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THE STATUS OF PRIVATE MILITARY CONTRACTORS UNDER INTERNATIONAL HUMANITARIAN LAW

WON KIDANE*

I. INTRODUCTION

The resort to and conduct of warfare has a long history of regulation.[1] The set of rules commonly known as the *jus ad bellum* provide the legal limits to the commencement of warfare.[2] The set of rules known as the *jus in bello* set forth the legal limits to its conduct.[3] The latter set of rules properly identifies all of the

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* Assistant Professor of Law, Seattle University School of Law. An earlier version of this article was presented at a faculty workshop at the Penn State Dickinson School of Law. I would like to thank members of the faculty for their thoughtful suggestions. In particular, I would like to thank Professors Stephen Ross and Tiya Maluwa for their written comments. I would also like to thank my former colleague, a former co-author and friend, Thomas R. Snider of the law firm of Wilmer Hale, for his thorough review of the manuscript and valuable suggestions. Finally, I would like to thank Mr. Darren Thomason and Ms. Junsen Ohno for their able research, editorial, bluebooking, and formatting help.

1. A very good example of an ancient Western tradition of some sense of justice in war is the Roman general Scipio Africanus' equation of the talents of a great army general with that of a surgeon who operates on a human body with due care not to cause an unnecessary injury. *See* STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS 21 (2005) [hereinafter NEFF]. A very good example of an ancient non-Western tradition is contained in the Confucian Classic, The Book of Changes – I Ching, Shih- The Army, http://www.cfcl.com/ching/P/07.20.shtml.

Long before the emergence of the traditional international legal theories of the nineteenth century, there were serious discourses relating to the relevance of law to war. While some had dismissed law's relevance to war entirely, others maintained its relevance at least in the sense of ethics, justice, and religious values. Von Moltke and Clausewitz may be cited as examples of those who had dismissed the law's relevance to war. *See* DAVID KENNEDY, OF WAR AND LAW 46 (1954) [hereinafter KENNEDY]. Catholic thinkers such as Francisco de Vitoria (1480-1546), Francisco Suárez (1584-1617), and the Protestant thinkers such as Hugo Grotius (1583-1645) and Alberico Gentili (1552-1608), may be cited as those who have advocated the law's relevance to war in different forms. *See id.* at 48. For Professor Kennedy's discussion of the works of the latter thinkers, *see generally* David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT'L L.J. 1 (1986). *See also*, HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES, VOL. II 470 (Francis W. Kelsey trans., 1925) (discussing the obligation of authors of war to provide restitution).

2. In its current form, the *jus ad bellum* is essentially based on Article 2(4) and Chapter VII of the United Nations Charter. *See* U.N. Charter art. 2, para. 4, ch. VII. *See also* George Aldrich, *The Laws of War on Land*, 94 AM. J. INT'L L. 42 (2000), *and* FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR 84, 170 (International Committee of the Red Cross 2001) (1987).

3. *Jus in bello* rules of most current importance are contained in the Four Geneva Conventions of 1949 (Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3116, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva

parties involved in hostilities and defines their rights and responsibilities.[4] In contemporary usage, the latter set of rules is commonly referred to as International Humanitarian Law (IHL).[5] Although IHL is not premised on the recognition that war is inevitable,[6] it seeks to mitigate the tragic consequences through regulations whenever and wherever it occurs.[7] The difficult equilibrium that it seeks to maintain is between military necessity and humanity.[8] As early as 1868, one of the landmark declarations known as the St. Petersburg Declaration neatly put the difficult equation as "the technical limits at which the necessity of war ought to yield to the requirements of humanity."[9]

Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV], and the Two Additional Protocols of 1977 (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]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II], and Laws and Customs of War on Land (Hague II), art. 43, July 29, 1899, 32 Stat. 1803, T.S. 403, *reprinted in* ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAWS OF WAR 67-84 (3rd ed. 2004) [hereinafter ROBERTS & GUELFF])).

4. It must, however, be noted that there are some overlaps between the *jus ad bellum* and *jus in bello* rules at different levels. ROBERTS & GUELFF, *supra* note 3, at 1-2.

5. The origin of this term is relatively recent and is not contained in the Geneva Conventions of 1949; however, it is currently used in relation to these Conventions and the Additional Protocols of 1977. *See* Christopher J. Greenwood, *Historical Development and Legal Basis*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 1-15 (Dieter Fleck ed., 2nd ed. 2008) [hereinafter FLECK]. "International Humanitarian Law comprises all those rules of international law which are designed to regulate the treatment of the individual – civilian or military, wounded or active – in international armed conflicts." *Id.* at 11. *See also*, ROBERTS & GUELFF, *supra* note 3, at 2 (discussing the origins and current usage of the term).

6. John Carey, *Introduction to the Three-Volume Work*, *in* INTERNATIONAL HUMANITARIAN LAW: ORIGINS xi-xii (John Carey et al. eds., 2003) [hereinafter *INTERNATIONAL HUMANITARIAN LAW: ORIGINS*] (discussing that in its solemn appeal to the international community on the occasion of the 50th Anniversary of the Four Geneva Conventions of 1949, the International Committee of the Red Cross (ICRC) urged all nations to reject the notion that war is inevitable and asked them to make profound efforts to eliminate the underlying causes); Int'l Review of the Red Cross, *People on War – Solemn Appeal*, 459-60, ICRC No. 835 (Sept. 30, 1999), *available at* http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57jq2r?opendocument.

7. *See* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 20-26 (2004) [hereinafter DINSTEIN]. Some proponents of the complete abolition of armed forces and peaceful resolution of all conflicts suggest that an attempt to regulate warfare may prejudice its complete abolition. *See, e.g.*, ROBERTS & GUELFF, *supra* note 3, at 28 (suggesting that "the need to mitigate the worst effects of armed conflict, by upholding the idea that there are standards of civilization by which conduct can be judged, remains. The legal regime embodying these standards is by no means prejudicial to various proposals to limit the use of force, and may even contribute to the achievement of broader ideas and objectives referred to above.").

8. DINSTEIN, *supra* note 7, at 16.

9. *Id.* at 17, explaining that:

> [i]f military necessity were to prevail completely, no limitation of any kind would have been imposed on the freedom of action of belligerent States: *à la guerre comme à la guerre*. Conversely, if benevolent humanitarianism were the only beacon to guide the path of armed forces, war would have entailed no bloodshed, no destruction and no human suffering; in short war would not have been war.

Dinstein concludes by saying that Humanitarian Law essentially takes the middle

The fundamental approach designed to attain a principled equilibrium between military necessity and humanity is the definition of the status of each and every party and individual involved and affected by warfare. The laws that regulated warfare prior to the Second World War focused on the protection of persons who had already fallen victim to warfare and rendered harmless, including the wounded, the captive, and the interned.[10] As the nature and magnitude of warfare changed, the scope of its reach obviously widened.[11]

The International Committee of the Red Cross (ICRC) commentary on Geneva Convention IV notes that the legal norms that regulated warfare prior to 1945 "had only applied to the armed forces, a well-defined category of persons, placed under the authority of responsible officers and subject to strict discipline" but then it became necessary "to include an unorganized mass of civilians scattered over the whole of the countries concerned."[12] That essentially led to the adoption of the Geneva Convention IV, which protects civilians in times of war.[13] The Convention identifies each individual involved in and affected by warfare and defines the scope of protection.[14]

In the summary of rationales section of their introduction to Documents on the Laws of War, professors Roberts and Guelff point out that one of the two most important rationales of the laws of war is that "[a]rmed hostilities should as far as possible be between organized armed forces, not entire societies: hence the efforts to maintain a 'firebreak' distinguishing legitimate military targets from civilian objects and people not involved in armed hostilities."[15]

It follows that the major distinction that the law makes is between combatants and non-combatants or civilians.[16] This distinction is extremely important because it determines the most important issue of who may kill or injure another human being during combat without fear of prosecution.[17] To this effect, article 43 of Additional Protocol II provides that"[m]embers of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities."[18] No other person is ordinarily entitled to a combatant status. If a person who does not have a combatant status gets involved in hostilities, he not only loses protection as a civilian but may also be prosecuted for any actions, including for killing an enemy solider.[19] Others claiming civilian

ground. *Id.* at 16-17.

10. *See* JEAN S. PICTET (ED.), ICRC, COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949 RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 5 (1958).

11. *Id.*

12. *Id.*

13. *Id. See also generally* Geneva Convention IV, *supra* note 3.

14. Geneva Convention IV, *supra* note 3, art. 4 (defining protected persons).

15. ROBERTS & GUELFF, *supra* note 3, at 27.

16. *See* FLECK, *supra* note 5, at 79-117 (discussing combatants and non-combatants).

17. *See* DINSTEIN, *supra* note 7, at 29-31.

18. *See* Additional Protocol I, *supra* note 3, art. 43(2).

19. *Id.* at art. 45. *See also* FLECK, *supra* note 5, at 83.

status who may be prosecuted include mercenaries,[20] spies,[21] and other kinds of unlawful combatants.[22]

In the post-Cold War era, the legal regulation of armed conflict has been complicated by the advent of a remarkable new player: the privatized military industry.[23] This multi-billion dollar industry drew its strength from providing efficient services to sovereign governments.[24] Today, private military contractors operate from "Albania to Zambia" and perform anything from transporting food and medicine to designing precision weaponry and performing outright combat duties.[25] Their clients range from brutal dictators to democratic governments and humanitarian agencies.[26] Because IHL took its current shape and form prior to and during the Cold War, the new players were not a significant part of the equation. As such, the status of today's private military contractors is ambiguous at best.[27]

The debate over the desirability of engaging private military contracts in activities traditionally performed by uniformed military personnel raises complex

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20. Additional Protocol I, *supra* note 3, art. 47. ("A mercenary shall not have the right to be a combatant or a prisoner of war."). This topic is discussed more fully in relation to civilian military contractors in Part IV *infra.*

21. *Id.* at art. 46 (stating that "[n]otwithstanding any other provision of the Conventions or this Protocol, any member of the armed forces of a party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy"). *See infra* Parts III, IV.

22. See *infra* Part III.

23. *See* P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 8 (2003) [hereinafter CORPORATE WARRIORS].

24. No precise current date is available; however, older data suggests that from 1994 to 2002, the Department of Defense of the United States entered into 3,000 contracts with private military contracts, the value of which is estimated at about $300 billion. *See id.* at 15 (citing INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISM, MAKING A KILLING: THE BUSINESS OF WAR (2002)). The contracted out duties included the maintenance and administration of B-2 bombers, the F-117 fighters, and several surface warfare ships. *Id.* Obviously, the number has since increased dramatically because of the conflicts in Iraq and Afghanistan. For example, the ratio of private contractors to uniformed military personnel now is ten times more than the ratio during the Gulf War of 1991. P.W. Singer, *War, Profits and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521, 522-23 (2004) [hereinafter *War, Profits and the Vacuum of Law*].

25. *See* CORPORATE WARRIORS, *supra* note 23, at 9.

26. *Id.* For example, the now defunct South African based military private contractor, Executive Outcomes (EO), had provided combat serves to various factions in different African countries, including in Sierra Leone and Angola, where its role was considered outcome-determinative. *See id.* at 4, 9. Although the United Nations has not yet involved private military contracts in peacekeeping missions, proposals have surfaced from time to time. *See e.g.,* U.K. Foreign and Commonwealth Office, Private Military Companies: Options for Regulation, 2001-02, H.C. 577, at 18 (cited in Laura A. Dickinson, *Public Law Values in a Privatized World,* 31 YALE J. INT'L L. 383, 394 (2006) [hereinafter *Public Law Values in a Privatized World*]). *See also* Peter H. Gantz, *Refugee International, The Private Sector's Role in Peacekeeping and Peace Enforcement,* Global Pol'y F., Nov. 18, 2003 (cited in *id.*).

27. In this article, the term "private military contractors" is used to limit the discussion to only a segment of the wider private military industry with a recognizable role in armed conflict situations. This limitation is important because the industry is otherwise extremely broad. In the words of Dr. Singer, the industry is so broad that "many Americans unknowingly own slices of the industry in their 401(k) stock portfolio." *War, Profits and the Vacuum of Law, supra* note 24, at 522.

legal, political, and socio-economic issues and is outside the scope of this article. This article, however, attempts to characterize the status of civilian military contractors under IHL, which has traditionally governed the conduct of armed conflict where the status of all parties to the conflict is clearly defined, and identify appropriate IHL standards that could be used for the regulation of civilian military contractors. Professor David Kennedy makes an interesting observation when he notes that "[i]n broader terms, modern war reflects modern political life. In large measure, our modern politics is legal politics: the terms of engagement are legal, and the players are legal institutions, their powers expanded and limited by law."[28] Accordingly, this article argues and properly assumes that the most pertinent body of law is IHL because the very existence of the private military industry is inextricably linked to the existence of the threat and use of military force; in other words, the existence of war. It further contends, therefore, that identification of the exact legal status under IHL of all the players is an essential step in understanding and regulating their future role.

Because event driven scholarship often tends to focus on the specifics of the given event, the legal literature that followed the news of the involvement of private military contractors in the abuses that occurred in the Iraqi prisons, particularly at Abu Ghraib, almost exclusively focused on ways and means of holding them immediately accountable for their role in the reported abuses.[29] Little effort seems to have been made to assess their general status under IHL. Such assessment is useful for several important reasons. Primarily, it identifies the gaps in the existing law, not only as it pertains to their accountability, but also as it relates to their own protection and the responsibilities of the states which host them and use their services. Secondly, it offers an important guidance as to how to supplement the gap and provide for their regulation. Thirdly, it helps to reemphasize the notion that the principal theoretical foundation for the discourses pertaining to the regulation of this particular industry must begin with IHL standards.

With this view, this article is divided into five parts. Part II provides a historical background on the legal limitations in warfare, and the monopoly of the use of coercive force by states to the exclusion of all other types of entities, including organized private forces. It also highlights the perceived necessity and philosophical underpinnings of the monopoly of the use of force by the state. Part III discusses the concept of lawful combatancy, and offers an analysis of the

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28. *See* KENNEDY, *supra* note 1, at 13.

29. The seminal work that dealt with the issue of private military contractors following these events was SINGER, *supra* note 23; *see also, e.g.*, Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability under International Law*, 47 WM. & MARY L. REV. 135, 142 (2005) [hereinafter *Government for Hire*] (advocating a contracts based accountability approach); *Public Law Values in a Privatized World, supra* note 26, at 389 (advocating similarly for a contracts based accountability approach); Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989 (2005); Wm. C. Peters, *On Law, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq*, 2006 BYU L. REV. 367 (2006) (advocating a courts-martial jurisdiction for civilian contractor misconduct) [hereinafter Peters].

definition of the status of each and every party involved and affected by armed conflict and sets the stage for the discussion of the status of today's private military contractors. Part IV highlights the nature and functions of the private military contracts and attempts to define their status under IHL based on the discussion in Part III of the various possible statuses. To put their status into perspective, it provides a detailed discussion of the various functions they perform in a legal continuum, and suggests an IHL based theoretical framework for the regulation of their operations. Part V concludes the article.

II. THE DEVELOPMENT OF LIMITATIONS IN WARFARE AND MONOPOLY OF THE USE OF FORCE BY NATION-STATES

Part II provides a brief description of the historical and philosophical underpinnings of limitations in warfare, and the notion, perceived necessarily, and development of the monopoly of all instruments of coercion by the state.

A. Limitations in Warfare

Military historian J.F.C. Fuller notes that "[p]rimitive tribes are armed hordes, in which every man is a warrior, and because the entire tribe engages in war, warfare is total."[30] He further notes that the objective of war was not only to defeat the armed forces of the opposing tribes but to overturn their entire social structure.[31] In situations where every man is a warrior, and the objective is to overturn the entire structure of the society, it is difficult to imagine the applicability of recognizable limits to warfare. Writing in the context of the historical development of state responsibility, Professor Brownlie noted that "[t]racing the origins of legal concepts and institutions can be an artificial and practically fruitless endeavor."[32] Indeed, pinpointing to a particular historic juncture during which states raised armies and monopolized all types of coercive force to the exclusion of all other entities and began to abide by certain rules of war could be very difficult.

In fact, perspectives seem to differ on whether limitations of humanity have always characterized human conflict. For example, Professor Stephen Neff suggests that war seems to have always been understood "as an exercise more in skill and craftsmanship than blind anger or emotion."[33] To support his position, he quotes from Proverbs:

> Wisdom prevails over strength,
> Knowledge over brute force;
> For wars are won by skilful strategy, and
> victory is the fruit of long planning.[34]

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30. J.F.C. FULLER, THE CONDUCT OF WAR, 1789-1961 31 (1961), *quoted in* PETER MAGUIRE, LAW AND WAR: AN AMERICAN STORY 38 (2000) [hereinafter MAGUIRE].

31. *Id.*

32. IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY PART I 1 (1983).

33. NEFF, *supra* note 1, at 20.

34. *Id.* at 21 (quoting 24 Proverbs 5-6).

He further notes that in Greek mythology, the goddess Athena symbolized not only bravery but also knowledge, wisdom, and skill.[35] Professor Neff also seeks support from the ancient Chinese Confucian tradition of fair play in war. According to this tradition, exploiting the weaknesses of the enemy was viewed as dishonorable, and because of that, for example, the days and places of battle were commonly fixed.[36]

Howard Levie takes a completely opposite point of view. He begins his thesis with the following remark:

> For many millennia there was no such thing as humanity in land warfare. From the caveman to Biblical times, and for centuries thereafter, the winner in battle took from the loser not only his life, but also all of his available belongings, including women, children, domestic animals, and personal property.[37]

To support this conclusion, he cites to the following Biblical verse:

> They made war on Midian as the Lord had commanded Moses, and slew all men. In addition to those slain in battle, they killed the kings of Midian – Evi, Rekem, Zur, Hur and Reba, the five kings of Midian – and they put to death also Balaam, son of Beor. The Israelites took captive the Midianite women and their dependents, and carried off their beasts, their flocks, and their property. They burnt all their cities, in which they had settled, and all their encampments. They took all the spoil and plunder, both man and beast.[38]

Professor Peter Maguire takes a somewhat middle ground and asserts that, at least in the European and American historical perspective, the rules of engagement seem to have depended on the nature of the enemy. He begins his inquiry by noting that "what is often overlooked is that the gentlemanly rules of war outlined by both Christian scholars and the Heralds applied only to warriors of the same race and class. When invasive 'others' like Norsemen and Muslims descended on early European states, the only law of war was survival."[39]

In the American historical context, Professor Maguire cites historian Fredrick Jackson Turner as saying that the first era of the formation of the United States

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35. *Id.* at 20-21. Most scholarly inquiries regarding the origins of limitations in warfare began from the ancient Greek and Roman times because historical evidence seems to suggest that the Greeks and the Romans respected certain humanitarian principles, which later became the foundations of the modern conception of the laws governing warfare. ROBERTS & GUELFF, *supra* note 3, at 3 (citing COLMAN PHILLIPSON, THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME, Vol. II 166-384 (1911)).

36. NEFF, *supra* note 1, at 22.

37. Howard S. Levie, *Humanitarian Law and the Law of War on Land*, *in* INTERNATIONAL HUMANITARIAN LAW: ORIGINS, *supra* note 6, at 181.

38. *Id.* (quoting *Numbers* 31:7-11). Professor Levie also quotes verses from the Koran for an exception: "When you meet in battle those who have disbelieved, smite their necks, and after the slaughter tighten fast the bonds, until the war lays aside its burdens. *Then either release them as a favor, or in return for ransom.*" *Id.* (quoting Surah xlvii ¶ 4 (M.Z. Kahn trans., 1971)).

