 24, 2011). The Horn of Africa is "one of the poorest and most conflict prone regions in the world. . . An uncontrolled, politically neglected, economically marginalised and environmentally damaged Horn has the potential to undermine the region and the EU broad stability and security." *Id.*

[17] The use of hijacked ships, known as mother ships as a staging platform to launch additional attacks has increased. *See* Rep. of the Monitoring Group on Somalia pursuant to S.C. Res. 1853 (2008), at 36, U.N. Doc. S/2010/91 (Mar. 10, 2010) [hereinafter Rep. of the Monitoring Group on Somalia] (stating that the use of mother ships enables pirates to remain underway for longer periods along with a greatly expanded operational reach); *see also* Caldwell & Pendleton, *supra* note 9, at 3 ("Officials also have cited reports of pirates using seafarers on the hijacked mother ships as 'human shields' to fend off attacks from naval vessels.").

[18] *See* Lang Rep., *supra* note 10, ¶ 43 (asserting that more than 2,000 pirates have been captured between 2008 and 2011).

[19] *2010 Annual Report, supra* note 12.

[20] *See* Lang Rep., *supra* note 10, ¶ 39. The success rate refers to the number of ships that are boarded/and hijacked versus the overall number of ships attacked. Thus, a success rate of twenty-five percent means that one in four ships that pirates sought to board, either, for example, through the firing or display of weapons, verbal communications or the movement of the vessels under their control resulted in a boarding/hijacking; *see also* Agence France-Presses, *World Piracy up, but more Somali attacks thwarted: report*, DEFENSE TALK, Oct. 19, 2011, http://www.defencetalk.com/world-piracy-up-but-more-somali-attacks-thwarted-report-37752/.

[21] *See* Lang Rep., *supra* note 10, ¶ 39 (stating, "[n]aval forces. . .proved effective: they thwarted 126 attacks in 2008, 176 in 2009 and 127 in 2010.").

[22] Jeffrey Gettleman, *Money in Piracy Attracts More Somalis,* N.Y. TIMES, Nov. 9, 2010, http://www.nytimes.com/2010/11/10/world/africa/10somalia.html (stating, "[A] band of pirates received what is widely believed to be a record ransom — around $10 million — for a hijacked South Korean supertanker, the Samho Dream. The ship had been commandeered in April and anchored for months off the

March 2011, Somali pirates held approximately 30 ships with 600 hostages for ransom.[23]

The international response to Somali piracy in diplomatic venues and on the water over the past four years is unprecedented: passage of ten Somali-piracy focused United Nations Security Council resolutions,[24] completion of several United Nations-directed studies[25] deployments of warships from more than two dozen countries,[26] updates to the Best Management Practices for commercial vessels,[27] and an expansion of bilateral and regional partnering.[28] Such impressive action has contributed to a significant decline in the success rate of attacks in 2011, but land-based issues in Somalia, along with pirate camps, remain. As Somali pirates expanded their operating area more than 1,200 miles east and

city of Hobyo, in central Somalia, in plain sight of the beach. The ransom was promptly divided among dozens of young gunmen, each allotted a $150,000 share. But many of the pirates never saw close to that much money because they had taken advances from their bosses and had to pay back expenses, said a pirate in the Hobyo area. During the six months the ship was here, they spent a lot on qat, a local stimulant, women and drink. . . Many just came home with $20,000.").

23 *Somalia Needs Governance to Defeat Piracy: U.S.*, NAVY TIMES, June 1, 2011, http://www.navytimes.com/news/2011/06/ap-somalia-needs-governance-defeat-piracy-060111/.

24 S.C. Res. 2020, U.N. Doc. S/RES/2020 (Nov. 22, 2011); S.C. Res. 2015; U.N. Doc. S/RES/2015 (Octo. 14, 2011); S.C. Res. 1976, U.N. Doc. S/RES/1976 (Apr. 11, 2011); S.C. Res. 1950, U.N. Doc. S/RES/1950 (Nov. 23, 2010); S.C. Res. 1918, U.N. Doc. S/RES/1918 (Apr. 27, 2010); S.C. Res. 1897, U.N. Doc. S/RES/1897 (Nov. 30, 2009); S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008); S.C. Res. 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008); S.C. Res. 1838, U.N. Doc. S/RES/1838 (Oct. 7, 2008); S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008).

25 *See* Lang Rep., *supra* note 10; *see also Possible Options, supra* note 3; Rep. of the Monitoring Group on Somalia, *supra* note 17; U.N. Secretary-General, Rep. of the Secretary-General pursuant to S.C. Res. 1846, U.N. Doc S/2009/146 (Mar. 16, 2009); Piracy off the Somali Coast: Final Report, INT'L EXPERT GROUP ON PIRACY OFF THE SOMALI COAST (Nov. 21, 2008), http://www.imcsnet.org/imcs/docs/somalia_piracy_intl_experts_report_consolidated.pdf (the report was commissioned by the Special Representative of the Secretary General of the UN to Somalia Ambassador Ahmedou Ould-Abdallah) [hereinafter Piracy off the Somali coast: Final Report]; Rep. of the Monitoring Group on Somalia and Eritrea, *supra* note 15.

26 *See About Us: European Union Naval Force (EU NAVFOR) Somalia – Operation ATALANTA*, EU NAVAFOR SOMALIA, http://www.eunavfor.eu/about-us/ (last visited Oct. 8, 2011) [hereinafter *Operation ATALANTA*]; *see also Combined Task Forct (CTF) 151,* COMBINED MARITIME FORCES, http://www.cusnc.navy.mil/cmf/151/index.html (last visited Oct. 8, 2011); *Counter-piracy operations*, NATO, http://www.nato.int/cps/en/natolive/topics_48815.htm (last visited Oct. 8, 2011).

27 *See Best Management Practices Version 4 – "BMP 4" a significant change for the better*, MARITIME SECURITY CTR. HORN OF AFRICA, http://www.mschoa.org/bmp3/Pages/BestManagement Practises.aspx (last visited Sept. 14, 2011) (stating, "[t]he presence of Naval/military forces in the Gulf of Aden, concentrated on the Internationally Recommended Transit Corridor (IRTC), has significantly reduced the incidence of piracy attack in this area."); *see also* Lang, *supra* note 10, ¶ 35 (stating "the best management practices are not binding. Some 20 percent of ships are reportedly not in compliance."). The IRTC spans 464 miles. Rear Admiral Terry McKnight, *Gulf of Aden Counter Piracy Operations: UNSI Brief*, U.S. NAVAL INSTITUTE, http://www.usni.org/userfiles/file/ADM%20McKnight%20GOA%20Piracy%20-%20USNI.pdf (last visited October 24, 2011).

28 In addition to bilateral agreements on the transfer and prosecution of pirates with regional states and those in the United States and in Europe. *See The Djibouti Code of Conduct*, INT'L MARITIME ORG, http://www.imo.org/OurWork/Security/PIU/Pages/DCoC.aspx (last visited Nov. 9, 2011); *The Contact Group on Piracy off the Coast of Somalia: Fact Sheet*, U.S. DEP'T OF STATE (May 18, 2009), http://www.state.gov/r/pa/prs/ps/2009/05/123584.htm; Media Note, *United States Signs New York Declaration*, U.S. DEP'T OF STATE (Sept. 9, 2009), http://www.state.gov/r/pa /prs/ps/2009/sept/128767.htm; *see also* Robert W. Maggi, *Countering Piracy: International Partnership Achieves Steady Progress,* DIPNOTE U.S. DEP'T OF STATE OFFICIAL BLOG (August 24, 2010), http://blogs.state.gov/index.php/site/entry/piracy_international_partnership_progress.

1,000 miles south,[29] more ships are exposed. In a three-year window (2007-2010), Somali pirates held six times more hostages despite a reduced success rate because the number of attempts jumped from a few dozen to more than 200.[30] Somali pirates have also increased their violent and aggressive treatment of hostages.

Even though less than one percent of the ships using these waters are attacked,[31] every vessel in the region is affected as insurance rates have increased from $500 per transit to more than $300,000 per transit.[32] Additionally, a leading shipping firm, CMA CGM, among others, imposes a piracy surcharge between $130-$260 dollars per container for ships transiting the Gulf of Aden.[33] For ships that may hold 10,000 containers, the surcharge could add hundreds of thousands of dollars for every transit. The use of private security teams, which can be armed or unarmed, adds potentially another $100,000 for a single transit, with private security contractors earning $1,000 a day.[34] Area avoidance is an option, but a costly one. The route around Africa and the Cape of Good Hope (versus going through the Suez Canal) adds as many as 2,700 miles and between 6 to 20 days of transit to the journey.[35]

Despite operating in the vicinity of superior military forces on the water, Somali pirates remain capable of hijacking ships because they have adjusted their tactics. Naval forces and the shipping industry have likewise adjusted their tactics to address this evolving threat.

Effectively confronting Somali pirates and maintaining public order in the maritime domain is particularly challenging because the operating space exceeds

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[29] *Operation ATALANTA, supra* note 26.

[30] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 11-449T, MARITIME SECURITY: UPDATING U.S. COUNTERPIRACY *Action plan* Gains Urgency as Piracy Escalates off the Horn of Africa 7 (2011), *available at* http://www.gao.gov/new.items/d11449t.pdf [hereinafter GAO Report] (The number of attacks includes both those that are unsuccessful *and* successful).

[31] *Id.* Based on 219 attacks reported in 2010 compared with the overall annual number of transits in the Gulf of Aden (33,000); *see also* Assistant Secretary of State Shapiro's remarks, *supra* note 13 (regarding 33,000 vessels annually transiting the Gulf of Aden).

[32] Anna Bowden, et.al, *supra* note 9, at 10.

[33] *See CMA-CGM Customer Advisory #107-2010, Piracy Risk Surcharge – East Africa & Indian Ocean Islands, Effective August 2010*, CMA CGM, (July 2, 2010), http://www.cma-cgm.com/Images/ContentManagement/en-US/WorldwideNetwork/Local/USA/Documentation/2010-CA-107-Piracy-Surcharge-East-Africa-and-Indian-Ocean-Islands-Aug-2010.pdf (stating, "[a]s the situation continues to worsen, CMA CGM is increasing the Piracy Risk Surcharge (PRS) as of August 1, 2010 for all shipments ex USA and destined for East African and Indian Ocean destinations, as follows: USD $130 per 20' container (all types) [and] USD $260 per 40' Container (all types)"); *see also* Press Release, CMA CGM, Aden Gulf Surcharge (December 17, 2008), *available at* http://www.cma-cgm.com/AboutUs/PressRoom/PressRelease_Aden-Gulf-Surcharge_7426.aspx (last visited October 24, 2011) (stating, "[t]he transit of Container Ships through the Gulf of Aden in both directions is now subject to additional high costs due to increased insurance premiums and other costs, caused by the prevailing risks of piracy in the area.").

[34] Anna Bowden, et.al, *supra* note 9, at 15; *see also* Anastasia Mistedaki, *Greek Commandos Protect Vessels Against Somalian Pirates*, GREEK WORLD REP. (April 22, 2011), http://world.greekreporter.com/2011/04/22/greek-commandos-protect-vessels-against-somalian-pirates/.

[35] Anna Bowden, et.al, *supra* note 9, at 13-14. The operating costs of ships vary; a 300,000 dead weight tonnage (DWT) Very Large Crude Carrier (VLCC) fuel vessel costs approximately $50,000 a day.

two million square miles, extensive land-based hurdles, and complex legal and judicial issues that require cooperation by a variety of countries.[36]

There is agreement that piracy is a universal crime, though no consensus exists regarding whether piracy is primarily a civilian or military concern, whether piracy represents a criminal or national security threat, or whether the long-term solution involves more economic development or kinetic action.[37]

A. Somalia

With a population near 10 million, Somalia occupies an area the size of Texas with a 2,300-mile coastline.[38] Somalia faces a variety of challenges including an adult literacy rate that is below 40 percent, massive unemployment and no viable economic infrastructure or development opportunities.

Nearly two decades ago, a senior adviser to the United Nations, Mohamed Sahnoun, noted that Somalia is "a country without central, regional or local administration, and without services. No electricity, no communication, no transport, no school, no health services."[39] Things have not changed much in the past two decades. Since 1991, no functioning government has existed in Somalia. While the Transitional Federal Government (TFG) may represent Somalia in international venues, the TFG faces tremendous resource, organization, and capacity problems.[40]

Since 2008, the United Nations has commissioned several reports on Somalia and Somali piracy.[41] The Report of the Monitoring Group on Somalia and Eritrea (2011), a comprehensive 417-page examination of Somali and Eritrea, recommended, among other things, that known pirates should be designated for targeted measures and that counter-piracy operations in the Gulf of Aden and

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36 One U.S. Navy analysis estimated that "1,000 ships equipped with helicopters would be required to provide the same level of coverage in the Indian Ocean that is currently provided in the Gulf of Aden – an approach that is clearly infeasible." GAO Report, *supra* note 30, at 6.

37 Defining *kinetic action* has sparked considerable discussion. A New York Times examination noted that, "in common usage, 'kinetic' is an adjective used to describe motion, but the Washington meaning derives from its secondary definition, 'active, as opposed to latent.' Dropping bombs and shooting bullets – you know, killing people – is kinetic. But the 21st-century military is exploring less violent and more high-tech means of warfare, such as messing electronically with the enemy's communications. . .are 'non-kinetics." Op-ed, Peter Catapano, *War of Semantics*, N.Y. TIMES OPINIATOR (March 25, 2011, 7:03 PM), http://opinionator.blogs.nytimes .com/2011/03/25/war-of-semantics/ (quoting Timothy Noah from Slate).

38 NATIONAL SECURITY COUNCIL, COUNTERING PIRACY OFF THE HORN OF AFRICA: PARTNERSHIP & ACTION PLAN, at 3 (Dec. 2008), *available at* http://www.marad.dot.gov/documents/Countering_Piracy_Off_The_Horn_of_Africa_-_Partnership__Action_Plan.pdf

39 MOHAMED SAHNOUN, SOMALIA: THE MISSED OPPORTUNITIES 18 (1994).

40 Rep. of the Monitoring Group on Somalia, *supra* note 17, at 6-12. "Somalia's frail Transitional Federal Government has struggled ineffectually to contain a complex insurgency that conflates religious extremism, political and financial opportunism, and clan interests." Regarding government forces in Somalia, "[t]he security sector as a whole lacks structure, organization and a functional chain of command," attributable to, among other things, poor command and control and a lack of resources. *Id.*

41 *See* note 18 for a list of these reports.

Indian Ocean should also, "enforce the arms embargoes on Somalia and Eritrea through boarding and inspection of suspicious vessels."[42]

Two UN-directed reports focused primarily on judicial and prosecutorial issues, one of which was chaired by Claude Heller (2010)[43], the other prepared by Ambassador Ahmedou Ould-Abdallah (2008).[44] These reports represent landmark examinations of the desperate situation in Somalia, particularly emphasizing the global impact of instability and violence in ungoverned areas. Dozens of subject matter experts were involved along with hundreds of interviews and extensive discussions. Separately conducted and tasked, the reports collectively describe the situation with incomparable depth, context, and background. The 2008 report by Ambassador Ahmedou Ould-Abdallah stated:

> For nearly twenty years, Somalia has been a failed state, a virtual black hole in the international community, divorced from the world economy, regional and global institutions, and the rule of law. So long as its problems were confined within its borders, the rest of the world could ignore the problem.[45]

Piracy changed that perspective, as commercial ships from dozens of nations, some transporting humanitarian aid, were attacked for ransom with increasing frequency. Beginning in the mid-1990s, armed groups hijacked ships claiming they were the authorized "coast guard" charged with protecting their nation's fishing resources. The illegal attacks dramatically increased in the years following the 2004 Indian Ocean tsunami that killed more than 200,000 and destroyed thousands of boats and jobs.[46] A *New York Times* article in 2008 stated Somalia, "is in chaos, countless children are starving and people are killing one another in the streets of Mogadishu, the capital, for a handful of grain. But one particular line of work – piracy – seems to be openly benefiting from all the lawlessness and desperation."[47] Diverse and varied organizations such as the United Nations, World Food Program, and African Union (AU), have worked to address Somalia's numerous challenges, but crime, poverty and famine continue to plague the country.

Change in Somalia is not easily attainable and as the Heller report noted, "efforts to restore peace and security to Somalia are critically undermined by a corrosive war economy that corrupts and enfeebles State institutions."[48] The report further concluded that:

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[42] Rep. of the Monitoring Group on Somalia and Eritrea, *supra* note 15, ¶¶ 450-51.

[43] Rep. of the Monitoring Group on Somalia, *supra* note 17.

[44] Piracy off the Somali Coast: Final Report, *supra* note 25.

[45] *Id.* § 6.

[46] *See Possible Options, supra* note 3; *see also* Aaron S. Arky, Trading Nets for Guns: The Impact of Illegal Fishing on Piracy in Somalia (Sept. 2010) (Thesis, Naval Postgraduate School), *available at* http://edocs.nps.edu/npspubs/scholarly/theses/2010/Sep/10Sep_Arky.pdf.

[47] Jeffrey Gettleman, *Somalia's Pirates Flourish in a Lawless Nation*, N.Y. Times, Oct. 30, 2008, http://www.nytimes.com/2008/10/31/world/africa/31pirates.html?_r=1&pagewanted=1.

[48] Rep. of the Monitoring Group on Somalia, *supra* note 17, at 7.

> The limited ability of the Transitional Federal Government to adequately pay government officials and security forces is handicapped by endemic corruption at all levels: commanders and troops alike sell their arms, sometimes to their adversaries. Armed opposition groups. . .claim that they obtain arms, ammunition and equipment from [TFG] forces and affiliated militias, either by seizing them on the battlefield or by purchasing them.[49]

Piracy is a manifestation of difficulties within Somalia[50] that resonates throughout East Africa. The crime of piracy has spawned a market for new professions that includes intermediaries, negotiators and interpreters, and has affected the real estate markets with pirates purchasing real estate in Kenya.[51] The report states, "[t]he entire region has not only suffered from the negative economic effects of piracy, but has also witnessed a gradual increase in illegal activities connected with piracy (money-laundering, destabilization of the real estate sector, trafficking of weapons and migrants), which are partially replacing legal activities."[52]

Moreover, members of the terrorist group Al-Shabaab and pirate militias are able to "officially" enter foreign countries in Europe, North America and Asia with illicitly obtained, government-issued visas.[53] The operation is remarkably simple:

> Politicians claim they need to travel on official business, such as an invitation to address a Diaspora group or attend a conference, accompanied by a bogus delegation of government officials (and occasionally family members). Such requests are typically accompanied by a note from the Somali Embassy, often with a supporting letter from a minister, the Speaker of Parliament, or one of his deputies. If the request meets with approval, the other members of the "delegation" pay as much as $15,000 for the opportunity to travel abroad with few ever returning to Somalia. Yet, with the country's economic system in shambles, the reality of the

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[49] *Id.*; *see also,* Rep. of the Monitoring Group on Somalia and Eritrea, *supra* note 15, at 11-12 (stating, "[t]he principal impediments to security and stabilization in southern Somalia are the Transitional Federal Government leadership's lack of vision or cohesion, its endemic corruption and its failure to advance the political process. Arguably, even more damaging is the Government's active resistance to engagement with or the empowerment of local, de facto political forces elsewhere in the country. . .More than half of Somali territory is controlled by responsible, comparatively stable authorities that have demonstrated, to varying degrees, their capacity to provide relative peace and security to their populations.").

[50] The French Permanent Representative to the United Nations, Jean-Maurice Ripert asserted that, "piracy is killing," and cited to the millions of Somali's that are reliant on food aid and emergency relief, of which approximately 95 percent arrive by sea. Stake Out by Ambassador Jean-Maurice Ripert, Permanent representative of France to the U.N., Following the adoption of UNSCR 1846 (Dec. 2, 2008), http://www.diplomatie.gouv.fr/en/IMG/pdf/Stake_out _by_Ambassador_Jean-Maurice_Ripert.pdf.

[51] Lang Rep., *supra* note 10, ¶ 16.

[52] *Id.* ¶ 27.

[53] Rep. of the Monitoring Group on Somalia, *supra* note 17, at 33.

situation is that the individuals who can afford to pay such sums are often those who profit from piracy, or leaders of armed groups.[54]

The Heller Report addressed the necessity of regional/international assistance and intervention. The diplomatic and operational partnering to combat piracy, discussed in detail below, could serve as the template for approaching broader Horn of Africa security issues, governance and economic development.[55]

A 2011 press release from the Counter-Piracy Directorate, Government of Puntland, Somalia recommended that, ". . .the international community. . . pursue an integrated approach that tackles the source of piracy, mainly economic disadvantages by creating job opportunities and improving the livelihoods of coastal communities."[56] Collaboratively confronting piracy in East Africa could produce beneficial results, including strengthening relationships among regional states, strengthening relationships between states and maritime powers, and strengthening relationships between Somalia and shipping nations.

Counter-piracy operations also expose an important element of African security - the need for professional militaries. The deployments of coast guards coupled with well-trained land forces that institutionalize the rule of law are critical to security and stability.[57] Somalia is currently developing a coast guard in part because of international and regional assistance. While this is certainly a step in the right direction, much more is needed to expand the fledgling coast guard's operational capability and military capacities.

A Somali coast guard must address training, resources, and the platforms required to address piracy, as well as illegal fishing and other asymmetric threats in the littorals. Operational capability and military capacity challenges are not unique to Somalia. For instance, a representative of Liberia's recently created coast guard said, "[w]e are working with grandpa zodiacs with 42 horse power motors."[58] Furthermore, collaboration between multiple navies and coast guards also poses challenges, as operational units may speak different languages, use different equipment and have different training and legal authorities.

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[54] *Id.*

[55] Global and regional organizations, including the United Nations (including the UN Office on Drugs and Crime and the UN Development Programme), International Maritime Organization, European Union (EU), International Criminal Police Organization (INTERPOL) and North Atlantic Treaty Organization (NATO), among others, are actively supporting repression efforts.

[56] *Press Release from Abdirizak M. Ahmed (Ducaysane), Director General, Counter-Piracy Directorate, Ministry of Maritime Transport, Ports and Counter-Piracy, Government of Puntland, Somalia,* GAROWE ONLINE (Feb. 25, 2011), http://www.garoweonline.com/ artman2/publish/Press_Releases_32/ Press_Release.shtml; *see also Transcript of Statement by Russian minister of Foreign Affairs Sergey Larvov at the UN Security Council Meeting on Fighting Piracy and Armed Robbery Off the Coast of Somalia, New York, December 16, 2008,* MINISTRY OF FOREIGN AFFAIRS OF THE RUSSIAN FEDERATION (Dec. 17, 2008), http://www.un.int/russia/new /MainRoot/docs/off_news/171208/newen1.htm.

[57] A shipping industry representative in Indonesia stated a well developed and resourced coast guard was necessary to curb violations and crimes at sea. Ridwan Max Sijabat, *Coast guard 'key to maritime security'*, THE JAKARTA TIMES, Sept. 21, 2011, http://www.thejakartapost.com/news /2011/03/19/coast-guard-%E2%80%98key-maritime-security%E2%80%99.html.

[58] David Lewis, *U.S. helps African navies with floating academies*, REUTERS, Apr. 20, 2010, http:// www.reuters.com/article/2010/04/20/us-africa-usa-navies-idUSTRE63J2K620100420.

However, sustained deliberate planning, interoperability training, and partnering commitments can bridge those differences and build capacity. Interoperability could include standardized operational procedures, the development of commonly used terms and phrases between patrol aircraft and surface assets, as well as ensuring that communications equipment is functional with the systems on a partner's platforms. If the ultimate goal is a criminal proceeding, states must be aware of its partner's evidence collection and case package requirements for prosecution, as each legal system is unique.

Even if a State cannot deploy naval assets to the Gulf of Aden, opportunities exist to support counter-piracy operations and best management practices.[59] Partnering, as well as ensuring sufficient legal authorities and judicial capacity exist, are all central to the maintenance of a more secure operating environment.[60] The related issues of piracy and the law will be discussed in further detail below.

III. Legal Issues Associated with Piracy

A. Maritime Piracy

Maritime piracy is a violation of international law and a universal crime that imposes a duty on all states to cooperate in its repression.[61] While multiple international treaties proscribe piracy, seizing control of a ship and taking hostages, prosecuting piracy remains a particularly difficult operational and legal issue.

The 1982 United Nations Convention on the Law of the Sea (LOS Convention),[62] the framework for peacetime maritime security cooperation, defines piracy as any illegal act of violence, detention, or depredation, committed outside of territorial waters for private ends by the crew or passengers of a private ship or aircraft against another ship, person or crew.[63]

The piracy definition in the LOS Convention emerged from customary international law as well as the 1958 Convention on the High Seas.[64] While inside

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[59] In addition to the deployment of operational assets, logistics assistance, criminal prosecutions and financial contributions reflect counterpiracy support.

[60] Successfully responding to maritime threats requires knowledge, platforms and the law. Jeff Kline, *Maritime Security, in* SECURING FREEDOM IN THE GLOBAL COMMONS 67, 73 (Scott Jasper, ed., 2010).

[61] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, art. 100 *available at* http://www.un.org/depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm [hereinafter LOS Convention]. Article 100 states, "Duty to Cooperate in the repression of piracy: All states shall cooperate to the fully possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State."

[62] *Id.*

[63] *Id.* art. 101 (defining piracy as consisting of the following acts, "(a) any illegal acts of violence or detention, or any act 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).").

[64] "Piracy is well-established and specifically and clearly codified in Article 15 of the Convention on the High Seas of 1958 and in Article 101 of the United Nations Convention on the Law of the Sea of

territorial waters, crimes like "armed robbery at sea" can be prosecuted by the host country because these crimes do not enjoy universal jurisdiction status and are generally the responsibility of the coastal state.[65] The 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention),[66] which proscribes the unlawful seizure or control of a vessel by force or threat or other form of intimidation, also provides legal authority to punish piratical acts.[67] The 157 State parties to the SUA Convention[68] represent almost 95 percent of the gross tonnage amongst the world's merchant fleets, and in 2005, State parties at the IMO amended the Convention to proscribe, among other things, the maritime transport of weapons of mass destruction.[69]

In addition to LOS Convention and the SUA Convention, the United Nations Convention Against Transnational Organized Crime (UNTOC) and the International Convention Against the Taking of Hostages (Hostages Convention) provide additional legal frameworks for prosecutions of Somali pirates. UNTOC was adopted by General Assembly resolution 55/25 on November 15, 2000, and entered into force September 29, 2003.[70] The UNTOC has three protocols,[71] requiring that State parties:

1982. . . [This] definition is both reflective of customary international law and universally accepted by states." Declaration of the U.S. Department of State's Legal Adviser Harold Hongju Koh, ¶ 9; U.S. v. Hassan, et.al., Criminal No. 2:10cr56 (E.D. Va. Sept. 3, 2010).

[65] J. Ashley Roach, *Agora: Piracy Prosecutions; Countering Piracy Off Somalia: International Law and International Institutions*, 104 AM. J. INT'L L. 397 (2010).

[66] Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221, 27 I.L.M. 668 (1988) [hereinafter SUA Convention]. The SUA Convention was approved at the International Maritime Organization in Rome on March 10, 1998 and entered into force on March 1, 1992. The SUA Convention entered into force for the United States on March 1995. *See* Violence Against Maritime Navigation, 18 U.S.C. §§ 2280-2281 (2008).

[67] *See* S.C. Res. 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008); S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008) (addressing the SUA and providing in part, "*reiterating* that the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA Convention") provides for parties to create criminal offences, establish jurisdiction, and accept delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat thereof or any other form of intimidation. . . ." Some States, however, do not have legislation that enables prosecution under SUA for piratical acts or assert SUA is inapplicable to piratical acts because it was drafted in a counterterrorism context).

[68] Status of Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221, 27 I.L.M. 668 (1988) *available at* http://www.imo. org/About/Conventions/StatusOfConventions/Documents/Status%20-%202011.pdf.

[69] Amendments to the 1988 SUA Convention were approved at the IMO in 2005 and entered into force in 2010 after ratification by the twelfth state. The protocols promulgated a new legal framework to combat the proliferation of weapons of mass destruction and their delivery systems on board vessels and platforms at sea. The protocols also criminalize the conduct of those who transport terrorists or use a ship as a weapon. They further provide enforcement mechanisms to facilitate non-flag state boarding of vessels of being involved in such illicit activity and mandate that a state party either prosecutes or extradites suspected SUA offenders. *See Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf*, INT'L MARITIME ORG., http://www.imo.org/About/Conventions/ListOfConventions/Pages/SUA-Treaties.aspx (last visited October 25, 2011).

[70] United Nations Convention against Transnational Organized Crime and its Protocols, *supra* note 7.

[71] *Id.* The three protocols "target specific areas and manifestations of organized crime: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol

> [1] commit themselves to taking a series of measures against transnational organized crime, including the creation of domestic criminal offences (participation in an organized criminal group, money laundering, corruption and obstruction of justice); [2] the adoption of new and sweeping frameworks for extradition, mutual legal assistance and law enforcement cooperation; and [3] the promotion of training and technical assistance for building or upgrading the necessary capacity of national authorities.[72]

The Hostages Convention was adopted December 17, 1979, and entered into force on June 3, 1983. With regard to piracy, the hostage convention applies:

> To the offense of direct involvement or complicity in the seizure or detention of, and threat to kill, injure, or continue to detain a hostage, whether actual or attempt, in order to compel a State, an international intergovernmental organization, a person, or a group of persons to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage.[73]

Provided there is national legislation – a challenge for several nations – the confluence of treaties and appropriate jurisdictional provisions allow prosecution for the act of threatening to seize a ship, firing at a ship, seizing control of a ship, stealing from passengers, stealing cargo, re-flagging a ship, holding hostages, and/or securing ransom.[74] While there is no consensus on criminalizing the possession of equipment used for piracy such as grappling hooks, national legislation could address required elements.

Because of issues associated with piracy legislation, including geography and jurisdiction as well as capacity, some countries have recommended the development of a multilateral instrument to combat piracy or, alternatively, the development of model legislation. In view of currently existing international treaties, a multilateral instrument is not necessary, though model legislation would be beneficial.

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against the Smuggling of Migrants by Land Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition."

[72] *Id.*

[73] International Convention Against the Taking of Hostages (Hostages Convention), *opened for signature* Dec. 17, 1979, G.A. Res. 146 (XXXIV), U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (1979) (entered into force June 3, 1983).

[74] In just the United States, pirates could be charged with violating 18 U.S.C. § 1651(2011) (piracy on the high seas); 18 U.S.C. § 111 (2011) (assault on federal officials); 18 U.S.C. § 113 (2011) (assault on the high seas); 18 U.S.C. § 371 (2011) (conspiracy); 18 U.S.C. § 844(i) (2011) (use of explosive against property used in foreign commerce of the United States or against any property used in an activity affecting foreign commerce of the United States); 18 U.S.C. § 1659 (2011) (plundering a ship); 18 U.S.C. § 2111 (2011) (robbery on the high seas); 18 U.S.C. § 2280 (2011) (Maritime violence/hijacking of a ship); 18 U.S.C. § 2232 (2011) (assaults on U.S. nationals overseas); 18 U.S.C. § 2232a (2011) (use of WMD against nationals outside of the U.S.); *see also* 18 U.S.C. § 7(1) (2011) (Special Maritime and Territorial Jurisdiction of the United States); the U.S. CONST., art. I, § 8.; NATIONAL SECURITY COUNCIL, COUNTERING PIRACY OFF THE HORN OF AFRICA: PARTNERSHIP & ACTION PLAN (Dec. 2008), *available at* http://www.marad.dot.gov/documents/Countering_Piracy_Off_The_Horn_of_Africa_-_Partnership__Action_Plan.pdf.

Even with legislation, a variety of issues may still exist.[75] Authority to arrest must be clearly detailed and given either to the police, other law enforcement officials, coast guard, or naval assets. Collecting evidence, maintaining a chain of custody, and ensuring the procedural rights of suspected pirates are other potentially difficult issues. Finally, the delivery of evidence to the prosecuting state, the transfer of suspects to the prosecuting state, and the timeliness of bringing a suspected pirate before a judge are additional challenges.

International law regarding piracy, as well as the authority for counter-piracy operations is based primarily on a combination of flag state concepts[76] and universal jurisdiction. For example:

> The general rule on the high seas is that the flag state has exclusive jurisdiction over ships flying its flag (and over the persons and items on board). Except as otherwise specifically provided or agreed, foreign flag ships on the high seas may not be boarded, searched or detained without the consent of the flag state. Nevertheless, on the theory that pirates are enemies of all mankind, international law has long maintained an exception to the rule, which authorizes all states to board, search and detain pirate ships and pirates. Conceptually, it can be said that all flag states have already consented to the boarding of ships flying their flag that are suspected of piracy. This exception extends to the seizure, arrest and prosecution of pirates and pirate ships.[77]

Piracy attained universal jurisdiction status, "not because it is uniquely heinous, but instead, because of the threat that piracy poses to orderly transport and commerce between nations and because the crime occurs statelessly on the high seas."[78] Though piracy is a universal crime, a state that criminally charges a pirate must have national legislation, prison capacity and the political will.

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[75] "Another problem continues to be the inadequacy of domestic piracy legislation, including in the United States. Only domestic courts are competent to try pirates: there is no international court with jurisdiction. As an example of the problem, on August 17, 2010, a U.S. federal district court judge dismissed a piracy charge on the grounds that firing a weapon at a ship (the USS Ashland (LSD-48)) to force it to stop and be boarded did not amount to an act of piracy. In its analysis of the piracy statute, 18 U.S.C. Section 1651, the district court applied the U.S. Supreme Court's definition of piracy as 'robbery' – and there was allegation of robbery. The district court did not take into account that Article 15(3) of the 1958 Geneva Convention on the High Seas (to which the United States is a part and which is therefore part of the 'supreme Law of the Land') defines piracy to include 'any act of inciting or of intentionally facilitating an act described' as piracy. Two months later, a different judge in the same district court came to the opposite conclusion." J. Ashley Roach, *Suppressing Somali Piracy – Next Steps*, 14 AMER. SOC. INT'L L INSIGHTS, at para. 7 (2010) *available at* http://www.asil.org/insights101201.cfm. The case in which the piracy charge was dismissed is United States v. Said, No. 2:10cr57, (E.D. Va. Aug. 17, 2010).

[76] *See* LOS Convention, *supra* note 61, art. 94 (listing duties of the flag state: "Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag"). *See generally*, Craig H. Allen, *Revisiting the Thames Formula: The Evolving Role of the International Maritime Organization and Its Member States in Implementing the 1982 Law of the Sea Convention*, 10 SAN DIEGO INT'L L. J. 265 (2009).

[77] J. Ashley Roach, *Agora: Piracy Prosecutions; Countering Piracy Off Somalia: International Law and International Institutions*, 104 AM. J. INT'L L. 397, 400 (2010), *available at* http://www.asil.org/ajil/July2010selectedpiece.pdf.

[78] U.S. v. Yousef, 327 F.3d 56, 104 (2nd Cir. 2003).

Additional legal challenges include enforcing statutes that may be judicially interpreted to have limitations (e.g., laws that require a nexus to the country instead of providing for universal jurisdiction) and, as noted above, rulings on the length of time it may take to bring a suspected pirate from operational assets in the Gulf of Aden to a courtroom. For example, a district court in Rotterdam, Netherlands, held in 2010 that the passage of 40 days to bring a suspected Somali pirates before a judge in Europe was "too long."[79] The Court held that bringing the suspects to court "could and should have been done earlier," and that this delay constituted a breach of article 5 of the European Convention on Human Rights (ECHR).[80]

The Rotterdam court did not dismiss the conviction[81] despite holding there was a "breach" of ECHR article 5, which provides in part that "everyone arrested or detained . . . shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial."[82]

Though issues related to the duration of detention will continue to be examined in criminal cases involving piracy and drug trafficking, these inquiries must balance the unique scope of at-sea boarding missions, the distances involved between location of capture and location of prosecution, and the fact that expeditious transfer of suspects and evidence is not always possible.

In addition to operational and judicial challenges, jurisdiction over crimes committed in the maritime domain could involve overlapping authority amongst flag, port and coastal states, with defendants, victims, and witnesses hailing from a variety of nations. Additionally, ship schedules, witness availability, interpreter availability, and the remuneration of witness expenses, many of whom are mariners, may be logistical challenges that can affect the outcome of the trial.

Despite those difficulties, over the past five years more than 1,000 pirates have been either convicted or transferred for prosecution in 18 countries.[83] However,

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[79] *Judgment Case Somali Pirates*, DE RECHTSPRAAK (June 17, 2010), http://www.rechtspraak.nl/Organisatie/Rechtbanken/Rotterdam/Nieuws/Pages/Judgemen-tcase-Somali-pirates.aspx (this link goes to the website of the Dutch Judiciary and may require the reader to select "English" on the top right corner of the webpage). The court also held, "All 5 suspects have received a 5-year prison sentence. The sentence is lower than the 7 years demanded. Although to a minor extent, it has been taken into consideration that in other comparable cases the arrested suspects were released and will not be tried. It has furthermore been taken into consideration that detention in the Netherlands forms a heavy burden on the suspects, who are far from home and can not, or hardly, maintain contact with their families in Somalia." *Id.*

[80] *Id.*

[81] An appeal of the court's decision affirming the conviction could possibly be heard by the European Court of Human Rights.

[82] Convention for the Protection of Human Rights and Fundamental Freedoms, June 1, 2010, 213 U.N.T.S. 221, *available at* http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf.

[83] Countries that have thus far prosecuted Somali pirates or detained in anticipation of a prosecution are: Somalia (TFG, Puntland and Somaliland), Yemen, Kenya, Seychelles, Oman, United Republic of Tanzania, Maldives, France, Germany, Netherlands, Spain, Belgium, United States, South Korea, India, Malaysia, Madagascar and Japan. Lang Rep., *supra* note 9, ¶ 42 (explaining that in the United States, as of May 2011, approximately 28 pirates were convicted or pending prosecutions for five separate piratical acts).

after interdictions by naval forces, many more pirates have had their weapons and gear either confiscated or destroyed and then been released.[84] Some of those released are *suspected pirates*, having not yet attempted to hijack a ship. Even though gear on the ship, such as grappling hooks, a cache of weapons and electronic equipment may be make their intentions apparent, most countries do not have the ability, or interest, to prosecute *attempted piracy*. In contrast, releasing pirates who have committed piratical acts undermines the considerable naval and diplomatic efforts unfolding to enforce the rule of law.

Focusing on the operational, judicial, and capacity issues are crucial, because as one study asserted, "[t]he imprisonment requirement by the end of 2011 might be as high as 2,000 persons."[85] In examining why some pirates have been released the Lang Report correctly noted, "warships do not always have secure location in which to keep such persons, so naval forces must be able to transfer them swiftly," suggesting that when transfer does not occur the pirates are often released.[86]

Several proposals have suggested creating international piracy courts.[87] Examining any multinational security challenge collaboratively is useful, but legal authority, in accordance with customary international law as reflected in the LOS Convention, as well as in the SUA Convention, already exists. However, prosecutions are a challenge for many countries because there may not be domestic legislation, an articulated political interest in prosecuting pirates or judicial/prison capacity. Regardless, the development of an international piracy court raises separate investigative, detention, and trial and appellate issues that may prove more difficult than current concerns.

Other legal challenges involve private contractors, known by the recently created phrase: Privately Contracted Armed Security Personnel (PCASP) on board ships[88] as well as the deployment of privately-contracted armed escort vessels.

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[84] *Id.* ¶ 43; *see also* Jane Clinton, *Why Navy Had to Free Brutal Sea Gangsters*, EXPRESS.CO.UK (April 10, 2011), http://www.express.co.uk/posts/view/239754/Why-Navy-had-to-free-brutal-sea-gangsters (quoting the British Foreign Office Minister Henry Bellingham "I can assure you that we are raising our game on this. I don't want to see any more catch and release. If pirates are captured and tried that sends a much stronger signal.").

[85] Possible Options, *supra* note 3, at 17.

[86] Lang Rep., *supra* note 9, ¶¶ 53-54.

[87] Patrick Worsnip, *UN Council suggests special Somali piracy courts*, REUTERS, April 27, 2010, http://af.reuters.com/article/topNews/idAFJOE63R02T20100428 (stating "the resolution, a rare Russian initiative on the council, expressed concern over such cases, calling them a failure that 'undermines anti-piracy efforts of the international community.'"); *see also*, S.C. Res. 1976, ¶ 26, U.N.Doc. S/Res/1976 (Apr. 11, 2011) (which states in part, "decides to urgently consider the establishment of specialized Somali courts to try suspected pirates both in Somalia and the region, including an extraterritorial Somali specialized antipiracy court. . .").

[88] See Interim guidance on use of privately contracted armed security personnel on board ships agreed by IMO Maritime Safety Meeting, INT'L MARITIME ORG. (May 20, 2011), http://www.imo.org/mediacentre/pressbriefings/pages/27-msc-89-piracy.aspx (accessed October 25, 2011); *see also* INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY PROVIDERS, ¶ 1, *available at* http://www.news.admin.ch/NSBSubscriber/message/attachments/21143.pdf (addressing, among other things, the use of force, training, management of weapons, incident reporting and grievance procedures; the Code has been developed and endorsed by more than 60 private companies in the shipping industry and was distributed to state representatives at the Maritime Safety Committee meeting in May 2011 at the IMO).

Interim guidance was developed at the International Maritime Organization for flag states, port and coastal States and ship owners, operators and masters regarding PCASP, though it is not binding and there exists no international, state-endorsed guidance[89] on private vessels.[90]

IMO Secretary General Efthimios E. Mitropoulos praised "the development of guidance to the industry and recommendations to flag States on the use of privately contracted armed security personnel on ships scheduled to sail through Indian Ocean areas exploited by pirates launching their operations from Somalia or mother ships."[91]

There was progress at the IMO, yet much work remains to ensure effective oversight/regulation of privately contracted security. The Report of the Monitoring Group on Somalia and Eritrea noted:

> Regulations imposed by the Governments with which the companies are registered, if they exist, may prove to be either unenforced or unenforceable. Armed private maritime security companies have no official status under the United Nations Convention on the Law of the Sea, which raises serious questions with respect to liability for actions they may take and the damage, injuries or deaths they may cause.[92]

National laws regarding a duty to report attacks and the use of force vary and possession of weapons, use of force, and criminal/civil accountability,[93] must all be addressed. Of the approximately 20 attacks by Somali pirates on ships with armed security teams through March 2011, none have been successful.[94]

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[89] *IMO approves further guidance on privately contracted armed security personnel,* INT'L MARITIME ORG. (Sept. 16, 2011), http://www.imo.org/mediacentre/pressbriefings/pages/47-piracyguidance.aspx (referencing the approved Maritime Safety Committee circulars for dissemination).

[90] *See IMO approves further interim guidance on privately contracted armed security personnel,* INT'L MARITIME ORG. (Sept. 16, 2011), http://www.imo.org/mediacentre/pressbriefings /pages/47-piracyguidance.aspx; *Interim Recommendations for port and coastal states regarding the use of privately contracted armed security personnel on board ships in the high risk area,* INT'L MARITIME ORG. (Sept. 16, 2011), http://www.imo.org/MediaCentre/HotTopics/piracy /Documents/1408.pdf (discussing how private security vessels raise additional legal issues, including, potentially, authorization from the state in which it is registered/flagged).

[91] *Interim guidance on use of privately armed security personnel on board ships agreed by IMO Maritime Safety Meeting,* INT'L MARITIME ORG. (May 20, 2011), http://www.imo.org/Media Centre/PressBriefings/Pages/27-MSC-89-piracy.aspx.

[92] Rep. of the Monitoring Group on Somalia and Eritrea, *supra* note 15, ¶ 181. The report also noted that, "very little data exists on the number of private maritime security companies operating, the arms and ammunition in their possession, their area of operations or the vessels they may use as escorts." *Id.*

[93] Coast Guard Authorization Act, H.R. 3619, 111th Cong. § 8107 (2010) (§ 8107. Use of force against piracy provides, "An owner, operator, time charterer, master, mariner, or individual who uses force or authorize the use of force to defend a vessel of the United States against an act of piracy shall not be liable for monetary damages for any injury or death caused by such force to any person engaging in an act of piracy if such force was in accordance with standard rules for the use of force in self-defense of vessels prescribed by the Secretary."); *see also,* Self-Defense of Vessels of the United States, 76 Fed. Reg. 4706 (Jan. 26, 2011).

[94] Sharon Weinberger, *State Department Says No to Merc Ships At Sea (Updated),* WIRED, Apr. 15, 2011, http://www.wired.com/dangerroom/2011/04/state-department-says-no-to-mercs-at-sea/ (quoting Andrew Shapiro, Assistant Secretary of State for Political-Military Affairs, "I would note that, to date, not a single ship employing armed guards has been successfully pirated."). The Report of the Monitoring

Some nations currently provide guidance to their flagged vessels. In the United States, Maritime Security Directives and Port Security Advisories address, among other things, operational issues, such as self-defense, the use of deadly force, the use of non-deadly force, retreat, defense of the vessel and other property, training, possession of firearms, reporting, communications, licensing, and means of identification and permissible durations of watch.[95]

While not a maritime instrument, the Montreux Document from 2008 on private military and security companies (PMSCs) during armed conflict is instructive.[96] The Montreux Document, "addresses substantive legal concerns [including] individual accountability for misconduct in different jurisdictions, and the authorities' duty to oversee and screen the actions of firms for potential misconduct. . ."[97]

Another challenge to the prevention of piracy is the lucrative nature of the ransoms secured by successful pirates. As such, a state's ability to identify, trace, freeze, seize, and confiscate criminal assets is paramount.[98] Neutralizing the illicit flow of money will definitely affect piracy operations – either through trailing/monitoring the money, pursuing organizers and financiers, restricting ransom payments or pursuing goods/property associated with piracy. The Report of the Monitoring Group on Somalia and Eritrea stated, "Piracy financing is more complex than widely believed. The notion that ransom payments disappear straight into pirates' pockets, and are then transferred to Dubai, Nairobi and Mombasa to invest real estate and commerce, is simplistic and in some ways misleading."[99]

Group on Somalia and Eritrea noted one incident in which pirates initially boarded a ship escorted by privately contracted armed security personnel, but were not successful in seizing control, stating, "[o]n 2 March 2011, the sailing yacht Capricorn was attacked and boarded by Somali pirates in the Arabian Sea, 729 nautical miles east of Puntland, despite being escorted by a private security vessel from private maritime security company Naval Guards Ltd. The two sailors barricaded themselves inside the yacht, which allowed an escort vessel to retake the yacht after a brief exchange of fire with the pirates. No casualties were reported on either side." Rep. of the Monitoring Group on Somalia and Eritrea, *supra* note 15, n.153.

95 *See* U.S. DEPARTMENT OF HOMELAND SECURITY, UNITED STATES COAST GUARD, PORT SECURITY ADVISORY (3-09) GUIDANCE ON SELF-DEFENSE OF OTHERS BY U.S.-FLAGGED COMMERCIAL VESSELS OPERATING IN HIGH RISK WATERS (2009); U.S. DEPARTMENT OF HOMELAND SECURITY, UNITED STATES COAST GUARD PORT SECURITY ADVISORY (5-09) (REV 1) MINIMUM GUIDELINES FOR CONTRACTED SECURITY SERVICES IN HIGH RISK WATERS (2009); MARSEC Directive 104-6 (Rev.5), 76 Fed. Reg. 2402 (Jan. 7, 2011).

96 INT'L COMM. OF THE RED CROSS, THE MONTREUX DOCUMENT ON PERTINENT INTERNATIONAL OBLIGATIONS AND GOOD PRACTICES FOR STATES RELATED TO OPERATIONS OF PRIVATE MILITARY AND SECURITY COMPANIES DURING ARMED CONFLICT (2008), *available at* http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/humlaw.Par.0078.File.tmp/Montreux%20Broschuere.pdf.

97 *Id.* at 5 (stating, "the Monteux Document is not the final word in all questions – regulatory or otherwise – associated with PMSCs. This was never the intention. It does not endeavour to establish new regulations but simply seeks to provide guidance on a number of thorny legal and practical points, on the basis of existing international law." The Montreux Document also seeks to debunk, "the prevailing misconception that private contractors operate in a legal vacuum.").

98 The United Nations Office on Drugs and Crime (UNODC) has provided significant assistance and support to developing national legislation proscribing piracy.

99 Rep. of the Monitoring Group on Somalia and Eritrea, *supra* note 15, at 228 (Annex 4.3, ¶ 1).

The detection of money in financial institutions scattered across multiple nations will require domestic and international information sharing between law enforcement and intelligence personnel. It may also require that states adjust restrictive regulations to enable such cooperation. A Government Accountability Office report released in March 2011 concluded:

> Multiple agencies collect or examine information on pirates' financial activities, including DOD, Justice, State, and the Treasury. However, officials agree that information their agencies gather on pirate finances is not being systemically analyzed, and it is unclear if any agency is using it to identify and apprehend pirate leaders or financiers. U.S. efforts to track and block pirates' finances in Somalia are hampered by a lack of government and formal banking institutions there.[100]

Curtailing financing and imposing legal consequences is an important component of a broader strategy to stop an environment that thrives on illegitimately secured funds. A separate 2011 study that assessed the costs of transnational crimes asserted drugs generated $320 billion in illicit funds, counterfeiting $250 billion, human smuggling, $31 billion and oil, $10.8 billion.[101]

IV. Analysis: The Underlying Infrastructure Sustaining Piracy

A. The Development and Execution of an Attack

While the methods vary by which transnational threats unfold, each provides insight into tactics, techniques, procedures, and more broadly, the network of the respective transnational threat. In 2011, some pirate organizations modified their business model by offering a twenty percent discount for a limited time on ransom payments to encourage payment.[102] Pirates realized there are considerable logistical costs, such as food and medical necessities, associated with detaining hundreds of hostages.

Although being adaptive is important to sustained effectiveness, organization is perhaps more critical as the Lang Report asserts it is organization that has sustained Somali pirates.[103] For example, "[p]irates continue to show evidence of organization, with well-defined networks and hierarchies of financiers, senior

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[100] Caldwell and Pendleton, *supra* note 9, at 13. Separately, in April 2011, Andrew Shapiro of the U.S. State Department stated that the United States was developing a, "more energetic and comprehensive approach to piracy, with a special focus on pirate leaders and financiers on shore." Keith Johnson, *FBI Snatches Alleged Pirate Inside Somalia*, WALL ST. J., Apr. 14, 2011, http://online.wsj.com/article/SB10001424052748704547804576261301548767880.html.

[101] Jeremy Haken, *Transnational Crime in the Developing World*, GLOBAL FINANCIAL INTEGRITY (Feb. 2011), http://transcrime.gfip.org/.

[102] *Pirates Discount Hijacked Ships*, NEWS24, Mar. 13, 2011, http://www.news24.com/ Africa/News/Somali-pirates-Hijacked-ships-sale-2011031. A pirate identified as "Hussein" remarked that, "We have changed our previous strategies. We have altered our operations and ransom deals with modern business deals. We want to free ships within a short period of time instead of keeping them for a long time and incurring more expenses in guarding them. We have to free them at a lower ransom so that we can hijack more ships." *Id.*

[103] Lang Rep., *supra* note 9, ¶ 15.

leaders and seagoing pirate crews."[104] Some pirate organizations even have rank structures and provide training for new recruits.

Taking advantage of the operating environment is another key enabler to the effectiveness of an attack. Somali pirates have exhibited ability to take advantage of the operating environment in Somalia:

> Somali piracy is unique in many regards, as Somalia does not have a natural coastal terrain of the sort that is usually favourable [sic] to pirates. Pirates in other parts of the world typically operate in areas with numerous forested inlets and islands, where ships could be hidden from aerial and maritime surveillance while they are being renamed and repainted. Instead, Somali pirates developed on-land sanctuaries from which they can launch pirate attacks and conduct ransom negotiations. This, no doubt, affects their choice to focus on hostages rather than cargo. What may have been considered a deficiency has resulted in a very positive outcome for the pirates: the amounts they command for ransoms far exceed what they could have gained through robbery.[105]

As piracy is planned on shore, examining the land-based structure is also critical to assessing the extent of the illicit activity and the accompanying repression options. Prior to engaging in an attack, considerable financial and organizational development is necessary, which requires as much as $70,000 in seed money.[106] The Heller report addressed the methodical Somali piracy construct that has generally, but certainly not always, involved between eight to twelve participants who remain at sea until a target is hit. Those participants earn a "class A share" upon a ransom payment. These pirates get underway with at least two skiffs, weapons, fuel and other supplies. Another group consisting of up to 12 individuals provide land support for the operation and earn a "class B share."[107] A pirate could receive $35,000 to $50,000, though the amount of the ransom will determine the exact payment.[108] Moreover, additional incentives exist for being the first on a hijacked ship, such as a Toyota Land Cruiser.[109]

Mother ships are an additional element of an attack. For instance, in March 2011, Indian naval assets rescued the crew of the fishing trawler Vega 5, captured 61 pirates and seized "large numbers of small arms and a few heavy weapons."[110] The pirates had used the vessel as a mother ship to launch attacks on other ships since December 2010.

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104 Caldwell and Pendleton, *supra* note 9, at 3.

105 THE GLOBALIZATION OF CRIME, *supra* note 6, at 198; *see also* Final Report, *supra* note 25.

106 Lang Rep., *supra* note 9, ¶ 96.

107 Rep. of the Monitoring Group on Somalia, *supra* note 17, at 99.

108 Frank Langfitt, *Inside The Pirate Business: From Booty to Bonuses,* NPR, Apr. 15 2011, http://m.npr.org/news/front/135408659?singlePage=true. The article quoted Stig J. Hansen, who interviewed more than 30 pirates, regarding ransom payments.

109 *Id.*

110 *Indian Navy Captures 61 Pirates on Mozambican Ship,* BBC NEWS SOUTH ASIA, March 14, 2011, http://www.bbc.co.uk/news/world-south-asia-12729629 (stating that the capture of 61 pirates, "is thought to be among the largest group of pirates to be captured").

> Mother ships provide additional infrastructure support to pirates, for example: If a ship is successfully hijacked and brought to anchor, the pirates and the militiamen require food, drink, qaad, fresh clothes, cell phones, air times, etc. The captured crew must also be cared for. In most cases, these services are provided by one or more suppliers, who advance the costs in anticipation of reimbursement, with a significant margin of profit, when ransom is eventually paid.[111]

Thus, if a hijacking results in a ransom payment, the supplier, financier, investors, local elders and participants share the money.[112] The tactics of pirates also reveal the extent of their intelligence:

> The visual horizon at sea is normally about three miles. The ability of pirates to locate target vessels in vast expanses of sea has led some to conclude that pirates are being provided with GPS coordinates by informants with access to ship tracking data. Crews of some hijacked vessels have said that the pirates appear to know everything about the ship on boarding, from the layout of the vessel to its ports of call. Calls made by pirates from their satellite phones from captured ships indicate an international network.[113]

This well-developed organization underscores the deep integration of piracy in Somalia and the extent of the challenge in removing land-based support. Somali pirates, similar to Barbary Corsairs more than 200 years ago, continue to command respect and admiration ashore. Governance, and specifically, the institutionalization of law and order on land coupled with capacity are necessary first steps in changing this environment and eliminating piracy networks.

V. Proposal: An International Model for Cooperation

A unity of effort against Somali pirates does exist, yet there is not a single nation, command, or unit in charge of all counter piracy efforts. The venues and newly created constructs that have drawn together an array of states, nongovernmental organizations, and the shipping industry highlight the unprecedented scope of cooperation.[114]

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111 Rep. of the Monitoring Group on Somalia, *supra* note 17, at 99.