39. MAGUIRE, *supra* note 30, at 19.

required "determination and brutality" to clear and pacify the western frontiers.[40] He further notes that "[b]efore there were 'war criminals,' there were 'barbarians,' 'heathens,' and 'savages,' who did not qualify as equals in the arena of 'civilized warfare.'"[41] He further notes that the founding fathers of the United States always considered the American Indians barbarians. He cites President John Adams's description of the Indian warfare of 1775: "The Indians are known to conduct their Wars so entirely without Faith and Humanity, that it will bring eternal infamy . . . . To let loose these blood Hounds to scalp Men and butcher Women and Children is horrid."[42] He concludes that this perception justified the lack of any traditional European restraints to the means and methods of warfare vis-à-vis the indigenous people.[43] He contrasts this with the treatment of armed forces of the Confederacy during the American Civil War. He notes that although the Federal Government "did not consider the Rebel Army lawful combatants . . . they were not 'others' who stood outside the circle and so not considered barbaric. This distinction was reserved for racial and cultural others who flouted the military customs of the West. The Confederates were both white and American."[44]

Although perspectives differ, it is clear that some concepts of restraint in warfare and humanitarianism had earlier historical origins rooted in theological and classical philosophical precepts.[45] The convergence of customs and the attainment of general consensus on some fundamental principles of humanitarian rules of warfare are phenomena that took a long time to crystallize.[46] Indeed, it was not until the nineteenth century that codifications of what might be considered customary rules of warfare began.[47] But then, the last century saw marked advancement in the refinement and codification of customary norms of humanitarian law.[48] Currently, humanitarian law stands as one of the most highly systematized and crystallized bodies of international law.

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40. *Id.* at 20.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id* at 37. It is important to note that this does not mean that existing European norms of restraint in warfare were respected in significant measure during the Civil War. Professor Maguire gives many examples which suggest otherwise. For example, he quotes George Nicolas, General Sherman's aide-de-camp as saying: "the only possible way to end this unhappy and dreadful conflict ... is to make it terrible beyond endurance." *Id.* at 38 (quoting J.F.C. FULLER, THE CONDUCT OF WAR 1789—1961 109 (1961)). General Sherman himself said: "war is cruelty and you cannot refine it." *Id.* Describing General Sherman's march on Atlanta, historian J.F.C. Fuller said: "Nothing like this march had been seen in the West since the maraudings of Tilly and Wallenstien in the Thirty Years War . . . . Terror was the basic factor in Sherman's policy, he openly says so." *Id.* at 39 (quoting J.F.C. FULLER, DECISIVE BATTLE OF THE U.S.A. 305-08 (1993)).

45. *See* Christopher Greenwood, *Historical Development and Legal Basis*, *in* FLECK, *supra* note 5, at 12.

46. *Id.*

47. *Id.*

48. *Id.*

B. Monopoly of the Use of Force by Organized and Disciplined Armed Forces of the State

Today the world is seemingly organized into territorial unities under sovereign entities. Although the political landscape is far more complicated than this simple assertion,[49] presumably, these sovereign entities command their own armies and protect their own territorial integrity. Although different historic eras saw different forms and shapes of the exercise of sovereign authority, the underlying notion of the monopoly of the means of coercion by sovereign entities of some sort is not a recent phenomenon.[50] Organized and disciplined militaries existed as far back as the Greek and Roman times.[51] Their organization was such that some military offenses punishable by law today were also punishable under the laws of the Greeks and the Romans.[52] These offenses, for example, include desertion, mutiny, violence to superiors, and the sale or misappropriation of arms.[53] The punishment also included such familiar determinates as dishonorable discharge.[54]

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49. Commenting on the complexity of today's international political environment, Professor David Kennedy said: "[T]he international political system today is a far more complex multilevel game than the rows of equivalent national flags arrayed at U.N. headquarters would suggest. States and their governments differ dramatically in powers, resources, and independence." KENNEDY, *supra* note 1, at 14.

50. P.W. Singer of the Brookings Institution provides a good historical background of the private military industry in his seminal book, CORPORATE WARRIORS, *supra* note 23, at 19-39. He argues that: "In fact, the monopoly of the state over violence is the exception in world history, rather than the rule." *Id.* at 19 (citing JANICE THOMSON, MERCENARIES (1994)). In conclusion, he quotes Jeffrey Herbst as saying: "The private provision of violence was a routine aspect of international relations before the twentieth century." *Id.* (quoting JEFFREY HERBST, THE REGULATION OF PRIVATE MILITARY FORCES, *in* GREG MILLS & JOHN STREMLAU, THE PRIVATIZATION OF SECURITY IN AFRICA, 117 (1997)). Recognizing the significant role that private military service providers have played in history, Singer's assessment that states' monopoly of the use of force has been the exception seems to be an overstatement. In fact, towards the end of the chapter on the history of private warriors (chapter two), Singer, himself, provides what seems to be a balanced account of their role. He states:

> At numerous stages in history, governments did not possess anything approaching a monopoly on force. Instead, rulers were often highly reliant on the supply of military services from business enterprises. Private actors, such as free companies, contracted units, military entrepreneurs, and charter companies played key roles in state-building and often served governmental interests. These organizations also had the tendency to become powers unto themselves, however, and often grew superior in power to local political institutions, particularly in areas of weak governance. *Id.* at 39.

His final and reasoned conclusion on the history and its importance reads: "In sum, the line between economies and warfare were never clear-cut. From a broad view, the state's monopoly of both domestic and international force was a historic anomaly. Thus, in that future, we should not expect that organized violence would only be located in the public realm." *Id.*

51. *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, 17 (1988) [hereinafter WINTHROP].

52. *Id.*

53. *Id.*

54. Although no written military codes of these times remain today, this constitutes a part of the historic record. *See id.*

As a natural continuation of this, the Romans did not consider a non-state entity as an enemy proper. Cicero, for example, pointed out that a true enemy of Rome must be a recognizable state possessing the following characteristics: "a Commonwealth, a Senate-house, a treasury, a consensus of likeminded citizens."[55] According to him, an enemy state must be distinguished from irregular entities such as pirates and bandits.[56] Any operation to eradicate the latter category was thus viewed as a law enforcement task rather than the conduct of war.[57] A similar suggestion is contained in the classical work of Ulpain. According to him, any armed forces other than states against which Rome declared war, or the vice versa, are just "robbers and bandits" who must be dealt with accordingly.[58] Cicero further noted that irregular armed forces, such as bandits, did not have legal status and unlike states, they neither acquired ownership title to any property they might have captured nor did they possess any authority to enslave prisoners they might have taken.[59]

Furthermore, states were not required to make deals or respect any truce made with such irregular forces as opposed to other states.[60] However, apparently some such forces called the *lactrociniae* were so powerful that military operations were at times necessary to deal with them.[61] Practically, Rome had to take a middle ground by conducting a limited military campaign against them.[62] That does not seem to have changed their perceived legal status.

The legitimacy and moral superiority of the monopoly of the use of force by states is a complex subject. St. Augustine's characterization of the Roman State as a "magna latrociniae" might be cited as an example of the school of thought that challenges the moral superiority of the state with respect to the use of force to the exclusion of others.[63]

Nonetheless, the perception of sovereign and lawful authority as opposed to unlawful irregular forces persisted throughout history. For example, written

55. NEFF, *supra* note 1, at 18 (quoting Cicero, *Philippics*, at 143).

56. *Id.*

57. *See id.* (citing Cicero, *On Duties*, at 141).

58. *Id.* (citing Justinian, *Digest*, at 49.15.24).

59. *Id.* (citing Cicero, *On Duties*, at 17-18, 141-45).

60. *Id.*

61. *Id.* at 19 (citing Cicero, *On Duties*, at 78, n. 1).

62. *See id.* Although the scale of these operations may not be characterized as the conduct of war, it is suggested that it is also difficult to characterize them as acts of law enforcement because the scale of operations did not allow the determination of the criminal guilt of everyone involved. *See id.* (citing O.F. ROBINSON, THE CRIMINAL LAW OF ANCIENT ROME 28-29 (1995)). This phenomenon is also of current jurisprudential importance because it pertains to a critical point of departure between the applicability of the emergency provisions of international human rights law which suggests an emergency situation, and the applicability of Common Article 3 to the Geneva Conventions, which suggests the existence of a state of armed conflict. For commentary on this issue, *see generally*, OREN GROSS & FIONNUALA NÍ AOLÁIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE 326-64 (2006).

63. Patrick Giddy, *Character and Professionalism in the Context of Developing Countries – the Example of Mercenaries*, 4 ETHIQUE ET ÉCONOMIQUE/ETHICS AND ECONOMICS 9 (2006) [hereinafter Giddy]. "Magna latrociniae" is translated as "a great band of robbers." *Id.*

European codes of military conduct date as far back as the fifth century.[64] In his seminal treatise, William Winthrop states that existing military codes of continental Europe have their origins in the French *ordonnance* of military law of 1378; the first German Kriegsartikel of 1487, and the celebrated 1532 penal code of Emperor Charles V.[65]

That is not to suggest that irregular armed forces such as mercenaries did not play a significant role in shaping the history of the world. Machiavelli's discussion of mercenaries and other irregular forces that he calls auxiliaries and mixed soldiery in *The Prince*, is instructive on how involved they were in the political and military environment of Sixteenth and Seventeenth-Century Europe.[66] Although it seems that many legitimate authorities sought their assistance in different forms, it is clear that they were a disfavored group of discrete entities.[67] Although it may not be representative of the general opinion that prevailed during that time in Europe, Machiavelli suggests that relying on mercenaries for military duties was utterly useless:[68]

> I say, therefore, that the arms with which a prince defends his state are either his own, or they are mercenaries, auxiliaries, or mixed. Mercenaries and auxiliaries are useless and dangerous; and if one holds his state based on these arms, he will stand neither firm nor safe; for they are disunited, ambitious and without discipline, unfaithful, valiant before friends, cowardly before enemies; they have neither the fear of God nor fidelity to men, and destruction is deferred only so long as the attack is; for in peace one is robbed by them, and in war by the enemy. The fact is, they have no other attraction or reason for keeping the field than a trifle of stipend, which is not sufficient to make them willing to die for you.[69]

The history of the British military's laws of proper conduct offers another example of the importance historically attached to assignment of the responsibility of the use of coercive force to an organized, disciplined, and accountable entity. Published statutory military codes of Great Britain date as far back as 1689.[70] Much older British laws of military discipline and conduct existed. These laws took the form of specific directives or orders issued from the government to the army.[71]

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64. These military laws were incorporated in what is called the Salic Code, originally compiled by the Chiefs of the Salians during this period. *See* WINTHROP, *supra* note 51, at 17-18. This Code was revised and improved by successive Frankish kings. *Id.* at 18.

65. *Id.* at 18. William Winthrop also lists other notable laws of military discipline including the Articles of War of the Netherlands of 1590, republished in 1705; the regulations of Louis XIV of 1651 and 1665; and the Penal code of 1768 of the Empress Maria Theresa. *Id.*

66. NICOLÓ MACHIAVELLI, THE PRINCE, *reprinted in* GREAT BOOKS OF THE WESTERN WORLD 17-21 (Robert Maynard Hutchins ed.,1952).

67. *Id.*

68. *See id.* at 18.

69. *Id.*

70. *See* WINTHROP, *supra* note 51, at 19.

71. *Id.* at 18. "They were commonly ordained directly by the King, by virtue of his royal

One of the most important requirements of these laws has been the taking of the oath of fidelity. For example, the Articles of War of James II issued in 1688 required every officer and other member of the army to take the following oath:

> I, A.B., Do swear to be true and faithful to my Sovereign Lord King JAMES, and to His Heirs and Lawful Successors; and to be Obedient in all things to His General, Lieutenant General, or Commander in Chief of His Forces, for the time being, And will behave myself obediently towards my Superior Officers in all they shall command me for His Majesty's Service .... I do likewise Swear, That I believe, That it is not lawful upon any Pretence whatsoever, to take Arms against the King and that I do Abhor that Traitorous Position of taking Arms by His Authority against His Person, or against those that are Commissioned by Him. *So help me God.*[72]

The oath of allegiance and fidelity to a sovereign entity remained at all times relevant to military service. It would not be an overstatement to say that an oath is perhaps one of the most important features that distinguishes a regular and disciplined military force from all other types of forces.

The history of law of the United States military is directly and immediately linked to the British military articles and codes briefly mentioned above. In fact, the raising of the armed forces of the United States predated the Constitution of the United States itself. It was on June 14, 1775, that the Continental Congress "resolved" to raise a military force and set up a committee consisting of George Washington and three other members to draft rules and regulations for the administration of the armed forces so raised.[73] The committee then drafted a military code consisting of sixty-nine articles. This code fundamentally relied on the same principles as the British army.[74] William Winthrop makes an interesting observation when he notes that the two opposing armies were in fact governed by a similar set of military rules.[75]

With the adoption of the United States Constitution, all preexisting military laws became part of the constitutional system.[76] The Constitution leaves no room

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prerogative, and with the aid and counsel of his peers, especially of the High Constable and Earl Marshall, official . . . viewed by some writers as the proper original of the court-martial in England." *Id.* (citing FRANCIS GROSE, MILITARY ANTIQUITIES RESPECTING A HISTORY OF THE ENGLISH ARMY 58 (1801)).

72. ARTICLE OF WAR OF JAMES II; RULES AND ARTICLES FOR THE BETTER GOVERNMENT OF HIS MAJESTIES LAND FORCES IN PAY (1688), art. VI., *reprinted in* WINTHROP, *supra* note 51, at 920-28 (emphasis in original). It is important to note that implicit in the contents of this oath is the notion that only the sovereign can raise and maintain armed forces to the exclusion of all others.

73. *See id.* at 21 (quoting 1 Journals of Congress, 82). The other four members of the committee were Philip Schuyler, Silas Deane, Thomas Cushing, and Joseph Hewes. *Id.*

74. The immediate precursor of this code was, however, the Massachusetts Articles, which is said to be the first American Code of military conduct. *Id.*

75. *See id.* at 22 n.81.

76. *See id.* at 15. "The Constitution itself provides for military government as well as for civil government.... There is no law for the government of the citizens, the armies, or the navy of the United States, within American jurisdiction, which is not contained in or derived from the Constitution."

for doubt that only Congress could raise, maintain, and regulate armed forces.[77] The President, as the Commander-in-Chief of the armed forces is responsible for the "faithful" execution of the laws.[78] Commenting about the role of the military following the American Civil War, Professor Peter Maguire wrote that"[a]bove all, what the Civil War demonstrated was the military was no longer the praetorian guard of the political elite. Instead, it was an instrument of democracy, and democratic political leaders could not be content to win a limited military victory and striking an advantageous diplomatic solution."[79] Similarly, contemporary political scientist Samuel Huntington remarked that "[w]hile all professions are to some extent regulated by the state, the military profession is monopolized by the state."[80]

Given this historical background, the legal status of any other types of armed forces is a matter that needs to be looked into very carefully.

III. LAWFUL COMBATANCY, IDENTIFICATION OF THE PARTIES, AND STATE RESPONSIBILITY

Part III offers a detailed discussion of the various possible statuses that every party involved in and affected by warfare may have in a continuum. It also provides a description of the consequences attached to each legal status, including individual and state responsibility. By so doing, it identifies the parameters by which the status of private military contractors must be measured.

A. Theoretical Background of Lawful Combatancy

The philosophical underpinnings of lawful combatancy are perhaps more complex than the legal prescriptions. In simple terms, a morally justifiable war, or a just war as to which it is often referred, would require right intentions, legitimate authority, and proportionate ends.[81] Michael Brough notes that "if the war is

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(quoting Chief Justice Chase, in Ex Parte Milligan 4 Wallace, 137).

77. *See* U.S. CONST. art. I, § 8.

> To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; To provide and maintain a navy; To make rules for the government and regulation of the land and naval forces; To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions; To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.

78. *See* U.S. CONST. art. II, §§ 1, 2, & 3. The President's powers include the commissioning of officers of the armed forces.

79. MAGUIRE, *supra* note 30, at 38.

80. CORPORATE WARRIORS, *supra* note 23, at 8 (quoting SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVILIAN-MILITARY RELATIONS 37 (1957)).

81. *See* Michael W. Brough, *Dehumanizing the Enemy and the Moral Equality of Soldiers*, *in* MICHAEL W. BROUGH, JOHN W. LANGO, HARRY VAN DER LINDEN, RETHINKING THE JUST WAR TRADITION 149, 162 (eds., 2007). Of course, this is a simplification of the deep philosophical inquiry that dates as far back as the history of warfare itself. The fundamental assumption throughout history remained to be that a legitimate authority may employ force in self-defense or for some legitimate reason and use proportionate means to attain the objective. For a succinct summary of the early

justified . . . then the soldiers must be allowed to kill. States must be allowed to direct the killing . . . ."[82] Even if the decision by the state to go to war may not be justified or is in violation of the *jus ad bellum*, from a philosophical perspective, the soldiers who are ordered to kill may not lose their moral authority. In this respect, Michael Walzer notes:

> [T]he moral status of individual soldiers on both sides is very much the same: they are led to fight by their loyalty to their own states and by their lawful obedience. They are most likely to believe that their wars are just . . . . they are not criminals; they face one another as moral equals.[83]

There is no dispute that loyalty to one's own state, citizenship, and obedience to the laws of the states are the important justifications for the soldiers' moral as well as legal authority to defend his or her nation and kill on its behalf when the circumstances so demand. It is this fundamental moral and legal authority that is usually missing in profit-driven military enterprise. In relation to this notion, Professor Patrick Giddy notes:

> But killing is not proportional to the private ends of contractual warriors, whatever these might be – say, supporting a middle-class family: this end is not grave enough to justify killing. Killing is only a proportionally appropriate act when military action for the just cause (restoring justice and peace) has been embarked upon by the proper authority, as a last resort with a reasonable chance of success.[84]

These historical and philosophical notions underpin the legal classification of parties involved and contribute to the legitimate use of force. Professor David Kennedy makes an important observation when he notes that the earlier thinkers considered the law not only as an ethical limit on military power but also as a license.[85] This suggestion has an enduring relevance to IHL because it pertains to the issue of lawful combatancy. In other words, it raises the question of who has the license to kill another human being without fear of prosecution. Writing from a moral and philosophical perspective, Pauline Kaurin notes:

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medieval, the medieval, the early modern and contemporary paradigms of the just war doctrine, see generally, William E. Murnion, *A Postmodern View of Just War*, *in* STEVEN P. LEE, INTERVENTION, TERRORISM, AND TORTURE 23, 23-40 (2007) [hereinafter INTERVENTION, TERRORISM, AND TORTURE].

82. Brough, *supra* note 81, at 163.

83. Brough, *supra* note 81, at 149 (quoting MICHAEL WALZER, JUST AND UNJUST WARS (3d ed. 2000)). Michael Brough further notes that according to Grotius, less than half of the wars ever fought were justified and according to the *jus ad bellum*. Accordingly, any randomly chosen war would be without justification. But in any case, the soldiers who were recruited by their states to fight and kill would be justified regardless of the justness of the war. *See* DAVID RODIN, WAR AND SELF DEFENSE, 165-73 (2002), *cited in id* at 150. For a critique on Michael Walzer's, Just and Unjust Wars, see also, David Duquette, *From Rights to Realism: Incoherence, in Walzer's Conception of Jus in Bello*, *in* STEVEN P. LEE, INTERVENTION, TERRORISM, AND TORTURE, *supra* note 81, at 41-57. *See also* Patrick Hubbard, *A Realist Response to Walzer's Just and Unjust War*, *in* LEE, INTERVENTION, TERRORISM, AND TORTURE, *supra* note 81, at 57-71 (2000).

84. *See* Giddy, *supra* note 63, at 13.

85. *See* KENNEDY, *supra* note 1, at 49.

> The clarity of the combatant / noncombatant distinction is crucial since it preserves the essential moral difference between a soldier and a murderer; the difference between doing one's duty and committing a war crime; the difference between coming home in honor or coming home in shame, with the attendant effects for both the soldier and society. If this distinction cannot be rendered in a way that is practical in the field, soldiers become murderers, committers of war crimes and bearers of individual and collective shame.[86]

The legal ramifications are even more serious. The following section provides a detailed discussion of the legal status of the various parties involved and affected by warfare and describes their rights and responsibilities. It is intended to set the stage for the discussion of the particular status of the private military contractors by showing the continuum of the various types of legal statuses under IHL. Because private military contractors perform various types of activities, their status would naturally depend on the types of activities they perform. The discussion of an activity-based continuum of legal statuses in Part III provides the standards against which the functions of the private military contractors should be measured.

B. Overview of Legal Statuses under International Humanitarian Law

In July 2002, fifteen-year old Omar Khadr allegedly threw a grenade and killed Sergeant Christopher J. Speer of the U.S. military during a firefight in southeastern Afghanistan.[87] He was later captured, held at Guantánamo Bay, Cuba, and brought to justice.[88] The fundamental legal question in his preliminary hearing before a military commission set up by the U.S. military for this purpose[89]

86. Pauline Kaurin, *When Less Is Not More: Expanding the Combatant/Noncombatant Distinction, in* BROUGH, ET AL., RETHINKING THE JUST WAR TRADITION, *supra* note 81, at 116.

87. *See* Josh White, *Charges Against Guantanamo Detainee Set for Trial Dropped Over Limit on Law*, WASH. POST, June 5, 2007, at 1, *available at* http://www.washingtonpost.com/wp-dyn/content /article/2007/06/04/AR2007060400188.html [hereinafter White].

88. *Id.* at 1.

89. The constitutionality of military tribunals set up to try persons detained in relation to the armed conflicts in Iraq and Afghanistan has remained a subject of great controversy. For a discussion of constitutional issues relating to this matter, see generally, Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002). This particular Military Commission was set up following the enactment of the Military Commission Act of 2006, Pub L. No. 109-366, 120 Stat. 2600 (2006). Prior to the enactment of this law, several cases challenged earlier attempts by the government to try detainees by ad hoc military tribunals. For example, in *Hamdi v. Rumsfeld*, the Supreme Court held that the government should provide a meaningful opportunity for detainees to contest the factual allegations against them before a neutral decision maker. The respondent in this case was a U.S. citizen. The Court suggested that a military commission duly constituted by an act of Congress would be sufficient. *See generally*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004). Thereafter, Congress enacted the Military Commission Act cited above. Other cases that dealt with related jurisdictional issues include: Rumsfeld v. Padilla, 542 U.S. 426 (2004). Particularly relevant to the passage of the Military Commission Act was the Supreme Court's decision in Hamdan v. Rumsfeld, 126 S.Ct. 2749 (2006) (requiring a congressional act for the establishment of a military commission and suggesting minimum requirements of due process).

was his combatant status.[90] The Military Commission suspended the charges against him on the grounds that his combatant status merely states "enemy combatant" while the Commission's jurisdiction only extends to the trial of "unlawful enemy combatants."[91] Determination of whether he was a lawful or unlawful combatant would essentially decide his fate, because if he had lawful combatant status when he caused the death of Sergeant Speer, he would be immune from prosecution.[92] The following quote from Professor Dinstein's book on the conduct of hostilities properly explains the essence of this assertion:

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90. *See* White, *supra* note 87.

91. *Id.* The usage of the terms "enemy combatant" and "unlawful enemy combatant" has recently been a source of some dispute primarily because of their inconsistent usage in the past in domestic and international jurisprudence. Nowhere is the term "enemy combatant" defined. The term first appeared in the U.S. domestic case of Ex parte Quirin, 317 U.S. 1 (1942). For a discussion of the history of this case, see Michael R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59 (1980). *Quirin* is a World War II case. In this case, eight German-born men were apprehended while attempting to sabotage installations in the U.S. and brought before a military commission. The Court held that their trial by a military commission was lawful. *See Quirin*, 317 U.S. at 45. The Court had to distinguish this World War II decision from its Civil War decision of Ex parte Milligan, 71 U.S. 2 (1866). In *Milligan*, the Court held that the use of military tribunals is not appropriate where the courts are open and their processes unobstructed. More particularly, the Court stated:

> It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war." *Id.* at 80-81.

The *Quirin* court distinguished this ruling. The major point of distinction that the Court made was that in *Quirin*, the defendants were "enemy combatants," while in *Milligan*, they were U.S. citizens who were alleged to have committed military-related crimes in peacetime. It is, however, clear from the reading of the *Quirin* opinion that the Court used the term "enemy combatants" to mean "unlawful combatants" because it characterized the defendants as not wearing uniforms, and secretly passing across enemy lines in a time of war. *See Quirin*, 317 U.S. at 31. Subsequent cases did not elaborate the usage of terminologies in *Quirin*. As such, the usage of the terminologies became a subject of dispute following the commencement of the current terrorism-related war in 2001. To clarify the uncertainty relating to the usage of terms, the Military Commission Act of 2006 used the term "unlawful enemy combatant" and defined it as one who is not a "lawful enemy combatant." *See* Military Commission Act of 2006, *supra* note 89. The issue in the pending Omar Khadr case, which the Military Commission suspended, centered exactly on the designation of the individual as an "enemy combatant" as opposed to an "unlawful enemy combatant" by the military's status review tribunals. The Commission deemed this distinction important because the Act limits the Commission's jurisdiction to the trial of "unlawful combatants" and the defendant was not so designated by the military. *See* White, *supra* note 87, at 2.

92. *See* White, *supra* note 87, at 2.

> At bottom, warfare by its very nature consist of a series of acts of violence (like homicide, assault, battery and arson) ordinarily penalized by the criminal codes of all countries. When a combatant, John Doe, holds a rifle aims it at Richard Roe (a soldier belonging to the enemy's armed forces) with the intent to kill, pulls the trigger, and causes Richard Roe's death, what we have is a premeditated homicide fitting the definition of murder in virtually all domestic penal codes. If, upon being captured by the enemy, John Doe is not prosecuted for murder, this is due to one reason only. LOIAC [Law of International Armed Conflict, a body of International Humanitarian Law] provides John Doe with a legal shield, protecting him from trial and punishment, by conferring upon him the status of a prisoner of war. If John Doe acts beyond the pale of a lawful combatancy, LOIAC removes the protective shield. Thereby, it subjects John Doe to the full rigour of the enemy's domestic legal system, and the ordinary penal sanctions provided by that law will become applicable to him.[93]

That is precisely why the Military Commission in the aforementioned Omar Khadr case suspended the trial – so that the Commission could first determine Khadr's legal status.

As indicated above, the most fundamental distinction that IHL makes is between combatants and non-combatants. This distinction essentially defines the legal status of all parties involved. It generally provides for their rights and responsibilities.[94] As a preliminary matter, it is important to note the distinction between primary and secondary statuses that IHL assigns to persons involved in situations of warfare. A primary status is a status that the particular individual possesses as a matter of his or her assignment by his or her state as a combatant or a non-combatant.[95] A secondary status is a status that arises out of the primary status but attaches as a result of a change in circumstances.[96] For example, a person with a primary combatant status would acquire a prisoner of war status in a case of capture by the enemy state.[97] The prisoner of war status can then be considered a secondary status that emanates from the primary status of being a lawful combatant. With this noted, the following sections discuss the legal status of persons involved in warfare in different capacities.

C. Combatants and Non-combatants / Civilians

The general premise is contained in article 3 of the Hague Regulations. It provides that "[t[he armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a

93. DINSTEIN, *supra* note 7, at 31.

94. *See* Knut Ipsen, *Combatants and Non-Combatants, in* FLECK, *supra* note 5, at 65.

95. *Id.*

96. *Id.*

97. *Id.*

right to be treated as prisoners of war."[98] Article 43 of Protocol I redefines the same principle and provides more elaborate guidance. It states:

> 1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.
>
> 2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.
>
> 3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.[99]

This definition articulates two fundamental principles. The first principle requires a chain of command and subordination as necessary elements. Mainly states,[100] as subjects of international law, may lawfully raise and deploy armed forces as their agents in their international relations.[101] The second important principle contained in this provision is that "non-combatants" may also be considered as constituting the armed forces of a state.[102] Members of the armed forces that are classified as non-combatants are not authorized to take part in

98. Laws and Customs of War on Land (Hague II), art. 43, July 29, 1899, 32 Stat. 1803, T.S. 403 [hereinafter Hague II], *reprinted in* ROBERTS, DOCUMENTS ON THE LAWS OF WAR, *supra* note 3, at 73-84. Article 1 of the Hague II provides for the qualifications of belligerents. It states:

> The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: 1. To be commanded by a person responsible for his subordinates; 2. To have a fixed distinctive emblem recognizable at a distance; 3. To carry arms openly; and 4. To conduct their operations in accordance with the laws and customs of war. In countries were militia or volunteer corps constitute the army, or form part of it, they are included under the denomination 'army'.

Id. at art. 1.

99. Additional Protocol I, *supra* note 3, art. 43.

100. The application of IHL does not depend on the recognition of the government of the state in question by the enemy. For example, Geneva Convention III makes it clear that armed forces of a government that is not recognized by the enemy state must be accorded prisoner of war status provided all the requirements of lawful combatancy are met. *See* Geneva Convention III, *supra* note 3, art. 4(A)(3). *See also* Additional Protocol I, *supra* note 3, art. 44. It is also important to note that this provision may also apply to non-state actors as long as they have a recognizable chain of command and discipline and meet the remaining requirements discussed more fully below.

101. *See* Knut Ipsen, *Combatants and Non-Combatants, in* FLECK, *supra* note 5, at 66.

102. *Id.*

armed hostilities or combat activities.[103] This category usually includes medical and religious personnel.[104] Summarizing these principles, Professor Ipsen notes:

> This means that only a party to a conflict which is a subject of international law can have armed forces whose members are combatants. This reflects the basic relation in international law between the state (as a subject of international law), and its armed forces (as its organ), and the members of armed forces (as combatants).[105]

Elaborating the principle further, Professor Ipsen notes that article 3 of Protocol I makes it clear that as a matter of international legal definition, if a state maintains armed forces, members of the armed forces would *ipso facto* acquire combatant status.[106] As such, they would have the legal authority to directly take part in hostilities.[107] He further notes that while the express exception is medical and religious personnel, a state may also designate, by an internal act, other members of the armed forces to be non-combatants.[108] By so arguing, he refutes an opposing argument, which suggests that a state possesses a broad authority to classify members of its armed forces as combatants and non-combatants.[109] The plain reading of the principle enshrined under article 3 paragraph 2 of Protocol I clearly supports Professor Ipsen's contention that all members of the armed forces of a state, except medical and religious personnel, are as a matter of principle presumed to be combatants.[110] However, a state may, by an internal act, designate some of such members as non-combatants.[111] "[R]educed to a concise formula: a member of the armed forces is a combatant by nature; the status of non-combatant can only be granted to a member of the armed forces by an internal constitutive legal act."[112]

It follows that persons possessing combatant status are immune from prosecution for any lawful combat activity, which may include fighting, killing, and causing destruction within the legal limits.[113] They will also be entitled to prisoner of war status if captured by the enemy.[114] However, if persons who do not possess combatant status take part in hostilities and cause the same type of injury and damage as combatants, they are considered unlawful combatants and are punishable as criminals.[115] Non-combatants or civilians[116] who do not "take a direct part in hostilities"[117] are, however, entitled to protection.[118]

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103. *Id.*
104. *Id.*
105. *Id.*
106. *See* Ipsen, *supra* note 5, at 67-68.
107. *Id.* at 68.
108. *See id.* at 66.
109. *Id.*
110. *See* Additional Protocol I, *supra* note 3, art. 43, para. 2.
111. *See* Ipsen, *supra* note 5, at 68.
112. *Id.*
113. *Id.* at 68.
114. *Id.*
115. *Id.*
116. Additional Protocol I, defines a civilian as:

The primary objective of this distinction is to ensure that armed hostilities are conducted only between disciplined armed forces of states, which presumably respect the laws and customs of warfare.[119] Equally important is the fundamental principle that seeks to identify civilians for protection. The lack of identification of civilians in combat activities vitiates two fundamental assumptions of humanitarian law. First of all, the identification is important because without identification they can never be protected. Secondly, combatants who pose as civilians mislead the enemy and take inappropriate advantage. For these reasons identification remains extremely crucial.[120] For example, combatants may hide among bushes to mislead the enemy but not among civilians for the same purpose.[121] If they do so, they lose their privileges as combatants and may be prosecuted for whatever conduct they perform and injury they make possible.[122] That is precisely why the law imposes punishment when those who are supposed to be protected as civilians take part in hostilities or commit "acts harmful to the enemy."[123] In fact, combatants are required to identify themselves as far as possible by carrying arms openly, wearing uniforms, and carrying distinctive emblems.[124] Although the practicability of all of these requirements may be problematic, they make the importance attached to the identification process clear.

Although the principle seems straightforward, the identification of persons who have a combatant status and those who take part in hostilities without having such status may be problematic. The appropriate legal test is contained in article 51, paragraph 3 of Protocol I. It states that "[c]ivilians shall enjoy the protection afforded by this Section, *unless and for such time as they take a direct part in hostilities*."[125] As soon as civilians take part in hostilities, not only are they not

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> 1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian. 2. The civilian population comprises all persons who are civilians. 3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

Additional Protocol I, *supra* note 3, art. 50.

117. Additional Protocol I, *supra* note 3, art 51(3).

118. The protection of civilians during armed conflict is perhaps the most fundamental legal principle of IHL. As a matter of fact, the whole of Geneva Convention IV is dedicated to the protection of civilians. *See also* Additional Protocol I, *supra* note 3, at arts. 50-51.

119. *See* DINSTEIN, *supra* note 7, at 27.

120. *Id.*

121. *See* Denise Bindschedler-Robert, *A Reconsideration of the Law of Armed Conflict, The Law of Armed Conflict: Report of the Conference on Contemporary Problems of the Law of Armed Conflicts, 1969* 1, 43 (1971), *cited in* DINSTEIN, *supra* note 7, at 29.

122. *See* DINSTEIN, *supra* note 7, at 29.

123. *See, e.g.*, Additional Protocol I, *supra* note 3, art. 13 (providing that medical personnel who engage in acts that are considered harmful to the enemy could lose their protection as civilians).

124. *See, e.g.*, Geneva Convention III, *supra* note 3, art. 4(A); *see also* Additional Protocol I, *supra* note 3, art. 44. For a comprehensive discussion of all the requirements of lawful combatancy, see DINSTEIN, *supra* note 7, at 33-47.

125. Additional Protocol I, *supra* note 3, art. 51(3) (emphasis added). Although this provision

entitled to protection as civilians, but they may also be subjected to prosecution as unlawful combatants.[126] As indicated above, the determination of direct involvement in hostilities could be very difficult. Nowhere is this standard defined. For example, would a civilian truck driver who delivers a supply of ammunition to combatants be considered to have taken a direct part in hostilities and lose his civilian status? What if the delivery was foodstuff? The ICRC Model Manual answers the former in the affirmative but the latter in the negative.[127] How about a civilian who collects intelligence in enemy occupied territories? What if she does the same work while sitting in an office thousands of miles away from the place of hostilities? The ICRC Model Manual again answers the former in the affirmative but the latter in the negative.[128] Be this as it may, however, the difficulty of the application of this standard cannot be over stated. In fact, as of the writing of this article, the ICRC is struggling to define and elaborate the direct participation standard.[129]

Professor Dinstein notes that because nobody is born a combatant, combatants may become non-combatants and vice versa.[130] He cautions, however, that a constant shift in status may create serious problems.[131] In line with this, he says "one cannot fight the enemy and remain a civilian."[132] To support this conclusion he cites to the Paris Declaration of 1856, one of the very first modern codifications of laws and customs of warfare in the sea. The very first article of this Declaration provides: "Privateering is, and remains, abolished."[133] Privateers were organized groups who attacked enemy merchant vessels upon the official request by the governments of belligerent states.[134] The law of warfare on land subsequently proscribed the same types of conduct by agents who paralleled the privateers of the maritime world.[135]

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contains perhaps the clearest expression of this principle, it is derived from Common Article 3 of the Geneva Conventions and it now appears in various provisions.

126. International Committee of the Red Cross, Official Statement: The Relevance of IHL in the Context of Terrorism, http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705.

127. *See* DINSTEIN, *supra* note 7, at 27-28 (citing A.P.V. Rogers & P. Malherbe, *Model Manual on the Law of Armed Conflict*, 29 (ICRC, 1999)).

128. *Id.*

129. The ICRC has recently released a detailed interpretive guide on the notion of direct participation on hostilities. The report is guide is available at http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-ihl-article-020609/$File/direct-participation-guidance-2009-ICRC.pdf. Since the specific meaning of this notion is outside of the scope of this article, no attempt is made to discuss the contents of the guide. It must, however, be emphasized that this guide is very useful in drawing the lines between the permissible and impermissible involvements of private military contractors.

130. DINSTEIN, *supra* note 7, at 28.

131. *Id.*

132. *See id.* at 27-28 (citing A.P.V. Rogers & P. Malherbe, *Model Manual on the Law of Armed Conflict*, 29 (ICRC, 1999)).

133. Paris Declaration Respecting Maritime Law, 1856, Laws of Armed Conflicts 787, 788, *cited in* DINSTEIN, *supra* note 7, at 28.

134. *Id.* They are sometimes called corsairs.

135. *Id.*

The other two important factors included in the definition of armed forces are the existence of a chain of command and internal discipline.[136] The chain of command and discipline requirements are necessary because of the state responsibility attached to the conduct of organs operating at the behest of the state, which is a subject of international law.[137] The law gives a state some flexibility as to who it may incorporate into its armed forces, including militia and volunteer corps.[138] However, it also requires the state to maintain a chain of command and ensure discipline.[139] In other words, it requires the state to ensure respect for IHL. The failure by any organ associated with the government to observe rules of IHL could potentially give rise to international legal responsibility for the state.[140] That is another important reason why states must be certain of the status of any entities with which they engage in any type of warfare-related duties. They should particularly be careful in involving forces outside their military's chain of command and not subject to their discipline. The last part of this section will be discussed more fully in Part IV below.

D. Non-combatants Accompanying the Armed Forces

Non-combatants may lawfully accompany armed forces and are entitled to civilian status as long as they refrain from combat activities.[141] Their primary status is civilian.[142] A near exhaustive list of non-combatants who are entitled to civilian status is contained in article 4A(4) of Geneva Convention III. It accords the following civilians prisoner of war status: "Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of the armed forces."[143] This category also includes "[m]embers of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civilian aircraft of the Parties to the conflict."[144]

The Convention also requires that such persons obtain authorization from the armed forces which they accompany, and carry an identity card that mimics a model that the Convention provides.[145] Identification and ascertainment of all parties involved in conflict situations is so important that the Convention provides a model identity card for state parties to issue to civilians that accompany their armed forces.[146] The card, which is reproduced below, specifically asks parties to complete the following statement: "Accompanying the armed forces as . . . ." The answer must be specific. As is seen below, it also requires the identification of the

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136. Additional Protocol I, *supra* note 3, art. 43(1).

137. *See* Knut Ipsen, *Combatants and Non-Combatants*, *in* FLECK, *supra* note 5, at 70-71.