112 Mark Leon Goldber, *The Somali Pirates' Business Model*, UN DISPATCH, March 17, 2010, http://www.undispatch.com/the-somali-pirates-business-model (stating that the supplier, financier and investors get 30 percent; local elders share 5-10 percent for anchoring rights, those receiving shares for support on land could get as much as $15,000, with the remaining money, the profit, divided among the participants in the hijacking).

113 THE GLOBALIZATION OF CRIME, *supra* note 6, at 198.

114 *Background Information about the Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia (ReCAAP) and the ReCAAP Information Sharing Center (ISC)*, RECAAP INFO. SHARING CTR. (Sept. 4, 2006), http://www.recaap.org/AboutReCAAP ISC.aspx (showing that states in other geographic areas affected by piracy and armed robbery at sea have also partnered efforts. As of May 2011, the parties to this agreement included: Bangladesh, Brunei Darussalam, Cambodia, China, Denmark, India, Japan, the Lao People's Democratic Republic, Myanmar, the Netherlands, Norway, the Philippines, the Republic of Korea, Singapore, Sri Lanka, Thailand and Vietnam).

The most strategically ambitious international effort in the fight against piracy has been the Contact Group on Piracy off the Somali Coast (CGPCS), established in 2009 following UN Security Council Resolution 1851. The CGPCS has facilitated discussions and coordination with diplomats, military personnel, lawyers, international organizations and the civilian industry.[115] This *ad hoc* international cooperation mechanism is emblematic of an emerging approach to collaboratively addressing transnational security threats. Participation is voluntary, as are contributions, and the organizations meetings are not conducted under the direction of the United Nations. The Contact Group started with approximately 20 participating States and by 2011 had grown to approximately 70.[116]

The Contact Group has five working groups: (1) Military and Operational Coordination, Information Sharing, and Capacity, (2) Judicial Issues, (3) Strengthening Shipping Self-Awareness and Other Capabilities (4) Public Information and (5) Financial Flows.[117] Each group is chaired by a representative from a different nation.[118]

Issues at the Contact Group have included the progress of States in establishing national piracy legislation and prosecution of pirates, regional capability development, and industry-focused self-protection measures, referred to as Best Management Practices.[119] At a Contact Group meeting in 2010, the Ministers of the Transnational Federal Government of Somalia, Puntland, and Galmudug provided a proposal for a Coastal Monitoring Force.[120]

The recently developed working group on financial flows "focuses on the illicit financial flows associated with piracy in order to disrupt the pirate enterprise ashore."[121]

An equally ambitious *ad hoc* construct to discuss Somali piracy repression efforts has also emerged for operational issues. Shared Awareness and Decon-

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[115] *Fact Sheet from the First Plenary Meeting of the Contact Group on Piracy Off the Coast of Somalia*, U.S. DEP'T OF STATE, BUREAU OF POLITICAL-MILITARY AFFAIRS (January 20, 2009), http://www.state.gov/t/pm/rls/fs/130610.htm (stating that "the CGPCS offers participation to any nation or international organization making a tangible contribution to the counter-piracy effort, or any country significantly affected by piracy off the coast of Somalia.").

[116] Plenary meetings have been held in the United States, Egypt, Japan, Greece, Norway, South Korea and Turkey. *See Contact Group on Piracy Off the Coast of Somalia,* U.S. DEP'T OF STATE, http://www.state.gov/t/pm/ppa/piracy/contactgroup/index.htm (last visited October 25, 2011).

[117] *Id.*

[118] *Id.* Working Group (WG) 1 is chaired by the United Kingdom; WG 2 is chaired by Denmark; WG 3 is chaired by the United States; WG 4 is chaired by Egypt and WG 5 is chaired by Italy. *See Fact Sheet for the Contact Group on Piracy off the Coast of Somalia,* U.S. DEP'T OF STATE (Jan. 14, 2009), http://www.state.gov/t/pm/rls/othr/misc/121054.htm.

[119] *Media Note from the Sixth Plenary Meeting of the Contact Group on Piracy off the Coast of Somalia*, U.S. DEP'T OF STATE (June 11, 2010), http://www.state.gov/r/pa/prs/ps/2010/ 06/143010.htm (stating that "industry and governments have continued to monitor the tactics used by Somali pirates and, based on evaluations, have revised Best Management Practices (BMPs) and other counter piracy guidance. . .During the March 2010 meeting of WG3 (Working Group 3), it was decided that a survey would be conducted to determine how Administrations were disseminating and implementing BMPs. Of the 29 Administrations that attended the meeting, 18 Administrations responded included the four largest ship registries.").

[120] *Id.*

[121] *See Contact Group on Piracy Off the Coast of Somalia, supra* note 116.

fliction Event ("SHADE"), a military forum that includes international law enforcement, the shipping industry, Combined Maritime Forces, European Union Naval Forces (EUNAVFOR), Maritime Security Centre Horn of Africa, NATO and international naval force representatives was established "to provide a forum in which the various military elements engaged in counter-piracy operations in the region can discuss their successes and challenges, share best practices and coordinate forthcoming activities."[122]

A SHADE meeting in 2010, led by NATO, was characterized as fostering, "a spirit of cooperation and frank/honest discussions to allow all forces and nations to share information and work together to combat piracy off the coast of Somalia."[123] SHADE meetings have included between 30 to more than 100 representatives from China, Russia, Japan, South Korea, Yemen, Seychelles, Egypt, Bahrain, Saudi Arabia and the United States among others, as well as maritime security and coordination agencies.[124] In September 2011, the 21st SHADE was held.[125]

In addition to SHADE, representatives from more than twenty countries met in Djibouti under the auspices of the International Maritime Organization (IMO) to develop a regional framework to cooperate against piracy.[126] The participating African and Arab states reached an agreement on a "code of conduct" to facilitate information sharing, regional training, capacity building, maritime domain awareness and updating legislation.[127]

In the United States, the alignment of federal departments in response to maritime threats occurs through the Presidentially-approved Maritime Operational Threat Plan (MOTR Plan).[128] The MOTR Plan directs executive departments,

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[122] Press Release, 18th SHADE Meets to Discuss Counter-Piracy from Commander, U.S. Naval Forces Central Command, U.S. Fleet Combined Maritime Forces (January 11, 2011), http://www.cusnc.navy.mil/articles/2011/CMF003.html.

[123] News Release, NATO Chairs Counter Piracy Meeting in Bahrain, Allied Maritime Command Headquarters Northwood (June 2, 2010), http://www.manw.nato.int/pdf/Press%20Releases%202010/Jun%20-%20Dec%202010/SNMG2%202010%2019.pdf; *see also, CMF hosts 21st SHADE Meeting*, COMBINED MARITIME FORCES (Sept. 27, 2011), http://combinedmaritime forces.com/2011/09/27/cmf-hosts-21st-shade-meeting/.

[124] *CMF hosts 21st SHADE Meeting, supra* note 123.

[125] *Id.*

[126] Press Briefing, UAE Signs IMO Anti-piracy Code, International Maritime Organization, Briefing 23/2011 (April 18, 2011), http://www.imo.org/MediaCentre/PressBriefings/Pages/UAE-signs-IMO-anti-piracy-Code.aspx (showing that, as of April 18, 2011, the Djibouti Code of Conduct had 18 signatory states with approximately $15 million contributed to a trust fund. The Code seeks to advance information sharing, regional training and capacity building, among others. Activities of the project implementation unit include: a regional training center in Djibouti, information sharing, national legislation, training, maritime situational awareness and project management. On February 1, 2011, the Sana'a Information Sharing Center became operational. Construction of a regional training center is slated to begin in Djibouti in 2011).

[127] *High-Level Meeting in Djibouti Adopts a Code of Conduct to Repress Acts of Pirace and Armed Robbery Against Ships*, INT'L MARITIME ORG. (January 30, 2009), http://www5.imo.org/SharePoint/mainframe.asp?topic_id=1773&doc_id=10933 (stating that "the Code of Conduct further calls for the setting up of national focal points for piracy and armed robbery against ships and the sharing of information relating to incidents reported).

[128] The MOTR process was implemented in 2005 with an *interim* plan that is substantially similar to the *final* MOTR plan of October 2006. The MOTR plan is one of eight maritime plans, along with the

such as Justice, State, Defense and Homeland Security, to develop desired national outcomes and execute courses of action in a time-sensitive fashion.

The MOTR Plan process has been used more than 1,000 times in six years to address the U.S. Government response to migrants, drug smugglers, fishing incursions, piracy, and other maritime issues of national importance. The MOTR Plan integrates national level command and operations centers with agency subject matter experts through e-mail, phone calls, or via secure video teleconferences. The MOTR process has been effective because timely cooperation is directed, a necessity in the maritime domain. National-level coordinating processes exist in other countries, to varying degrees, to enable separate agencies, such as the national police, coast guard, or naval forces, to be in contact with foreign ministries and departments of justice to quickly, and collaboratively, make decisions.

Countering piracy presents a common threat that nations collectively can work against. In this regard, bilateral agreements have also significantly advanced repression efforts. In a 2011 U.S.-Indian Memorandum of Counter-Terrorism, U.S. Ambassador to India, Timothy J. Roemer, remarked that, "[m]aritime security can be an area where we can work together in the future. We know that these pirates are increasingly reaching out further and further off shore."[129]

Considerable partnering with the civilian industry has occurred elsewhere, for example, "U.S. agencies, primarily the Coast Guard and the Maritime Administration, have worked with industry partners to facilitate collaborative forums, share information, and develop joint guidance for implementing counter piracy efforts."[130] Regardless of the forum, collaboration is key to countering piracy.

VI. Conclusion

Transnational threats, such as drug trafficking, human smuggling, and piracy are corrosive to stability and governance. The response to Somali piracy in diplomatic venues demonstrates the value of partnering and unity of effort against threats that transcend borders. In addition to action at the United Nations, the International Maritime Organization, multiple regional and international organizations, naval assets, flag States, ship owners, and the shipping community have contributed. With multiple venues addressing piracy, ensuring there is not redundancy of action will be challenging.

National Strategy on Maritime Security, directed by National Security Presidential Directive 41/Homeland Security Presidential Directive 13, Maritime Security Policy, December 21, 2004. *See NSPD 41/HSPD 13 National Strategy for Maritime Security Supporting Plans*, DEP'T OF HOMELAND SEC., http://www.dhs.gov/files/programs/editorial_0608.shtm (last visited October 25, 2011). The Presidential Directive provides, in part, that the Maritime Threat Response plan will ensure the, "seamless United States Government response to maritime threats against the United States." *Id.*

129 *US Looks at India as Strategic Partner to Counter Pirates: Timothy J Roemer*, DAILY NEWS & ANALYSIS, March 9, 2011, http://www.dnaindia.com/india/report_us-looks-at-india-as-strategic-partner-to-counter-pirates-timothy-j-roemer_1517838-all (stating that the US and India could be strategic partners to confront piracy).

130 Caldwell & Pendleton, *supra* note 9, at 11.

Continued collaboration against Somali piracy is critical to improving both the situation on the ground and the threat on water. Somalia may have unique humanitarian, governance, and development challenges, but the financial objectives of pirates are similar to other transnational crimes, like other threats, it will be imperative to disrupt and dismantle the networks and eliminate operating bases.

Collectively confronting Somali piracy and protecting navigational freedoms has provided a strong framework for increased maritime domain awareness, communication and sharpened legal authority. However, thousands of ships remain vulnerable to attack during transit in a two million square mile area. Lessons learned from confronting other organized criminal networks, including building capacity, institutionalizing the rule of law, pursuing leaders and those who provide external support, aggressively tracking the illicitly obtained money, and removing sanctuary have relevance in the fight against Somali pirates. Those lessons are equally relevant in ensuring maritime security in the Gulf of Guinea.[131]

The operational and diplomatic cooperation that has emerged to align action against Somali pirates is emblematic of a new period in international maritime security partnering. Sustaining the impressive and considerable efforts - which have made a positive difference in reducing the success rate of attacks - along with building capacity, expanding land-based efforts to pursue pirate leaders, and addressing financial issues, particularly with regional states in the lead, will be critical in transforming an environment that has now experienced a generation of impunity.

[131] *See Ban calls for integrated strategy against maritime piracy in Gulf of Guinea*, U.N. NEWS CENTRE, October 19, 2011, http://www.un.org/apps/news/story.asp?NewsID=40103&Cr=gulf+of+guinea&Cr1=. United Nations Secretary-General Ban Ki-moon, "urged States and regional organizations in West Africa's Gulf of Guinea to develop a comprehensive and integrated strategy to combat maritime piracy, which he said threatens to hinder economic development and undermine security in the region." The Secretary-General remarked to the Security Council during a debate on piracy in the Gulf of Guinea that, "The threat is compounded because most Gulf [of Guinea] States have limited capacity to ensure safe maritime trade, freedom of navigation, the protection of marine resources and the safety and security of lives and property."

THE BUSH DOCTRINE AND THE USE OF FORCE: REFLECTIONS ON RULE CONSTRUCTION AND APPLICATION

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Abstract

The Bush Doctrine is a suggested modification of international law that would allow states to launch preventive military action in order to preclude terrorist attacks or enemy strikes involving weapons of mass destruction. At present, however, the Bush Doctrine is little more than a prescriptive notion as opposed to a fully developed set of proposed legal rules. This article considers a series of different rule explications and ancillary rules that would be necessary to give the Bush Doctrine effect in law. Specifically, we consider: (1) What is the Threat Threshold that Triggers the Doctrine?; (2) Who is Allowed to Authorize Action?; (3) Must This Be a Last Resort Option?; (4) Must the Right be Exercised Multilaterally or is Unilateral Action Permitted?; (5) How Do the Laws of War Constrain Doctrine Actions?; and (6) What Mechanisms Exist for Ensuring Compliance/Enforcement and to Punish Violations? The viability and implications of different answers to these questions are examined.

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I. Introduction

The common refrain, "there ought to be a law," signals a preference for some new proscription or prescription in the international or other legal systems. Yet changing legal rules involves more than broadly specifying allowed or prohibited behavior. There must also be a series of ancillary rules that establish qualifications about the behavior. Furthermore, additional rules must specify the processes that provide for the orderly implementation and enforcement of the central normative rule. Rules that provide issue-specific requirements about behavioral conduct can be referred to as part of the "normative system" of international law. Working in tandem with normative requirements, the "operating system" provides the framework for establishing rules and norms, outlines the parameters of interaction, and provides the procedures and forums for resolving disputes involving the norms.[1] It is the configuration of these supplemental rules that determine the conditions under which a rule can be exercised, which actors can exercise the rights or are constrained by the obligations of the new rule, and how the new rule will be enforced and violations of the rule addressed.

In this article, we examine the so-called Bush Doctrine, or the "claim of authority to use, unilaterally and without international authorization, high levels of violence in order to arrest a development that is not yet operational and hence is not yet *directly* threatening, but which, if permitted to mature, could be neutralized only at a high, possibly unacceptable, cost."[2] An example of such an action is the 1981 Israeli attack on the Osirek nuclear reactor in Iraq. Much of the debate over the Bush Doctrine concerns whether it should or should not be (and in a few cases whether it is or is not) international law.[3] The Doctrine is better understood as a yet to be clearly defined right to use military force, rather than a set of clear rules on its application. The rules chosen to constrain or channel this right have substantial implications for how the Bush Doctrine would be exercised, its frequency of use, and its effectiveness. Thus, a full evaluation of its implications cannot be made without specifying and analyzing the ancillary rules that might accompany a new rule for the use of military force.[4]

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[1] *See* PAUL F. DIEHL & CHARLOTTE KU, THE DYNAMICS OF INTERNATIONAL LAW 74-102 (2010).

[2] W. Michael Reisman, *Self Defense in an Age of Terrorism*, 97 AM. SOC'Y INT'L. L. PROC. 141, 143 (2003) (emphasis in original).

[3] *See* Donna M. Davis, *Preemptive War and the Legal Limits of National Security Policy*, 10 IUS GENTIUM 11, 50-52 (2004); *see also* Robert J. Delahunty & John Yoo, *The "Bush Doctrine": Can Preventative War be Justified?*, 32 HARV. J.L. & PUB. POL'Y 843, 865 (2009); *see also* Thomas R. Anderson, *Legitimizing the Gap Between the Just War and the Bush Doctrine*, 8 GEO. J.L. & PUB. POL'Y 261, 265-67 (2010).

[4] Another criterion for evaluating new rules is the degree to which they empirically fulfill their purposes, that is their effectiveness. With respect to the Bush Doctrine, we use this standard in Paul F. Diehl & Shyam Kulkarni, *Worth a Pound of Cure?: An Empirical Assessment of the Bush Doctrine and Preventive Military Action*, U.MIAMI INT'L & COMP. L.REV. (forthcoming). Our general conclusion is that using military force in a preventive fashion provides very limited, if any value, to states that employ this strategy. At best, there is less than an even chance of victory in such circumstances and this requires a full-scale war. The utility of preventive strikes diminishes tremendously in attacks short of war, and indeed the minimal success rate (around 10%) is no better than using coercive diplomacy by merely threatening force rather than actually using it. The success rate improves somewhat for major power

Accordingly, we consider a series of rules that would be necessary to give the Bush Doctrine effect in law. Specifically, we consider (1) What is the Threat Threshold that Triggers the Doctrine?; (2) Who is Allowed to Authorize Action?; (3) Must This Be a Last Resort Option?; (4) Must the Right be Exercised Multilaterally or is Unilateral Action Permitted?; (5) How Do the Laws of War Constrain Doctrine Actions?; and (6) What Mechanisms Exist for Ensuring Compliance/Enforcement and to Punish Violations? We begin with a brief elaboration of the Bush Doctrine and describe the analytical framework that guides our address of the six questions noted above.

II. The Basic Elements of the Bush Doctrine

The purported right of states to take preventive action is labeled with the name of President George W. Bush, but his immediate predecessors each presented policies that were consistent with the Bush Doctrine.[5] Such justifications took place in the context of specific threats against the U.S., but the resulting assertions took the form of general American policy.

In light of the September 11, 2001 (9/11) attacks, the U.S. developed a policy in its September 2002 National Security Strategy that stated, "our best defense is a good offense."[6] The strategy further asserted that the U.S. would act prior to any attack by stating, "we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country."[7]

Less than six months later, U.S. President George W. Bush expanded the potential targets of preventive actions to include enemy regimes that were pursuing weapons of mass destruction, specifically Iraq:

> Some have said we must not act until the threat is imminent. Since when have terrorists and tyrants announced their intentions, politely putting us on notice before they strike? If this threat is permitted to fully and suddenly emerge, all actions, all words, and all recriminations would come too late.[8]

Bush Doctrine strikes are designed to take place before an attack occurs, but there is no explicit benchmark on how likely the military attack would have to be

states, but not enough to justify the use of force or perhaps to overcome the establishment of a right that only a limited set of actors can exercise.

[5] Zhiyuan Cui, *The Bush Doctrine and Neoconservatism: A Chinese Perspective*, 46 HARV. INT'L L.J. 403, 403 (2005).

[6] NAT'L SECURITY COUNCIL, The Nat'l Sec. Strategy of the United States of America (Sept. 2002), pt. III, *available at* http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/. The idea of preventive military actions or "anticipatory self-defense" predates Bush Administration policy and action, although its prominence is more recent. *See* ALAN M. DERSHOWITZ, PREEMPTION: A KNIFE THAT CUTS BOTH WAYS 1-55 (2006) (for a brief history in chapter 1). Note also that anticipatory self-defense is not necessarily the only law based justification with respect to the invasion of Iraq. The United States and others might have cited the Iraqi violation of the cease-fire agreement part of UN Resolution 687. *See* DINSTEIN, *infra* note 77, at 215 for an elaboration of this argument.

[7] NAT'L SECURITY COUNCIL, *supra* note 6, pt. III.

[8] President George W. Bush, State of the Union Address (Jan. 28, 2003).

before a preventive action is justified – it could be weeks or years before a prospective attack (these elements are discussed below). The purpose of Bush Doctrine actions is to foreclose an attack, and, therefore, negate the need for self-defensive actions later on.

The legal rationale underlying the Bush Doctrine arises from the changing character of warfare over time and the inadequacy of United Nations (U.N.) Charter-based law to deal with these circumstances. Provisions in the U.N. Charter dealing with the use of force, specifically Article 51,[9] permit self-defense actions, but only after an attack has occurred. They are predicated on the assumption that the attack arises from another state; individuals and groups are relevant only as subjects of legal protection during the use of military force. Yet, in the last several decades, non-state actors such as armed militias and terrorist groups have undertaken military operations, and they are increasingly well armed and capable of launching widespread and destructive attacks.

Identifying responsible actors and their use of force is different than conventional military attacks, and the standard rules do not seem to apply. Terrorist attacks tend to be singular events such that conventional self-defense responses are not feasible; there is no ongoing invasion or attack against which one can respond. In such circumstances, laws of state responsibility dictate that the victim-state file a claim against the state where the attack originated or file against secondary-state supporters of those perpetrating the acts.[10] Yet states are not responsible for actions of terrorist groups unless the former exercises "effective control" over the latter. Most often, however, states do not support or have control over the groups operating within its borders. In the case of failed states, there might be no legitimate authority against which a claim might be directed. This presumes that the geographic origin of the terrorist attack can even be determined; in fact, the planning, financial support, and execution might involve multiple states and may not be transparent. Furthermore, terrorist groups do not have legal status to have a claim made against them directly, even in the unlikely event that they would honor such legal responsibilities. The deterrent effect from traditional self-defense may not be applicable or credible against non-state actors and, therefore, the non-state actors are not likely to be restrained in their actions. As such, preventive action is necessary where deterrence will not work.

In addition, Charter-based self-defense provisions are inadequate in cases of attack involving weapons of mass destruction. A nuclear attack could conceivably wipe out a victim state's military forces or government structures, such that the ability to launch self-defense actions is precluded. As W. Michael Reisman explains:

> The introduction of vastly more destructive and rapidly delivered weapons began to undercut the cogency of that [UN Charter] legal regime. The reason was simple: a meaningful self-defense could be irretrievably

[9] U.N. Charter art. 51, para 1.

[10] CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 121-24 (3rd ed. 2008); *see also* Richard N. Gardner, *Neither Bush nor the "Jurisprudes"*, 97 AM. J. INT'L L. 585, 590 (2003).

> lost if an adversary with much more destructive weapons and poised to attack had to initiate (in effect, accomplish) its attack before a right of self-defense came into operation.[11]

In the case of geographically small states such as Israel, a large portion of its society would be destroyed following a nuclear attack. The magnitude of the harm is so great that waiting for attack is unreasonable. Most analogous, however, is the precautionary principle, which is notably applied in environmental and other areas of law.[12] According to this principle, the mere prospect of significant harm, especially of great magnitude and irreversible effects, is sufficient justification for government action.[13] Uncertainty, or the probability of an event occurring, must be weighed in comparison to the magnitude of the harm. When catastrophic harm is possible (e.g., effects of global warming), the presumption is tilted in favor of action rather than inaction. Such logic has even been directly applied to the Bush Doctrine where political figures have used rhetoric consistent with the precautionary principle in justifying preventive strikes and scholars have looked at terrorism and nuclear war in the context of catastrophic risk.[14]

Various arguments in support of the Bush Doctrine as accepted international law involve rationales based on instant custom,[15] *jus cogens*,[16] and *opinion necessitates*.[17] Nevertheless, there is little indication that the Bush Doctrine is presently accepted law or practice. State practice with respect to anticipatory self-defense has been so rare, indicating that traditional custom has not been established, nor have the conditions that would make established international law been fulfilled.[18]

In the absence of established law, as specified in a treaty or customary practice, there is little guide to the precise elements of what any international rule might encompass. With respect to the Bush Doctrine, the central prescription is that military force could be exercised in a preventive fashion, but there is little beyond that. For the Bush Doctrine to function as law, a series of additional rules are required that provide the parameters of the allowed behavior – i.e., the preventive use of military force – and how those behaviors will be managed in

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[11] Reisman, *supra* note 2, at 142-43.

[12] James Cameron & Juli Abouchar, *The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment*, 14 B.C. INT'L & COMP. L. REV. 1, 3 (1991). *See generally* CASS SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE (2005).

[13] *See generally* Cameron & Abouchar, *supra* note 12; SUNSTEIN, *supra* note 12.

[14] *See* Jessica Stern & Jonathan Wiener, *Precaution Against Terrorism*, 1-58 (Harvard Univ. Faculty Research, Working Paper No. 019, 2006).

[15] Benjamin Langille, *It's "Instant Custom": How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001*, 26 B.C. INT'L & COMP. L. REV. 145, 156 (2003); *see also* Lucy Martinez, *September 11th, Iraq and the Doctrine of Anticipatory Self Defense*, 72 UMKC L. REV., 123, 190 (2003).

[16] David B. Rivkin, Jr., Lee A. Casey & Mark Wendell DeLaquil, *War, International Law, and Sovereignty: Reevaluating the New Century Preemption and Law in the Twenty First Century*, 5 CHI. J. INT'L L. 467 (2005).

[17] Christian M. Henderson, *The 2006 National Security Strategy of the United States: The Pre-Emptive Use of Force and the Persistent Advocate*, 15 TULSA J. COMP. & INT'L L. 1, 28 (2007).

[18] David A. Sadoff, *Question of Determinacy: The Legal Status of Anticipatory Self-Defense*, 40 GEO. J. INT'L L. 423, 583 (2009).

the international legal system. Following Paul Diehl and Charlotte Ku, we refer to these as normative and operating systems rules respectively.[19]

III. Normative System v. Operating System Rules

Transforming the Bush Doctrine from a vague policy proposal to a more precise rule of international law will require a series of decisions that provide greater specificity about the conditions under which preventive military action is allowed. This is part of what is referred to as the normative system of international law. International law as a normative system provides direction for international relations by identifying the substantive values and goals to be pursued. The Bush Doctrine will also require operational elements that outline the parameters of interaction and provide the procedures and forums for resolving disputes among those taking part in these interactions. Any rule of law must be properly specified normatively, but must also be compatible with the operating system structures and processes that give it effect. We discuss the normative and operating system elements in more detail below as a prelude to covering the key elements that are required for the Bush Doctrine.

In defining the normative system, the participants in the international legal process engage in a political and legislative exercise that defines the substance and scope of the law. Normative change may occur slowly with evolution of customary practices, a traditional source of international law. Yet, in recent historical periods, normative change has been precipitated by new treaties (*e.g.*, the Nuclear Non-Proliferation Treaty) or by a series of actions by international organizations (*e.g.*, the activities of the first team of U.N. weapons inspectors in Iraq). The Bush Doctrine could logically come to fruition under either process, but one might expect that evolutionary practice, especially one defined by more rapid customary practice,[20] is more likely than codification of the rule in a multilateral treaty. In any case, the establishment of international legal norms is still less precise and structured than in domestic legal systems where formal deliberative bodies enact legislation.

The topics of the normative system are issue-specific, and many components of the system refer to subtopics within issue areas (*e.g.*, the status of women within the broader topic area of human rights).[21] Many of these issues have long been on the agenda of international law. In fact, proscriptions on the use of military force have their roots in natural law and early Christian teachings on just war.[22] Many normative rules concerning the law of the sea (*e.g.*, seizure of commercial vessels during wartime) also have long pedigrees in customary prac-

[19] DEIHL & KU, *supra* note 1, at 74-102 (elaborating on the normative and operating systems).

[20] Anthea Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 759 (2001).

[21] *See* Thomas Buergenthal, *The Evolving International Human Rights System*, 100 AM. J. INT'L L. 783, 788-90 (2006); *see also* Christopher C. Joyner, *The Responsibility to Protect: Humanitarian Concern and the Lawfulness of Armed Intervention*, 47 VA. J. INT'L L. 693, 708-09 (2007) (contending the U.N. Charter establishes international obligations to protect not only people but sub-groups such as women and children).