138. Additional Protocol I, *supra* note 3, at art 43.

139. *Id.*

140. *See* Knut Ipsen, *Combatants and Non-Combatants*, *in* FLECK, *supra* note 5 *supra* note 5, at 71.

141. *See, e.g.*, Additional Protocol I, *supra* note 3, art. 13.

142. *See* Knut Ipsen, *Combatants and Non-Combatants*, *in* FLECK, *supra* note 5, at 95.

143. Geneva Convention III, *supra* note 3, art. 4(A)(4).

144. *Id.* at art. 4(A)(5).

145. *Id.*

146. *See* Geneva Convention III, *supra* note 3, Annex IV.

issuing authority. All persons who accompany the armed forces as non-combatants must carry this identification card.[147] The card serves as evidence of authorization to perform whatever civilian duties that the person carrying the card performs. Most importantly, if a civilian falls in the hands of the enemy, it would serve as evidence of entitlement to prisoner of war status.[148]

ANNEX IV

A. IDENTITY CARD

(see Article 4)

NOTICE

This identity card is issued to persons who accompany the Armed Forces of .... but are not part of them. The card must be carried at all times by the person to whom it is issued. If the bearer is taken prisoner, he shall at once hand the card to the Detaining Authorities, to assist in his identification.

Official seal imprint

Religion ....

Blood type ....

Fingerprints (optional)

(Left forefinger) (Right forefinger)

Any other mark of identification ....

Hair	Eyes	Weight	Height

Photograph of the bearer

(Name of the country and military authority issuing this card)

IDENTITY CARD

FOR A PERSON WHO ACCOMPANIES THE ARMED FORCES

Name ....

First names ....

Date and place of birth ....

Accompanies the Armed Forces as ....

Date of issue ....

Signature of bearer ....

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Remarks. — This card should be made out for preference in two or three languages, one of which is in international use. Actual size of the card: 13 by 10 centimetres. It should be folded along the dotted line.

Civilian status has significant benefits. Persons having a status of "civilian accompanying the armed forces," and identified as such could be entitled to dual protection. Firstly, they cannot be targeted by the enemy. Secondly, they are

147. *See* Geneva Convention III, *supra* note 3, art 4(A)(4); *see also* the "Notice" section of the card reproduced above.

148. *See* Geneva Convention III, *supra* note 3, art. 4(A)(4).

149. Geneva Convention III, *supra* note 3, Annex IV, sample *available at* http://www.icrc.org/ihl.nsf/FULL/375?OpenDocument (last visited June 6, 2007).

entitled to prisoner of war status if they fall into the hands of enemy forces. The two protections are discussed in turn below.

Article 57 of Additional Protocol I articulates what could be considered one of the most fundamental principles of IHL. The essence of this provision is the protection of civilians. It states in part: "Those who plan or decide upon an attack shall: (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection."[150] The same provision goes on stating that persons who plan an attack must "refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[151] It further provides that "effective advance warning shall be given of attacks which may affect the civilian population, unless the circumstances do not permit."[152] And of course, what this essentially requires is the reasonable balancing of the interests of military advantage and the extent of collateral damages.[153] It is important to note that by accompanying the armed forces, civilians assume the risk of becoming collateral victims. Such victimization may not necessarily be a result of the enemy's unlawful conduct if the military advantage it obtains by including civilians in the attack outweighs the civilian injury caused by the attack.[154]

The second important protection that civilians accompanying the armed forces get is a prisoner of war status if they fall into the hands of the enemy. As indicated above, Geneva Convention III specifically accords civilians who accompany the armed forces, and are properly identified as such, prisoner of war status.[155] Prisoner of war status is extremely beneficial not only because persons having such status must be repatriated to their country as soon as hostilities cease,[156] but also because it entitles the prisoner to several protections while in captivity.[157]

In the case of combatants, as discussed in Part II above, it would serve as a shield from prosecution for death, injury, and damage they might have caused

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150. *See* Additional Protocol I, *supra* note 3, art. 57(2)(a)(i).

151. *Id.* art. 57(2)(a)(iii).

152. *Id.* art. 57(2)(c).

153. *See, e.g., id.* art. 57(2)(b)

> [A]n attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

154. *See id.*

155. *See* Geneva Convention III, *supra* note 3, art. 4(A).

156. S*ee also* Geneva Convention III, *supra* note 3, arts. 109-17 (providing for circumstances whereby repatriation should occur prior to the conclusion of hostilities). S*ee id.* arts. 118-19.

157. Protection begins from the time of captivity, *see, e.g.*, Geneva Convention III, *supra* note 3, art. 17-20. For protection during internment, see *id.* § II.

during combat.[158] What is extremely important to note here is that if civilians conduct themselves outside their civilian duties and are suspected of combat behavior, the repercussions could be extremely serious. Not only would they lose their protection as civilians, but they would also lose prisoner of war status and may be prosecuted for war crimes and other related forms of criminal offenses, which they could have avoided if they had a combatant status. That is precisely the reason why there should be no room for lack of identification of the exact status of persons involved in any capacity in situations of hostility.

The provisions of Additional Protocol I relating to the protection of medical personnel demonstrate the link between legal status and the treatment the status-holder must receive.

Article 12 provides that medical personnel must be protected at all times and must not be made targets of attack;[159] however, this provision conditions the protection on numerous specific grounds. These grounds include: (1) the given civilian medical unit must "belong to one of the Parties to the conflict"[160] and (2) they must be "recognized and authorized by the competent authority of one of the Parties to the conflict"[161] or otherwise be authorized by Parties permitted by the Protocol and Geneva Convention I.[162] Moreover, the parties are required to identify the locations of their medical units so that they may not be targeted by the enemy.[163] Of course, shielding military objectives from attack under the pretext of medical units is strictly prohibited.[164]

Most importantly, the Protocol provides for conditions for the discontinuance of protection to civilian medical units. It provides that protection may cease if they are "used to commit, outside their humanitarian function, acts harmful to the enemy."[165] The Protocol does not define what constitutes "acts harmful to the enemy;" however, it contains a list of acts that are not considered harmful to the enemy.[166] The opposite could easily be extrapolated from the list.

The following are not considered to be harmful to the enemy:

> a. that the personnel of the unit are equipped with light individual weapons for their own defense or for that of the wounded and sick in their charge;
>
> b. that the unit is guarded by a picket or by sentries or by an escort;

158. *See* DINSTEIN, *supra* note 7, at 31.

159. *See* Additional Protocol I, *supra* note 3, art. 12(1).

160. *See id.* art. 12(2)(a).

161. *See id.* art. 12(2(b).

162. Other parties such as neutral powers and humanitarian agencies may deploy medical workers. *See id.* art. 12(2)(c) and the provisions cross-referenced therein. This is a prime demonstration of the strict regulation of who may do what lawfully.

163. *See id.* art. 12(3).

164. *Id.* art. 12(4).

165. *Id.* art. 13(1).

166. *Id.* art. 13(2).

> c. that small arms and ammunition taken from the wounded and sick, and not yet handed to the proper service, are found in the units;
>
> d. that the members of the armed forces or other combatants are in the unit for medical reasons.[167]

Presumably, the same principle applies to all other categories of civilians accompanying the armed forces. The Protocol provides for a related concept that would disqualify all civilians from the protection accorded to civilians. It states: "[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities."[168]

A cumulative reading of these provisions suggests that there is, indeed, a red line that must not be crossed by anyone claiming civilian status. Although factual disputes as to the applicability of the standard are inevitable, IHL seems to have drawn the line at the performance of any action that could reasonably be interpreted as taking a direct part in hostilities. Crossing that line would not only wipe out all the protections that would otherwise be available to civilians, but also expose them to criminal prosecution.[169] This subject will be discussed in more detail in relation to civilian military contractors in Part IV below.

E. Unlawful Per Se

Towards the end of the legality spectrum are categories that are unlawful per se. Persons classified in these categories are presumed unlawful combatants, and as such are not entitled to any of the benefits of IHL, and may be prosecuted for their conduct.[170] The most notable categories are spies and mercenaries. These categories are discussed in turn below.

1. Spies

Although the definition of the term spy is contained in earlier legal instruments, including the Brussels Declaration of 1874,[171] the legal definition of most current importance is contained in articles 29 – 31 of The Hague Regulations and article 46 of Additional Protocol I.

The Hague Regulations provide that a person is considered a spy "when, acting clandestinely or on false pretences, he obtains or endeavors to obtain information in the zone of operation of a belligerent, with the intent of communicating it to the hostile party."[172] The most important factor that makes a person a spy is not the gathering of the information and communication of the same to the enemy, but the manner of the collection. For example, if the same information is obtained without false pretences while wearing a military uniform that would identify the person as belonging to the armed forces of the opposing party, that person is not considered a spy.

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167. *Id.*

168. *Id.* art. 51(3).

169. *See* DINSTEIN, *supra* note 7, at 29-30.

170. *Id.* at 31.

171. *See* The Brussels Declaration, art. 19, *cited in* Knut Ipsen, *Combatants and Non-Combatants, in* FLECK, *supra* note 5, at 111.

172. Hague II, *supra* note 98, art. 29.

This principle is also contained in article 46 of Additional Protocol I. It states:

> A member of the armed forces of a Party to the conflict who, on behalf of that Party and in territory controlled by an adverse Party, gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces.[173]

If the same soldier wears a disguise, penetrates into the enemy territory, and collects information, he would be considered a spy.[174] The same applies to civilians accompanying the armed forces.[175] This classification is important because spies are not only denied prisoner of war status but are also considered criminals and may be prosecuted and punished for their espionage and related crimes.[176]

This is yet another clear demonstration of the importance of the identification of the exact status of any individuals involved and affected by situations of armed conflict. Of course, with the advancement of sophisticated military surveillance equipment, the workability of this traditional definition of a spy might be problematic. This issue is discussed in some detail in relation to the military intelligence gathering roles of private military contractors in Part IV below.

2. Mercenaries

The most important unlawful per se category is perhaps mercenaries. Mercenaries are unlawful combatants who are denied combatant and prisoner of war status.[177] The definition of the term mercenary of most current importance is contained in article 47 of Additional Protocol I. It provides that:

> A mercenary is a person who:
>
> (a) is specially recruited locally or abroad in order to fight in an armed conflict;
>
> (b) does, in fact, take a direct part in hostilities;

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173. Additional Protocol I, *supra* note 3, art. 46(2). The unlawfulness of wearing the enemy's uniform or other forms of clothing for purposes of disguise in military operations has always been a subject of controversy. For a brief discussion of this controversy and the compromise that the existing rules make, *see* Knut Ipsen, *Combatants and Non-Combatants, in* FLECK, *supra note* 5, at 108 ("It shall be lawful for combatants recognizable as such (by their uniforms, insignia etc.) to participate in raids, acts of sabotage, and other attacks carried out by special forces in the enemy's hinterland or in forward areas. Combatants who commit such acts wearing plain clothes or the uniform of the adversary are liable to be punished. They shall nevertheless have the right to a regular judicial procedure."

174. *See* Hague II, *supra* note 98, art. 29. According to Hague II, those who are not considered spies include:

> Soldiers and civilians, carrying out their mission openly, entrusted with the delivery of dispatches intended either for their own army or for the enemy's army. To this class belong likewise persons sent in balloons for the purpose of carrying dispatches and, generally, of maintaining communications between the different parts of an army or a territory. *Id.*

175. *See* Knut Ipsen, *Combatants and Noncombatants, in* FLECK, *supra* note 5, at 99.

176. *See* Hague II, *supra* note 98, arts. 29. *See also* Additional Protocol I, *supra* note 3, art. 46.

177. *See* Additional Protocol I, *supra* note 3, art. 47(1) ("A mercenary shall not have a right to be a combatant or a prisoner of war.").

(c) is motivated to take part in the hostilities by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party;

(d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;

(e) is not a member of the armed forces of a Party to the conflict;

(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.[178]

Anyone meeting these requirements is considered an unlawful combatant. Mercenaries have always been a disfavored category of fighters. Professor Ipsen suggests that the codification of this particular rule in the Additional Protocol I "can be explained by the crucial and fatal role which mercenaries – especially of European and North American origin – have played in armed conflicts on the African continent."[179] The exclusion of mercenaries, apart from the practical undesirable roles they have historically played, rests on the fundamental assumption that only disciplined forces of a party to the conflict are authorized to engage in armed conflict with a primary status of lawful combatants. Professor Ipsen neatly summarizes this notion as follows:

> First and foremost it is the person belonging to the armed forces of a party to the conflict who has the primary status of combatant. This assignment to an organ constitutes authorization to carry out armed acts causing harm. A simple contract between an individual and a party to the conflict – fighting in exchange for payment – is not sufficient. Thus the rule regarding mercenaries does not amount to an exception but represents a logical consequence of the law: a person who is not a member of the armed forces is not (with the exception of participants in a *levée en masse*) a combatant either.[180]

Engaging in harmful conduct for monetary compensation is not authorized and recognized as legitimate conduct under IHL. Persons who meet the above requirements are thus considered to have engaged in criminal enterprise and may be prosecuted for their crimes.[181] Commentators note that this is an extremely narrow definition of mercenaries because all six requirements need to be met cumulatively.[182] The definition is so narrow that it promoted a commentator to

178. Additional Protocol I, *supra* note 3, art. 47.

179. *See* Knut Ipsen, *Combatants and Noncombatants*, *in* FLECK, *supra* note 5, at 69. ("Because of the prevalence of mercenary activities in post-colonial Africa, in 1972, the Organization of African Unity adopted The African Mercenary Convention."); OAU Convention for the Elimination of Mercenaries in Africa, *entered into force* Apr. 22, 1985, O.A.U. Doc. CM/433/Rev. L. Annex. 1 (1972). The convention criminalizes different levels of participation in mercenary activities. *See, e.g., id.* art. 1(2). It also creates state responsibility. *See, e.g., id.* art. 5.

180. *See* Knut Ipsen, *Combatants and Noncombatants*, *in* FLECK, *supra* note 5, at 69.

181. *See, e.g.*, DINSTEIN, *supra* note 7, at 52.

182. *See, e.g., id.* at 50-52.

suggest "any mercenary who cannot exclude himself from this definition deserves to be shot – and his lawyer with him."[183]

Perhaps as a result of the narrowness of the definition, in 1989, the United Nations General Assembly adopted an international convention pertaining to mercenaries, which eliminated the active participation requirement of the definition of Protocol I quoted above.[184] This category is discussed in more detail in relation to private military contractors in Part IV below.

F. The Status of Parties in Non-international Armed Conflict

Finally, it is important to note that the same standards by and large apply in non-international armed conflicts. Although advocacy for the application of civilized rules of warfare in civil war situations dates back many centuries,[185] it was not until the mid-twentieth century that international treaties dealing with situations of armed conflict began to provide formal rules applicable in non-international armed conflict.[186] That is not to say that there were not historical instances where customary rules of humanitarian law applied in domestic conflicts. Historically, the principle of recognition of belligerents within a given state often prompted the application of some of the same rules that were applicable in international armed conflict situations.[187] However, a transformative step was taken when Common Article 3 was incorporated into the Geneva Conventions of 1949.[188] That essentially brought conflicts of a non-international nature within the ambit of IHL. Therefore, the same principles discussed in the preceding subsections of Part III now generally apply in non-international armed conflicts.

More important for purposes of this article is the application of some of the same principles for the identification of parties to the conflict. For example, prisoner of war status in an armed conflict, whether it is of an international or non-international nature, is limited to those members of a party to the conflict, which meet the following criteria:

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183. *See* Christopher Weigley, *The Privatization of Violence: New Mercenaries and the State*, 1, *available at* http://www.caat.org.uk/publications/government/mercenaries-1999.php (last visited June 15, 2007) (quoting Geoffrey Best in DAVID SHEARER, PRIVATE ARMIES AND MILITARY INTERVENTION 18 (1998)).

184. *See id. See also* The International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries, G.A. Res. 34, at 590, U.N. GAOR, 44th Sess., Supp. No. 43, U.N. Doc. A/44/43 (1989), *art. 1* [hereinafter U.N. Convention Against Mercenaries] *(omitting the direct participation in hostilities part of the definition of mercenaries under Additional Protocol I, art. 47).*

185. Writing in 1758, Vattel, for example, suggested that "it was perfectly clear that the establishment of law of war, those principles of humanity, forbearance, truthfulness, and honor, which we have earlier laid down, should be observed on both sides in a civil war," ROBERTS & GUELFF, *supra* note 3, at 22 (quoting EMMERICH DE VATTEL, LE DROIT DES GENS: OU PRINCIPES DE LA LOI NATURELLE, APPLIQUÉS, À LA CONDUITE ET AUX AFFAIRES DE NATIONS ET DES SOUVERAINS 338 (Charles G. Fenwick trans., 1916) (1758).

186. *See* ROBERTS & GUELFF, *supra* note 3, at 22.

187. *See id.* at 23.

188. *See id.* at 24; *see also* the Four Geneva Conventions, *supra* note 3, common art. 3

> a. that of being commanded by a person responsible for his subordinates;
>
> b. that of having a fixed distinctive sign recognizable at a distance;
>
> c. that of carrying arms openly; and
>
> d. that of conducting their operations in accordance with the laws and customs of war.[189]

As discussed in the previous section, members of the armed forces of a state are ipso facto entitled to combatant status and subsequently prisoner of war status unless of course they try to confuse the enemy. Other members of a party to the conflict should meet all the above requirements cumulatively. This will be discussed more fully in relation to the functions of private military contractors in Part IV below.

IV. PRIVATE MILITARY CONTRACTORS

Part III offered a lengthy discussion of almost all of the possible statuses of individuals and groups under IHL. Some are lawful statuses such as combatants and civilians accompanying them. Others are unlawful statuses such as spies, mercenaries and civilians who engage in combat activities without authorization. Part IV tackles the following question: under which one of the above categories do private military contractors fall? To answer this question and characterize the status of private military contractors under IHL, Part IV discusses the typical and known activities of the private military contractors in a continuum vis-à-vis the various legal statuses discussed above.

A. Definition and Background

On December 11, 2003, BBC World News contained the following report:

> A private UK-based military firm says it is looking for an investor to fund an operation to seize indicted former Liberian President Charles Taylor. Mr. Taylor, who has been granted asylum in Nigeria, is wanted by the UN-backed court on war crimes charges. Northbridge Services Group says it has people ready to kidnap Mr. Taylor to claim a $2m reward allegedly offered by the United States Congress. Washington has said it opposes any violent action to seize Mr. Taylor. "Any potential investors that are interested in going in together in this operation, we would be willing to split the profits," Northbridge Services Group's director Pasquale Dipofi told the BBC's World Today programme.[190]

This report is remarkable not only because it is an explicit admission of the privatized use of military force for profit, but also the manner of its reporting makes it seem like any ordinary business transaction.

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189. Geneva Convention III, *supra* note 3, art. 4(2).

190. *Military Firm Seeks Taylor Bounty*, BBC NEWS, Dec. 11, 2003, *available at* http://news.bbc.co.uk/2/hi/africa/3309203.stm.

Dr. Peter W. Singer of the Brookings Institute reported that in 1996 he met members of Military Professional Resources Incorporated (MPRI), a Virgina-based private military company, somewhere in Bosnia where the company was conducting training of the Bosnian military.[191] He expressed his first impression in the preface of his seminal work, Corporate Warriors, in the following terms:

> The members of the firm were polite and generally helpful, but the ambiguity between who they were and what they were doing always hung in the air. They were employees of a private company, but were performing tasks inherently military. It just did not settle with the way we tended to understand whether business or warfare.[192]

No authoritative definition of Private Military Firms could be found. Dr. Singer offers a fairly broad definition of these firms as "business organizations that trade in professional services intricately linked to warfare. They are corporate bodies that specialize in the provision of military skills, including combat operations, strategic planning, intelligence, risk assessment, operational support, training and technical skills."[193] As a matter of fact, by estimates of the American Bar Association, about 30,000 private contractors now provide various services including security services in Iraq.[194] The following subsections assess the legality of the various functions of these entities vis-à-vis IHL.

B. Functions and Categories

As indicated above, private military contractors undertake a variety of functions. While some of these functions would give them clear lawful status under IHL, some functions would put them in questionable status. Still other functions towards the opposite end of the legality spectrum would put them completely at odds with the law. The following subsections discuss the various functions and possible statuses.

1. Non-combat functions

The continuum begins with purely and uncontrovertibly civilian functions. An excellent demonstration of the various functions performed by private military

191. *See* CORPORATE WARRIORS, *supra* note 23, at vii.

192. *Id.*

193. *Id.* at 8.

194. *See* Chris Lombardi, *Law Curbs Contractors in Iraq*, 3 A.B.A.J.E-Rep., May 14, 2004, *cited in* Peters, *supra* note 29, at 382 n.59. If reconstruction and oil workers are added, the figure would jump to about 50,000 to 75,000. *See* Max Boot, Commentary, The Iraq War's Outsourcing Snafu, L.A. TIMES, Mar. 31, 2005, at B13 (cited in *id.*). In fact, the New York Times recently reported that up to 126,000 American, Iraqi, and other nationals now work for the U.S. government in Iraq. James Risen, *Back from Iraq, Contractors Face Combat-Related Stress*, N.Y. TIMES, July 5, 2007, at A1. The report also indicated that since the Iraq war began, about 1,000 civilian contractors were killed, and 13,000 of them were injured. *Id.* In fact, they are exposed to the same kinds of danger that military personnel are exposed to, including post traumatic distress disorder after they return home. *Id. See* Steve Fainaru, *Ambush in Iraq Last Fall Left 4 Americans Missing and a String of Questions About Company they Worked for*, WASH. POST, July 29, 2007. One member of the civilian contacts in Iraq described his duties as: "We protect the military. Isn't that mind-boggling? . . . And I'm taking about escorting soldiers, as well. Isn't that frightening?" *Id.*

contractors is contained in Lockheed Martin's list of "products" that it offers to customers. The products are listed under thirteen headings: Air Power, Air Traffic & Transportation Management, Distribution Systems, Homeland Security, Information Superiority, Information Technology, Missiles & Missile Defense, Net-Centric Solutions, Space Systems & Technologies, Surveillance, Radar & Fire Control, Technical Support Services, Technology Research, Training & Simulation.[195]

One of the subcategories under "Air Power" capability is "combat" capability.[196] Lockheed Martin describes its "combat" capability as follows:

> Lockheed Martin's tactical aircraft respond decisively to the evolving and complex demands of modern combat situations. Our aircraft are the most versatile fighters in the world, excelling even in the most demanding of multi-role missions. We have a proven lineage of air power dominance, from the experienced F-16, to the F-22, and F-35 next-generation fighters. These aircraft were born through research and development efforts underscored by a relentless pursuit of new advances in technology and low-cost, innovative manufacturing methods. Through a work ethic dedicated to quality, Lockheed Martin provides unparalleled design, development, production and full systems support of fighter/attack aircraft. For this reason, our fighters dominate the skies of the world, extending strong, enduring international defense partnerships. The next generation of high-performance combat aircraft will continue to push the envelope further - with design concepts that expand the definition of multi-role aircraft and mission flexibility. We develop future technology for implementation today, including stealth capability, precision weapons delivery, battlespace interoperability and systems compatibility. Through these endeavors, Lockheed Martin's fighter aircraft will continue as a dominating force behind national defense and global security.[197]

Existing and prospective consumers of these produces include: Air Force, Army, Asia/Pacific, Defense Agencies, Department of Defense, Department of Homeland Security, Greece, India, Italy, Japan, Marine Corps, NASA, Navy, Republic of Korea, Special Operations Command.[198] Although some policy issues may be raised as to the desirability of the involvement of private companies in some of these activities,[199] Lockheed Martin's involvement in the development of

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195. Lockheed Martin, Capabilities, *available at* http://www.lockheedmartin.com/capabilities/ (last visited 5 Feb., 2010).

196. Lockheed Martin, Air Power, *available at* http://www.lockheedmartin.com/capabilities/air_power/index.html (last visited Feb. 5, 2010) [hereinafter Air Power].

197. *Id.*

198. Lockheed Martin, Customers, *available at* http://www.lockheedmartin.com/customers (last visited Feb. 5, 2010).

199. In relation to the public-private dilemma, P.W. Singer writes:

> The division of the world into public and private spheres is at the center of the long debate over what government's role should be. Ever since the rule by kings

military technology including the advancement of weaponry and the selling of such weaponry to the above listed consumers does not ordinarily trigger the applicability of IHL.[200] However, it gets trickier when the provision of such products is accompanied by the provision of services such as training, supply, and maintenance of military equipment in the field. It starts to slowly march into the gray area. The following section discusses such ambiguous functions.

2. Ambiguous functions (intelligence, training, equipment transportation, maintenance, interrogation, base construction, protection of civilians)

Training could be one ambiguous function depending on where and how it is conducted. For example, Lockheed Martin, advertises its training capability as follows:

> The customer's need for readiness is our business. Flight crews and maintainers must move from training to the real world without hesitation. To meet this need, Lockheed Martin's end-to-end training solutions provide experience in the live, virtual, and constructive domains. Lockheed Martin offers an integrated approach to delivering total training solutions, creating products that meet specific customer needs. Our flight and maintenance training systems are world leaders in training large, widely dispersed student populations operating diverse fleets of aircraft. Lockheed Martin's proven instructional systems development, systems engineering, and logistics processes are coupled with our corporation's intimate knowledge of current aircraft platforms to ensure a real-world experience in training.[201]

Another well-known civilian military contactor, MPRI, provides the following services: "MPRI personnel supplement Region operations across the entire spectrum of activities to include personnel, training, mobilization, logistics, force protection, airfield operations, transportation operations, food service, ammunition management, engineering, environmental operations and human resources."[202]

If a couple of air force military officers from India come to Bethesda, Maryland and receive training as to how to fly and use Lockheed Martin's next generation F-35 and purchase a few of these aircraft and take them with them to India, no recognizable issues of IHL would arise. However, consider the following

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> was replaced by the bureaucratic state in the seventeenth century, there has been a give-and-take between the public and the private, with the line between the two constantly in flux. In fact, the debate about where this line should fall has been described as one of the "grand dichotomies of western political thought."

CORPORATE WARRIORS, *supra* note 23, at 7.

200. *But see* Richard T. De George, *Non-Combatant Immunity in an Age of High Tech Warfare*, *in* INTERVENTION, TERRORISM, AND TORTURE, *supra* note 81, at 301-10 (discussing the issue of a possible IHL duty on the part of weapons designers to make weapons smarter with a view to mitigating unnecessary injury and damage).

201. Air Power, *supra* note 196.

202. MPRI, Staff Augmentation, *available at* http://www.mpri.com/main/recruitingaugmentation.html (last visited Feb. 5, 2010).

scenario. The training takes place in India close to the Kashmir border. Pakistan shoots down one of the training aircraft and the two states get into a small-scale armed conflict. Assume further that Pakistan captures three occupants of the aircraft that was shot down: two Indian trainees and one Lockheed Martin trainer. Would all of them be considered lawful combatants and as a result entitled to prisoner of war status?

This is not as farfetched as it might sound. Consider the following real story. In 1999, when genocide was looming in Kosovo, NATO forces conducted an air attack against the Milosevic government.[203] These attacks produced thousands of refugees and created humanitarian emergencies.[204] Because the involvement of the United States in this conflict was not popular, the administration chose to involve the Texas-based private military contractor Brown & Roots (KBR).[205] The company performed the following activities with efficiency: constructed temporary facilities on the ground that housed thousands of displaced persons from Kosovo; ran the supply system for U.S. forces in the area, including transportation of food and other supplies; constructed bases; and maintained vehicles and weaponry.[206]

Given the circumstances described above, there was a real possibility that Milosevic's forces could have attacked one of the bases and captured some of KBR's personnel while maintaining some of the military equipment or transporting some of the equipment and weaponry. Had this occurred, what would have been their status under IHL? Would they have been entitled to prisoner of war status? Would they have had combatant status or would they have just been persons accompanying the armed forces? Or would they even be considered mercenaries? Because this fact pattern would help demonstrate the ambiguity in the status of these personnel, it is important to test the facts against the rules described in Part III above.

Assume further that some members of the company were armed with weapons for their own protection and used the weapons to kill some members of Milosevic's army before they were captured. The first question that needs to be asked is whether they would be entitled to combatant status. In other words, may they be prosecuted for killing Milosevic's soldiers? As discussed in Part III above, combatant status may only be acquired if the following requirements are cumulatively met: membership to the armed forces of a party to the conflict with identifiable uniforms and emblems, the presence of a chain of command wherein officers are responsible for their subordinates, the existence of internal discipline, and respect for international law relating to warfare.[207]

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203. CORPORATE WARRIORS, *supra* note 23, at 6.

204. *Id.*

205. *Id.* Better known as KBR, it is a leading engineering and construction firm. *See generally* KBR, http://www.kbr.com/ (last visited June 26, 2007) (describing the KBR "as the largest contractor for the United States Army and a top-ten contractor for the U.S. Department of Defense, it is currently the world's largest defense services provider").

206. *See* CORPORATE WARRIORS, *supra* note 23, at 6.

207. *See* Additional Protocol I, *supra* note 3, art. 43.

The party to the conflict in this case was NATO. All members of the U.S. military would evidently qualify as members of the party to the conflict by virtue of the membership of the U.S. in NATO. Members of KBR were evidently not sworn members of the U.S. military and as such did not qualify as members of the NATO forces, which was one of the only two parties to the conflict; the second being Milosevic's army. If they were not members of a party to the conflict, subject to the chain of command and discipline, then they cannot be considered lawful combatants. The relationship between the firm and the U.S. military is purely contractual. Although the details of the contracts are confidential,[208] it is fair to assume that the contract does not require members of the firm to take an oath similar to the one that members of the military take, or otherwise incorporate them as de jure members. As will be discussed below, the U.S. had actually negotiated immunity for members of the defense forces as well as contractors operating in Iraq,[209] but in the absence of such immunity, they risk exposure to prosecution as unlawful combatants. More particularly because the *lex specialis* in the instant example is IHL, members of KBR may theoretically be prosecuted for killing Milosevic's soldiers. It is important to reemphasize here that killing in combat requires legal authorization. Anyone who kills an enemy solider without authorization lacks immunity from prosecution.

Could such members of KBR claim the status of civilians or non-combatants accompanying the armed forces and avoid prosecution? To be considered civilians accompanying the armed forces and claim prisoner of war status, they must belong to one of the following categories: medical and religious workers,[210] civilian members of aircraft crew, war correspondents, supply contractors, or members of labor units.[211] Moreover, persons claiming civilian status must first be authorized to undertake their civilian activities by the party to the conflict and carry an

208. Copies of these kinds of contracts are not publicly available. For a copy of an example of a private military contract outside the U.S., see CORPORATE WARRIORS, note 23, at 245, appendix 2 (providing a copy of the contract between private sector firm, Sandline, and the government of Papua New Guinea). This contract was signed between the now defunct military firm, Sandline International, and the government of Papua New Guinea (PNG). Among the responsibilities undertaken under the contract were to "gather intelligence to support effective deployment and operations; conduct offensive operations in Bougainville in conjunction with PNG . . ." *See id.* at Prmble. The PNG agreed to pay $36,000,000 for these services. *See id.* at 251, appendix 2, Fees and Payments. Despite allegations of illegality, an international tribunal enforced this contract. *See* Sandline Int'l Inc. v. Papua N.G., 117 I.L.R. 552 (Arb. Tribunal 1998). For commentary on the nature of the contracts and how they may be used to ensure accountability, *see* Laura A. Dickinson, *Torture and Contract*, 37 CASE W. RES. J. INT'L L. 267, 273-74 (2006) [hereinafter Torture and Contract].

209. *See* The Coalition Provisional Authority, Order 17 (Revised), Status of the Coalition Provisional Authority, MNF – Iraq, Certain Missions and Personnel in Iraq, Sec. 2, Iraqi Legal Process, *available at* http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf ("Unless provided otherwise herein, the MNF, the CPA, Foreign Liaison Missions, their Personnel, property, funds and assets, and all International Consultants shall be immune from Iraqi legal process.").

210. *See* Additional Protocol I, *supra* note 3, art. 43(2). *See also* Geneva Convention III, *supra* note 3, art. 33.

211. *See* Geneva Convention III, *supra* note 3, art. 4(A)(4).

identity card similar to the one reproduced in Part III(d) above.[212] They must properly identify themselves as civilians in that card.[213] Whether they could claim immunity as civilians accompanying the armed forces depends not only on their belonging to the above categories but also on whether their activities could be considered as taking direct part in hostilities[214] or causing harmful acts to the enemy.[215]

Presumably, members of KBR in the instant example could qualify as supply contractors with authorization to function as such in a combat zone. It could also be presumed that they could carry light weapons for their own protection or for the protection of other civilians.[216] Thus, it is obvious that if they are attacked in the place where they were performing civilian functions, they could use their light weapons to protect themselves. If in doing so they kill enemy soldiers and get captured thereafter, they may be entitled to prisoner of war status and, as such, immunity from prosecution, provided that their conduct does not rise to the level of war crimes.[217] It may nonetheless be argued that conducting training and maintaining weaponry near combat areas is taking direct part in hostilities which rescinds civilian status under article 51(3) of Additional Protocol I. It could further be argued that even if training and maintenance of weaponry do not qualify as taking direct part in hostilities depending on where and when they take place, these activities could possibly be considered as acts that cause harm to the enemy under the rationale of article 13 of Additional Protocol I.

The two other categories that could raise some ambiguities are mercenaries and spies. In the above example, would members of KBR qualify as mercenaries? Mercenary is a carefully defined legal term. As discussed in Part III(e)(ii) above, the essential requirements include special recruitment for combat, taking a direct part in hostilities for excessive private gain, and alienage.[218] Under the definition of a mercenary, all of the essential requirements must be met cumulatively.[219] In other words, if any one of the above requirements is not present, the actors are not considered mercenaries. In the above example, it cannot be said that members of KBR were specifically recruited for combat. As such, they cannot be considered mercenaries. Whether they meet the remaining requirements could be disputed. For example, more facts would be needed to determine the excess in payment or the nationality of each involved individual member of the team. The requirement of whether they took a direct part in hostilities may also be disputed. Although

212. *See id.* 4(A)(4).

213. *See supra* Model Identity Card, reproduced in Part III(D).

214. *See* Additional Protocol I, *supra* note 3, art. 51(3).

215. *See id.* at art. 13.

216. *See id.* at art. 13(2)(a). Although this provision deals with medical personnel, it may reasonably be assumed that the same standards would apply to other civilian contractors.

217. This argument is based on the rules that regulate the situations of medical personnel who are inherently civilian. It appears, however, that the same principles would apply to other civilians. *See* Additional Protocol I, *supra* note 3, art. 13(1)-(2).

218. *See* Additional Protocol, *supra* note 3, art. 47.

219. *See id.*

they do not meet the requirements of mercenary, the ambiguity in their status remains.

The last category that needs to be discussed in this subsection is the spy category. Because intelligence gathering is an important function of private military contractors, it is necessary to understand their status in this regard. For example, Lockheed Martin advertises its intelligence capabilities as follows:

> From the depths of the oceans to the far reaches of space, we serve the Department of Defense and the intelligence community with leading-edge intelligence, surveillance and reconnaissance (ISR) systems for maritime, terrestrial, airborne, and space missions. Lockheed Martin is a leader in satellite imagery and information systems, air surveillance, radar, geospatial imagery, mission management, and ground system operations. Our focus is on providing joint and multi-agency organizations with valuable, effective ISR data for a diverse set of missions ranging from precision targeting to geographic mapping.[220]

Nothing makes the performance of these activities illegal, even in times of war. However, if the information is gathered under false pretenses, the intelligence gathering would become espionage activity.[221] The personnel engaged in the activity would be considered spies and as such unlawful per se. As a matter of law, not even members of the armed forces or combatants are immune from such designation, as long as they collect the intelligence under false pretense.[222]

The traditional way of collecting information under false pretense is usually wearing the enemy's uniforms and infiltrating into enemy held territories.[223] With the advancement of technology, however, intelligence gathering could be done by civilians sitting in their offices thousands of miles away from the frontlines. For example, a civilian contractor sitting in his office in Alexandria, Virginia could hack into the software of an enemy anywhere and obtain information for the U.S. military. If the hacker obtains the information under a false pretense, he would qualify as a spy.[224] If a "cyber-soldier"[225] does the same, he or she would likewise be considered a spy.[226] Such designation could only have significance if the said

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220. *See* Lockheed Martin, Intelligence, Surveillance & Reconnaissance, http://www.lockheed martin.com/ capabilities/information_superiority/ (last visited June 18, 2007).

221. *See* Hague II, *supra* note 98, at arts. 29-31; *see also* Additional Protocol I, *supra* note 3, art. 46.

222. *See* Hague II, *supra* note 98, at arts. 29-31; Additional Protocol I, *supra* note 3, art. 46; *see also supra* discussion of spies under Part III(E)(1).

223. *See, e.g.*, Additional Protocol I, *supra* note 3, art. 46(2) (providing: "A member of the armed forces of a Party to the conflict who, on behalf of that Party and in the territory controlled by an adverse Party, gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces.").

224. *See* Hague II, *supra* note 98, art. 29.

225. This term is borrowed from Professor De George. He provides a brief description of and commentary on computer hacking from the point of view of situations of warfare. *See* Richard T. De George, *Non-Combatant Immunity in an Age of High Tech Warfare*, *in* INTERVENTION, TERRORISM, AND TORTURE 301, 310-13 (Steven P. Lee ed., 2006).

226. *See* Hague II, *supra* note 98, art. 29 ("Soldiers not wearing a disguise who have penetrated

individuals, the civilian or the soldier, fall into the hands of the enemy anytime thereafter. If that happens, however, the law does not treat the two individuals the same way.[227] While the civilian may be prosecuted for the crime of espionage he committed in the past, the soldier is immune from such prosecution as long as he remains a member of the armed forces or rejoins the armed forces after engaging in the said activities of espionage. In other words, a soldier can be prosecuted as a spy only if he is caught in the act or before rejoining his unit.[228] To the contrary, once a civilian is a spy, he is always a spy, and may be prosecuted anytime for any acts of espionage committed anytime regardless of his current status.[229]

Because of the foregoing, intelligence gathering is also an area of ambiguity that requires further reflection. Although technology based intelligence gathering would not ordinarily expose civilian contractors to danger, situations where such exposure could ensue is foreseeable. One of the KBR employees captured by Milosevic's army in the example discussed above could easily be an intelligence analyst who had engaged in cyber intelligence gathering.

The status issue becomes even more complicated when the private military contractors get involved to protect civilians from irregular forces in situations where there is no conventional armed conflict. This is similar to the situation in Iraq. For example, some 800 armed members of one of the largest U.S. based security firms, Blackwater, currently guard American diplomats in Iraq.[230] The State Department rules allow these contractors to use deadly force if the civilians they are protecting face "imminent and grave danger."[231]

Because of the obvious difficulty in identifying the exact course of legal action that needs to be taken in cases where such a standard is not respected, under the seemingly no war, no peace situations, policy makers still remain perplexed. To address the issues of the gap in accountability under these circumstances,

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into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies.").