[22] MALCOLM N. SHAW, INTERNATIONAL LAW 22-24 (6th ed. 2008).

tice.[23] Yet, recent trends in the evolution of the normative system represent expansions in its scope and depth. Some current issue areas of international legal concern, most notably with respect to human rights and the environment, have developed almost exclusively during the latter half of the twentieth century. Furthermore, within issue areas, legal norms have sought to regulate a wider range of behaviors. For example, international law on the environment has evolved beyond simple concerns of riparian states to include concerns with ozone depletion, water pollution, and other problems.[24]

With respect to the Bush Doctrine, specifying the normative element means not only allowing preventive military action as a norm or value of the international community, but also providing clarity and detail on what kinds of military actions are permitted, the conditions that must be present for the actions to be legal, and how the actions relate to other rules of international law. Below, we address the different options available to answer these concerns.

The operating system deals with a different series of concerns or questions. Who, for example, are the authorized decision-makers in international law? Whose actions can bind not only the parties involved but also others? How do we know that an authoritative decision has taken place? When does the resolution of a conflict or a dispute give rise to new law? The operating system may be associated with formal structures, but not all operating system elements are institutional. For example, the Vienna Convention on Treaties entails no institutional mechanisms, but it does specify various operational rules about treaties and therefore the parameters of lawmaking.[25]

The operating system has a number of dimensions or components that are typically covered in international law textbooks but largely unconnected to one another.[26] Some of the primary components include: (1) the sources of law, (2) actors, (3) jurisdiction, and (4) courts or institutions.[27] The operating system then is a set of rules that govern how international law is made, which actors have rights and obligations, how legal processes are managed, and which structures are assigned tasks with respect to dispute resolution and compliance. If there are not suitable operating system procedures available, then norms in the legal system are likely to be ineffective in promoting the desired behaviors. New

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[23] The Paquete Habana, The Lola, 175 U.S. 677, 708-09 (1900).

[24] PETER M. HAAS, ROBERT O. KEOHANE & MARC A. LEVY, INSTITUTIONS FOR THE EARTH: SOURCES OF EFFECTIVE INTERNATIONAL ENVIRONMENTAL PROTECTION 27-29, (1993); DAVID G. VICTOR, THE COLLAPSE OF THE KYOTO PROTOCOL AND THE STRUGGLE TO SLOW GLOBAL WARMING 13-15 (2004); Ronald B. Mitchell, *Regime Design Matters: Intentional Oil Pollution and Treaty Compliance*, 48(3) INT'L ORG. 425, 430-33, 458 (1994).

[25] *See* United Nations Vienna Convention on the Law of Treaties art. 3-5, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

[26] Shaw, *supra* note 22 at, 62-64.

[27] Kenneth Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54(3) INT'L ORG., 421, 424-26; *see generally* Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757 (2001); *see also* Jose Alvarez, *The New Treaty Makers*, 25 B.C. INT'L & COMP. L. REV. 213, 218-32 (2002) (discussing the emergence and role of international organizations); *see also* Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM.J. INT'L L. 348, 359-62 (2006) (discussing the impact of Non-Governmental Organizations on international law).

norms, such as the Bush Doctrine, can rely on extant processes created for general purposes – like, for example, the role that the International Court of Justice plays for any question of international law, regardless of issue area, which constitutes a dispute between state parties. States might also create norm or issue area specific institutions or processes, such as the WTO dispute resolution mechanism that exists for trade conflicts.[28]

With respect to the Bush Doctrine, concerns with defining what constitutes law or not, as well as jurisdictional elements (*e.g.*, national vs. universal jurisdiction in criminal matters), are largely irrelevant. Yet, which actors can exercise the right to preventive military action and which actors can decide (with which legal processes) is fundamental to the operation of a new Bush Doctrine precept. In addition, the Bush Doctrine must include provisions for how disputes over its usage are settled, how violators are punished, and what remedies are available to those that are victims of abuse of the new rights granted by the Bush Doctrine. Below, we address these vital elements.

In the following section, we present and analyze different options or variations for key elements of normative and operating system components of the Bush Doctrine. We cover these not by system category, but rather by the sequence in which they would be carried out in practice, namely authorization, execution, and enforcement.

IV. Key Elements of a Prospective Bush Doctrine

Any Doctrine or legal right must be constrained or channeled through rules on its application. In order to analyze the rules that could apply to the Bush Doctrine, we divide the process of applying the Bush Doctrine into three analytical phases: authorization, execution and enforcement. In analyzing the authorization phase, we examine the threshold that might trigger the right, the actors that might hold authority over the right, and the right's status relative to other legal remedies. Considering the execution phase, we investigate the actors that might actually conduct a preventive act and how those acts are constrained by the laws of war. Finally, we question what mechanisms exist to ensure compliance/enforcement and to punish violations.

A. Authorization

1. What is the Threat Threshold That Triggers the Doctrine?

The first step for any rule of law permitting a given behavior is to specify the conditions under which the action is applicable and when the right can be exercised. This is a part of the normative system in that the prescribed behavior is conditioned by additional rules that define not only what actions are permitted, but also the context in which they are permitted. For example, the right to withdraw from treaties can only be exercised according to the provisions specified in

[28] *See Understanding the WTO: Settling Disputes*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm (last visited April 16, 2011) (explaining the WTO's dispute resolution process).

the treaty itself or those noted in applicable articles of the Vienna Convention on Treaties.[29] With respect to the Bush Doctrine, this involves detailing when preventive military action might be allowed, as even the most liberal interpretations of the doctrine do not regard unconditional military action as allowable. Because Bush Doctrine action is designed to address a future threat, international legal rules should ideally address two dimensions of that threat in delimiting its usage: severity and timing.

In terms of the severity dimension, ideal international legal rules would designate the seriousness of the threat necessary before preventive action might be permitted. Threats to national security range from the most extreme existential threats to those that would involve limited damage or costs to the state. The U.N. Charter and its rules on self-defense do not differentiate between different levels of severity providing that an actual attack has occurred (more on the timing element below). Article 51 of the U.N. Charter states, "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[30]

An armed attack might involve a wide range of activities, from those that are minor threats to the state and its material well being, such as a border incursion involving a limited number of troops, to those that are far more serious, such as a full-scale invasion designed to conquer territory. According to the Charter standard, any act of aggression justifies the use of force in response. The U.N. definition of aggression, adopted by the United Nations General Assembly in a 1975 resolution, sought to provide a list of unacceptable uses of military force.[31] These include not merely threats of force, but the actual uses of force to include invasions, aerial bombardments, blockades, and allowing irregular forces to use one's territory to launch attacks against another state.

The U.N. Charter standard sets a relatively low bar as any kind of military attack can trigger a self-defense response. It is also one that is relatively easy to assess in practice given that the attack has already occurred and that such military action will be transparent. Setting a severity standard for the Bush Doctrine is not as simple, given that an assessment of the threat is prospective.

At one extreme, one could adopt a rule that permits anticipatory self-defense via the Bush Doctrine on the same grounds as the U.N. Charter. That is, *any* prospective military attack would allow the potential victim to take preventive action. Adopting the Charter standard, however, encounters a number of risks and potential disadvantages for the international community. How does one know that an armed attack is likely from an opponent? States regularly undertake military planning and deployment of troops based on various contingencies,

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[29] Vienna Convention, *supra* note 25, art. 54, 56; Laurence Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1588-91 (2005).

[30] U.N. Charter art. 51, para. 1.

[31] G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp No. 19, U.N. Doc A/9619, at 142-144 (Dec. 14, 1974).

such as the occurrence of a civil war in a neighboring state. For example, U.S. and NATO plans for attacking Libyan air defenses existed for many years prior to the outbreak of civil war in Libya in 2011. States make such plans regularly against their rivals, and indeed possibly against allies who might undergo regime change or alter their foreign policy orientations. Allowing preventive military action in such cases would open the door for frequent and numerous military actions in the global community, potentially turning every rivalry into armed hostilities, which is precisely what the U.N. Charter and the Bush Doctrine desire to preclude. In the post-cold war period, there have been approximately 290 serious rivalries in which enemies repeatedly threaten one another.[32] Thus, the risk of escalation to full-scale war would be great, as victims of Bush Doctrine actions could cite Charter rules for self-defense to respond in kind. States would be given license to use military force rather than be required to seek peaceful resolution to resolve disputes, an outcome in direct contradiction to Article 2, Section 4 of the Charter: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[33]

Might these problems be addressed by requiring a specific verbal threat to use force before the Bush Doctrine could be operative? This eliminates the misinterpretation or exploitation of regularized and purely defensive actions by an opponent, but it is far from an ideal solution itself. Threats to use military force are quite frequent,[34] and indeed are often a bargaining strategy for actors who seek to have opponents back down in a dispute.[35] It is also the case that such threats are frequently bluffs or "cheap talk," and there is no intention to actualize them.[36] For example, North Korea has regularly threatened to go to war with South Korea and other countries in the region over a wide range of slights (e.g. economic sanctions, withholding of food aid), and such threats have never been brought to fruition. Encouraging preventive military actions in the face of verbal threats is likely to produce many instances of military action that are not actually necessary.

Because of the problems attendant to encouraging preventive military actions for any potential threats, some analysts have argued that the Bush Doctrine should be applicable only to those threats that cross a threshold at the other end of the continuum – existential threats and other catastrophic risks.[37] This would

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[32] Paul F. Diehl, Gary Goertz & James P. Klein, *The New Rivalry Dataset: Procedures and Patterns*, 43 J. PEACE RESEARCH 331, 340 (2006).

[33] U.N. Charter art. 2, para. 4.

[34] Stuart Bremer, Faten Ghosn & Glenn Palmer, *The MID3 Data Set, 1993-2001: Procedures, Coding Rules and Description*, 21 CONFLICT MGMT. AND PEACE SCI. 133, 135-36 (2004).

[35] *See generally* James Fearon, *Rationalist Explanation for War*, 49(3) INT'L ORG. 379 (1995).

[36] *Id.*; Robert F. Trager, *Diplomatic Calculus in Anarchy: How Communication Matters*, 104 AM. POL. SCI. REV. 347 (2010).

[37] Gary Ackerman & William Potter, *Catastrophic Nuclear Terrorism: A Preventable Risk in* GLOBAL CATASTROPHIC RISK 441 (Nick Bostrom, Milan M. Ćirković eds., 2008); *see also* RICHARD POSNER, CATASTROPHE: RISK AND RESPONSE 89-91 (Oxford University Press 2004); Matthew C. Wax-

significantly restrict the range of cases in which preventive military action might be used, generally consistent with international community values that attempt to make military force the exception, rather than the norm, for international interaction.

Unlike an armed attack, which has clear and observable elements, detecting future threats is complex and requires accurate intelligence and assessment. Such estimations must be made of both an opponent's capabilities and its intent to use those capabilities. If we restrict the scope of the threats to those involving massive destruction, at present there are only nine states that have nuclear weapons capability.[38] Most of these are unlikely candidates for "first use" of such weapons. One could expand the permissiveness range of the Bush Doctrine to include those states that are in the process of acquiring nuclear weapons, perhaps in contravention to international treaty obligations. This was one of the bases for Israeli strikes against Iraqi and Syrian nuclear facilities in 1981 and 2007 respectively, actions consistent with the Bush Doctrine. The detection of chemical weapons capability is more complex, given (a) that many dangerous compounds (*e.g.*, VX gas) can be hidden in small places, and (b) chemical weapons can be created quickly from the combination of two or more benign and permitted compounds. Nuclear and chemical capabilities of terrorist groups are even more problematic to determine, given the absence of specific target locations (e.g., nuclear processing facility) associated with those groups and the shadowy character of such groups relative to states.

Determining intent to use weapons is even more problematic than assessing capabilities. The U.N. Charter standard avoids this problem by requiring an actual attack. States and terrorist groups do not publicly announce their intent to use weapons at a specific time or place, because even if such intent exists, there are clear tactical and strategic advantages not to signal actions in advance. Thus, intelligence analysts would need to make a probability estimate of whether a state or group will use its weapons capability and against which targets. Again, there is room for error, most seriously on the side of overestimation of the threat as Bush Doctrine rules are created. Rules permitting preventive military action cannot solve the problem of "false negatives" (not taking action when the threat was real), but might encourage "false positives" (taking military action when none was necessary).[39] Of course, as the 2003 invasion of Iraq indicated, accurate intelligence about the existence of weapons of mass destruction and the intent to use them is not always present, and there is a great risk of mistakes, the consequences of which can be quite severe. Nevertheless, it seems best that the Bush

man, *The Use of Force Against States that Might Have Weapons of Mass Destruction*, 31 MICH. J. INT'L L. 1, 6-15 (2009); *see also* MICHAEL W. DOYLE, STRIKING FIRST: PREEMPTION AND PREVENTION IN INTERNATIONAL CONFLICT 25-30 (Stephen Macedo ed., 2008).

[38] United States, France, United Kingdom, China, Russia, Pakistan, India, Israel, and North Korea (not including states engaged in nuclear weapons sharing via NATO).

[39] The ideas behind the statistical principles of false positives and false negatives are explained in RICHARD BINGHAM & CLAIRE FELBINGER, EVALUATION IN PRACTICE 11 (2002) and ROBERT P. ABELSON, STATISTICS AS A PRINCIPLED ARGUMENT 104-30 (1995). Ideas of false positives and false negatives are also commonly referred to as Type I and Type II errors, respectively. With respect to the Iraq invasion, the point was made in HANS BLIX, DISARMING IRAQ 55-274 (2004).

Doctrine be limited to a narrow set of threat levels – those in which the consequences of the threat being carried out are significant.

A second element of the threat threshold is timing of the threat. There are different standards available for the timing of permitted military action in international law, depending on whether the threat has been actualized in the form of an attack, is imminent but not yet actually carried out, or might be actualized at some specified time in the future. As noted above, the U.N. Charter provisions allow military actions only after an actual attack has occurred. Another set of timing rules, specific to anticipatory self-defense, was laid out in the *Caroline* affair. This dates back to 1837 and involved British forces that seized and burned a vessel in American waters that was preparing to transport men and material to rebellious forces in Canada. The United States protested these actions and U.S. Secretary of State Daniel Webster laid out a famous set of conditions before preemptory military actions were permitted, specifically, the "necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment of deliberation."[40] This declaration has been widely cited and repeated over the last two centuries, but it is not clear that customary practice has given it weight as international law. The *Caroline* criteria permit military action only immediately before an attack occurs, as soon as indications are such that an attack is imminent. Although an exact point cannot be determined, one might presume that the window is again quite narrow – it could be as little as hours and no longer than days or a week.

Timing issues are more complex with respect to the Bush Doctrine. Defensive strikes occur before an attack occurs, but this could be weeks or years before a prospective attack and there is no explicit benchmark on how likely the military attack would have to be before a preventive action is justified. Power transition theorists project that China will surpass the U.S. in material capabilities sometime in the middle 21st century and such a transition point has been associated with major power war in the past, initiated by the rising state.[41] Taking this as a cue, preventive action could extend back 40 years from the possible attack as well as any time up to the actual attack.

Allowing preventive military action well in advance of a threat being actualized carries with it a number of risks. First, there is the strong potential for states to mistakenly identify threats. By allowing action only in close temporal proximity to the threat, the Charter and *Caroline* standards offer much less prospect for "false positives" in terms of future attacks. Intelligence estimates (as with any kind of forecasting) become less accurate as the time between the assessment and the prospective event increases. One only has to look at the best-selling book from early 1990s about a then purported threat to the U.S. – *The Coming War*

[40] William C. Fray & Lisa A. Spar, *British-American Diplomacy The Caroline Case,* THE AVALON PROJECT, http://avalon.law.yale.edu/19th_century/br-1842d.asp (last visited Sept. 13, 2011).

[41] Douglas Lemke & Ronald L. Tammen, *Power Transition Theory and the Rise of China,* 29 INT'L INTERACTIONS 269, 270 (2003); Ronald Tammen & Jacek Kugler, *Power Transition and China-US Conflicts,* 1 CHINESE J. INT'L POL. 35, 45 (2006); *see also* STEVE CHAN, CHINA, THE U.S., AND POWER TRANSITION THEORY: A CRITIQUE 2 (2008).

with Japan[42] – to see that many such claims look ridiculous in retrospect. Any long-term forecast is subject to error because of the presence of subsequent intervening factors that might mitigate the threat. These include changes in regime and, therefore, the policies of potential opponents, or the rise of new international norms and institutions that prevent threats from being carried out.

Long-term forecasts are also open to substantial abuse given that any state in a rivalry can argue that it will be subject to future attack at sometime from its opponent. In actuality, many interstate rivalries never involve full-scale war or advanced military confrontations;[43] nonetheless, states actively plan as if such confrontations were commonplace. It is easy to envision various states using a variety of excuses to justify the launching of military attacks against an opponent in the absence of manifest indicators. Creating liberal rules on timing might create more incidences of military attacks than it would prevent.

The creation of international rules on the timing element also must be consistent with rules on other dimensions. For example, a provision that preventive military actions could only be used as a last resort (see below) might be incompatible with one that permits action far in advance of the actualized threat. With an extended time period available for peaceful solutions, it might be all but impossible to conclude that diplomacy has irrevocably failed. A few failures early in the conflict resolution process do not signal that the outlook is hopeless. We know that mediation and other efforts often fail repeatedly before some progress is made or a resolution is reached.[44] Thus, states might wrongly conclude that some initial failures at diplomacy are suitable justification for moving ahead with preventive military action.

In sum, there are significant problems with allowing preventive military actions far in advance of when an opponent might attack. However, the optimal time point for preventive military actions is not clear. It must be somewhat earlier than what is allowed by the *Caroline* criteria or the necessity for Bush Doctrine would be moot. Yet, more than a year in advance seems unduly lenient. Greater clarity in terms of rule formation is apparent when deciding on the severity standard. There, it appears that normative rules would confine Bush Doctrine actions to threats involving mass or extensive destruction, including catastrophic risks.

2. *Who is Allowed to Authorize Action?*

A second consideration in rule construction focuses on who decides when the conditions like those outlined above are manifest and, therefore, preventive military action is justified. Who can make decisions concerning when rights can be

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[42] GEORGE FRIEDMAN & MEREDITH LEBARD, THE COMING WAR WITH JAPAN xiii-xiv (1992).

[43] Diehl et. al., *supra* note 32, at 335. For example, the US-USSR rivalry never experienced direct war.

[44] Jacob Bercovitch & Paul F. Diehl, *Conflict Management of Enduring Rivalries: The Frequency, Timing, and Short-term Impact of Mediation*, 22 INT'L INTERACTIONS 299, 317 (1997); James A. Wall, Jr., et. al., *Mediation: A Current Review and Theory Development*, 45 J. CONFLICT RESOL. 370, 385 (2001).

exercised is fundamental to the legal operating system; a *priori*, who decides whether a preventive military action meets the specified normative conditions, whatever those standards might be? Operating system rules could allow the decision to rest solely in the hands of individual state actors at the one extreme or there could be a requirement for approval by some quasi-judicial or political entity at the international level.

Among scholars who have discussed the potential application of a Bush Doctrine, there have been many different potential authorizing agents. States may be allowed to authorize themselves when they feel a sufficient threat,[45] or the United Nations Security Council (UNSC) could authorize action. There is also the possibility for the creation of a new structure within the international operating system. Thomas R. Anderson suggested the creation of a new international tribunal called the International Court of Threat Assessment.[46]

If the goal is to create a rule in which the Bush Doctrine will be used frequently, it would be easiest to allow states to invoke the Bush Doctrine any time that they perceive a threat. This is consistent with many extant operating system procedures that give primacy to state sovereignty and decision-making. For example, the Charter provisions for self-defense allow states to launch necessary military actions, although unilateral execution of defensive military action is permitted only until the Security Council takes appropriate action.[47] Scholars like Robert J. Delahunty and John Yoo have argued that the U.S. should be allowed to use force legally for both preventive self-defense and humanitarian missions;[48] this suggests a rule that international law should afford states such discretion. This might be a realistic position given that states are the ones who write the rules for themselves and there is always the expectation that the operating system will provide for *post hoc* judgments on the legality of decisions (see below).

Allowing states discretion to act when they perceive a threat would allow them to invoke the principle any time it might be needed, but also renders considerable potential to increase the amount of global conflict. If states are allowed to be their own arbiters, they may invoke the Bush Doctrine in situations when the perceived threat does not warrant preventive action. Indeed, the philosopher John Locke aptly noted "it is unreasonable for men to be judges in their own cases, that self-love will make men partial to themselves and their friends: and on the other side that ill-nature, passion, and revenge will carry them too far in punishing others."[49] States have historically misused current self-defense permissions, so it is unlikely that they would be any more judicious with the Bush Doctrine.[50] As Thomas Franck has observed, "wars continue to occur, as they

[45] Delahunty & Yoo, *supra* note 3, at 849.

[46] Anderson, *supra* note 3, at 285.

[47] U.N. Charter art. 51.

[48] Delahunty & Yoo, *supra* note 3, at 848.

[49] THE LOCKE READER 282 (John W. Yolton ed., 1977).

[50] For instance, Adolf Hitler justified the German invasion of Poland in 1939 using the principle of self-defense. In fact, German soldiers staged an attack on a German radio outpost to provide the pretext of self-defense.

have since time immemorial, with parties both of which are using force allegedly in 'self-defense.'"[51] Even if states did not abuse the right to invoke the Bush Doctrine, states may have very different perceptions of threat, creating another potential source of concern. Additionally, states that previously experienced hostilities may be more likely to invoke the Bush Doctrine in the future.[52]

If states cannot be trusted as authorizing agents for their own Bush Doctrine actions, some sort of international authorization process must be specified. Doing so would also confer additional legitimacy upon the Bush Doctrine,[53] especially should the procedural requirements for using the Bush Doctrine be exceptionally stringent. The United Nations Security Council (UNSC), already an established part of the operating system, has been suggested as a logical body for approving preventive military actions.[54]

The UNSC is already permitted to authorize action in collective self-defense. Although a codification of the Bush Doctrine may make the UNSC more willing to consider it explicitly, political, not legal, considerations have made the authorization by the Security Council extremely rare. Each of the five permanent members of the Security Council — the U.S., Russia, China, France and the United Kingdom — can exercise a veto on an authorization of force. Therefore, unless there is consensus among these five states (and an affirmative vote of nine Council members), it is impossible for the UNSC to act.

Since its inception, the UNSC has only authorized collective self-defense twice. In the first case, the Korean War, the Nationalists represented China and the Soviet Union boycotted the authorizing vote; neither is likely to be repeated. The second case involved the first Gulf War in the early 1990s, which occurred after a brief moment of great power consensus following the end of the Cold War. Perhaps more relevant is the willingness of the UNSC to approve the use of military action by member states to redress a range of different problems. Famously, the Council did not approve U.S. and British action in Iraq prior to the second Gulf War, but it did give its stamp of approval to take military action in Haiti and Libya respectively, using the euphemism "all necessary means/measures" to give states the green light to take military action.[55] Yet, these latter circumstances were far from those envisioned by the Bush Doctrine. The presence of repressive regimes and humanitarian concerns motivated the UNSC members to allow military force. Still, there is no right or obligation for the

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[51] Thomas M. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809, 811 (1970).

[52] Michael Skopets, *Battered Nation Syndrome: Relaxing the Imminence Requirement of Self-Defense in International Law*, 55 AM. U. L. REV. 753, 780 (2006) (explaining justification for preventative force); Onder Bakircioglu, *The Right to Self-Defence in National and International Law: The Role of the Imminence Requirement*, 19 IND. INT'L & COMP. L. REV. 1, 31 (2009).

[53] Anderson, *supra* note 3, at 263.

[54] Martinez, *supra* note 15, at 191; Matthew C. Waxman, *The Use of Force Against States that Might Have Weapons of Mass Destruction*, 31 MICH. J. INT'L L. 1, 30 (2009).

[55] *See* S.C. Res. 940, ¶ 14, U.N. Doc. S/RES/940 (July 31, 1994) (approving action in Haiti); *see also* Press Release, Security Council, Security Council Approves 'No-Fly Zone' Over Libya, Authorizing 'All Necessary Measures' to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions, U.N. Press Release SC/10200 (March 17, 2011).

international community to intervene for humanitarian concerns ("responsibility to protect"),[56] and in other instances of humanitarian emergencies, the UNSC chose not to grant authorization for military action (*e.g.*, Darfur). Thus, the Council would be less willing to approve preventive action against uncertain and future threats. Whereas allowing individual states to decide actions might lead to an excess of military actions, placing that authority in the hands of the UNSC would likely produce the opposite outcome: few actions and some missed opportunities.

If existing operating system structures are flawed, an alternative is the creation of a new institution tailored to the needs of the Bush Doctrine. Anderson's International Court of Threat Assessment (ICTA) is such a body.[57] In his conception, the ICTA would:

> (1) be non-adversarial, (2) be non-public in its proceedings, (3) have a large pool of impartial judges from which petitioning states may choose, (4) possess special competencies in strategic intelligence assessment, (5) offer only advisory opinions, (6) possess a widely-accepted set of criteria for authorizing prophylactic self-defense, and (7) be a court of last resort.[58]

By creating a court that could operate apolitically and in secret, hearing only the appeals of threatened states, the ICTA has the potential to constrain the most egregious abuses and, potentially, promote efficient uses of the Bush Doctrine for the public good. Moreover, by centralizing the analysis of sensitive intelligence and creating a large pool of judges, advocates for ICTA contend that states can more securely outline actions they are considering taking under the Bush Doctrine.[59] Despite these aspirations, twin tensions bind the ICTA and, in our assessment, make it unlikely that an ICTA would be able to accomplish its purported goals without sacrificing either the legitimacy or the caseload of the court.

On the one hand, to function efficiently and with the trust of plaintiff states the ICTA would necessarily need to be secret.[60] Judges and their staff would deal with sensitive intelligence on developing threats – information that states jealously guard. Additionally, given the severity of the threats and potential responses that plaintiff states might propose, it would be impossible to have the target states or other actors represented before the court. To do so would tip the targets off to the intelligence gathered, as well as the security concerns and potential responses of the plaintiff states.[61]

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[56] *See* Joyner, *supra* note 21, at 696; Alex J. Bellamy, *The Responsibility to Protect and the Problem of Military Intervention*, 84 INT'L AFF. 615, 615 (2008).

[57] Anderson, *supra* note 3, at 263.

[58] *Id.* at 285-90.

[59] *Id.* at 287.

[60] *Id.* at 286-87.

[61] An analogy in municipal law can be made to the Foreign Intelligence Surveillance Court (FISC), which authorizes surveillance of potential spies in accordance with the Foreign Intelligence Surveillance Act (FISA). FISC operates in secrecy, with the subjects of investigations only being notified after the fact. Were the government to notify potential spies in advance, that would cause them to flee, conceal

On the other hand, for the ICTA to function as intended, it must garner broad recognition and approval within the international community. In order for plaintiff states to take the step of case referral (as opposed to deciding on action unilaterally), they would need some assurance that a favorable ICTA ruling will help them make their case in the public domain. The ability of the ICTA to attain such reputational capital is complicated by the secret, one-sided character of cases that would be considered. One way to remedy this problem might be to include judges from a diversity of states and to limit the ability of the plaintiffs to choose their judges. This may persuade the international community that, even if they are not privy to the cases, they can reasonably assume that garnering approval of the court will require winning over at least some skeptical judges.

Unfortunately, these requirements for secrecy and legitimacy work against one another, and any movement one way or the other is likely to exacerbate the problems of legitimacy or case referral. If a plaintiff state is allowed to pick its panel of judges, then the ICTA is unlikely to ever gain legitimacy in the international community. Given plaintiff state concerns of privacy and maintaining the military advantage of surprise, solutions such as including a judge from the target state or a target state ally are unavailable in this context because they would effectively discourage plaintiff states from appealing to the ICTA. The problem of driving plaintiff states away reappears if those states are not allowed to pick their judges. From a purely logistical perspective, no state is going to turn over valuable intelligence without knowing who will be privy to it. Once plaintiff states are notified of their draw from the judicial pool and are unsatisfied with it, what is to stop a plaintiff state from refusing to proceed in turning over their intelligence or even naming the target state?