227. *Id.* at arts. 29-31.

228. *Id.*

229. *See* Additional Protocol I, *supra* note 3, art. 46(4):

> A member of the armed forces of a Party to the conflict who is not a resident of territory occupied by an adverse Party and who has engaged in espionage in that territory shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured before he has rejoined the armed forces to which he belongs.

It is important to note that the Protocol clearly limits such privilege to members of armed forces. *Compare* Hague II, *supra* note 98, art. 29 ("A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.").

230. *See* Eric Schmitt & Thom Shanker, *Pentagon Sees Authority Over Contractors*, N.Y. TIMES, Oct. 17, 2007, www.nytimes.com/2007/10/17/washington/17blackwater.html [hereinafter Schmitt & Shanker]. Blackwater was a subject of great media coverage following the fatal shooting of sixteen Iraqi civilians in Bagdad on September 16, 2007. The company has obtained $1 billion in U.S. government security contracts since 2001. *See* Steve Fainaru, *How Blackwater Sniper Fire Felled 3 Iraqi Guards*, WASH. POST, Nov. 8, 2007, at A01 [hereinafter Fainaru].

231. Fainaru, *supra* note 230, at A01. As of this report, it had 867 security guards in Iraq. *Id.*

understandably, various options are being proposed and considered, although as of the writing of this article no concrete measures have been taken. One of the options that is being considered is military supervision of contractors.[232] However, such a proposal cannot address the underlying issue of the applicable law in holding violators accountable.

The legal uncertainty indeed is the following. As discussed above, U.S. military, as well as civilian contractors, are immune from the Iraqi legal process. Moreover, the applicability of the Uniform Code of Military Justice is doubtful because the civilian contractors mostly provide security service to a civilian agency, such as the State Department, much like a security guard provides services for a museum in Atlanta or New York. [233] Of course, trying civilians in military courts also has its own problems.[234] The best option seems to be the prosecution of civilian contractors under the Military Extraterritorial Jurisdiction Act, which permits the prosecution of civilians accompanying the armed forces.[235] Although this seems to be a better option, it also does not answer the main question this article raises - do military contractors qualify as civilians under IHL? Accordingly, therefore, the ambiguity of the statute remains to be the most serious legal challenge.

3. Combat Functions

The involvement of private military contractors in actual combat is not a rhetorical scenario. In recent decades, they have been involved in conventional inter-state as well as unconventional domestic warfare.[236] This subsection provides examples of real stories where military contractors have played a significant role in conventional and non-conventional warfare and assesses contractors' status in light of IHL.

A devastating war commenced between Eritrea and Ethiopia in May 1998, along the western boundary between the two countries.[237] Within a short time the conventional armed hostilities engulfed almost the entire border between the two

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232. *See* John M. Broder & David Johnston, *U.S. Military Will Supervise Iraq Security Firms*, N.Y. TIMES, Oct. 31, 2007, www.nytimes.com/2007/10/31/washington/31contractor.html (explaining the details of this plan); *see also* Schmitt & Shanker, *supra* note 230.

233. For example, in 2006, the Uniform Code of Military Justice was amended to cover civilian contracts "in declared wars or contingency operations." But this amendment does not address the issue of whether contractors working for civilian agencies would be covered. *See* Alissa J. Rubin & Paul von Zielbauer, *Blackwater Case Highlights Legal Uncertainties*, N.Y. TIMES, Oct. 11, 2007, www.nytimes.com/2007/10/11/world/middleeast/11legal.html.

234. *See infra* section IV.

235. *See id.* (citing Scott Horton of Columbia University, a specialist in law of armed conflict).

236. *See*, CORPORATE WARRIORS, *supra* note 23, at 3-6.

237. *See* Ethiopia's *Jus Ad Bellum* Claims, Ethiopia-Eritrea Claims Commission paras. 14, 16 (Dec. 19, 2005); *see also* Eritrea's Western Front Arial Bombardment and Related Claims, Ethiopia-Eritrea Claims Commission para. 22 (Dec. 19, 2005); Ethiopia's Western Front Claims, Ethiopia-Eritrea Claims Commission para. 25 (Dec. 19, 2005); Ethiopia's Central Front Claims, Ethiopia-Eritrea Claims Commission para. 24 (Apr. 28, 2004); Eritrea's Central Front Claims, Ethiopia-Eritrea Claims Commission para. 30 (Apr. 28, 2004). All of the partial awards cited hereinabove are available at http://www.pca-cpa.org/showpage.asp?pag_id=1151 (last visited Feb. 10, 2010).

countries.[238] The two parties ceased their hostilities in June of 2000, pursuant to a cessation of hostilities agreement signed in Algiers.[239] During this war an estimated 70,000 people were killed.[240] In addition to that, Eritrea captured and interned 1,100 prisoners of war,[241] including an air force pilot.[242] Ethiopia captured and interned 2,600 prisoners of war.[243] All the prisoners were later repatriated to their home countries.[244] The prisoners of war taken by each party were nationals of the other, and as such there were no formal claims of involvement of private military contractors.[245] However, the story does not end there. What was unique about this African war was the involvement of extremely sophisticated high-tech fighter jets. According to BBC's Patrick Gilkes, in December 1999, while Ethiopia acquired eight Sukhoi 27 fighters, Eritrea acquired eight to ten MiG 29 interceptors.[246] Most importantly, Gilkes added that "[n]either side, however, [had] any pilots qualified for the new planes. They [were] being flown by pilots from Russia, Ukraine or Latvia and both [were] using Russian technicians for their maintenance."[247] At the time, it was widely understood that the Russian, Ukrainian, or Latvian pilots, mechanics, or advisers were private military contractors,[248] rather than officials formally representing their respective governments.[249]

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238. *See* Ethiopia's *Jus Ad Bellum* Claims, Ethiopia-Eritrea Claims Commission para. 19 (Dec. 19, 2005) *available at* http://www.pca-cpa.org/upload/files/FINAL%20ET%20JAB.pdf.

239. *See* Agreement on Cessation of Hostilities Between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia, Eri.-Eth., June 18, 2000, 85 U.N.T.S. 2138.

240. *See, e.g.*, Xan Rice, *After 70,000 deaths, Eritrea and Ethiopia prepare for war again*, THE TIMES, Dec. 8, 2005, http://www.timesonline.co.uk/tol/news/world/article754553.ece (last visited June 19, 2007).

241. *See* Ethiopia's Prisoners of War Claim, Ethiopia – Eritrea Claims Commission para. 3 (July 1, 2003), *available at* http://www.pca-cpa.org/upload/files/ET04.pdf (last visited June 19, 2007).

242. *See* Emma Jane Kirby, *Ethiopia, Eritrea to free all PoWs*, BBC NEWS, Aug. 23, 2002, http://news.bbc.co.uk/2/hi/africa/2212159.stm (last visited June 19, 2007).

243. *See* Eritrea's Prisoners of War Claim, Ethiopia – Eritrea Claims Commission para. 3 (July 1, 2003), *available at* http://www.pca-cpa.org/upload/files/ER17.pdf (last visited June 19, 2007).

244. *Id.*

245. *Id.* at para. 1; Ethiopia's Prisoners of War Claim, Ethiopia – Eritrea Claims Commission para. 1 (July 1, 2003), *available at* http://www.pca-cpa.org/upload/files/ET04.pdf (last visited June 19, 2007).

246. *See* Patrick Gilkes, *World: Africa Analysis: Arms pour in for border war*, BBC NEWS, Mar. 2, 1999, http://newsvote.bbc.co.uk/1/hi/world/africa/280273.stm (last visited June 19, 2007).

247. *Id.*

248. *See, e.g.*, CORPORATE WARRIORS, *supra* note 23, at 11 ("In its war with Eritrea, Ethiopia leased a wing of jet fighters from Sukhoi firm, along with the pilots to fly them, the mechanics to maintain them, and the commanders to plan out their attacks.") (citing to numerous sources including: Charles Smith, *Wars and Rumors of War: Russian Mercenaries Flying for Ethiopia: Advisers, Pilots, Artillerymen Engaged in "Large-scale offensives' against Eritrea*, WORLD NET DAILY, (July 18, 2000), *available at* http://www.wnd.com/index.php?fa=PAGE.view&pageId=7158; Thomas Adams, *The New Mercenaries and the Privatization of Conflict*, PARAMETERS, 103-116 (Summer 1999) *available at* http://www.usamhi.army.mil/USAWC/Parameters/99summer/adams.htm; *Russians Fly for both Sides in Horn of Africa*, LONDON TIMES, (Feb. 19, 1999). Sukhoi is a private Russian company. For the company's profile and holdings philosophy, *see* Sukhoi, http://www.sukhoi.org/eng/company/ideology/ (last visited June 19, 2007).

249. Indeed, if they were official representatives of their respective governments, they would have

The involvement of the private contracts in the sale, delivery, and maintenance of the equipment as well as the training and advising away from the conflict zones would not have serious legal consequences. However, once the Sukhoi pilots started flying the aircraft in combat, the legal status becomes problematic. Although reports have indicated that the pilots were involved in actual combat, the truth of these allegations has never been officially recognized by the involved parties. Be that as it may, assuming for the sake of legal argument that the allegations were true, what would have been the legal status of a Sukhoi employee captured by Eritrea after being shot down while flying the Su-27 high-tech fighter jet in combat? Would he have been treated just like one of the 1,100 Ethiopian prisoners of war that Eritrea captured? Would there be a difference in status between a Sukhoi pilot flying an aircraft for Ethiopia, and a pilot belonging to the Ethiopian air force? The same questions could be asked about private contractors that might have flown the MiG-29 fighter jets that Eritrea used against Ethiopia.

The answer to all of these questions is clear. The Sukhoi or MiG-29 pilots would not be entitled to prisoner of war status and may be prosecuted by the detaining party for any death, injury, or damage that they might have caused while flying in combat even if the targets were legitimate military targets. IHL provides no combatant immunity for private contractors under these circumstances.[250] In fact, this is a classic example of an unambiguous unlawful combatant status of private military contractors in conventional inter-state armed conflict.

There are several examples of recent involvement of private military contractors in non-international armed conflicts. The following two instances are representative of a much wider role they have played particularly on the African continent.

In 1991, the government of the West African nation of Sierra Leone, a former British colony, found itself cornered by a violent rebellion.[251] The rebellion, led by a group called the Revolutionary United Front (RUF), brought about untold misery to the civilian population.[252] The movement used child soldiers and admittedly used unlawful means of warfare, including the deliberate targeting of civilians for rape and extermination.[253] A particularly horrific signature of the RUF was the malicious amputation of civilians' arms regardless of age and gender.[254] Within approximately four years, the RUF gained ground, controlled the economically vital diamond mines, and continued to perpetrate atrocious acts.[255] In 1995, the

a legitimate status provided that they respected the laws and customs of warfare. *See, e.g.*, Additional Protocol I, *supra* note 3, art. 47(2)(f) (excepting a person sent on official duty by the government of his home country from the definition of the term mercenary).

250. Additional Protocol I, *supra* note 3, art. 47(2)(f).

251. *See* CORPORATE WARRIORS, *supra* note 23, at 3.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

RUF began advancing towards the capital city, Freetown.[256] The government soldiers began fleeing in disarray and some even joined the RUF.[257] As the RUF closed in on the city, the civilian population was completely engulfed in horror. Foreign embassies and international organizations evacuated their personnel and their families, and the situation looked extremely gloomy.[258]

However, unexpectedly and inexplicably, an unknown and sophisticated elite force equipped with precision air and artillery weapons began pounding the positions of the RUF rebels.[259] Immediately followed by mechanized infantry units, this elite force drove the surprised rebels away from Freetown and the mine fields.[260] The once powerful rebel forces were obliterated. Within a short period of time, relative peace and security prevailed in Sierra Leone. It was followed by democratic elections and the prosecution of war criminals.[261] The elite ground forces and pilots that destroyed the rebels and made this possible wore no uniform, carried no insignia and flew no flags.[262] They were employees of a South African based private military company called Executive Outcomes.[263]

Although this might be an oversimplification of the character and resolution of the predicaments that Sierra Leone faced during its civil war and thereafter,[264] it is a good example of the nature of transactions that private military contractors are hired to perform. Because this is a purely combat function, the issue that needs to be considered in this case is whether the members of Executive Outcome were lawful combatants. Their performance was undoubtedly efficient and desirable. However, what was their status under IHL? Did they have lawful combatant status? The answer to this question is simply no because they meet each and every requirement of Additional Protocol I pertaining to mercenaries.[265] To reiterate the requirements discussed above, a mercenary is a person who meets the following requirements: special recruitment for armed conflict abroad, taking part in hostilities for pay in excess of what might be paid for a regular soldier, not a national of the party to the conflict, and not sent on official duty by the state of nationality.[266]

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256. *Id.* at 3-4.
257. *Id.*
258. *Id.*
259. *Id.* at 4.
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.*
264. Of course, the civil conflict in Sierra Leone involved several actors with different motives, and as such, the situation was not as simple as Singer's description would suggest. For proper documentation of the history of the civil war, see Sierra Leone Web, http://www.sierra-leone.org/history-conflict.html. For more information related to the civil war and the prosecution of RUF members and other accused of war crimes and crimes against humanity, see The Special Court for Sierra Leone, http://www.sc-sl.org/ABOUT/tabid/70/Default.aspx.
265. *See* Additional Protocol I, *supra* note 3, art. 47.
266. *Id.*

In this case, members of Executive Outcomes were specially recruited to fight in armed conflicts outside of South Africa, presumably for excessive pay.[267] They obviously were not sent by the South African government, which in fact disbanded them in 1999 following the passage of a law to that effect.[268] Despite the rosy picture that the descriptive paragraph above paints, the negative adverse role that mercenaries play in conflicts around the world is almost universally recognized. Mercenaries complicate matters more rather than help resolve them.[269] That is precisely why their activities remain illegal.

A scenario by which the legal status of a fighter affiliated with Executive Outcomes captured by RUF might seem meaningless as he would likely be shot instantly by his captors before the question even arises. However, the legal status of the captured individual would certainly affect the status of those RUF members who captured him when they have to answer to criminal charges. For example, it is not inconceivable that an RUF member who is on trial now before the Special Court for Sierra Leone might defend against charges of murdering a member of a private military contractor by saying that the killing was justified because the civilian contractor was an unlawful combatant. Of course, he would then be asked if the killing was performed pursuant to a death sentence after a proper trial as required by IHL. He may not have a good answer for that, but at least the crime may not be as severe as killing a prisoner of war.

The lawful status of combatants is never unimportant, particularly when there is some sort of post-conflict justice, because only a lawful combatant status justifies the killing of another human being. Obviously, the importance of legal status increases as the level of lawlessness decreases. The following example demonstrates an increased level of importance relating to another African civil war.

Just about the same time when Executive Outcomes was involved in the Sierra Leone conflict, Mobutu Sese Seko, the former ruler of the Democratic Republic of Congo (DRC), then called Zaire, sought assistance from private military contractors to salvage his authority which was being increasingly

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267. Executive Outcomes' involvement in several civil conflicts in Africa has been reported. *See* Military Intelligence, Professional Bulletin, http://www.fas.org/irp/agency/army/tradoc/usaic/mipb/1999-3/brooks.htm. It advertised its services as: "Military Training, advice and support services. Para-Military Services. Peacekeeping Services. Special Security Services." *See* Executive Outcomes, Mission & Services, http://web.archive.org/web/19981205202613 /www.eo.com/miserv/miserv2.html (last visited June 19, 2007).

268. Executive Outcomes was dissolved in January 1999 when South Africa enacted the Regulations of Foreign Military Assistance Act. *See* Regulation of Foreign Military Assistance Bill, Bill 54D-97 (GA), *available at* http://www.info.gov.za/view/DownloadFileAction?id=71747 [hereinafter Regulation of Foreign Military Assistance Bill].

269. *See, e.g.*, U.N. Comm. on Human Rights, The Right of Peoples to Self-Determination and its Application to Peoples under Colonial or Alien Domination or Foreign Occupation, Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impending the Exercise of the Rights of Peoples to Self-Determination, U.N. Doc. E/CN.4/1994/23 (Jan. 12, 1994) (providing that mercenaries "tend to increase the violent and cruel nature of specific aspects of the armed conflict in which they are involved").

threatened by rebellion.[270] Although Executive Outcomes and MPRI declined his request, as they considered his situation hopeless, another firm known as Geolink got involved in the conflict to assist him.[271]

The leader of the rebellion, Laurent Kabila, finally took over government power, reportedly with some assistance from another private company.[272] When Kabila was in turn threatened by a coalition of forces, which included the national militaries of Uganda, Rwanda, and Zimbabwe, he hired Executive Outcomes for military support.[273] His adversaries also hired private military contractors including the South Africa based Stabilco and Avient for air combat support.[274]

This complex situation demonstrates a number of different scenarios. The situations that could have or might have happened include the following: the capture by Sese Seko forces of one or more of the private personnel aiding Kabila; the capture by national armed forces of the DRC (after Kabila's take over) of Stabilco or Avient personnel fighting on behalf of Uganda, Rwanda, or Zimbabwe; and finally the capture by the national armed forces of any one of the three nations of Executive Outcomes' personnel fighting for Kabila. In all of the above examples, the captors would be sovereign governments with national armed forces who could, if they choose, put the captured on trial for unlawful combatancy. Additionally, in all of these examples, almost invariably, the private military contractors qualify as mercenaries under the narrow definition of article 47 of Protocol I discussed at length above.

In conclusion, it appears that the provision of combat services by private military contractors is almost always illegal. As such, it would put involved personnel at risk of being prosecuted for their participation as well as any injury, death, or damage they might cause, regardless of the legitimacy of the military objectives.

C. Responsibility

The preceding subsections of this part attempted to put the various activities of private military contractors in a legal continuum. The continuum shows that while some activities are perfectly legitimate, others are either ambiguous or outright illegitimate. The discussion in these subsections was limited to the identification of the possibility of prosecution for the illegitimate activities whenever the actors fall into the hands of the governments or other entities against which they fight. The following section looks at the status of private military contractors from the perspective of the states that host, employ, and deploy them.

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270. *See* CORPORATE WARRIORS, *supra* note 23, at 10.

271. *Id.* Singer notes that this company might have been a cover for the French intelligence rather than an independent private firm, citing O'Brien, *Military Advisory Groups and African Security* (does not provide citation). This would, of course, change the entire status analysis pertaining only to this particular entity because if there is government involvement, the status of the personnel involved would be different.

272. *Id.*

273. *Id.* at 11.

274. *Id.*

It also examines the responsibilities of these states under international law, and sets the stage for the concluding analysis.

1. Private Military Contractors' Accountability

Two general forms of accountability could be envisaged: individual criminal responsibility and company civil liability. Both of these options are briefly discussed in turn.

a. Individual Criminal Responsibility

Holding members of private military contractors criminally responsible in the states that host them, and employ their services could be very problematic. A practical example that can demonstrate the difficulty with this regard is the widely publicized Abu Ghraib situation.[275]

Private military contractors were involved in the abuses along with uniformed U.S. military personnel.[276] The abuses clearly constituted criminal acts. While several military personnel involved in the abuses were prosecuted, convicted, and sentenced to up to ten years in prison,[277] no criminal prosecution was made against the civilian contractors who were equally responsible for the crimes.[278] That is primarily because of the very difficult nature of the status of the private actors under conflict situations.[279] The forum to hold them responsible is simply not easily available. Understandably, the military personnel were held accountable before courts-martial. The jurisdiction of the courts-martial did not, however, extend to the trial of private individuals accompanying the armed forces in this case.[280] The reason for this is complex, and this article does not attempt to provide a detailed analysis of the jurisprudence in that area.[281]

However, it is important to briefly point out that the U.S. has an elaborate statutory framework for the prosecution in U.S. federal courts of private contractors who commit criminal conduct abroad.[282] The most notable statutes are

275. For a comprehensive discussion of the Abu Ghraib situation, *see generally* Major General Antonio Taguba, Article 15-6 Investigation of the 800th Military Police Brigade (2004) *available at* http://www.au.af.mil/au/awc/awcgate/awc-law.htm#abu_ghraib (last visited June 20, 2007).

276. *See also* Joel Brinkley & James Glanz, *Contractors in Sensitive Roles, Unchecked,* N.Y. TIMES, May 7, 2004, at A15.

277. *See* MSNBC, *England Sentenced to 3 Years,* Sept. 28, 2005, *available at* http://www.msnbc.msn.com/id/9492624/ (last visited June 20, 2007). *See also* CNN, *Sentencing Phase Begins in Abu Ghraib,* May 3, 2005, *available at* http://www.cnn.com/2005/LAW/05/02/ england.plea/index.html (last visited June 20, 2007); *see also* Eric Schmitt, *Iraq Abuse Trial Is Again Limited to Lower Ranks,* N.Y. TIMES, Mar. 23 2006, at A1 (quoting a military spokesperson as saying a total of 251 military personnel had received varying levels of punishment for prisoner abuse); *see also* Josh White, *Conflicting Portraits of Officer Charged Over Abu Ghraib,* WASH. POST, July 31, 2007, at A03.

278. *See* P.W. Singer, *Outsourcing War,* FOREIGN AFFAIRS, Mar.-Apr. 2005, at 127, *cited in* Peters, *supra* note 29, at 367. Since then, some contractors were prosecuted for contract fraud, which had nothing to do with the abuses. *See id.* at n.1.

279. *See id.* at 126-127 (discussing legal dilemmas).

280. Uniform Code of Military Justice, § 802, art. 2.

281. For a thorough discussion of the jurisdictional issue, *see generally* Peters, *supra* note 29.

282. Jennifer K. Elsea, *Private Security Contractors in Iraq and Afghanistan: Legal Issues,* CONGRESSIONAL RESEARCH SERVICE FOR CONGRESS, Jan. 7, 2010.

the Military Extraterritorial Jurisdiction Act (MFJA),[283] the Special Maritime and Territorial Jurisdiction Act (SMTJ),[284] and the War Crimes Act (WCA).[285] Therefore, individual criminal responsibility, at least from the perspective of the U.S., could theoretically be pursued in regular federal courts if desired.[286] Federal courts do not seem to be convenient forums for practical reasons unrelated to the issue of jurisdiction.[287] What would have been the most appropriate and convenient forum, one that has tried the cases of the uniformed personnel, the military court system, is simply not available for cases involving civilian contractors in the absence of a declared war.[288] This is another important reason for the proper definition of their status under IHL and the regulation of their conduct under the domestic laws of the states that host them and employ their services.

b. Company Civil Liability

Civil liability is perhaps more complicated than holding wrongdoers criminally responsible. In the U.S., there are limited avenues that victims may explore. One of the possibilities is a civil suit under the Alien Tort Claims Act ("ATCA").[289] ATCA grants federal courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[290] There are several seeming obstacles to prevailing in a civil suit against a private military contractor under the ATCA. Three major obstacles can easily be identified.

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283. Codified as amended at 18 U.S.C. § 3261-3267 (2000).

284. 18 U.S.C. § 7 (2000).

285. Codified as amended at 18 U.S.C. § 2441 (2000).

286. For example, the SMTJ gives federal courts jurisdiction for conducts that occur outside of the U.S. but in facilities run by the U.S. government. *See* 18 U.S.C. § 7 as amended by USA Patriot Act of 2001, Pub. L. No. 107-56, tit. VIII, § 894, 115 Stat. 272, 377 (2001).

287. For various reasons, including political, this option does not seem to have been considered seriously and pursued as it could have been. In fact, there was only one prosecution related to prisoner abuse by civilian contractors in Iraq or Afghanistan. *See* Jaime Jansen, *Federal Trial Begins for CIA Contractor Charged with Afghan Detainee Abuse*, JURIST LEGAL NEWS AND RESEARCH, Aug. 7, 2006, *available at* http://jurist.law.pitt.edu/paperchase/2006/08/federal-trial-begins-for-cia.php (last visited June 22, 2007). In an interesting departure from previous practice, five Blackwater Guards were charged with fourteen counts of manslaughter on December 8, 2008, for their roles in the Nisoor Square incidents that occurred on September 16, 2007, during which fourteen Iraqi civilians were killed. *See* Ginger Thompson & James Risen, *Plea by Blackwater Guard Helps Indict Others*, N.Y. TIMES, Dec. 8, 2008, *available at* http://www.nytimes.com/2008/12/09/washington/09blackwater.html. This case is likely to raise serious jurisdictional controversy.

288. *See* United States v. Averette, 19 U.S.C.M.A. 363 (1970) (cert. denied.) In *Averette*, the United States Court of Military Appeals held that the term "in times of war" in the Uniform Code of Military Justice, 10 U.S.C §. 802(a)(10), limits the federal courts' jurisdiction to conduct occurring in declared wars. *See id.* at 365. *See also* Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 248 (1960) (holding that military jurisdiction did not extend to civilian dependents of military personnel in peace time); *see also* Reid v. Covert, 354 U.S. 1, 40-41 (1957) (holding that civilians in times of peace may not be tried by courts-martial).

289. Also called the Alien Tort Statute (ATS) 28 U.S.C. § 1350 (2000).

290. *Id.*

The first obstacle is of course overcoming the Supreme Court's strict interpretation of the substantive limits of the ATCA in *Sosa v. Alvarez-Machain*.[291] In *Sosa*, the Supreme Court, while recognizing that the ATCA is a jurisdictional statue, raised the standard for the severity of the injury that must be alleged as a violation of "the law of nations."[292] The Court held that the nature of the violation must be such that it is universally recognized as seriously injurious.[293] To demonstrate the level of seriousness, the Court borrowed language from several courts of appeals. For example, it quoted the Court of Appeals for the D.C. Circuit for the proposition that section 1350 of the ATCA applies when the violations must be "a handful of heinous actions – each of which violates definable, universal and obligatory norms."[294] It also relied on the holding of the Court of Appeals for the Second Circuit, which said that "[f]or purposes of civil liability, the torturer has become – like the pirate and slave trader before him – hostis humani generis, an enemy of all mankind."[295] Given the strict limitation of the ATCA to hostis humani generis, any private action against private military contractors would recognizably be very difficult. There are a few pending cases brought by victims of Abu Ghraib abuses against involved private military companies under the ATCA.[296] Given the current debate about the meaning of torture, it remains to be seen in the few cases that are now pending, whether the courts will hold that the abuses met the standards that the Supreme Court set in *Sosa*.

The second obstacle is establishing a government connection. International obligations are often defined in terms of government accountability. For example, under the Convention Against Torture,[297] acts of torture may only give rise to liability if they are committed by a public official or at the acquiescence of a public official.[298] Consequently, to prevail under ATCA, the claimant must establish that the law of nations has been violated, and prove that there was a nexus between the injury and government conduct.[299]

Wherever private military contractors are involved, establishing a government nexus could be very difficult. For example, would private contractors hired by the Iraqi Coalition Provisional Authority (CPA) be considered to have been hired by the U.S. government or an Iraqi government? Or was the CPA a government at all? If the CPA is not a government, it would mean that there is no civil liability for private military contractors under the circumstances.

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291. Alvarez v. Sosa, 504 U.S. 655 (1992).

292. *See id.* at 735.

293. *Id.*

294. *Id.* (quoting Tel-oren v. Libya Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984)).

295. *Id.* (quoting Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980)).

296. *See, e.g.*, Ibrahim v. Titan Corp., 391 F. Supp. 2d 10 (D.D.C. 2005); Saleh v. Titan Corp., 436 F. Supp. 2d 55 (D.D.C. 2006).

297. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984). *See also* Foreign Affairs and Restructuring Act of 1998, P.L. 105-277.

298. G.A. Res. 39/46, *supra* note 297, art. 1.

299. 28 U.S.C. § 1350 ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

These arguments are not hypothetical. For example, in a case against private contractor Custer Battles LLC for fraud under the False Claims Act, a U.S. federal judge set aside a jury verdict holding the company responsible for $10 million precisely because of the ambiguous nature of the status of the CPA during the initial years of the Iraqi invasion.[300] The only issue in this case was the status of the CPA as a government entity and its relations with the U.S.[301] The government argued that fraudulent bills presented to the CPA could be considered to have been presented to the government of the United States because the CPA was created and financed by the United States to run Iraq and staffed by American personnel.[302] However, despite this, the court held that the CPA was an international entity with an ambiguous status but may not be considered a part of the United States government.[303] As such, the fraudulent documents submitted to the CPA cannot be considered to have been submitted to the United States.[304] That meant that the private contractor was not held responsible for the fraudulent behavior despite a jury verdict determining the existence of fraudulent activities.[305] Because this was the first test case, the ruling obviously rendered the dozens of others that were ready to be filed[306] void *ab inito,* at least from the point of view of this particular basis of jurisdiction.

Another example that demonstrates the obstacles that the private-government distinction might create is the D.C. Circuit's June 2006 preliminary decision in *Saleh v. Titan Corp.*[307] In *Saleh*, several Iraqi nationals brought an action under the ATCA against the Titan Corporation, a private military contractor which provided interrogation and translation services in Iraq.[308] They alleged that Titan's personnel abused the claimants in violation of the law of nations.[309] The court essentially held that the claimants did not sufficiently demonstrate the required degree of nexus between the private actors and the government.[310] In other words, they did not show that they were operating under official capacity or under the color of law.[311] Ironically, throughout history, it is in these types of ambiguous

300. *See* Jeannie Shawl, *Federal Judge Sets Aside Verdict In Iraq Contract Fraud Case,* JURIST LEGAL NEWS AND RESEARCH, Aug. 20, 2006, *available at* http://jurist.law.pitt.edu/paperchase/2006/08/federal-judge-sets-aside-verdict-in.php [hereinafter Shawl].

301. *Id.*

302. Shawl, *supra* note 300; *see also* Erik Eckholm, *U.S. Judge Sets Aside Verdict of Corporate Fraud in Iraq on Technical Grounds,* N.Y. TIMES, Aug. 19, 2006, *available at* http://www.nytimes.com/2006/08/19/world/africa/19iht-web.0819reconstruct.2536456.html?_r=1 [hereinafter Eckholm].

303. Eckholm, *supra* note 302.

304. *Id.*

305. *See id.*

306. *Id.* (reporting that there were dozens of others that were ready to be filed at the time this case was decided).

307. Saleh v. Titan Corp., 436 F. Supp. 2d 55 (2006).

308. *Id.* at 56-57.

309. *See id.*

310. *Id.* at 57.

311. *Id.* at 57-58. (In so holding, the court emphasized that in *Sosa*, the Supreme Court clearly held that lower "federal courts should be extremely cautious about discovering new offenses among the law of nations. . . .") *Id.* at 57-58.

situations that the services of the private military contractors are needed the most.[312] That is an additional reason why their legal status must be properly defined and their conduct properly regulated.

The third obstacle to the success of civil suits against private military companies is the government contractor defense. The government contractor defense was initially endorsed by the Supreme Court in *Boyle v. United Techs. Corp.*[313] The doctrine essentially extends sovereign immunity to private actors performing services under a government contract.[314] That would evidently create a gap in accountability. A good demonstration of this is the Abu Ghraib situation, where the private military contractors were involved under a government contract.[315] They have essentially escaped any kind of criminal accountability[316] for which their military counterparts were punished. This might also invoke sovereign immunity to avoid civil liability under the Boyle government contractor doctrine.[317] That would be a win-win situation for private actors.

2. State Responsibility

We now know that sixteen of the forty-four incidents at Abu Ghraib were committed by private contractors.[318] If Iraq were to seek redress under international law, would the United States be responsible for all of the incidents or just the twenty-eight incidents that its own military personnel committed? The answer to this question is not straightforward because some of the same private-government nexus issues discussed in the above subsection arise in almost an identical way. However, this subsection suggests that state responsibility could be established more easily than the private-government nexus in the domestic law context.

The International Law Commission's (ILC) *Draft Articles on Responsibility of States for Internationally Wrongful Acts* provides the following general principle: "Every internationally wrongful act of a State entails the international responsibility of that state."[319] According to the ILC, two important elements must

312. *See, e.g.*, CORPORATE WARRIORS, *supra* note 23, at 39 ("Private actors, such as free companies, contracted units, military entrepreneurs, and charter companies played key roles in state-building and often served government interests. These organizations also had the tendency to become powers unto themselves, however, and often grew superior in power to local political institutions, particularly in areas of weak governance.").

313. Boyle v. United Techs. Corp., 487 U.S. 500, 514 (1988).

314. *See id.* at 12; *see also* 28 U.S.C. § 1346(b) (1997).

315. P.W. Singer, *The Contract the Military Needs to Break*, WASH. POST, Sept. 12, 2004, at B03 [hereinafter The Contract the Military Needs to Break].

316. *Id.*

317. Professor Laura Dickinson suggests that because Boyle was a products liability case, in which the contractor followed government specifications relating to design, it could be argued that the doctrine does not extend to the provision of services where such instructions do not exist. Government for Hire, *supra* note 29, at 189. It could also be argued, however, that civilian contractors performing services pursuant to government instructions would also enjoy sovereign immunity. Pending litigation would resolve some of these issues. *See, e.g.*, Saleh v. Titan Corp., 436 F. Supp. 2d 55 (D.D.C 2006).

318. The Contract the Military Needs to Break, *supra* note 315.

319. International Law Commission, Draft Articles on Responsibility of States for Internationally

be met cumulatively: a breach of international law and attribution to the state.[320] The existence or non-existence of both elements is determined by international law.[321]

The most relevant part of the two-part equation is the attribution requirement. The question that needs to be answered is thus, when does the conduct of private military contractors bind the state that employs their services? According to the ILC, the general principle is that the state would be responsible for the actions of its own organs, which includes all three branches of government and their political subdivisions.[322] This principle is simple. To go back to the Abu Ghraib example, the United States would be held responsible for the conduct of its military personnel under this general principle. The ILC articles also make it clear that States may be held responsible for the conduct of private actors if the following requirements are met:

> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.[323]

The most important element here seems to be the empowerment of a private or para-statal entity to perform an inherently governmental function. In his commentary on this particular provision, Professor James Crawford offers the following example: "[i]n some countries private security firms may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations."[324] Providing security services in prisons administered by a state outside of the territory would not change the equation.

Wrongful Acts, U.N. GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10, art. 1 (2001) [hereinafter ILC]. *Reprinted* with commentary *in* JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY 61 (2002) [hereinafter CRAWFORD]. "Text adopted by the Commission at is fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission, 2001*, vol. II (Part Two). Text reproduced as it appears in the General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4." Responsibility of States for Internationally Wrongful Acts, U.N. GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), *available at* http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf.

320. ILC, *supra* note 319, art. 2.

321. *Id.* art. 3.

322. *Id.* art. 4

> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

323. *Id.* art. 5.

324. *See* CRAWFORD, *supra* note 319, at 100.

The one argument that may be raised is that the private military firms perform their activities as a matter of contractual obligation, not as a matter of authorization by law.[325] Professor Crawford's commentary suggests that the authorization by law is essential because the private entities bind their states as they are more or less partial government entities themselves. He notes that the primary purpose for the inclusion of these entities is because of the "increasing phenomenon of para-statal entities, which exercise elements of governmental authority in place of state organs."[326]

Although state responsibility for contract based private actions may raise these kinds of issues, article 8 of the ILC draft provides a clear rule filling the gaps left by the provisions discussed above. It states: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[327] As long as "the existence of a real link between the person or group performing the act and the State machinery" is established, the State would be held liable.[328] A contractual relationship between the state and the private entity would obviously establish this link because it would amount to express authorization or ratification.[329]

Nonetheless, a state in whose name violations have been committed by private contractors would obviously argue that the authority it had given was exceeded. However, under the ILC articles of state responsibility, the fact that the private entity exceeded the lawful authority does not exonerate the state.[330] Article 7 of the ILC articles provides that: "The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."[331] This is a self explanatory provision, but again, there is nothing that would prevent the state from holding the private contractor responsible for its excesses and obtain indemnification for any damages that the state may incur as a result of the private contractor's excesses.

It can safely be concluded, therefore, that the conduct of private military contractors could potentially expose the state that employs their services to

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325. The civilian almost always gets involved pursuant to contractual arrangements. *See generally* Dickinson, *Torture and Contract*, *supra* note 208.

326. CRAWFORD, *supra* note 319, at 100.

327. ILC, *supra* note 319, art. 8.

328. CRAWFORD, *supra* note 319, at 110.

329. *See* IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS, STATE RESPONSIBILITY, VOL. I, 160-161:

> In certain cases of special need the authorities of a state may supplement their own actions by authorizing operations by private persons or groups designed as 'auxiliaries' or 'militia'. Such persons are not 'regular' or 'formal' elements in the state apparatus but they do in fact act on behalf of the state conferring authority.

330. ILC, *supra* note 319, art. 7.

331. *Id.*

international legal responsibility. Accordingly, that is another important reason for understanding their status and carefully regulating their conduct.

D. Drawing the Line: What may they do, and what must they not do?

As indicated above, not all activities of private military contractors can easily be classified as legal or illegal. Most of the private military contractors perform legitimate activities most of the time. As such, in times of war their legal status fits nicely into the non-combatant designation of IHL. The serious challenge is, however, to circumscribe the scope of their activities within the legal limits. Although private military contractors share some fundamental similarities, it cannot be concluded that they have a unitary status under IHL. In other words, their status depends on the activities they perform at a given time and place.

The most important question that needs to be answered here is thus, where must the line be drawn? Private military contractors that meet the requirements of mercenaries are clearly banned. The problem with that is the extremely narrow definition of Protocol I article 47.[332] As indicated above, the United Nations Mercenary Convention has broadened the definition by eliminating the requirement of taking direct part in hostilities.[333] According to this Convention, therefore, private military contractors may be considered mercenaries if they recruit personnel for combat and pay them in excess of what a regular soldier would be paid under the same circumstances.[334] This responsibility of the firms attaches because the Convention holds not only the recruited foot-soldiers but also the recruiters and financiers responsible for the same offenses.[335] However, perhaps because of the revisions in the definition of mercenary, this Convention has not been ratified widely.[336] That would mean that in states that did not ratify this Convention, accountability may not attach until actual participation in hostilities resumes. Aside from the ambiguity that results from the application of the two alternative definitions of mercenary, it could safely be concluded that engaging in combat, for pay, in a foreign land, without being a uniformed member of the armed forces of a party to the conflict, remains prohibited. So, there is a clear line.

Moving forward with the continuum, the next stage is the involvement of private military contractors in support services without actually taking part in actual combat. The standard set forth under IHL is that a civilian accompanying the armed forces of a party to the conflict may not take direct part in hostilities[337] or use the civilian status to cause harm to the enemy.[338] These are difficult

332. Additional Protocol I, *supra* note 3, art. 47.

333. *See* International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries, *supra* note 184, art. 1.

334. *Id.*

335. *Id.* at art. 2. ("Any person who recruits, uses, finances or trains mercenaries, as defined in article 1 of the present Convention, commits an offence for the purposes of the Convention").