For the sake of argument, let us assume that this problem of judge selection is somehow overcome. Even if an ICTA existed that could credibly commit to both plaintiff and target states that rulings would be impartial and secret, a filtering effect would still exist on the cases that they would likely receive. All threats might presumably meet the high severity threshold specified above, but cases could vary according to the uncertainty surrounding the likelihood the threat would be carried out as well as the probability that the plaintiff's preventive action would be successful.

The cases about which ICTA advocates are most concerned – high uncertainty, low probability of winning – might never make it to the ICTA because of

their actions, or otherwise move ahead with their criminal activities. Thus, the secrecy is justified, despite the lack of democratic accountability associated with it. There are a few differences between FISA and a potential court assessing the Bush Doctrine. States in the international system are not given the same right to privacy that individuals enjoy, nor would an international court likely have as much ability to acquire information on potential rogue states. Regardless, the general logic requiring secrecy applies to both the FISA situation and a potential court evaluating the Bush Doctrine. For articles discussing the tension, *see generally* Americo R. Cinquegrana, *The Walls (And Wires) Have Ears: The Background and First Ten Years of the Foreign Surveillance Act of 1978*, 137. U. PA. L. REV. 793 (1988-1989); *see also* Robert A. Dawson, *Shifting the Balance: The D.C. Circuit and The Foreign Intelligence Surveillance Act of 1978*, 61 GEO. WASH. L. REV. 1380 (1992) (discussing the tension between secrecy and notification); *see also* Nola K. Breglio, *Leaving FISA Behind: The Need to Return to Warrantless Foreign Intelligence Surveillance* 113 YALE L.J. 179 (2003) (reappraising the context of FISA after the passing of the USA PATRIOT act).

a plaintiff state's fear of the reputational damage from losing. This is a desirable outcome if the effect is also to deter the plaintiff state from launching the preventive attack. Unfortunately, cases at the other extreme –low uncertainty and high probability of winning – are also unlikely to appear before the ICTA either because states might not want to risk an unfavorable ruling in the face of a near-certain threat that could be eliminated. As the severity of the threat increases, the risk and the tendency to bypass the court will also increase. It is exactly these cases that could most bolster an ICTA's reputation by affording the body the opportunity to support a justified case.

The cases most likely to make it to our imagined impartial and secret ICTA would be murkier cases in which the evidence of the threat is less compelling or the case for effective preventive action is less convincing. In either event, the ICTA would likely risk its own reputation. Rejecting a proposed action that is then undertaken by the plaintiff anyway carries the risk of making the court seem irrelevant. Meanwhile, supporting a proposed action that is carried out without successfully undermining the purported threat carries a risk to the broader ICTA legitimacy. Had the U.S. referred its plans for an invasion of Iraq to an ICTA and received approval, the failure to find weapons of mass destruction would have destroyed any credibility that the body had.

The ICTA and the UNSC could also involve lengthy deliberation processes. In the interim and assuming such deliberations were known by the target – almost assured in the UNSC and quite possibly with leaks in the ICTA – that actor could undertake strategic counter-measures to lower the probability of a successful attack. Nearly all practitioners and a majority of analysts can agree that when contemplating an attack a state must be wary of issuing a signal to potential targets.[62] A nuclear weapons state might attempt to harden the sites of the weapons, including placing defenses around a nuclear facility. A terrorist group might quickly dismantle its training bases, making an approval of a preventive action moot. Consider the 2007 preventive action taken against a Syrian nuclear reactor by Israel. Had Israel taken its case before an authorizing body that signal might have – at a minimum – tipped off Syria to the impending strike. More troubling however is that the signal issued by Israel would be vague – remember the actual petition and proceedings would be kept secret. Such a signal might provoke a cascade of uncertainty and tension in the region. Syria is not alone in posing a potential threat to the Israeli state.

Ultimately, there is no perfect operating system rule for authorizing Bush Doctrine action. Allowing states to be the sole arbiter would allow for widespread use without delay, but would do little to offset the potential for abuse. Giving authority to the U.N. Security Council would prevent abuse but limit use. An international court specifically charged with assessing threat might be shunned by states in key circumstances.

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[62] *See* Anderson, *supra* note 3, at 284 (noting "surprise" is a fundamental tenet of successful military operations); *see also* UNITED STATES ARMY, FIELD MANUAL 3-0: OPERATIONS, 4-12 (2001).

3. *Must This Be a Last Resort Option?*

Even with clear standards and proper authorization, there is the option of putting additional normative requirements on the Bush Doctrine before preventive military action could be employed. Conditioning rights on prior behaviors is common in legal systems — requirements that other solutions or actions must first be taken before the right in question can be exercised. For example, there usually needs to be an exhaustion of local remedies before a state can file an international claim on behalf of one of its citizens or corporations.[63] With respect to the Bush Doctrine, the most commonly mentioned condition is that preventive military action be exercised only as a "last resort."[64]

The requirement that military force be employed as a last resort is rooted in the logic that rules of international law should minimize the use of military force to the greatest extent possible. Hence, U.N. Charter provisions lay out a strict and general prohibition against the use of force,[65] and allowances for self-defense are then only a limited exception to that general prohibition. Restricting military force to a last resort option also promotes the peaceful resolution of disputes, as actors are required to try alternative means to deal with disagreements first. This is no accident because in a system where violent action by a state carries costs far beyond the battlefield casualties (*e.g.* economic and societal disruption; creation of new enmities, etc.), it is in the interest of all states to see if other actions might first resolve the situation. International legal rules do not specify precisely what those alternate means might be, but presumably, many of those mentioned in the U.N. Charter, Chapter VI – mediation, conciliation, adjudication – would be applicable.[66] Nevertheless, such alternatives might be impractical or inadequate in the context of terrorist threats from non-state actors. Adjudication is not an option, given that no legal issues might be involved and non-state actors lack standing in most international venues. Negotiations are often politically unlikely, as well as practically impossible given that such groups often lack clear organizational structures and leadership.

At first glance, a requirement that other peaceful alternatives be tried before military action is allowed seems like a viable option. By definition, the time until a threat might be operational necessarily affords the threatened state the opportunity to pursue alternative methods of threat prevention. Yet, there are two problems unique to imposing last resort requirements on the Bush Doctrine – those relating to determining when alternatives have been exhausted and bargaining advantages.

If rules require that other alternatives must be pursued before a given action is permitted, there is the inherent problem of determining when those alternatives

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[63] *See generally* Sylvia D'Ascoli & Kathrin Maria Scherr, *The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection* (EUI Working Paper No. EUI WP LAW 2007/02), *available at* http://cadmus.eui.eu/bitstream/handle/1814/6701/LAW_2007_02.pdf?sequence=1.

[64] *See* Anderson, *supra* note 3, at 272; *see also* Delahunty & Yoo, *supra* note 3, at 863.

[65] U.N. Charter art. 2, para. 4.

[66] *Id.* art. 33-38.

have been exhausted and, therefore, when the last resort option is in order. The exhaustion of local remedies for international claims can be determined by examining whether all legal avenues and appeals have been pursued.[67] As for the use of force, the Charter and *Caroline* standards provide a clear basis for assessing when peaceful resolution is no longer possible: an armed attack has either occurred or is imminent. Unfortunately, the Bush Doctrine presents special challenges in this regard. First, unlike exclusively legal options, there are a variety of peaceful alternatives such as mediation and negotiation that have no identifiable concluding points. Even if mediation and negotiations fail initially, this does not preclude their further use to resolve conflict, unlike most legal proceedings; some conflict management attempts fail, but lay the groundwork for better relations and ultimate success in the future.[68] Thus, it might be impossible to assess when military action is truly the last resort, which provides an opening for a state to declare an impasse in order to justify military action. Second, and complicating this problem, is the timing element referenced above in the discussion of threat thresholds. As the threat might be months or years before the threat is actualized, there is ample time for additional peaceful overtures. Even with initial failure, in most cases there would still be substantial time to pursue further alternatives. As long as time remains and attack is not imminent, one could argue that alternatives have not been exhausted and therefore preventive military action is not justified.

The second problem involves the bargaining incentives. Bargaining incentives are relevant if international law accepts the view that the Bush Doctrine authorizes the use of force only as a last resort. If the target actor is negotiating with its potential attacker, the shadow of a future Bush Doctrine action might lead to two undesirable consequences. First, the target of a Bush Doctrine action would likely offer greater concessions to its enemy than might otherwise be the case. If the target expects costly military action from its opponent, it will settle for less in present deliberations. This is a bargaining advantage that the potential attacker can exploit, even if the outcome is not just or the likelihood of preventive military action is low. Indeed, if this theory is correct, powerful states are more likely to invoke the Bush Doctrine in order to benefit from such bargaining advantages. Second, Bush Doctrine actions are likely to be carried out disproportionately, or primarily, by more powerful states.[69] Thus, giving effect to the Bush Doctrine but mandating attempts at peaceful remedies secures a bargaining advantage for the strong versus the weak. Recognizing this, the weaker side might choose to launch its own attack (assuming it has the capability at that time), under "better now than never" logic because its best chance to achieve its

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[67] Interhandel (Switz. v. U.S.), Judgment, 1959 I.C.J. 34 (March 21).

[68] JACOB BERCOVITCH & RICHARD JACKSON, CONFLICT RESOLUTION IN THE TWENTY-FIRST CENTURY 46 (2009).

[69] *See* DIEHL & KULKARNI, *supra* note 4; *see also State System Membership List, v2008.1*, CORRELATES OF WAR, http://www.correlatesofwar.org/ (last visited Nov. 30, 2010) (list of major powers varies by historical era and includes as few as five (US, Soviet Union, China, UK, and France in the 1950s) and as many as nine (before World War I) states since 1816); *see generally* Fearon, *supra* note 35; *see also* Trager, *supra* note 36, at 347.

goals might be to carry out its threat rather than wait for either a sub-optimal negotiated outcome or a military strike by its opponent.

Requiring peaceful alternatives to precede preventive military actions is consistent with the other normative values in the international legal system. The absence of such a requirement would have pernicious effects in encouraging states to carry out military actions frequently and perhaps with impunity. Yet, a last resort requirement is not without some problems when applied to the Bush Doctrine, as determining whether the standard has been met is inherently difficult, and it might confer bargaining advantages on stronger states leading to unintended and undesirable consequences.

B. Execution

1. Must the Act Be Exercised Multilaterally or Is Unilateral Action Permitted?

Normative and operating system rules condition not only the authorization of certain behaviors, but might also dictate the execution of those behaviors. Assuming that Bush Doctrine actions are justified and properly authorized, the next step is to consider what limits might be placed on the actual use of preventive military actions. Operationally, one key consideration is which actors can exercise the rights granted under a new rule of law. Although this is a legal specification, there is also a practical effect of whether the rule privileges certain actors' abilities to exercise those rights over others. In theory, the Bush Doctrine applies to all states. Nevertheless, consideration must be given to whether the right to launch preventive action is limited to unilateral state actions or whether collective action in response to a common threat or to aid a state that is particularly threatened is allowed (or even required).

Rules for traditional self-defense embedded in the U.N. Charter allow individual states to both take defensive actions independently of their allies as well as take actions assisted by collectives of allies.[70] Incorporating the Bush Doctrine within the extant operating system would provide for greater continuity in the legal system. Yet, the question arises whether some modifications should be made to these arrangements. The first is whether the right might be restricted to unilateral actions by states, with the exclusion that other states may not participate in the action unless, of course, they too are directly threatened by potential aggression from target actors.

By restricting the Bush Doctrine to unilateral actions, the frequency of its use would be limited to instances in which powerful states have the need and will to act. *De facto*, most states lack the necessary intelligence to detect long-term

[70] U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.").

threats accurately and lack the capacity to project military power across significant geographic distances.[71] This is not to argue that many states cannot take action at or near their national borders, but rather that regional and global powers (*e.g.*, U.S., France) are better able to take advantage of a rule. This has the benefit of reducing overall violence in the international system – a worthy goal – but as referenced earlier, introduces a problem of legitimacy. It is unlikely that multilateral treaty negotiations would produce a rule from which only a limited numbers of states could benefit, and allowing only unilateral action would be perceived both as institutionalizing hegemonic influence in global affairs and as incompatible with the principle of the sovereign equality of states.[72]

Expanding the Bush Doctrine to permit collective action in response to either a common threat or aid to a threatened state necessarily broadens the range of instances in which the Bush Doctrine might be invoked. As a result, weaker states might now call upon allies to assist it in meeting prospective external threats, just as they may call upon allies when responding to actual attacks. Permitting collective action might also enhance the likelihood of successful execution of preventive military action as threatened states can call upon the resources and expertise of others.[73] Operating system rules should always facilitate the implementation of norms, not undermine their success. Otherwise, the values favored by the international community will not be maximized.

On the other end of the continuum, if it makes good legal and practical sense to permit collective response for the Bush Doctrine, should individual preventive military action be banned and collective action be a requirement? This could effectively modify any authorization rule on the Bush Doctrine such that even if individual states could determine when preventive action is justified, they would still need to persuade others about the validity and utility of that judgment. This could confer additional legitimacy on the action. The world witnessed this requirement's haphazard use in the 2003 U.S. invasion of Iraq. It was no accident that the U.S. wanted to engage the largest possible coalition of partners.[74] Even though many of the coalition partners were minimally involved, the time and effort needed to persuade forty heads of state to lay their reputations on the line and support the U.S. decision to invade was a significant accomplishment.

As a practical matter, requiring that any state wishing to invoke the Bush Doctrine also garner the support of some minimum number of states may serve as a possible solution to the privacy concerns evoked by negotiations and the strategic evasion possible with the ICTA; coalition building would apply to any and all states. At the same time, it would allow a threatened state considering the Bush Doctrine to secretly discuss its concerns with potential coalition partners – al-

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[71] *See generally* DOUGLAS LEMKE, REGIONS OF WAR AND PEACE 67-80 (2002).

[72] Richard Steinberg, *Who is Sovereign*, 40 STAN. J INT'L L. 329, 340 (2004).

[73] *See* DIEHL & KULKARNI, *supra* note 4 (Multilateral actions are not necessarily more likely to be successful. An empirical analysis of this point with specific regards to its relevance to the Bush Doctrine suggest that fewer multilateral actions end in stalemate, but the increased chances of victory are offset by increased chances of losses).

[74] JAMES BAKER & LEE HAMILTON, IRAQ WAR STUDY GROUP REPORT: THE WAY FORWARD – A NEW APPROACH 310 (2006).

ready a part of current diplomatic practice. The additional imposition of commitment gathering could act as a screening agent for unreasonable strikes as opposed to strikes that a reasonably large segment of the international community might support.

Nevertheless, requiring collective action does not necessarily solve the problem of privileging powerful states, as these states are still the ones that will necessarily be the part of many coalitions that form in order to carry out military attacks. Major power states are also the centerpieces of existing alliances, such as NATO, that are most likely the agents to carry out collective military actions under the Bush Doctrine.[75] Many small states do not have ready access to such groupings. In addition, many threats will be highly specific to certain countries, and other states might be unwilling to take action or endorse it because the future attack does not affect their national interests, leaving individual states bound under a coalition requirement without any options even if the threat is real and the prospective damage great.

Given the above discussion, it seems most desirable to have execution rules for the Bush Doctrine mirror those already in place for traditional self-defense, namely allowing both individual *and* collective military action. Restricting the practice to only individual states or only to coalitions undesirably favors the most powerful states in the international system and creates other problems, while yielding minimal advantages over current operating system arrangements.

2. *How Do the Laws of War Constrain Doctrine Actions?*

When certain actions are sanctioned, rarely (if ever) does this include an unlimited exercise of rights as limitations on the extent of action or other constraints are often already written into the rules. For example, the Law of the Sea treaty limits the right of "hot pursuit" according to the location of where the chase began and where it might end as well as how the chase is conducted.[76] Thus, another consideration is how the normative precepts of the Bush Doctrine map with other normative restrictions on the conduct of war and the use of military force generally. There are a variety of international rules on the conduct of war, generally labeled under *jus in bello* or international humanitarian law.[77] Does the Bush Doctrine fit well within those rules or must modifications be made?

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[75] NATO carried out actions in Libya and Kosovo. Even as weaker states took the lead on specific military operations, the major powers within NATO offered the operational support necessary for successful completion of particular military actions and a sustained presence in the region.

[76] United Nations Convention on the Law of the Sea, § VII, art. 111, Dec. 10, 1982, 1833 U.N.T.S. 3 ("The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted."); *see also* G. Bruce Knecht, Hooked: Pirates, Poaching, and the Perfect Fish 1-4 (2006).

[77] YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 27-52 (2d ed. 2010) (explaining and listing applicable rules).

For the most part, the Bush Doctrine can accommodate existing rules on the conduct of war. International rules on the treatment of the wounded, sick, and prisoners of war[78] seem no less applicable to preventive military action than when military force is employed in other contexts. Similarly, the protection of civilians from harm has no unique meaning in the context of Bush Doctrine actions. Preventive action will presumably be designed to degrade or destroy military capabilities and civilian targets will not be part of that equation. We recognize that terrorist bases, weapons stockpiles, or nuclear plants might be located near or in civilian populated areas, but these are already concerns for conventional uses of military force and the Bush Doctrine presents no special case.[79] Finally, limitations on the kind of weapons (e.g., chemical weapons) work well when preventive military action is envisioned so there is no need to loosen or modify such restrictions.

The one possible exception to the compatibility of the laws of war and the Bush Doctrine is with respect to proportionality. Conventional rules on proportionality dictate that a state's response or action be roughly equal in terms of severity to that of the original offense.[80] In the context of an armed attack, a state can only use military means to the extent necessary to defend itself. With respect to the old customary law of retaliation, the aggrieved party must only respond with military force roughly equivalent to what was done to it, reflecting the biblical standard of "an eye for an eye."[81] It has been suggested that the Bush Doctrine be similarly constrained.[82] Nevertheless, the concept of proportionality is strained when applied to a future attack rather than an actual attack.

It is not clear how one would calculate proportionality given that no attack has occurred and any estimate of what damage an attack might precipitate could be highly speculative.[83] States would be tempted to adopt a risk-adverse posture, and therefore use what might be considered excess force in retrospect in order to insure that any threat is eliminated. However, if the Bush Doctrine is confined to

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[78] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T,S. 85 [hereinafter Convention Against Torture]; Convention [No. 1] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Convention [No. 2] for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Convention [No. 3] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Convention [No. 4] Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

[79] *Human Rights in Palestine and Other Occupied Arab Territories*, HUMAN RIGHTS COUNCIL OF THE U.N. (April 7, 2011), http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.pdf (Goldstone report issued by the United Nations Human Rights Council found that in order to disincentivize strikes by Israel, members of Hamas would intentionally stockpile weapons in schools, hospitals and other areas of heavy population).

[80] JUDITH GARDHAM, NECESSITY, PROPORTIONALITY, AND THE USE OF FORCE 8-28, 59 (2004).

[81] *See* Edward Kwakwa, *Belligerent Reprisals in the Law of Armed Conflict*, 27 STAN. J. INT'L L., 49-81 (1990).

[82] Delahunty & Yoo, *supra* note 3, at 861-62.

[83] MARY ELLEN O'CONNELL, INTERNATIONAL LAW AND THE "GLOBAL WAR ON TERROR" 39 (2007).

situations involving weapons of mass destruction and other catastrophic risks, the proportionality requirement for use of force is more easily determined and satisfied. Any military action to destroy weapons of mass destruction would presumably have fewer negative consequences (*e.g.*, less destruction, fewer lives lost) than an attack using those weapons. Thus, preventive strikes would not produce a disproportionate action, but indeed lead to more limited uses of military force than would otherwise be the case.

Overall, the Bush Doctrine does not appear to necessitate new normative rules for the conduct of military action, and with the possible exception of proportionality standards, is easily accommodated within the existing framework of international law.

C. Enforcement – What Mechanisms Exist for Ensuring Compliance/ Enforcement and to Punish Violations?

Provisions designed to enhance compliance with the rules, monitor the practice of those rules, and provide mechanisms for redressing violations of those rules must accompany all legal rules. Do existing operating system mechanisms, such as the U. N. Security Council and various international courts, suitably play these roles with respect to the Bush Doctrine? If not, what new operating system structures might be necessary?

Although there are benefits to adherence to international law for its own sake, this is not always a sufficient incentive for states.[84] In the cases in which states might not adhere to laws without added incentives, compliance mechanisms are necessary. In the case of the Bush Doctrine, there would be incentives to use military force to achieve policy goals, and a new rule could provide political and legal cover for such unintended consequences. There are two potential hurdles to enforcing any rule successfully: detecting violations (monitoring) and then punishing them.[85] Various types of compliance mechanisms exist. Various sanctions commonly used in international politics give states that have been victims of non-compliance the option of retorsion (or the adoption of an "unfriendly and harmful act" that is still legal but is in retaliation against injurious acts of other parties).[86] In addition, legal rules could require violators to pay punitive damages. In the absence of any direct action, there is always the loss of reputation faced by states that violate law. However, each potential mechanism to enforce proper use of the Bush Doctrine has its own set of challenges.

Should the Bush Doctrine become law, the primary source of abuse would be in states engaging in wars for reasons other than self-defense. Depending on the authorization standards created, going to war before it was cleared by the relevant international body would also be a type of non-compliance. Although states

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[84] *See generally* A Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823 (2002).

[85] *See* Ronald B. Mitchell, *Sources of Transparency: Information Systems in International Regimes*, 42 INT'L. STUD. Q. 109, 122 (1998) (discussing information supply); *see also* Xinyuan Dai, *Information Systems in Treaty Regimes*, 54 WORLD POL. 405, 412 (2002) (discussing noncompliance).

[86] SHAW, *supra* note 22, at 1101.

have obligations not to threaten others,[87] the Bush Doctrine itself is the solution to providing punishment to those states. Additionally, the Bush Doctrine does not create a legal obligation to intervene, and therefore states cannot be held responsible for failing to act. Thus, the only way a state could violate the Bush Doctrine would be to engage in a conflict that did not meet the standards for anticipatory self-defense.[88]

Monitoring military action itself is unlikely to be a major problem in enforcing the Bush Doctrine. Military action tends to be highly transparent, and in most cases, the source of the action is not difficult to identify. Nevertheless, should states engage in more clandestine actions, such as the alleged cyber-attacks on Iran's nuclear facilities by the U.S. and Israel,[89] monitoring might become a greater problem. Additionally, consideration must be given to the fact that if the punishment for violating the Bush Doctrine were to increase, states would then possess greater incentives to engage in even more clandestine actions (e.g. cyber hacking, special operations raids) than they currently do. Increasing the punishment of violating the Bush Doctrine will likely increase the propensity of states to violate it as well. In an environment of increased punishment for Bush Doctrine violations, the attractiveness of victims claiming violations would also increase. Of course, this line of thought presumes that suitable mechanisms exist for managing disputes over Bush Doctrine actions and rendering appropriate decisions on their legality.

International courts would be the logical forums for determining the legality of purported Bush Doctrine actions. In many ways, courts assessing violations would make many of the same judgments as the ICTA, but in a *post hoc* fashion. The tallest hurdle for international court action is state consent. The court most likely to hear such cases, the International Court of Justice (ICJ) lacks jurisdiction in many cases because of limits imposed by state consent. Few states (approximately 66 out of 191) have agreed to accept the optional clause authorizing the ICJ to hear cases automatically without reservations.[90] As a result of requiring state consent for a majority of states, the number of cases that the ICJ could hear would be limited. In general, any state expecting a decision rendered against their interest would likely refuse to submit the case to ICJ jurisdiction or accept jurisdiction if action was brought against it. Although states could voluntarily submit their cases to the ICJ, it is exceedingly unlikely that states would submit matters involving national security to the ICJ or any other international court. This unwillingness is further evidenced by the U.S.'s withdrawal from the

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[87] U.N. Charter art. 2, para. 4.

[88] In a previous section on authorization, the potential means by which non-compliance would be determined have already been discussed, but the key aspect of this section is the punishment that would be given to these violators.

[89] No government has officially acknowledged responsibility for the cyberworm Stuxnet, a worm specifically designed to target Iran's nuclear facilities. *See* Ed Barnes, *Mystery Surrounds Cyber Missile That Crippled Iran's Nuclear Weapons Ambitions*, FOX NEWS, April 11, 2011, http://www.foxnews.com/scitech/2010/11/26/secret-agent-crippled-irans-nuclear-ambitions/ (explaining the cyberworm).

[90] *Jurisdiction: Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INT'L COURT OF JUSTICE (April 7, 2011), http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3.

optional clause following the ICJ's 1984 ruling in *The Republic of Nicaragua v. The United States of America*.[91] Given that the U.S. is the originator of the Bush Doctrine, it is likely that the U.S. would be a state that would commonly want to invoke it. Many other major powers that might invoke the Bush Doctrine, such as China, France and Russia, similarly have not accepted the ICJ's optional clause without reservation. Many potential rogue states, ones that, according to Delahunty and Yoo are the likely targets of the Bush Doctrine, have also not accepted the optional clause.[92] As has been demonstrated by the *Case of Certain Norwegian Loans*,[93] the reciprocity clause in state acceptance of ICJ jurisdiction allows accused states to use the reservations of other states.

Even as the ICJ is the primary court dealing with states, the International Criminal Court (ICC) also represents a potential venue for punishing individuals who commit international crimes in the course of Bush Doctrine actions. Yet, the ICC is unlikely to be a frequent venue for dealing with violations of the Bush Doctrine. First, its jurisdiction is limited to a narrow set of war crimes,[94] most of which are not frequent occurrences in interstate conflict. Most ICC investigations thus far have focused on civil wars, not military strikes across state borders. Of course, there is potential for this to change if the ICC adds aggression to its list of crimes as has been proposed.[95] Second, and beyond jurisdictional limitations imposed by its statute,[96] the ICC suffers consent problems similar to those of the ICJ. In contrast to the ICJ, the ICC lacks an optional clause and does not offer reservations to the acceptance of the ICC and has yet to win universal acceptance. Despite 114 states having joined the body,[97] most major powers, including the U.S., China and Russia, have not acceded to the ICC nor have the

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91 Case concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 160 (June 27).

92 Delahunty & Yoo, *supra* note 3, at 862-63.

93 Case of Certain Norwegian Loans (France v. Norway), 1957 I.C.J. 57, 16 (July 6).

94 Crimes covered by the international court include genocide, war crimes, crimes against humanity and crimes against United Nations and associated personnel. Adding the crime of aggression has been considerably controversial and strongly opposed by the United States and Russia, among other great powers (many of which have showed their opposition despite not being members of the ICC).

95 *See* Anja Seibert-Forh, *The Crime of Aggression: Adding a Definition to the Rome Statue of the ICC*, 12 ASIL INSIGHTS 24, para. 3-5 (2008), *available at* http://www.asil.org/insights081118.cfm (for more on the debate over the issue of adding aggression to the list of crimes covered by the ICC); since the publication of the article, there has been some progress, but it is still unlikely to see any prosecution for the crime of aggression until 2017 at the earliest, and even then, there are likely to be considerable limitations; *see also* Karen Allen, *The International Criminal Court Needs More Than Time*, BBC NEWS, June 4, 2010, http://www.bbc.co.uk/news/10241421, for a more recent, but non-scholarly source.

96 The ICC has complementary jurisdiction over cases, meaning that the ICC will not act in cases where a municipal or other court is already trying the case. Additionally, the ICC can only prosecute cases committed by a national of a state that has accepted the court's jurisdiction, cases that were committed on the territory of a member, or a case that has been referred to the ICC by the Security Council. Additionally, while not particularly problematic for the prosecution of crimes into the future, the ICC cannot prosecute crimes that occurred before July 1, 2002.

97 As of September 22, 2011, there were 139 signatories and 118 members. Full list of members is available at *Rome Statute of the International Criminal Court*, U.N. TREATY COLLECTION (Sept. 10, 2011, 7:02:55 EST PM), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en; Rome Statute of the International Criminal Court, July 1, 2002, 2187 U.N.T.S. 3.

majority of Middle Eastern states (Jordan being the only exception). Finally, there are issues of institutional capacity that limit the ICC's ability to be effective. Given the size of the ICC prosecutor's office,[98] the ICC can only afford to go after the most egregious violators of international law.

If there is some determination that a violation has occurred, the final phase of enforcement is punishing the violator. The absence of a punishment phase could render much of the previous enforcement elements useless as states could exceed Bush Doctrine limitations with impunity. Three potential considerations must be taken into account when considering potential mechanisms for punishment. First, how feasible is it that a punishment could be delivered successfully? Second, if a punishment could be issued, would issuing that punishment do more good than harm? Finally, could the punishment serve as an effective deterrent to other violations? Four types of compliance mechanisms in particular are discussed below: sanctions, reprisals, punitive damages, and reputational costs.

Economic sanctions are a common form of punishment in the international system and could potentially be imposed on states that violate Bush Doctrine conditions.[99] States that fail to gain clearance before taking action under the Bush Doctrine could be sanctioned, and states that go to war without following Bush Doctrine criteria might be similarly punished. A key problem with sanctions, however, is securing the approval of other states to comply with them. At the very least, it seems unlikely that a violator's allies would agree to sanction the state.[100] Other states with important trade ties will also be reluctant to engage in sanctions,[101] and such trade ties are particularly likely among the types of major powers that are most likely to abuse the Bush Doctrine. As a result, sanctions have generally not been effective as a means of coercion, especially when used to dissuade states in security matters.

Additionally, the issue of whether sanctions would achieve their entire goal could also damage the willingness of states to support using sanctions. For ex-

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98 As of January 2009, the entire staff at the ICC is 587, not all of who work in the Prosecutor's Office. *Frequently Asked Questions: How Many People Word for the ICC?*, INT'L CRIM. COURT (Oct. 19, 2011, 4:25:34 EST PM), http://www.icc-cpi.int/NetApp/App/MCMSTemplates/Index.aspx?NRMODE=Published&NRNODEGUID=%7bD788E44D-E29246A1-89CC-D03637A52766%7d&NRORIGINALURL+Menus/ICC/About+the+Court/Frequently+asked+Questions/&NRCACHEHINT=Guest#id_12.

99 *See* Jon Hovi, Robert Huseby & Detlef F. Sprinz, *When Do (Imposed) Economic Sanctions Work?*, 57 WORLD POL. 479, 499 (2005) (on the use of sanctions and their effectiveness); *see also* Adrian U-Jin Ang & Dursun Peksen, *When Do Economic Sanctions Work? Asymmetric Perceptions, Issue Salience, and Outcomes*, 60 POL. RES. Q. 135, 143 (2007); *see also* INTERNATIONAL SANCTIONS: BETWEEN WORDS AND WARS IN THE GLOBAL SYSTEM (Peter Wallensteen & Carina Staibano eds., 2005).

100 *See* Dan G. Cox & A. Cooper Drury, *Democratic Sanctions: Connecting the Democratic Peace and Economic Sanctions*, 43 J. OF PEACE RES. 709, 719 (2006) (analyzing data from 1978 to 2000, finding that states tend not to sanction allies, though the United States is an exception to this rule); *see also* Bryan R. Early, *Sleeping with Your Friends' Enemies: An Explanation of Sanctions-Busting Trade*, 53 INT'L STUD. Q. 49, 67-68 (2009) (analysis of 77 instances of sanctions from 1950 to 1990 also finds that allies will undermine the sanctions placed by their partners).

101 David Lektzian & Mark Souva, *An Institutional Theory of Sanctions Onset and Success*, 51 J. OF CONFLICT RESOL. 848, 854-56 (2007). Nevertheless, trade is only likely to discourage sanctions when both states are equally dependent on it, as is the case with many of the trade relations among the great powers.

ample, consider that the Iraq War started in 2003. After the initial attack on Iraq by the U.S., the U.S. engaged in a lengthy process to build a democratic regime within the country. Placing sanctions on the U.S. would have hurt its ability to engage in regime building, thereby hurting the victim of the violation as much or more than the perpetrator. Additionally, many opponents of the Iraq War, once the war had begun, preferred that democracy building efforts were successful. Notably, many states that did not support the initial war such as the Netherlands and Denmark were later willing to support reconstruction efforts in Iraq.[102] Research on the subject of sanctions generally shows that they are of limited effectiveness. Even one of the more optimistic empirical analyses on the effectiveness of sanctions examined all the sanctions cases between 1914 and 1990 and found that they generally had to be used in accompaniment with other tools of statecraft in order to be successful.[103] Nevertheless, Robert Pape examined 40 of the 115 cases of sanctions that were deemed successful and argued that only five of these cases were unqualified successes.[104] Other research has qualified the effectiveness of sanctions based on regime type, suggesting only democracies would be responsive to sanctions.[105] Finally, it has been suggested that if sanctions are going to be effective it will only be as threats because any actualization of sanctions means that their "threat" has already failed.[106]

Retorsion represents another potential means of sanction for violations. Retorsion is a proportionate military action taken by a state in response to an illegal military action.[107] This is similar to remedies offered by the World Trade Organization in which states that are victims of trade treaty violations are authorized to take punitive action against violating states in proportion to the original offense.[108] The likelihood that retorsion could be undertaken is stronger than sanctions because a reprisal only requires action from the victim of a violation, not the international community at large. Nevertheless, a retorsion by a weaker state may not be possible if it is not allowed to draw upon the resources of allies. Indeed, the preventive military action might have destroyed a capacity to respond. In addition, allowing retorsion seems to make little sense if terrorist groups were the targets of Bush Doctrine actions. One would not want to permit such groups to carry out retorsion, and the state on whose territory the preventive action occurred might be unwilling or unable (in the case of a failed state) to launch a retaliatory strike. In any case, retorsion runs counter to the international community's preference for minimizing the use of military force.

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[102] Some states also helped the United States indirectly by helping in Afghanistan. States such as Canada and France opposed the Iraq war but continued to support US efforts in Afghanistan, allowing the United States greater flexibility.

[103] GARY CLYDE HUFBAUER, JEFFREY J. SCHOTT & KIMBERLY ANN ELLIOT, ECONOMIC SANCTIONS RECONSIDERED 91-93 (2nd ed. rev. 1990).

[104] Robert A. Pape, *Why Economic Sanctions Do Not Work*, 22 INT'L SEC. 90, 105 (1997).

[105] Lektzian & Souva, *supra* at note 101, at 849.

[106] Dean Lacy & Emerson M.S. Niou, *A Theory of Economic Sanctions and Issue Linkage: The Roles of Preferences, Information and Threats*, 66 J. OF POL. 25, 38 (2004).

[107] SHAW, *supra* note 22, at 1128.

[108] World Trade Org., *supra* note 28, para. 3-4.

Punitive damages are equally hard to apply and could be difficult to enforce. Given that the state engaging in the violation is likely to consider its actions justified, further compliance mechanisms would need to be put in place to insure the state actually paid the damages. Punitive damages are unlikely to deter a state on an issue that the state perceives to be one of key national security. According to economists Joe Stiglitz and Linda Bilmes, the Iraq War would cost the U.S. three trillion dollars.[109] If punitive damages were commensurate to the U.S.'s initial action (excluding any damages that occurred after the U.S. were invited by the new Iraqi government), it is unlikely that amount would be nearly as significant as what the U.S. was willing to spend on the war. In such cases, it is difficult to see how punitive damages would effectively dissuade a state, even if they could be assessed successfully.

Finally, there are reputational costs suffered by states that violate international law. Reputational costs are the losses that a state suffers in its global reputation as a result of violating international law.[110] Reputational costs are not difficult to enforce, as they occur immediately once a state violates international law. There are no costs to international peace by a state losing reputation. Under previous rules regarding the use of force, however, the reputational losses have not been a sufficient deterrent to prevent states from engaging in illegal acts of aggression,[111] so it is unlikely that reputational losses would be a sufficient deterrent under a Bush Doctrine.

V. Conclusion

The Bush Doctrine is a much-debated proposal to give legal standing for states to use military force in a preventive fashion against future threats. Heretofore, most of the discussion has been over its effectiveness, morality, and other concerns. Yet, the Bush Doctrine at this stage is little more than a series of general precepts and political statements. To become part of the international legal system, there needs to be much greater specification of the Doctrine, including what we have termed operating and normative system rules. The former deals with the

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[109] *See* JOSEPH E. STIGLITZ & LINDA J. BLIMES, THE THREE TRILLION DOLLAR WAR: THE TRUE COST OF THE IRAQ CONFLICT 24-31 (2008) for a description of the costs of the Iraq war. As of 2007, the Congressional Budget Office (CBO) listed lower estimates of the costs of the Iraq war as $604 billion and projected that depending on different scenarios, it would cost an additional 570 to 1,055 billion dollars. *See Estimated Costs of U.S. Operations in Iraq and Afghanistan and of Other Activities Related to the War on Terrorism: Statement before the Comm. on the Budget, U.S. House of Representatives*, 110th Cong. (2007) (statement of Peter Orszag, Director, Office of Mgmt. and Budget), *available at* http://usgovinfo.about.com/gi/dynamic/offsite.htm?site=http://www.cbo.gov/.

[110] *See* Mark J.C. Crescenzi, *Reputation and Interstate Conflict*, 51 AM. J. OF POL. SCI. 382, 394 (2007) (on how damaged reputations can lead to more conflict for the states who have suffered them); *see* MICHAEL TOMZ, REPUTATION AND INT'L COOPERATION 239-41 (2007) (reputation also applies to other areas of international relations, such as international finance).

[111] Vietnam's invasion of Cambodia in 1979 is an example of a case where a state willingly sacrificed reputation for an issue of national security. Vietnam invaded Cambodia and as a result ended the genocidal reign of Pol Pot. However, knowing that ending the conflict under said justification would be legally insufficient, Vietnam did not offer that argument in their defense and was sanctioned by the United Nations. *See* Martha Finnemore, *Constructing Norms of Humanitarian Intervention in* THE CULTURE OF NATIONAL SECURITY 179-80 (Peter J. Katzenstein, ed., 1996).

application and management of international law whereas the latter provide details on the acceptable behaviors. This article examined the various legal choices available with respect to the authorization, execution, and enforcement of preventive military action under the Bush Doctrine.

Various aspects of the Bush Doctrine fit easily within extant international legal system rules, but in several cases, there are various tradeoffs present in defining Bush Doctrine rules, always resulting in various costs no matter what options are selected. The fewest costs would seem to accrue if Bush Doctrine actions were limited to threats involving mass or extensive destruction, including catastrophic risks. Yet, the problem of specifying how far in advance preventive military action should be permitted seems insoluble. Allowing attacks well in advance of prospective threats would encourage frequent mistakes and escalating conflict when other, peaceful means might have been pursued. Permitting actions when threats are imminent obviates the utility of a Bush Doctrine and might be handled under some standard applications of the international law of self-defense.

Making states exhaust peaceful means of conflict resolution before launching an attack ("last resort") appears superior to alternatives that would promote more violence, but the problems of determining when other means are no longer viable and granting bargaining advantages to stronger states remains. Leaving decisions to launch Bush Doctrine actions to state authority will promote widespread and improper use, but avoid delays in execution that might undermine effectiveness. The reverse is encountered with giving authority to the U.N. Security Council – abuse is less likely, but at the cost of significant and potentially crippling delay. An international court specifically charged with assessing threats raises problems with secrecy and legitimacy that do not make it a viable alternative.

The execution of Bush Doctrine actions seems to be accommodated well by existing international legal rules. Permitting unilateral and collective actions provides maximum flexibility for threatened states and does not handicap smaller states from exercising new legal rights to use military force. Similarly, current international laws on armed conflict involving protection of civilians and use of certain weapons are not inherently compromised. Any problems in specifying a proportionality standard can be redressed by only allowing Bush Doctrine actions to respond to threats involving high levels of prospective destruction such as those from the use of weapons of mass destruction. More problematic are constructing rules for detecting Bush Doctrine violations and punishing those responsible. The records of the U.N. Security Council and international courts are not encouraging in this regard, but there does not seem to be superior alternatives that would overcome the political and other difficulties associated with those institutions.

The changing character of security threats (terrorism, weapons of mass destruction) raises important questions about the suitability of current international rules to address them. Incorporating the Bush Doctrine into international law has been suggested as one solution. Yet, our analysis reveals that its utility varies according to a series of rule choices about preventive military action, but in no case is the Bush Doctrine a panacea to solve all problems nor, even at its best, is the Bush Doctrine without significant problems in application.

THE IMPENDING NUCLEAR DISASTER: FLAWS IN THE INTERNATIONAL COUNTER-PROLIFERATION REGIME AT SEA

Captain Raul (Pete) Pedrozo†

I. Introduction

The Nuclear Non-Proliferation Treaty (NPT) was originally negotiated and designed to prevent the spread of nuclear weapons beyond the five recognized nuclear-weapon states – China, France, Russia, United Kingdom and the United States.[1] Although there were some initial setbacks when India, Israel, Pakistan and South Africa did not sign the NPT in 1968 and subsequently acquired nuclear weapons, the non-proliferation regime was generally successful in limiting the spread of nuclear weapons beyond the five permanent members of the U.N. Security Council.[2] Belarus, Kazakhstan, and Ukraine joined the NPT and returned the nuclear weapons they had inherited from the Soviet Union to the Russian Federation.[3] South Africa also abandoned its nuclear weapons program and

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[1] *Nuclear Weapons: Who Has What at a Glance*, ARMS CONTROL ASS'N, http://www.armscontrol.org/factsheets/Nuclearweaponswhohaswhat (last visited Oct. 3, 2011).

[2] *Id.*

[3] *Id.*

joined the NPT in 1991, as did Argentina, Brazil, Libya, South Korea, and Taiwan. In addition, the two Gulf Wars effectively ended Iraq's nuclear ambitions.[4]

However, at no time since the NPT entered into force in March 1970 has the world been closer to the brink of a nuclear disaster. Conflict over the disputed Kashmir region between India and Pakistan, both nuclear weapon holders, could escalate into a nuclear exchange. Israel also possesses nuclear weapons. Of greater concern, however, are the fledgling nuclear weapons programs of North Korea (DPRK) and Iran, and the possibility that nuclear devices and related technology from these countries could find their way into the hands of terrorist groups or other rogue states like Syria. Both states have defied U.N. Security Council resolutions and International Atomic Energy Agency (IAEA) safeguard agreements: the DPRK by successfully testing two nuclear devices in 2006 and 2009 following its withdrawal from the NPT in 2003,[5] and Iran by engaging in a clandestine nuclear weapons program.[6] These actions draw into serious question the continued ability of the non-proliferation regime and the Security Council to stop the spread of nuclear weapons and related technology in the twenty-first century. Coupled with their unpredictable political regimes and their growing ballistic missile programs, both the DPRK and Iran pose more than just regional threats. Both the former Chairman of the Joint Chiefs of Staff, Admiral Mike Mullen, and the former Secretary of Defense, Robert Gates, have indicated that the DPRK's expanding ballistic missile and nuclear programs are becoming a "direct threat to the United States."[7] Intelligence estimates indicate that the DPRK will have the capability to strike the continental United States with an intercontinental ballistic missile within the next five years,[8] and the DPRK has, on more than one occasion, threatened South Korea (ROK) with nuclear war.[9] Iranian President Mahmoud Ahmadinejad has also made it quite clear that Israel should be "wiped off the map."[10] Then-Iranian President Hashemi Rafsanjani made similar statements in 2001 indicating that a nuclear weapon developed by a Muslim state might be used to destroy Israel.[11]

This paper will outline the international counter-proliferation regime currently in effect; examine whether the existing regime is adequate to curtail the proliferation of weapons of mass destruction (WMD), their delivery systems and other

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[4] *Id.*

[5] *See Text of North Korea's Statement on NPT Withdrawal*, ATOMIC ARCHIVE (Jan. 10, 2003), http://www.atomicarchive.com/Docs/Deterrence/DPRKNPTstatement.shtml.

[6] *Nuclear Weapons: Who Has What at a Glance*, *supra* note 1.

[7] Anne Gearan, *Pentagon Chief Huddles With Allies About NKorea*, ABC NEWS INT'L, Jan. 13, 2011, http://abcnews.go.com/International/wireStory?id-12602644.

[8] Elizabeth Bumiller and David E. Sanger, *Gates Warns of North Korea Missile Threat to U.S.*, N.Y. TIMES, Jan. 11, 2011, http://www.nytimes.com/2011/01/12/world/asia/12military.html?_r=1&nl=todaysheadlines&emc=tha24.

[9] Chico Harlan, *South Korea-U.S. Cooperation Draws Nuclear Threat by North*, WASH. POST, Dec. 14, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/12/13/AR201012130 5363.html.

[10] *Iran's Leader's Comments Attacked*, BBC NEWS, Oct. 27, 2005, http://news.bbc.co.uk/2/hi/43789 48.stm.

[11] *Id.*

related materials; identify weaknesses in the regime that have prevented the international community from dissuading the DPRK and Iran to abandon their nuclear ambitions; and offer a way forward to convince the DPRK and Iran to return to the NPT and abandon their nuclear weapons programs.

II. International Counter-Proliferation Legal Regime

A. General Principles of International Law of the Sea

A host of international and domestic laws and regulations govern the interdiction of WMD and related systems and materials. Foremost are the general principles of international maritime law reflected in the United Nations Law of the Sea Convention (UNCLOS) and other international agreements and arrangements.[12] In general, unless otherwise provided by law, jurisdiction to board and inspect foreign flag vessels is dependent on the location of the vessel (*i.e.*, internal waters, territorial sea, contiguous zone, exclusive economic zone (EEZ) and high seas), the vessel's registry or flag state, the vessel's status (*i.e.*, public or commercial) and the vessel's conduct (*i.e.*, legal or illegal).[13] In this regard, international law permits the boarding and inspection of foreign flag vessels suspected of illegally transporting WMD-related material in the following circumstances: as a function of port state control; coastal state customs jurisdiction in the territorial sea and contiguous zone; with the consent of the flag state or ship's master in areas beyond national jurisdiction (*e.g.*, EEZ, high seas); pursuant to a U.N. Security Council resolution; or in accordance with bilateral or multi-lateral agreements.

1. Port State Control/Coastal State Jurisdiction

Coastal states enjoy complete sovereignty over their internal waters and their territorial sea and archipelagic waters, subject to the right of innocent passage by foreign-flagged ships.[14] Accordingly, coastal states may adopt laws and regulations consistent with international law relating to innocent passage through the territorial sea in respect of, *inter alia*, the prevention of infringement of the customs, fiscal, immigration, or sanitary laws and regulations of the coastal state.[15] Additionally, in the case of ships proceeding to internal waters, the coastal state may also take the necessary steps to prevent any breach of the conditions to which admission of those ships is subject.[16] Moreover, within the contiguous zone, a coastal state may also exercise the control necessary to: (1) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations

[12] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, *available at* http://www.un.org/depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm [hereinafter UNCLOS].

[13] *Id.* pt. 2, sec. 2.

[14] *Id.* pt. 2, sec. 2, art. 2; pt. 4, art. 49.

[15] *Id.* pt. 2, sec. 3, art. 21(1)(h); pt. 4, art. 52.

[16] *Id.* pt. 2, sec. 3, art. 25(2); pt. 4, art. 52.

within its territory or territorial sea, and (2) punish infringement of these laws and regulations committed within its territory or territorial sea.[17]

For example, 33 U.S.C. § 1228 provides that "no vessel . . . shall operate in the navigable waters of the United States or transfer cargo or residue in any port or place under the jurisdiction of the United States, if such vessel . . . (2) fails to comply with any applicable regulation issued under [the Ports and Waterways Safety Act] . . . or any other applicable law or treaty."[18] Similarly, 33 U.S.C. § 1223 provides that ships destined for a U.S. port may be required to provide pre-arrival messages in sufficient time to permit advance vessel traffic planning prior to port entry.[19] In this regard, foreign ships bound for a U.S. port must provide a notice of arrival at least 96 hours before entering the port.[20] Authority to enforce conditions of port entry is vested in the Captain of the Port (COTP).[21]

The COTP has authority to inspect and search any non-sovereign immune vessel or any person or thing thereon that is within the jurisdiction of the United States.[22] Similarly, 14 U.S.C. § 89 authorizes Coast Guard officials to make "inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and *waters over which the United States has jurisdiction*, for the prevention, detection, and suppression of violations of laws of the United States."[23] Thus, a foreign vessel that enters a U.S. port, whether suspect or not, may be boarded and searched upon its arrival to determine the nature of its cargo (*e.g.*, WMD) and its crew (*e.g.*, terrorists), and to assure compliance with other U.S. laws and regulations.[24] Similarly, foreign vessels located within the U.S. territorial sea or contiguous zone may be boarded and searched if there is reason to believe that the vessels may be violating, *inter alia*, U.S. customs, fiscal, or immigration laws.[25] Accordingly, if there are reasonable grounds to believe that a vessel is transporting prohibited items or persons in violation of U.S. customs and immigration laws, the Coast Guard may board and search the vessels in the U.S. territorial sea or contiguous zone.[26]

2. *Flag State Jurisdiction*

Generally, ships sail under the flag of only one state and, with limited exceptions, are subject to the exclusive jurisdiction of the flag state on the high seas.[27]

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[17] *Id.* pt. 2, sec. 4, art. 33.

[18] 33 U.S.C. § 1228 (1990).

[19] 33 C.F.R. §§ 160.201-215.

[20] *Id.* Certain vessels are exempt from complying with this requirement, including vessels arriving at a port under force majeure.

[21] 33 C.F.R. § 1.01-30.

[22] 33 C.F.R. § 6.04-07.

[23] 14 U.S.C. § 89 (1986) (emphasis added).

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] UNCLOS, *supra* note 12, pt. 7, sec. 1, art. 92.

Therefore, flag state or master consent is required before a warship can stop and board a foreign flag vessel on the high seas.[28] For purposes of WMD-interdiction and related materials at sea, the same rule applies in the EEZ.[29] A vessel that violates this rule and sails under the flags of two or more states may be assumed to be a ship without nationality and therefore subject to the jurisdiction of all states.[30] To illustrate this point, in November 2002, U.S. intelligence sources began tracking the M/V *So San* after it departed Nampo, North Korea, with a suspected cargo of missiles bound for the Middle East. The *So San* was registered in Cambodia, but was sailing without a flag. In addition, the ship's name and identification number had been painted over. The ship was therefore assumed to be stateless. At the request of the United States, Spanish naval units (*Navarra* (F-85) and *Patino* (A-14)) in the vicinity of the *So San* were requested to stop and inspect the vessel on the high seas (600 miles off the Yemeni coast). On December 9, 2002, when the *So San* failed to respond to requests to heave to, failed to respond to warning shots from *Navarra* and *Patino* and attempted to escape, Spanish Special Forces conducted a nonconsensual boarding by helicopter and small boat. The ship's manifest indicated that the freighter was carrying a cargo of cement to Yemen. However, a subsequent search of the cargo hold by Spanish and U.S. naval personnel discovered 15 scud missiles (surface-to-surface missles), 15 conventional warheads, and 85 drums of inhibited red fuming nitric acid used in scud missile fuel hidden under 40,000 bags of cement.[31] While this incident illustrates how nations can cooperate to interdict WMD and related materials on the high seas, it also warned states of proliferation concern like Iran and the DPRK never to use a stateless vessel to transport prohibited cargo.

International law does, however, provide a number of exceptions to the principle of exclusive flag state jurisdiction on the high seas. For instance, as mentioned above, the flag state or the master may give consent to authorities of another state to board and inspect one of its vessels on the high seas. From a practical and a safety standpoint, flag state or master consent are the preferred methods to gain access to a ship. As a matter of state practice, U.S. warships routinely request and receive permission from the master or the flag state to board vessels suspected of engaging in illegal activities, such as narcotics trafficking, migrant smuggling, nuclear proliferation, and, as of September, 11 2009 (9-11), terrorist-related activities. However, not all nations agree with the U.S. view that the master can legally give consent to foreign authorities to board a vessel. Nonetheless, the U.S. takes the position that, as the official representative of the flag state, the master has plenary authority over all activities on board the

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[28] *Id.* pt. 7, sec. 1, art. 94.

[29] *Id.*

[30] *Id.* pt. 7, sec. 1, art. 92.

[31] *See* Brian Knowlton, *Ship allowed to take North Korea Scuds on to Yemeni port: U.S. freed freighter carrying missiles*, N.Y. TIMES, Dec. 12, 2002, http://www.nytimes.com/2002/12/12/ news/12iht-scuds ed3 .html; *see also* Amitai Etzioni, *Tommorow's Institution Today: The Promise of the Proliferation Security Initiative*, 88 FOREIGN AFFAIRS 7, 7 (May/June 2009), *available at* http://www.gwu.edu/~ccps/etzioni/documents/A397%20(PSI)%20Tomorrow's%20Institution%20Today-%20PSI.pdf.

vessel while in international waters, including authority over all personnel on board. The U.S. position is supported by Article 27(1)(c) of UNCLOS, which recognizes the authority of the master to request the assistance of local authorities to exercise criminal jurisdiction on board the vessel.[32] But while master consent permits the boarding and search of the vessel, it does not allow the assertion of additional law enforcement authority, such as arrest of persons or seizure of cargo or the vessel. Even under the U.S. view, flag state consent would still be required to take these additional law enforcement measures against the vessel unless unilateral action was required in self-defense.

Nonconsensual boardings can also be conducted if the foreign flag vessel is engaged in universally condemned activities. Pursuant to the right of visit reflected in Article 110 of UNCLOS, a warship that encounters a foreign ship (except sovereign immune vessels) beyond the territorial sea of another nation may board the ship if there are reasonable grounds to suspect that the ship is engaged in piracy, slave trade, or unauthorized broadcasting.[33] After inspecting the ship's papers, if suspicion remains that the ship is engaged in one of the prohibited activities, the boarding officer may proceed with a further examination of the ship. Unfortunately, however, the right of visit does not apply to ships engaged in proliferation-related or terrorist-related activities.

B. Nuclear Non-proliferation Treaty

The NPT defines nuclear-weapon states to include those states that had "manufactured and exploded a nuclear weapon or other nuclear explosive device prior to January 1, 1967."[34] These states include the United States (1945), Soviet Union (1949), United Kingdom (1952), France (1960) and China (1964).[35] Pursuant to Article II, the 184 non-nuclear-weapon State Parties agree "not to receive the transfer . . . of nuclear weapons or other nuclear explosive devices; . . . not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices."[36] To ensure peaceful nuclear material is not diverted for illegal weapons purposes, the non-nuclear-weapon states also agree under Article III to "accept safeguards . . . for the exclusive purpose of verification of. . .its obligations assumed under this Treaty with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices" and to "conclude agreements with

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[32] *See* UNCLOS, *supra* note 12, pt. 2, sec. 3, art. 27(1)(c).

[33] *Id.* pt. 7, sec. 1, art. 110 (with regard to unauthorized broadcasting, UNCLOS does impose some limitation on the exercise of jurisdiction).

[34] Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161, art. IX, *available at* http://www.armscontrol.org/documents/npt.

[35] *Nuclear Weapons: Who Has What at a Glance*, *supra* note 1 (India and Pakistan first tested nuclear weapons in 1974 and 1998 respectively. Israel and South Africa have not publicly conducted nuclear tests).

[36] Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 34, art II.

the International Atomic Energy Agency to meet the requirements of this article."[37]

Pursuant to Article III of the NPT, both Iran and the DPRK entered into safeguard agreements with the IAEA in 1974[38] and 1992,[39] respectively. In Article 1 of the respective agreements, both governments agree to "accept safeguards. . .on all source or special fissionable material in all peaceful nuclear activities within its territory, under its jurisdiction or carried out under its control anywhere, for the exclusive purpose of verifying that such material is not diverted to nuclear weapons or other nuclear explosive devices."[40] They further agree in Article 3 to "co-operate to facilitate the implementation of the safeguards provided for in this Agreement."[41]

Despite these undertakings, neither Iran nor the DPRK have complied with their legal obligations under the NPT or their safeguard agreements. In his most recent report, the IAEA Director General said, "Iran has not provided the necessary cooperation to permit the Agency to confirm that all nuclear material in Iran is in peaceful activities."[42] He reported further, "Iran is not implementing the requirements contained in the relevant resolutions of the Board of Governors and the Security Council . . . which are essential to . . . resolve outstanding questions."[43] In particular, contrary to the relevant resolutions of the Board of Governors and the Security Council, Iran has: (1) continued with the operation of the Pilot Fuel Enrichment Plant and Fuel Enrichment Plant at Natanz, and the construction of a new enrichment plant at Fordow; and (2) continued with the construction of the IR-40 reactor and related heavy water activities and has failed to allow the IAEA to take samples of the heavy water which is stored at the Uranium Conversion Facility, and has not provided the IAEA access to the Heavy Water Production Plant.[44]

Similarly, the Director General's report on the DPRK reflects that "since December 2002, the DPRK has not permitted the Agency to implement safeguards in the country and, therefore, the Agency cannot draw any safeguards conclusion

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[37] *Id.* art. III.

[38] Int'l Atomic Energy Agency [IAEA], *The Text of the Agreement between Iran and the Agency for the Application of Safeguards [AAS] in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons*, IAEA Doc. INFCIRC/214 (Dec. 13, 1974), *available at* http://www.iaea.org/Publications/Documents/Infcircs/Others/infcirc214.pdf [hereinafter AAS-Iran].

[39] IAEA, *Agreement of 30 January 1992 between the Government of the Democratic People's Republic of Korea and the IAEA for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons*, IAEA Doc. INFCIRC/403 (May 1992), *available at* http://www.iaea.org/Publications/Documents/Infcircs/Others/inf403.shtml [hereinafter IAEA Agreement].

[40] IAEA Agreement, *supra* note 39, art. 1; AAS-Iran, *supra* note 38, art. 1.

[41] IAEA Agreement, *supra* note 39, art. 3; AAS-Iran, *supra* note 38, art. 3.

[42] IAEA, *Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions 1737 (2006), 1747 (2007), 1803 (2008) and 1835 (2008) in the Islamic Republic of Iran, Report of the Director General*, ¶ 46, IAEA Doc. GOV/2010/10 (Feb. 18, 2010), *available at* http://www.isis-online.org/uploads/isis-reports/documents/IAEA_Report_Iran_18F eb10.pdf [hereinafter IAEA, *Implementation*].

[43] *Id.* ¶ 47. Further IAEA resolutions concerning Implementation of the NPT Safeguards Agreement with Iran *available at* http://www.iaea.org/newscenter/focus/iaeairan/ iaea_resolutions.shtml.

[44] *Id.*

regarding the DPRK."[45] Additionally, the report indicates that the DPRK has not "implemented the relevant measures called for in United Nations Security Council resolutions 1718 (2006) and 1874 (2009)" and that, since April 15, 2009, the IAEA "has not been able to carry out any monitoring and verification activities in the DPRK and thus cannot provide any conclusions regarding the DPRK's nuclear activities."[46]

C. United Nations Sanctions Regime

1. U.N. Charter

Pursuant to Article 39 of the U.N. Charter (Charter), the Security Council has the authority to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and "decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."[47] Measures adopted under Article 41 do not include the use of armed force and "may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." In accordance with Article 42, however, if the Security Council determines that measures not involving the use of armed force will not be adequate "or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security," to include "demonstrations, blockade, and other operations by air, sea, or land forces."[48] Of course, prior to adopting measures under Articles 41 or 42, the Security Council may "call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable."[49]

Acting under Chapter VII, the Security Council adopted Resolution 1540 on April 28, 2004.[50] After acknowledging that the proliferation of WMD and their delivery systems constituted a threat to international peace and security, the Council called on "all states, in accordance with their national legal authorities and legislation and consistent with international law, to take cooperative action to prevent illicit trafficking in nuclear, chemical or biological weapons, their means of delivery, and related materials."[51]

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[45] IAEA, *Application of Safeguards in the Democratic People's Republic of Korea (DPRK), Report of the Director General*, ¶ 9, IAEA Doc. GOV/2010/45-GC(54)/12 (Aug. 31, 2010), *available at* http://www.iaea.org/newscenter/focus/iaeadprk/iaea_reports.shtml.

[46] *Id.*

[47] U.N. Charter art. 39.

[48] *Id.* art. 40.

[49] *Id.*

[50] S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004), *available at* http://www.un.org/docs/sc/.

[51] *Id.* ¶ 10.

2. *DPRK-Specific Resolutions*

On February 19, 1992, ROK and the DPRK issued a joint declaration renouncing the testing, manufacturing, production, receipt, possession, storing, deploying or use of nuclear weapons.[52] Less than a year later, in March 1993, the DPRK sent a letter to the President of the Security Council stating its intent to withdraw from the NPT. The Security Council responded with the adoption of Resolution 825 on May 11, 1993, in which the Council called on the DPRK to reconsider its decision, reaffirm its commitment to the NPT and honor its non-proliferation obligations under the NPT and its safeguards agreement with the IAEA.[53] The DPRK suspended its withdrawal from the NPT on June 9, 1993.[54] But thereafter began the saga of broken promises; numerous U.N. Security Council Resolutions (UNSCRs), IAEA resolutions and other international efforts failed to convince the DPRK to abandon its nuclear ambitions.

Ten years later, in January 2003, the DPRK revoked its suspension and formally withdrew from the NPT, citing national security concerns, and further declared that it would no longer abide by the terms of its safeguards agreement with the IAEA.[55] A few years later, following the fourth round of the Six-Party Talks in Beijing in September 2005, the DPRK affirmed that it was committed to abandoning all nuclear weapons and its existing nuclear programs and that it intended to return to the NPT and IAEA safeguards.[56]

Despite its affirmations, international expectations for a more stable Korean Peninsula were shattered on July 5, 2006 when the DPRK launched a number of ballistic missiles that landed in the Sea of Japan, violating its self-proclaimed moratorium on missile launching. The Security Council reacted ten days later by condemning the multiple launches and demanding that the DPRK suspend all activities related to its ballistic missile program.[57] UNSCR 1695 additionally required "all Member States, in accordance with their national legal authorities and legislation and consistent with international law," to prevent:

- the transfer of missile and missile-related items, materials, goods and technology to the DPRK's missile or WMD programs;
- the procurement of missile and missile-related items, materials, goods and technology from the DPRK; and
- the transfer of any financial resources in relation to the DPRK's missile or WMD programs.[58]

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[52] *Joint Declaration of South and North Korea on the Denuclearization of the Korean Peninsula,* CENTER FOR NONPROLIFERATION STUDIES (Feb. 19 1992), http://www.nti.org/e_research/ official_docs/ inventory/pdfs/aptkoreanuc.pdf (last updated Feb. 25, 2009).

[53] S.C. Res. 825, U.N. Doc. S/RES/825 (May 11, 1993), *available at* http://www.un. org/docs/sc/.

[54] *Joint Declaration, supra* note 52.

[55] *Text of North Korea's Statement on NPT Withdrawal, supra* note 5.

[56] *Joint Statement of the Fourth Round of the Six-Party Talks, Beijing,* THE ACRONYM INSTITUTE (Sept. 19, 2005), *available at* http://www.acronym.org.uk/docs/0509/doc04.htm.

[57] S.C. Res. 1695, U.N. Doc. S/RES/1695 (Jul. 15, 2006), *available at* http://www.un.org /docs/sc/.

[58] *Id.* ¶ 4.

The DPRK responded to the Security Council's demands with a nuclear weapon test on October 9, 2006 in flagrant disregard of UNSCR 1695. Recognizing that this test had increased tensions in the region and was a "clear threat to international peace and security," the Council condemned the nuclear test and demanded that the DPRK not conduct any further tests or ballistic missile launches.[59] Acting under Article 41 of the Charter, UNSCR 1718 further directed the DPRK to abandon all nuclear weapons and nuclear programs, and other existing WMD and ballistic missiles programs, in a complete, verifiable, and irreversible manner.[60] Additionally, all Member States were directed to prevent the supply, sale or transfer to the DPRK, through their territories or by their nationals, or using their flag vessels or aircraft, of:

- any battle tanks, armored combat vehicles, large caliber artillery systems, combat aircraft, attack helicopters, warships, missiles or missile systems, or related materials including spare parts;
- items, materials, equipment, goods and technology that could contribute to the DPRK's nuclear-related, ballistic missile-related or other WMD-related programs; and
- luxury goods.[61]

Member States were also directed to:

- prohibit the procurement of these items from the DPRK[62] by their nationals or using their flagged vessels or aircraft;
- prevent any transfers to or from the DPRK by their nationals or from their territories, of technical training, advice, services or assistance related to these items;
- freeze financial assets located in their territories used to support the DPRK's nuclear-related, other WMD-related and ballistic missile-related programs;
- impose travel restrictions on designated persons responsible for the DPRK's nuclear-related, ballistic missile-related and other WMD-related programs and polices.[63]

Finally, Member States were urged to "take, in accordance with their national authorities and legislation, and consistent with international law, cooperative action including thorough inspection of cargo to and from the DPRK."[64]

Three years later, the DPRK reacted to the increased sanctions in UNSCR 1718 with a second nuclear test on May 25, 2009. The Security Council responded with UNSCR 1874, which reiterated the condemnations, demands and

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[59] S.C. Res. 1718, ¶¶ 1-2, U.N. Doc. S/RES/1718 (Oct. 14, 2006), *available at* http://www.un. org/docs/sc/.

[60] *Id.* ¶ 6.

[61] *Id.* ¶ 8(a).

[62] The DPRK was also prohibited from exporting such items; *see id.* ¶ 8(b).

[63] *Id.* ¶ 8(c)-(e).

[64] *Id.* ¶ 8(f).

economic sanctions of UNSCR 1718, in addition to prohibiting all weapons exports by the DPRK and expanding the arms embargo to all arms (except small arms and light weapons).[65] UNSCR 1874 additionally established an inspection regime that required all states to inspect:

- in accordance with their national authorities and legislation, and consistent with international law, all cargo to and from the DPRK, in their territory, including seaports and airports, if they have reasonable grounds to believe the cargo contains items prohibited by UNSCRs 1718 or 1874 (i.e., port state control/jurisdiction), and
- vessels, with the consent of the flag state, on the high seas, if they have reasonable grounds to believe that the vessel's cargo contains items prohibited by UNSCRs 1718 or 1874 (i.e., flag state jurisdiction/consent).[66]

With regard to the latter point, if the flag state does not consent to the inspection on the high seas, the flag state shall direct the vessel to proceed to an appropriate and convenient port for the required inspection by local authorities. If an inspection discovers prohibited items, member states are further authorized to seize and dispose of the items. This "diversion" provision of the resolution is an interesting, but irrelevant, new development. While responsible flag states will, in all probability, observe this requirement and divert their vessels to a convenient port for inspection, it is highly unlikely that rogue states like Syria, Iran, Myanmar and the DPRK will do so.

An additional new requirement in UNSCR 1874 that warrants special recognition, however, is the "no bunkering" provision.[67] Operative paragraph 17 of the resolution prohibits Member States from providing "bunkering services, such as provision of fuel or supplies, or other servicing of vessels, to DPRK vessels if they have. . .reasonable grounds to believe they are carrying items. . .prohibited by [UNSCR] 1718 (2006) or. . .[UNSCR 1874]."[68] This provision was instrumental in preventing a suspected weapons shipment from finding its way from the DPRK to Myanmar in July 2009. In June 2009, satellites detected that the DPRK was loading the tramp steamer *Kang Nam 1* with a cache of weapons for Myanmar. After the vessel set sail, the *USS John S. McCain* shadowed it for several days. When it became apparent to the ship's master that he would not be able to refuel in Singapore as originally planned, the *Kang Nam* reversed course and returned to the DPRK.[69] Assuming regional coastal nations such as China, Indonesia, and Malaysia continue to comply with this prohibition, it will be ex-

65 S.C. Res. 1874, U.N. Doc. S/RES/1874 (Jun. 12, 2009), *available at* http://www.un.org/docs/sc/. As was the case with previous resolutions, this resolution was adopted pursuant to Chapter VII and took measures under Article 41.

66 *Id.* ¶¶ 11-12.

67 *Id.* ¶ 17.

68 *Id.*

69 Op.-Ed., *A Victory for U.N. Sanctions*, BANGKOK POST, July 10, 2009, http://www.ba ngkokpost.com/opinion/opinion/19963/a-victory-for-un-sanctions.

tremely difficult, if not impossible, for DPRK flag vessels to make the long voyage to Myanmar or Iran without stopping for fuel along the route.

3. Iran-Specific Resolutions

In March 2006, Iran announced its intentions to resume its enrichment-related activities and suspended cooperation with the IAEA. The Security Council responded with a weak resolution, adopted under Article 40 of the Charter, demanding Iran suspend all enrichment-related and reprocessing activities, including research and development.[70] The resolution, UNSCR 1696, additionally called on all states, "in accordance with their national legal authorities and legislation and consistent with international law, to. . .prevent the transfer of any items, materials, goods and technology that could contribute to Iran's enrichment-related and reprocessing activities and ballistic missile programs."[71] It is unclear why this resolution is somewhat watered-down in comparison to UNSCR 1695 on the DPRK, which additionally prevented both the procurement of missile and missile-related items from the DPRK and the transfer of any financial resources related to the DPRK's missile or WMD programs.[72] Perhaps the thirst for oil had something to do with it, but the Security Council clearly missed an opportunity to send a stronger message to Tehran concerning its nuclear weapons and ballistic missile programs.

Like the DPRK, Iran ignored the demands of UNSCR 1696. In response, the Security Council adopted enhanced measures under Article 41 of the Charter demanding that Iran suspend all enrichment-related and reprocessing activities, including research and development, and all work on heavy water-related projects, including the construction of a research reactor moderated by heavy water.[73] UNSCR 1737 further provided that all Member States must prevent the supply, sale or transfer to Iran from their territories or by their nationals using their flag vessels or aircraft of all items, materials, equipment, goods and technology that could contribute to Iran's enrichment-related activities, reprocessing activities, heavy water-related activities or to the development of nuclear weapon delivery systems.[74] Member States were also required to "prevent the provision to Iran of any technical assistance or training, financial assistance, investment, brokering or other services, and the transfer of financial resources or services, related to the supply, sale, transfer, manufacture or use of the prohibited items, materials, equipment, goods and technology. . ." specified in the resolution.[75]

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[70] S.C. Res. 1696, U.N. Doc. S/RES/1696 (Jul. 31, 2006), *available at* http://www.un. org/docs/sc/.

[71] *Id.* ¶ 2.

[72] *See* S.C. Res. 1695, *supra* note 57, ¶ 4.

[73] S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 27, 2006), *available at* http://www.un .org/docs/sc/.

[74] *Id.* ¶ 3. For a list of prohibited nuclear program-related and ballistic missile program-related items see Permanent Representative of France to the U.N., Letter dated Oct. 13, 2006 from the Permanent Representative of France to the U.N. addressed to the President of the Security Council, U.N. Doc. S/2006/814, S/2006/815 (Oct. 13, 2006), *available at* http://www.undemocra cy.com/S-2006-814.pdf and http://www.undemocracy.com/S-2006-815.pdf (the annex to the letter contains an extensive list of prohibited materials by category).

[75] S.C. Res. 1737, *supra* note 73, ¶ 6.

Additionally, Member States were specifically required to prevent specialized teaching or training of Iranian nationals in disciplines that would contribute to Iran's proliferation sensitive nuclear activities and development of nuclear weapon delivery systems.[76] UNSCR 1737 also prohibited Iran from exporting, and Member States or their nationals from procuring, any of the items in documents S/2006/814 and S/2006/815.[77] Lastly, Member States were directed to freeze financial assets located in their territories that were owned or controlled by persons identified by the Security Council as being engaged in, directly associated with, or providing support for Iran's proliferation-sensitive nuclear activities or the development of nuclear weapon delivery systems.[78] Unlike UNSCR 1718, which imposed travel restrictions on certain individuals responsible for the DPRK's nuclear and ballistic missile programs, UNSCR 1737 only required states to exercise "vigilance" regarding the entry or transit of their territories of individuals involved in Iran's proliferation-sensitive nuclear activities or the development of nuclear weapon delivery systems. Again, it is unclear why the Security Council would elect to impose lesser restrictions on Iran when it was apparent that stronger sanctions against the DPRK had failed.

When Iran failed to comply with the requirements of UNSCR 1737, the Security Council imposed new measures under Article 41 of the Charter aimed at encouraging Iran to comply with its previous resolutions and the requirements of the IAEA.[79] New measures adopted by the Council in UNSCR 1747 included a prohibition on the:

- the supply, sale or transfer by Iran (or its nationals or use of its flag vessels or aircraft) of any arms or related materials; and
- the procurement of such items from Iran by any State (or its nationals or use of its flag vessels or aircraft).[80]

Additionally, all states were urged, but not required, to:

> exercise vigilance and restraint in the supply, sale or transfer directly or indirectly from their territories or by their nationals or using their flag vessels or aircraft of any battle tanks, armored combat vehicles, large caliber artillery systems, combat aircraft, attack helicopters, warships, missiles or missile systems . . . and in the provision to Iran of any technical assistance or training, financial assistance, investment, brokering or other services, and the transfer of financial resources or services, related to the supply, sale, transfer, manufacture or use of such items.[81]

Similarly, all states and international financial institutions were urged, but not required, not to "enter into new commitments for grants, financial assistance, and

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[76] *Id.* ¶ 17.

[77] *Id.* ¶¶ 3-4.

[78] *Id.* ¶¶ 12-15.

[79] S.C. Res. 1747, U.N. Doc. S/RES/1747 (Mar. 24, 2007), *available at* http://www.un .org/docs/sc/.

[80] *Id.* ¶ 5.

[81] *Id.* ¶ 6.

concessional loans" to Iran.[82] The failure to impose a mandatory arms embargo on major weapons systems and mandatory economic sanctions on Iran clearly sent the wrong signal to Iran and other states of proliferation concern and demonstrated a lack of resolve on the part of the Security Council to adequately curtail Iran's nuclear ambitions.

Less than a year later, the Director General of the IAEA issued a report that indicated that Iran had not suspended its enrichment-related, reprocessing activities or its heavy water-related projects as required by UNSCRs 1696, 1737 and 1747.[83] The report further indicated that Iran had not resumed its cooperation with the IAEA and had taken issue with the IAEA's right to verify design information in accordance with Article 39 of Iran's Safeguards Agreement.[84] In an effort to persuade Iran to comply with resolutions 1696, 1737, and 1747 and other IAEA requirements, the Security Council adopted additional measures under Article 41 of the Charter.[85] UNSCR 1803 imposed new travel restrictions, directing all states to prevent the entry into or transit through their territories of designed individuals that were engaged in, directly associated with or providing support for Iran's proliferation sensitive nuclear activities or development of nuclear weapon delivery systems.[86] The resolution additionally required all states to take the necessary measures to prevent the supply, sale, or transfer from their territories or by their nationals or using their flag vessels or aircraft to Iran of:

- all items, materials, equipment, goods and technology associated with Iran's nuclear program, as set out in relevant Security Council documents (except for use in light water reactors), and
- all items, materials, equipment, goods and technology associated with Iran's ballistic missile program, as set out in relevant Security Council documents.[87]

States were also urged, but not required, to avoid contributing to Iran's nuclear activities or the development of nuclear weapons by exercising vigilance in entering into new commitments for financial support or trade with Iran, and over the activities of financial institutions in their territories with banks in Iran.[88] Lastly, states were urged, but not required, to exercise port state jurisdiction both in accordance with their national legal authorities and legislation and also consistent with international law (in particular the law of the sea and relevant international civil aviation agreements.)[89] Specifically, states were requested to inspect the cargoes at their airports and seaports located on board aircraft and vessels

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[82] *Id.* ¶ 7.

[83] IAEA, *Implementation*, *supra* note 42, ¶ 56.

[84] *Id.* ¶ 56.

[85] S.C. Res. 1803, ¶¶ 15, 20-21, 23, U.N. Doc. S/RES/1803 (Mar. 24, 2007), *available at* http://www.un.org/docs/sc/.

[86] *Id.* ¶ 3.

[87] *Id.* ¶ 8.

[88] *Id.* ¶ 9.

[89] *Id.* ¶ 11.

owned or operated by Iran Air Cargo and Islamic Republic of Iran Shipping Line, if the state had reasonable grounds to believe that the aircraft or vessel was transporting prohibited goods to or from Iran.[90]

Despite numerous political and diplomatic efforts to bring Iran into compliance with its obligations under the NPT and relevant UNSCRs (including an offer by Russia and France to have Iran swap its low-enriched uranium for higher grade fuel rods for use in its nuclear reactors), Iran was not dissuaded from pursuing its nuclear ambitions.[91] Additional reports surfaced in mid-May 2010 of a trilateral agreement between Iran, Turkey and Brazil to send low-enriched uranium abroad for enrichment.[92] Notwithstanding these efforts, in May, an IAEA report indicated that Iran was not cooperating with the IAEA and had not suspended its enrichment-related activities, reprocessing activities and heavy water-related projects as required by UNSCRs 1696, 1737, 1747 and 1803.[93] Of greater concern, however, was the finding that Iran had constructed an enrichment facility at Qom and had enriched uranium to 20 percent without notifying the IAEA, violating its obligations under its Safeguards Agreement.

In response, the Security Council directed Iran not to begin construction on any new uranium-enrichment, reprocessing, or heavy water-related facility and to discontinue any ongoing construction of any such facility in UNSCR 1929.[94] UNSCR 1929 further provided that all states were to prohibit Iran, its nationals, and entities incorporated in (or acting on behalf of) Iran from acquiring an interest in any commercial activity in their territories involving uranium mining, production, or use of nuclear materials and technology.[95] Additionally, all states were directed to "prevent the. . .supply, sale or transfer to Iran, from or through their territories or by their nationals. . .or using their flag vessels or aircraft. . .of any battle tanks, armored combat vehicles, large caliber artillery systems, combat aircraft, attack helicopters, warships, missiles or missile systems. . .or related material, including spare parts."[96]

States were also directed to take the necessary measures to prevent the transfer of technical training, financial resources or services, advice, other services or assistance related to the supply, sale, transfer, provision, manufacture, maintenance, or use of such arms and related materials to Iran.[97] Similarly, Iran was

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[90] *Id.*

[91] Lara Setrakian, *Iran Agrees to Draft of a Nuclear deal – Again*, ABC WORLDNEWS, Oct. 21, 2009, http://abcnews.go.com/WN/International/iran-nuke-deal-prompts-talk-normalizing-relations/story?id=8881164.

[92] *See Iran Agrees Turkey Nuclear Deal*, BBC NEWS, May 17, 2010, http://ne ws.bbc.co.uk/2/hi/8685846.stm; *see also* Daniel Dombey, Harvey Morris & Geoff Dyer, *Clinton Attacks Turkey-Brazil deal with Iran*, FINANCIAL TIMES, May 18, 2010, http://www.ft.com /cms/s/0/58caa4b4-62a4-11df-b1d1-00144feab49a.html#axzz1BbwYrK8G; *see also Text of the Iran-Brazil Turkey deal*, THE GUARDIAN, May 17, 2010, http://www.guardian.co.uk/world/julian-borger-global-security-blog/2010/may/17/iran-brazil-turkey-nuclear.

[93] IAEA, *Implementation*, *supra* note 42, ¶ 38.

[94] S.C. Res. 1929, U.N. Doc. S/RES/1929 (June 9, 2010), *available at* http://www.un. org/Docs/sc/.

[95] *Id.* ¶ 7.

[96] *Id.* ¶ 8.

[97] *Id.*

directed not to undertake any activity related to ballistic missiles capable of delivering nuclear weapons, including launches using ballistic missile technology.[98] Unlike the limited travel restrictions imposed by UNSCR 1737, UNSCR 1929 imposed a strict travel ban on certain designated individuals, similar to the travel restrictions imposed by UNSCR 1718 on individuals responsible for the DPRK's nuclear and ballistic missile programs.[99] States were also urged to exercise vigilance over transactions involving the Islamic Revolutionary Guard Corps that could contribute to Iran's proliferation-sensitive nuclear activities or the development of nuclear weapons.[100] The Security Council imposed additional economic sanctions regarding banking and financial services.[101]

With regard to cargo inspections, UNSCR 1929 called upon all states to exercise port state jurisdiction by inspecting all cargo to and from Iran into its territory when it had reason to believe the cargo contained items prohibited by UNSCRs 1737, 1747, 1803 or 1929 in a manner consistent with international law and in accordance with their national authorities and legislation.[102] All states were also urged to, "request inspections of vessels on the high seas with the consent of the flag State" and to "cooperate in such inspections if there is information that provides reasonable grounds to believe the vessel is carrying items" prohibited by UNSCRs 1737, 1747, 1803 or 1929.[103] If states discovered prohibited items during an inspection, they were authorized to seize and dispose of the items. Bunkering services to Iranian-owned or contracted vessels were also prohibited similar to the restrictions imposed on DPRK ships under UNSCR 1874.[104] Unlike UNSCR 1874, however, UNSCR 1929 did not contain a "diversion" provision that would require a flag state that did not consent to an inspection on the high seas of one of its vessels to direct the vessel to proceed to an appropriate port for inspection.

D. Convention for the Suppression of Unlawful Acts (SUA Convention)

In October 1985, Palestinian terrorists hijacked the Italian cruise ship *Achille Lauro* off the coast of Egypt. The hijackers demanded the release of 50 Palestinian prisoners from Israel in exchange for the 400 passengers and crew on board the vessel. When their demands were not met, the terrorists killed Leon Klinghoffer, a 69-year-old American tourist with a disability, and threw his body over the side, along with his wheelchair. The hijackers ultimately surrendered to Egyptian authorities in exchange for a pledge of safe passage. While the Egyptian aircraft was en-route to Tunisia, however, it was intercepted by U.S. Navy fighters and forced to land in Sicily, where the terrorists were taken into cus-

98 *Id.* ¶ 9.

99 *Id.* ¶¶ 10-12.

100 *Id.* ¶ 12.

101 *Id.* ¶¶ 23-24.

102 *Id.* ¶ 14.

103 *Id.* ¶ 15.

104 *Id.* ¶ 18.

tody.[105] Concerned over this and other incidents affecting the safety of ships and the security of their passengers and crews, the International Maritime Organization (IMO) adopted the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf in March 1988 (the 1988 Convention and Protocol).

1. 1988 Convention and Protocol

The goal in adopting the 1988 Convention and Protocol was to ensure appropriate action was taken against persons who committed unlawful acts against ships and persons onboard. Acts prohibited under Article 3 of the Convention include:

- seizing or exercising control over a ship by force;
- acts of violence against a person on board a ship;
- destroying a ship or causing damage to the ship or its cargo;
- placing a device or substance on the ship that is likely to destroy the ship or cause damage to the ship or its cargo;
- destroying or damaging maritime navigational facilities or seriously interfering with their operation;
- communicating information which is known to be false that endangers the safe navigation of the ship; and
- injuring or killing any person in connection with the commission of any of the offenses.[106]

Article 6 obligates States Parties to extradite or prosecute any alleged offenders.

2. 2005 Protocols

The 1988 Convention and Protocol were amended in 2005 following the terrorist attacks against the United States on 9-11. The 2005 Protocols, which entered into force in July 2010, add a number of new offenses directly related to terrorism and the proliferation of WMD. Both the 1988 Convention and the 2005 Protocol to the Convention should be read as a single, integrated treaty, which is called the 2005 SUA Convention. The same nomenclature applies to the treaty concerning fixed platforms on the continental shelf, which is referred to as the 2005 Protocol.

Under the 2005 SUA Convention, if the purpose of the act is to intimidate a population or compel a government or an international organization to do or abstain from any act, Article 3*bis* of the new Protocol prohibits:

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[105] *American killed as terrorists capture cruise ship — October 7, 1985*, CNN INTERACTIVE VIDEO ALMANAC (1985), http://www.cnn.com/resources/video.almanac/1985/index2.html.

[106] *Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation*, CENTER FOR NONPROLIFERATION STUDIES (Mar. 10, 1988), http://www.nti.org/e_research/official_docs/inventory/pdfs/maritime.pdf.

- using against or on a ship or discharging from a ship any explosive, radioactive material or biological, chemical, nuclear (BCN) weapon in a manner that causes or is likely to cause death or serious injury or damage;
- discharging from a ship, oil, liquefied natural gas, or other hazardous or noxious substance, in such quantity or concentration that causes or is likely to cause death or serious injury or damage; or
- using a ship in a manner that causes death or serious injury or damage.[107]

Article 3*bis* additionally prohibits transporting on board a ship:

- any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, death or serious injury or damage for the purpose of intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act;
- any BCN weapon, knowing it to be a BCN weapon;
- any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA comprehensive safeguards agreement; and
- any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose.[108]

A new Article 3*ter* prohibits the transportation of persons on board a ship knowing that the person has committed an act that constitutes an offense under the SUA Convention or any of the nine terrorism-related treaties listed in the Annex to the Protocol.[109] And Article 3*quater* makes it an offense to injure or

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[107] *Id.*

[108] *Id.*

[109] *Id.* The treaties listed in the Annex include:

Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970;

Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971;

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973;

International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979;

Convention on the Physical Protection of Nuclear Material, done at Vienna on 26 October 1979;

Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988;

Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988;

kill any person in connection with the commission, or attempted commission, of any of the offenses in the Convention, as well as participating as an accomplice or contributing to the commission of an offense.[110]

Article 8*bis* of the Protocol includes a comprehensive framework to facilitate boarding of suspect vessels at sea.[111] This framework, although more robust, suffers from the same drawback as other international instruments and arrangements regarding the boarding of foreign flag vessels on the high seas—it is based on flag state consent. In this regard, if a boarding request is received by the flag state, it must:

- authorize the requesting party to board and take appropriate measures;
- conduct the boarding and search with its own officials;
- conduct the boarding and search with the requesting party; or
- decline to authorize the boarding and search.[112]

It is highly unlikely that any state of proliferation concern, including Iran and the DPRK, would authorize a boarding by foreign officials.

E. Proliferation Security Initiative

In December 2002, President Bush unveiled a new, more robust strategy to combat WMD proliferation that went beyond the traditional methods of dealing with proliferation—diplomacy, arms control, threat reduction assistance and export controls—by placing greater emphasis on the need to interdict WMD and related materials.[113] Five months later, President Bush announced the establishment of the Proliferation Security Initiative (PSI) in Krakow, Poland.[114] Support for the initiative has grown from its original eleven members to nearly a hundred countries, although the level of support varies from country to country.[115] The Obama Administration has continued to voice its strong support for the initiative. The 2010 National Security Strategy emphasizes that the Administration will "work to turn programs such as the [PSI] and the Global Initiative to Combat Nuclear Terrorism into durable international efforts."[116] Of course, states of

International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997;

International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999.

110 *Id.*

111 *Id.*

112 *Id.*

113 *See* BUREAU OF INT'L SEC. AND NONPROLIFERATION [ISN], U.S. DEP'T OF STATE, NATIONAL STRATEGY TO COMBAT WEAPONS OF MASS DESTRUCTION, 2 (2002), *available at* http://www .state.gov/documents/organization/16092.pdf; *see also* MARY BETH NIKITIN, CONG. RESEARCH SERV., RL 34327, PROLIFERATION SECURITY INITIATIVE (PSI), 1 (2011), *available at* http://www.fas.org/sgp/crs/nuke/RL34327.pdf.

114 NIKITIN, *supra* note 113, at 1.

115 *Proliferation Security Initiative Participants,* ISN, U.S. DEP'T OF STATE (Sept. 10, 2010), http://www.state.gov/t/isn/c27732.htm; NIKITIN, *supra* note 113, at 2.

116 *See* EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY STRATEGY, 24 (2010), *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf; *see also* Re-

proliferation concern like the DPRK, Iran, Myanmar, and Syria have not signed on to the initiative, while some other notable countries[117] have rejected PSI as contrary to international law. Unfortunately, many of the states that have not signed on to the PSI are strategically situated along the sea routes, which could significantly diminish the effectiveness of the interdiction regime envisioned by the initiative, in particular port state and coastal state interdiction efforts.

Recognizing that the spread of WMD, their delivery systems, and related materials represent a fundamental threat to global peace and security, PSI is designed to prevent trafficking in WMD and related materials to and from states and non-state actors of proliferation concern. PSI does not, however, create a new international organization with formal membership and a secretariat to run day-to-day operations. Rather, it is an operationally focused activity that relies on the voluntary participation of states with the common interest of curtailing the growing threat of WMD proliferation by air, land and sea. Moreover, PSI is not intended as a replacement for other nonproliferation mechanisms (e.g., SUA, UNSCRs, NPT, MTCR); rather, it is designed to reinforce and complement these mechanisms.[118] Since 2003, PSI nations have conducted forty-five exercises aimed at enhancing counter-proliferation cooperation.[119]

States that endorse PSI commit themselves to follow the PSI Statement of Interdiction Principles (SIP). These principles are designed to establish a more coordinated and effective basis through which to disrupt trafficking in WMD, their delivery systems, and related items in a manner consistent with national and international legal authorities and nonproliferation frameworks. In particular, the SIP encourage supporting states to commit to:

- undertake effective measures, either alone or in concert with other states, for interdicting the transfer or transport of WMD, their delivery systems, and related materials to and from states and non-state actors of proliferation concern;
- adopt streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity. . .dedicate appropriate resources and efforts to interdiction operations and capabilities, and maximize coordination among participants in interdiction efforts;
- review and work to strengthen their relevant national legal authorities where necessary to accomplish these objectives, and work to strengthen when necessary relevant international law and frameworks in appropriate ways to support these commitments; and
- take specific actions in support of interdiction efforts regarding cargoes of WMD, their delivery systems, or related materials, to the extent their

marks of President Barack Obama in Hradèany Square (Prague, Czech Republic, Apr. 5, 2009), *available at* http://prague.usembassy.gov/obama.html.

[117] Brazil, China, Bangladesh, India, Indonesia, Malaysia, and Pakistan.

[118] *Proliferation Security Initiative Fact Sheet*, ISN, U.S. DEP'T OF STATE, http://www.state .gov/t/isn/c10390.htm (last visited Sept. 13, 2011).

[119] Jeffrey Lewis and Philip Maxon, *The Proliferation Security Initiative*, 2 DISARMAMENT FORUM 35, 37 (2010), *available at* www.unidir.org/pdf/articles/pdf-art2962.pdf.

national legal authorities permit and consistent with their obligations under international law and frameworks.[120]

Interdiction efforts contained in the SIP are based on the existing legal principles of port state control, coastal state jurisdiction and exclusive flag state jurisdiction, including the duties:

- not to transport or assist in the transport of MWD-related cargoes to or from states or non-state actors of proliferation concern, and not to allow any persons subject to their jurisdiction to do so;
- to take action to board and search any vessel flying their flag in their internal waters or territorial seas, or areas beyond the territorial seas of any other state, that is reasonably suspected of transporting such WMD-related cargoes, and to seize such cargoes that are identified at their own initiative or at the request by another state;
- to seriously consider providing consent to other states to board and search its flag vessels, and to seize WMD-related cargoes in such vessels;
- to take appropriate actions to stop and/or search in their internal waters, territorial seas, or contiguous zones vessels that are reasonably suspected of carrying WMD-related cargoes and to seize such cargoes;
- to take appropriate actions to enforce conditions on vessels entering or leaving their ports, internal waters or territorial seas, such as requiring vessels to be subject to boarding and search prior to entry;
- to (a) require aircraft that are reasonably suspected of carrying MWD-related cargoes and that are transiting their airspace to land for inspection and seize any such cargoes that are identified; and/or (b) deny aircraft reasonably suspected of carrying such cargoes transit rights through their airspace in advance of such flights at their own initiative or upon the request by another state; and
- to inspect vessels, aircraft, or other modes of transport reasonably suspected of carrying such cargoes, and to seize such cargoes that are identified if their ports, airfields, or other facilities are used as transshipment points for shipment of WMD-related cargoes.[121]

Consistent with UNSCR 1540 and the 2005 SUA Convention, PSI encourages states to enter into bilateral agreements or operational arrangements to enhance cooperation and facilitate authorized ship boardings by participating flag states. In this regard, the United States has entered into a number of bilateral boarding agreements with key flag states, including the major flags of convenience, to allow for boarding and inspection of suspect ships seaward of the territorial sea of other nations. Under these agreements, if a vessel registered in the U.S. or the partner country is suspected of carrying WMD-related cargo, either party can request the other to confirm the nationality of the ship and authorize the board-

120 *Proliferation Security Initiative: Statement of Interdiction Principles*, ISN, U.S. DEP'T OF STATE (2003), http://www.state.gov/t/isn/c27726.htm.

121 *Id.*

ing, search, and detention of the vessel and its cargo. The boarding provisions vary from agreement to agreement, from flag state consent being required under all circumstances (*i.e.*, Bahamas and Croatia), to boarding authority being presumed if the flag state does not respond within a certain timeframe (*i.e.*, Belize, Liberia, Marshall Islands, Mongolia and Panama), to authority to board within a certain period of time if registry cannot be confirmed (*i.e.*, Cyprus, Liberia, Malta, Marshall Islands, Mongolia, and Panama). To date, the United States has concluded ten such agreements with the Bahamas, Belize, Croatia, Cyprus, Liberia, Malta, Mongolia, Panama, Marshall Islands, Mongolia, and St. Vincent and the Grenadines.[122] These countries account for over sixty percent of the world's shipping in terms of deadweight tonnage.[123]

While there have been alleged successes along the way (*e.g.*, interdiction of the *BBC China* in October 2003[124] and an Ilyushin cargo plane by Thai authorities in 2009[125]) PSI suffers from the same defect as other counter-proliferation regimes and initiatives: it is based on flag state consent. As a result, states of proliferation concern and key states that have refused to participate in the initiative (e.g., Brazil, China, India, Indonesia, Malaysia, and Pakistan) can operate their ships and aircraft on the high seas or disregard their port state and coastal state responsibilities with impunity.

III. Are U.N. Sanctions Effective?

Despite years of economic sanctions and arms embargoes, both the DPRK and Iran appear unwilling to abandon their nuclear weapons and ballistic missile programs. Not only have they disregarded their obligations under the NPT, their respective IAEA Safeguard Agreements, and numerous UNSCRs; but also neither the DPRK nor Iran participate in any of the relevant counter-proliferation initiatives established to curtail the spread of MWD and ballistic missile technol-

122 *Ship Boarding Agreements Fact Sheet*, ISN, U.S. DEP'T OF STATE (2011), http://www.state.gov/t/isn/c27733.htm.

123 *Flags of Convenience Countries*, INT'L TRANSPORT WORKERS' FEDERATION, http://www.itfglobal.org/flags-convenience/flags-convenienc-183.cfm (last visited Sept. 27, 2011); *The Geography of Transport Systems: Tonnage by Country of Registry, 2006*, HOFSTRA UNIVERSITY, http://people.hofstra.edu/geotrans/eng/ch3en/conc3en/registships.html (last visited Sept. 27, 2011).

124 Lewis and Maxon, *supra* note 119. The *BBC China* was a German-owned ship en route to Libya with centrifuge components. At the request of Washington and Berlin, the ship owner directed the ship to proceed to Taranto, where Italian officials inspected the vessel and seized the cargo.

125 *See Crew of NKorean Weapons Plane in Thai Court*, WORLDNEWS, Dec. 14, 2009, http://article.wn.com/view/2009/12/14/Crew_of_NKorean_weapons_plane_in_Thai_court_l/; *see also South Korea Seizes Iran-Bound Nuclear Material*, IRAN WATCH (Dec. 2010), http://www.iranwatch.org/enforcementnotebook/enforcement-newsummaries.htm (last visited September 27, 2011). In December 2009, Thai authorities seized a Georgian-registered plane and its cargo when it landed at Don Muang airport in Bangkok to refuel. The inspection of the aircraft by Thai authorities revealed 35 tons of explosives, rocket-propelled grenades and surface-to-surface missile components in violation of the U.N. arms embargo against the DPRK.

ogy.[126] Nor have the two emerging nuclear-armed powers filed the reports required by UNSCRs 1540 and 1673.[127]

Most experts would agree with former IAEA Director General Mohamed ElBaradei that the DPRK has become a "fully-fledged nuclear power."[128] Having conducted successful nuclear tests in 2006 and 2009, the Arms Control Agency now estimates that the DPRK has separated enough plutonium for up to twelve nuclear warheads.[129] There are also reports that the DPRK may be planning a third nuclear test in early 2011.[130] Moreover, in November 2010, the DPRK announced that it could produce uranium hexafluoride (a raw material for uranium enrichment) and had constructed a uranium-enrichment plant at Yongbyon that could be easily converted to produce highly enriched uranium for weapons.[131] U.S. officials have indicated that the DPRK has "at least one other" uranium-enrichment facility apart from the Yongbyon plant.[132] When fully operational, the Arms Control Agency estimates that the new plant could produce enough material for one to two bombs each year.[133] The DPRK also has an active ballistic missile program and is in the process of developing intercontinental ballistic missiles, which pose a direct threat to the United States.[134] In addition, the DPRK remains a major exporter of ballistic missile technology to the Middle East, South Asia and North Africa.[135]

Iran continues to insist that it does not have nuclear weapons ambitions and that its peaceful nuclear efforts are purely for energy production and medical research, but it remains defiant of Security Council and IAEA demands for transparency. In late-January 2011, nuclear talks between Iran and the P5+1 (Britain, China, France, Russia, the United States and Germany) collapsed after Iran re-

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126 Relevant counter-proliferation initiatives include: the Australia Group, Missile Technology Control Regime, Nuclear Suppliers Group, Wassenaar Arrangement, Global Initiative to Combat Nuclear Terrorism, Hague Code of Conduct against Ballistic Missile Proliferation and the PSI.

127 *Arms Control and Proliferation Profile: North Korea*, ARMS CONTROL ASS'N, http://www.armscontrol.org (last visited Sept. 27, 2011) [hereinafter *Arms Control: North Korea*]; *Arms Control and Proliferation Profile: Iran*, ARMS CONTROL ASS'N, http://www.armscontrol.org (last visited Sept. 27, 2011) [hereinafter *Arms Control: Iran*].

128 Malcolm Moore, *North Korea now fully fledged nuclear power*, THE TELEGRAPH, Apr. 24, 2009, http://www.telegraph.co.uk/news/worldnews/asia/northkorea/5212630/North-Korea-now-fully-fledged-nuclear-power.html.

129 *Arms Control: North Korea*, *supra* note 127.

130 Yu Miao, *Third Nuke Test Feared*, GLOBAL TIMES, Dec. 16, 2010, http://world.globaltimes.cn/asia-pacific/2010-12/602003.html.

131 *Arms Control: North Korea*, *supra* note 127.

132 Miao, *supra* note 130.

133 *Arms Control: North Korea*, *supra* note 127.

134 *See* Anne Gearan, *Pentagon chief huddles with allies about NKorea*, FOX NEWS, Jan. 13, 2011, http://www.foxnews.com/world/2011/01/12/pentagon-chief-huddles-allies-nkorea/; *see also* Elisabeth Bumiller and David Sanger, *Gates Warns of North Korea Missile Threat to US*, N.Y. TIMES, Jan. 11, 2011, http://www.nytimes.com/2011/01/12/world/asia/12military.html?_r=1&nl=todaysheadlines&emc=tha24.

135 *Arms Control: North Korea*, *supra* note 127.

fused to allow increased IAEA scrutiny of its nuclear program.[136] Ali Asghar Soltaneih, Iran's representative to the IAEA, stated, "resolutions, sanctions, threats, computer virus [sic] or even a military attack will not stop uranium enrichment in Iran."[137] This statement is consistent with Iranian practices to date. Secret nuclear facilities—a heavy-water production plant near Arak (that could be used to produce plutonium) and a gas centrifuge uranium-enrichment facility near Natanz (that could be used to produce fissile materials for weapons)—were discovered by the IAEA in 2002. A number of additional clandestine nuclear activities have been discovered since that time, including a secret facility near Qom.[138] Uranium extracted from a mine in southern Iran, near Bandar Abbas, and considerable amounts of yellowcake (uranium concentrate) acquired from South Africa in the 1970s and from China before U.N. sanctions were imposed could be used to offset U.N. sanctions that ban Iran from importing nuclear material.[139] Additionally, Iran continues to develop and refine its ballistic missile forces, one of the largest in the Middle East.[140] Reported ranges for these missiles vary from 1,000 to 2,000 kilometers. Missiles of this range could be used to attack targets in Israel.[141]

IV. Conclusion: Shortcomings And The Way Forward

Although the NPT has been widely accepted and offers a framework for preventing the spread of nuclear weapons and related materials, it lacks the necessary "teeth" to keep rogue nations in line. Moreover, the IAEA, the Security Council and the international community have been reluctant to use all available measures to enforce its provisions. As a result, a regime that envisioned a world with only five nuclear weapons states is now faced with the realization that India, Israel, Pakistan and the DPRK possess nuclear weapons in flagrant disregard of the NPT structure, and Iran could have enough enriched uranium to produce nuclear weapons as early as 2011, though most analysts believe that 2015 is a more realistic date.[142] Israel, who has the most to lose from a nuclear-armed Iran, estimates that the Islamic Republic will not be able to produce a nuclear weapon until the latter date.[143] But the British Defense Secretary told Parliament in Janu-

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[136] *EU lawmakers seek to extend Iran sanctions*, GOOGLE NEWS, Jan. 25, 2011, http://www.google.com/hostednews/afp/article/ALeqM5hU6LHfXFn-HXyKK8CrSlLxCEZAQw?docId=CNG.148a6c382024ebbebe64021de441dac9.5b1.

[137] George Jahn, *Iran sees progress at talks, others demur*, WASHINGTON EXAMINER, Jan. 21, 2011, http://washingtonexaminer.com/news/world/2011/01/iran-and-6-powers-begin-nuke-talks.

[138] *Arms Control: Iran, supra* note 127.

[139] *Iran says key site has higher uranium ore reserves*, FOX NEWS, Oct. 19, 2010, http://www.foxnews.com/world/2010/10/19/iran-says-key-site-higher-uranium-ore-reserves/.

[140] *Arms Control: Iran, supra* note 127.

[141] *Id.*

[142] NATIONAL INTELLIGENCE COUNCIL, IRAN: NUCLEAR INTENTIONS AND CAPABILITIES (Nov. 2007), *available at* http://www.dni.gov/press_releases/20071203_release.pdf.

[143] Adrian Croft and Janet Lawrence, *Iran could have nuclear weapons by 2012: Britain*, REUTERS, Jan. 31, 2011, www.reuters.com/article/2011/01/31/us-iran-nuclear-britain-idUSTRE70 U5SV20110131.

ary 2011 that Iran could produce such weapons as early as 2012.[144] This new British assessment appears to be in line with a soon-to-be-released study by the Federation of American Scientists that indicates that Iran is not slowing down its nuclear ambitions and could produce a simple nuclear warhead by mid-2011.[145] Furthermore, Iran remains openly defiant of U.N. sanctions and IAEA inspectors as Iran's envoy to the IAEA indicated while speaking on Iranian state TV, that U.N. sanctions and continued threats by the international community will not stop Iran's uranium enrichment program.[146] Additionally, Iranian officials have accused the Western powers of "nuclear terrorism," blaming Israel and the United States for the assassination of one of Iran's leading nuclear scientists, Majid Shahriariwas.[147]

U.N. sanctions have been ineffective in preventing the development of nuclear weapons by the DPRK. Yet, sanctions imposed on Iran have followed the exact same stepped-approach model and have, in some cases, been less stringent than those imposed on the DPRK. More importantly, where DPRK sanctions focused on, *inter alia*, "luxury goods" to encourage North Korean leaders to return to the NPT and abandon their nuclear weapons program, U.N. sanctions on Iran fail to limit Iran's oil exports. Loss of oil revenues would cripple Iran's economy and would undoubtedly have a lasting, detrimental effect on Tehran's nuclear ambitions. While many might argue that such a measure would adversely affect the world economy, oil prices would also skyrocket if a nuclear-armed Iran would attack Israel or one of its neighbors. Thus, there are two options: either deal with the rise of oil prices now with a non-nuclear Iran, or wait to deal with the inevitable rise in oil prices a few years after Iran acquires and uses nuclear weapons. Clearly, dealing directly and harshly with a non-nuclear Iran now is the preferred option, a fact recognized by Spain's Member of the European Parliament, Alejo Vidal-Quadras, who indicated that the current "soft" approach being used by the Western powers to deal with Iran has proven futile.[148]

Similarly, all of the maritime interdiction regimes attempted to date, including UNSCRs, SUA, and PSI, have failed to prevent rogue states from transporting WMD-related material by sea. All of these regimes suffer from the same fatal defect—they are based on exclusive flag state jurisdiction on the high seas. One would expect a responsible state to consent to a boarding of one of its flag vessels on the high seas if there is reasonable grounds to believe that the ship is transporting prohibited goods. But in most cases, ships registered in responsible states will not be used by states of proliferation concern to transport WMD-related material. Rather, states of concern will use their own flag vessels to transport material to support their nuclear and ballistic missile programs. If a request

144 *Id.*

145 Ali Akbar Dareini and George Jahn, *Iran's nuke program - how much time for diplomacy?*, MSNBC NEWS, Jan. 20, 2011, http://www.msnbc.msn.com/id/41176786/ns/world_news-mideastn_africa/#.

146 Jahn, *supra* note 137.

147 *Iran accuses West of 'nuclear terrorism'*, FOX NEWS, Jan. 25, 2011, http://www.foxnews.com/world/2011/01/25/iran-accuses-west-nuclear-terrorism/.

148 *EU lawmakers seek to extend Iran sanctions*, *supra* note 136.

were made to board one of these vessels, the answer would undoubtedly be "no." The only way to get on board one of these suspect vessels to inspect its cargo would be through a nonconsensual boarding.

Speaking on the issue of nonproliferation, Admiral Robert Willard, Commander U.S. Pacific Command, recently asked: "how do you leverage with a regime [like the DPRK] that does not care how it is viewed by the rest of the world, and does not care how it treats its own people."[149] The same observation could be made regarding Iran's sensitivity to world opinion. The answer is simple - the international community must adopt a more forceful and effective approach rather than the contemporary "sanction and diplomacy" approach. Because of decades of dithering, the world faces the prospect that armed force alone may be the only effective recourse.

The only two effective U.N. sanction regimes in recent memory were the sanctions imposed on Iraq and Former Republic of Yugoslavia (FRY). These sanctions were effective because the Security Council authorized the use of all necessary means, including the use of force and nonconsensual boardings, to interdict all shipping entering or departing Iraqi and FRY ports. Iraq, for example, was subjected to a total embargo (except medical and humanitarian food stuffs) and severe economic sanctions for over a decade.[150] UNSCR 665 authorized a maritime blockade of Iraq, including the use of such "measures commensurate to the. . .circumstances as may be necessary . . . to halt all inward and outward maritime shipping, in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid down in resolution 661 (1990)."[151] These sanctions, coupled with the maritime blockade and U.S.-led invasion of Iraq authorized by UNSCR 1441 in 2003, put an end to Saddam Hussein's nuclear ambitions once and for all.[152] Similar measures were adopted by the Security Council with regard to the FRY in UNSCRs 713 (1990), 724 (1990), 757 (1992), 787 (1992), 820 (1993), 942 (1994), 943 (1994), and 1015 (1995).[153]

Absent more effective sanctions enforcement and authority for nonconsensual boardings, Israel will once again have to intervene, as it did in 1981 and 2007, to ensure that nuclear weapons do not fall into the hands of erratic Middle Eastern states. On June 7, 1981, Israeli aircraft destroyed the Iraqi nuclear reactor under construction in Osirak, Iraq.[154] Two decades later, on September 6, 2007, Israeli

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149 RSN Singh, *India and the US-China Great Game*, 25.4 INDIAN DEF. REV. (Dec. 20, 2010), *available at* http://www.indiandefencereview.com/geopolitics/India-and-the-US-China-Great-Game.html.

150 S.C. Res. 661, ¶ 3, U.N. Doc. S/RES/661 (Aug. 6, 1990), *available at* http://www.un. org/docs/sc/.

151 S.C. Res. 665, U.N. Doc. S/RES/665 (Aug. 25, 1990), *available at* http://www.un. org/docs/sc/.

152 S.C. Res. 1441, U.N. Doc. S/RES/1441 (Nov. 8, 2002), *available at* http://www.un. org/docs/sc/.

153 S.C.Res. 713, ¶ 6, U.N.Doc. S/RES/713 (Sept. 25, 1991); S.C.Res. 724, ¶ 5 U.N.Doc.S/RES/724 (Dec. 15, 1991), S.C.Res. 757, ¶ 4, U.N.Doc.S/RES/757 (May 30, 1992); S.C.Res. 787, ¶¶ 11-12, U.N.Doc.S/RES/787 (Nov. 16, 1992); S.C.Res. 820, ¶ 13, U.N.Doc.S/RES/820 (Apr. 17, 1993); S.C.Res. 942, ¶ 7, U.N.Doc.S/RES/942, (Sep.23,1994); S.C.Res. 943, ¶ 1, U.N.Doc.S/RES/943 (Sep. 23, 1994); S.C.Res. 1015, U.N.Doc.S/RES/1015 (Sep. 15, 1995), *available at* http://www.un.org/Docs/sc/.

154 *Operation Opera*, ABSOLUTE ASTRONOMY, http://www.absoluteastronomy.com/topics/Operation_Opera (last visited Oct. 3, 2011).

aircraft destroyed a possible undeclared nuclear reactor in the Deir ez-Zor region of Syria.[155] Although condemned by many nations, these operations effectively prevented Iraq and Syria from advancing their respective nuclear weapons programs. Alternatively, although no nation has claimed responsibility or has been blamed for deploying the virus, continued cyber attacks like the Stuxnet malware virus can also be used to significantly damage and delay Iran's enrichment program. Iran has acknowledged that Stuxnet disrupted uranium enrichment at Natanz in November 2010 by crippling thousands of centrifuges.[156]

Failure to fix the flaws in the current enforcement regime could result in a worldwide nuclear disaster. Members of the UNSC and bilateral partners must recognize that deterrence should be preferred option to the use of force, but the use of force through nonconsensual enforcement authority, cyber-solutions, or surgical strikes would be preferable to nuclear strikes by erratic nations who refuse to respect existing UNSCRs and international law.

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155 *Operation Orchard*, ABSOLUTE ASTRONOMY, http://www.absoluteastronomy.com/topics/Operation_Orchard (last visited Oct. 3, 2011).

156 Dareini and Jahn, *supra* note 145; William Broad, John Markoff, and David Sanger, *Israeli Test on Worm Called Crucial in Iran Nuclear Delay*, N.Y. TIMES, Jan. 15, 2011, http://www.nytimes.com/2011/01/16/world/middleeast/16stuxnet.html; Ed Barnes, *Mystery Surrounds Cyber Missile That Crippled Iran's Nuclear Weapons Ambitions*, FOX NEWS, Nov. 26, 2010, http://www.foxnews.com/scitech/2010/11/26/secret-agent-crippled-irans-nuclear-ambitions/; Ken Dilanian, *Iran's nuclear program and a new era of cyber war*, L.A. TIMES, Jan. 17, 2011, http://articles.latimes.com/2011/jan/17/world/la-fg-iran-cyber-war-20110117.