336. *See* U.N. Treaty Collection, Depositary Notifications (CNs) by the Secretary-General, http://treaties.un.org/Pages/CNs. Aspx (last visited June 25, 2007).

337. *See* Additional Protocol I, *supra* note 3, art. 51(3).

338. *Id.* at art. 13. As indicated above, this standard is extracted from the rules that govern medical

concepts to define, but unfortunately, under the existing IHL, that is where the line must be drawn. Nonetheless, this line is extremely important because it offers a solid foundation for further regulation.[339]

E. Going Forward: Conduct-based Time, Place, and Manner Regulation

The discussion so far has made one important matter clear: the status of private military contractors under IHL depends on what they perform at a given time and place and how they perform the activities. The legal literature and international and domestic legislative initiatives presented thus far, by and large, focus on ways of holding them directly accountable for illegitimate activities they had already performed, or on the ways of regulating the whole private military industry as a single unit through international mechanisms. Although both approaches offer plausible alternatives, they clearly ignore the guidance that already existing norms of IHL provide for future regulation. Precisely because of that, they either treat the industry as a holistic unit or emphasize individual accountability for wrongdoing after its occurrence. These shortcomings would inevitably make the proposals incomplete. Some examples of these approaches are briefly discussed below.

One common proposal is extending courts-martial jurisdiction to private military contractors who engage in misconduct.[340] This is a good proposal; however, it does not resolve the underlying problem of unlawful combatancy, because one may only be brought before courts-martial for a crime that had already been committed. That would mean that there would be no penalty for crossing the line drawn by IHL, for example, taking direct part in hostilities until such time that a crime is committed. In other words, there would be no grounds to court-martial a private military contractor who transports ammunition in a combat zone, even if that conduct may be interpreted as taking direct part in hostilities under IHL. Although the mere transportation of the ammunition may be prosecuted as aiding and abetting the enemy while enjoying a civilian status, serious illegality would ensue if the truck is attacked and the driver kills enemy soldiers and gets captured.[341] A mere participation or even the killing of an enemy soldier is not a conduct that would be prosecuted before the courts-martial of the employing state unless a war crime had been committed. As such, the courts-martial proposal for

units. Although the provision is exclusively dedicated to the regulation of medical units, it is evident that the principle has a broader meaning, particularly when read together with the other provisions of the Protocol dealing with the protection of civilians in armed conflict. *See id.* at art. 67.

339. The ICRC's 2009 interpretive guide on the notion of direct participation in hostilities could be a very useful tool in determining the nature of activities that would cross the line for this purpose. *See* INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/$File/direct-participation-guidance-2009-icrc.pdf.

340. A notable proponent of this proposal is professor Wm. C. Peters of the United States Military Academy, West Point. *See* Peters, *supra* note 29.

341. And, of course, the driver would raise the issue of self-defense but the very fact that he took direct part in hostilities by transporting weaponry may override the defense. This is, however, a matter for the enemy's adjudication of the details of the case.

private military contractors is limited to holding wrongdoers responsible from the point of view of the employer state after recognizable crimes had been committed. It is an important tool but it does not address the greater need for proper regulation of the conduct of private military contractors with a view to ensuring compliance with international humanitarian norms.

The other notable domestic proposal is a contracts-based proposal.[342] Under this proposal, the contract that the private military contractors sign could be used as a tool to regulate their conduct. This is a very good proposal. However, this proposal presents four problems. First, the nature of contracts will always depend on the circumstances, particularly the negotiating powers of the parties at a given time and place.[343] Secondly, because the contracts approach is inherently ad hoc, it cannot possibly bring uniformity and order to the private military industry. Thirdly, since it is not a legal requirement, the contracts will always remain open for re-negotiation. Fourthly, such contracts are almost always confidential and shielded from public scrutiny. That would mean that the industry would be governed by unknown sets of contractual terms.

The second set of proposals envisions regulations of an international nature. For example, Judge Advocate Todd Milliard proposes an international convention establishing a regime of accountability and licensing.[344] Similarly, Dr. Singer argues that given the industry's ability to globalize and avoid domestic accountability, a successful regulation must be international in nature.[345] He recognizes that banning the provision of military services altogether is not realistic given today's supply and demand environment.[346] He then proposes an international mechanism of registration, licensing, and auditing under the United Nations Secretary General's Special Rapporteur on Mercenarism.[347] He also proposes that this mechanism be supported by international experts on issues of regulation, evaluation, and codes of conduct.[348] According to him, this will help transform the industry into a sanctioned international business industry.[349]

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342. The proponent of this approach is Professor Laura Dickinson of the University of Connecticut. *See Public Law Values in a Privatized World, supra* note 26, at 401 (advocating a contract-based approach); *see also Government for Hire, supra* note 29, at 199; *see also Torture and Contract, supra* note 208, at 273-74.

343. For example, if the government is badly in need of extinguishing a fire at a military base in Kuwait within 24 hours and the only company that can do the job is KBR, the company may strike a deal for additional future contracts in combat zones in Iraq as a condition of accepting the Kuwait project. And if the Iraq project is awarded in exchange for the badly needed Kuwait project, the company may risk being considered as having taken direct part in hostilities depending on what was set ablaze in the Iraqi conflict zone. That would potentially expose KBR personnel to unlawful combatant status. This is, of course, assuming that the adversary itself is a lawful combatant.

344. Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies,* 176 MIL. L. REV. 1, 79-84 (2003) (recognizing the importance of domestic regulation).

345. *See War, Profits, and the Vacuum of Law, supra* note 24, at 544.

346. *Id.*

347. *Id.* at 545.

348. *Id.*

349. *Id.* at 545-46.

There have also been legislative initiatives. Two notable examples are the 2002 United Kingdom Green Paper prepared by the order of the House of Commons entitled Private Military Companies Options for Regulations,[350] and the 1998 South African Regulation of Foreign Military Assistance Act.[351] These two initiatives are discussed in turn below.

The U.K. Green Paper contains a somewhat thorough analysis of the private military industry and proposes options for the domestic regulation of the industry.[352] The basic proposal assesses the pros and cons of each option. The options include banning military activities abroad altogether,[353] and also banning recruitment for military activities abroad.[354] Alternatively, it would establish a licensing regime for military services, which includes registration and notification requirements.[355] The final and additional option contained in the Green Paper is self-regulation in the form of voluntary codes of conduct.[356] The proposal was written with the following fundamental assumption in mind:

> The distinction between combat and non-combat operations is often artificial. The people who fly soldiers and equipment to the battlefield are as much a part of the military operation as those who do the shooting. At one remove the same applies to those who help with maintenance, training, intelligence, planning and organization – each of these can make a vital contribution to the war fighting capability.[357]

Although this is completely true, the problem with this premise is that it does not seem to have been properly informed by the standards set forth under the existing norms of IHL. As discussed in several sections above, IHL actually makes a distinction between those who fly the aircraft with the authorization to shoot, and civilian crew members of military aircraft who are not authorized to shoot.[358] Unlike the assumption made above, their status and treatment is actually distinct. It is only if the civilian members take direct part in hostilities that their

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350. BRITISH FOREIGN AND COMMONWEALTH OFFICE, PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION (2002), *available at* http://www.fco.gov.uk/resources/en/pdf/pdf4/fco_pdf_private militarycompanies [hereinafter BRITISH FOREIGN AND COMMONWEALTH OFFICE]. The Green Paper was prepared by the order of the House of Commons, however, proposals forwarded were not considered by the House as of the writing of this article. FOREIGN AND COMMONWEALTH OFFICE, PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION, 2002, H.C. 577.

351. Regulation of Foreign Military Assistance Bill, *supra* note 268. South Africa is at the forefront of this regulation primarily because of its history. Some of the prominent military contractors that operated in Africa, and elsewhere, in the post-colonial period had their origins in the apartheid regime. For example, some executives of these firms occupied prominent positions in the Special Forces of the apartheid regime. Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT'L L. 75, 93-97 (1998).

352. *See* BRITISH FOREIGN AND COMMONWEALTH OFFICE, *supra* note 350.

353. *Id.* at 22.

354. *Id.* at 23.

355. *Id.* at 24-25.

356. *Id.* at 26.

357. *Id.* at 8.

358. *See* Geneva Convention III, *supra* note 3, art. 4(A)(4).

civilian status ceases.[359] The proposal uses the term "vital contribution"[360] which is not a legally significant phrase as far as IHL is concerned. The proper standard is "taking direct part in hostilities."[361] The use of different terminology in itself may not be a serious problem but it demonstrates the lack of reliance on the most appropriate and most relevant body of law.

The Green Paper could have been properly informed by the standards set under IHL but it was not. As such, it suffers from that shortcoming. But more importantly, just like all the other proposals discussed above, the theoretical foundation of the proposals is based on the desire to regulate the industry as a holistic unit as opposed to looking at the issue in terms of what conduct may or may not be performed by whom and when. A reliance on the standards set forth by international humanitarian law would have suggested such an approach.

South Africa's approach is more or less the same as the proposed U.K. Green Paper approach, for example, licensing and monitoring of South African private military service providers.[362] The Act does not, however, make it abundantly clear that South African private military contractors cannot take direct part in hostilities no matter what the excuses may be.[363] To be fair, the Act provides that mercenaries are banned,[364] and that the Ministry of Defense of South Africa may not grant the request for a license if it "would be in conflict with the Republic's obligations in terms of international law."[365] However, it appears that firms may

359. Additional Protocol I, *supra* note 3, art. 51(3)

360. BRITISH FOREIGN AND COMMONWEALTH OFFICE, *supra* note 350, at 8.

361. Additional Protocol I, *supra* note 3, art. 51(3).

362. Regulation of Foreign Military Assistance Bill, *supra* note 268, at Preamble.

363. *See id.* at art. 1(iii): "foreign military assistance'' means military services or military-related services, or any attempt, encouragement, incitement or solicitation to render such services, in the form of—

> *(a)* military assistance to a party to the armed conflict by means of—
> (i) advice or training;
> (ii) personnel, financial, logistical, intelligence or operational support;
> (iii) personnel recruitment;
> (iv) medical or para-medical services; or
> (v) procurement of equipment;
> *(b)* security services for the protection of individuals involved in armed conflict or their property;
> *(c)* any action aimed at overthrowing a government or undermining the constitutional order, sovereignty or territorial integrity of a state;
> *(d)* any other action that has the result of furthering the military interests of a party to the armed conflict.

364. *Id.* at art. 2. The Act defines mercenary activity as "direct participation as a combatant in armed conflict for private gain." *Id.* at art. 1(iv). It is important to note that "private gain" is a requirement that could easily be masked with allegations of protection of public order or democratic institutions or government. It is also important to note that the requirement of "direct participation" is at odds with the definition of the U.N. Convention Against Mercenaries. *See* UN Convention Against Mercenaries, *supra* note 184, art. 1.

365. Regulation of Foreign Military Assistance Bill, *supra* note 268, art. 7(1)(a). It is important to note here that the manner in which the criteria is stated suggests that combat operations are not outlawed or excluded in their entirety, but somehow regulated through licensing procedures. It is also important to note that South Africa is not a signatory to the O.A.U. Convention for the Elimination of

operate under a lawful license to "do any action that has the result of furthering the military interest of a party to the armed conflict."[366] The fundamental flaw is thus, just like the approaches discussed above, the theoretical foundation is not the standards set by IHL. It also attempts to regulate the industry as a holistic unit. Apparently, the Ministry would issue the license based on paperwork filed according to the requirements. The criteria set forth under article 7(1) are not only very general but also make no reference to IHL in particular,[367] which is the most pertinent body of law that must have guided the drafting of the Act.

All of the above discussed proposals, which fairly represent the proposals circulating today, have one remarkable characteristic in common – they attempt to regulate the private military industry as one holistic unit and ignore the valuable guidance offered by IHL. This article proposes a different approach, a time, place, and manner regulation based on the standards provided by IHL. More particularly, it suggests that instead of attempting to regulate the industry as a whole, which is extremely diverse and in everyone's 401(k) portfolio (to use Dr. Singer's words),[368] compliance could reasonably be attained if the time, place, and manner of their operations are regulated based on the standards already provided by IHL. The application and use of these standards, which are discussed at length in the

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Mercenarism in Africa. *See* Int'l Comm. of the Red Cross, *Convention of the OAU for the Elimination of Mercenarism in Africa*, http://www.icrc.org/IHL.NSF/WebSign?ReadForm&id=485&ps=S (last visited June 27, 2007). *See* Tiyanjana Maluwa, *South Africa and the African Union*, 2 INT'L ORG. L. REV 103, 117-22 (2005) (commenting on South Africa's lack of ratification).

> "Criteria for granting or refusal of authorizations and approvals
> 7. (1) An authorisation or approval in terms of sections 4 and 5 may not be granted if
> it would—
> *(a)* be in conflict with the Republic's obligations in terms of international law;
> *(b)* result in the infringement of human rights and fundamental freedoms in the territory in which the foreign military assistance is to be rendered;
> *(c)* endanger the peace by introducing destabilising military capabilities into the region where the assistance is to be, or is likely to be, rendered or would otherwise contribute to regional instability and would negatively influence the balance of power in such region;
> *(d)* support or encourage terrorism in any manner;
> *(e)* contribute to the escalation of regional conflicts;
> *(f)* prejudice the Republic's national or international interests;
> *(g)* be unacceptable for any other reason.
> (2) A person whose application for an authorisation or approval in terms of section 4
> or 5 has not been granted by the Minister may request the Minister to furnish written
> reasons for his or her decision.
> (3) The Minister shall furnish the reasons referred to in subsection (2) within a reasonable time." Regulation of Foreign Military Assistance Bill, *supra* note 268, art. 7(1)(a).

366. Regulation of Foreign Military Assistance Bill, *supra* note 268, art. 1(iii) (d). When read with articles 4 and 5, the meaning stated above is indicated.

367. *See id.* at art. 7(1).

368. *War, Profits and the Vacuum of Law*, *supra* note 24, at 522.

previous sections, render illegal certain conduct based on the place, time, and manner of their performance. A valid regulation would therefore follow this already existing guidance.

For instance, the two most important areas where the standards set by IHL, namely, taking direct part in hostilities or causing harm to the enemy, create some ambiguity are in services that involve transportation of military supplies and construction of bases. To take the Iraq situation as a demonstration of issues pertaining to transportation, under the standards of IHL discussed above, it would appear that while a private contractor may transport weapons and ammunition from Maryland to Qatar, it may not transport the same package across the Euphrates River to supply an Infantry Division stationed deep inside Iraq because the latter could reasonably be interpreted as taking direct part in hostilities.[369] Proceeding with the same assumptions (because at least theoretically this is true in most other conflicts), if a private military contractor is captured while transporting military equipment, that person would not be entitled to prisoner of war status and may be prosecuted for whatever conduct he or she had performed. If, however, the supply was food, water, and medicine instead of ammunition, IHL protects the driver as a civilian and he must be treated as a prisoner of war and returned unharmed at the conclusion of the hostilities.[370]

Construction is another area of ambiguity. Going back to the Yugoslavian example, while a private military contractor may build a refugee camp in Macedonia, it cannot lawfully build a military barricade in Srebrenica, which would clearly mean taking direct part in hostilities.

Therefore, to the extent some of the conduct they perform might be interpreted as direct participation in hostilities or causing harm to the enemy, in the interest of ensuring the legality of the activities of private military contractors, states that host them and employ their services must in their domestic laws define the line more clearly and prohibit conduct that would not only expose the firms to liability and the persons serving on the ground to danger but also lead to the host state's international responsibility. The easiest and most appropriate regulation would be a time, place, and manner regulation.

For instance, in the Yugoslavia example discussed above, it may be provided that while a private military contractor may transport supplies including military supplies from Maryland to Bonn, it may not fly the same supplies from Bonn to an airport near Belgrade, where there would be a high risk of becoming involved in an unauthorized conflict. So, instead of prohibiting the transportation of military equipment by private contractors altogether, the regulations may provide for a reasonable limit as to the time, place, and manner of the provision of the services. That would not only avoid situations whereby private personnel would be drawn or

369. DINSTEIN, *supra* note 7, at 27.

370. Although the Iraq situation is used as an example because of its current importance, it is important to note that the nature of the conflict is atypical. Thus, such assumptions need to be made. Of course, the examples make more sense in conventional inter-state conflicts, where both parties consider themselves bound by IHL.

forced into combat activity without lawful authorization, but would also spare the state using their services of international responsibility for violations of IHL. Similarly, reasonable time, place, and manner regulation should also work well for construction services, which is one of the most important services provided by private military contractors. In this respect, the regulation may provide that contractors may not perform construction activities within some miles of active hostilities until such time that the hostilities cease. The details of the regulations would obviously need to be looked into very carefully.

V. CONCLUSION

Private military contractors will continue to complicate the equation relating to international peace and security for the foreseeable future. As their re-emergence is a twenty-first century phenomenon, their status as a unitary entity is not directly defined by international humanitarian law whose marked development preceded the advent of the post-Cold War era proliferation of private military contractors. However, international humanitarian law defines the status of each and every person involved in and affected by warfare. When private military personnel perform war-related activities, whether in the form of the design of precision weaponry from an office in Bethesda, Maryland, or in the form of transporting ammunition in Kosovo, or chasing terrorists in Afghanistan, their status at each given moment and place is well defined under international humanitarian law. Therefore, what could be concluded about the status of private military contractors under international humanitarian law is that it depends on what they do and where, when, and how they do it. That is precisely why attempting to regulate the industry as a whole without seeking guidance from international humanitarian law is often a futile exercise.

This article has attempted to demonstrate the status of military contractors in a continuum. It highlighted not only the two extremes, the perfectly legal activities and clearly illegal activities, but also described the challenges involved in classifying certain activities, and attempted to show where the line must be drawn. As such, states that consider themselves bound by international humanitarian law should regulate the provision of military-related services by private parties using the standards set forth under international humanitarian law. The use of these standards would inevitably require a time, place, and manner regulatory regime.

THE UNPLEASANT RESPONSIBILITIES OF INTERNATIONAL HUMAN RIGHTS LAW

ARIEL ZEMACH*

The prevailing view in the legal literature on the fight against terrorism is that the current structure of international law–the law enforcement/armed conflict dichotomy–is ill-suited to address large-scale hostilities between a state and a terrorist organization. The law enforcement model is governed by international human rights law. The armed conflict model is primarily governed by the law of war. Human rights law, it is argued, allows states too little in their struggle against terrorist organizations while the law of war allows them too much.

Hence, many advocate the development of a new body of law, a normative middle ground between the law of war and human rights law, applicable to armed conflicts between a state and a terrorist entity. According to this approach, large-scale hostilities between a state and a terrorist organization are considered armed conflict. Yet the application of the law of war to such conflicts is qualified by the principles of international human rights law. The interaction between the law of war and human rights law produces a new, distinct set of norms. The permission to use lethal force afforded to a state under these norms is broader than the one afforded to it under human rights law yet narrower than the one available to the state under the law of war.

This article rejects the normative middle ground approach and defends the traditional law enforcement/armed conflict dichotomy. It advances a very high threshold for the existence of armed conflict, arguing that only hostilities that border on full-scale war amount to an armed conflict. Within the sphere of armed conflict, properly constructed, the law of war does not allow states too much. On the contrary, it offers the best bargain from a humanitarian perspective, and therefore its application should not be qualified.

This article further argues that grave, large-scale violence that falls short of a full-scale war is governed exclusively by human rights law. This argument is tenable provided that human rights law presents realistic standards of conduct for states in the face of such violence. The author argues that it does. The liberties to exercise lethal force required in order to contain grave, large-scale violence are, and should be, available to a state under human rights law. In the course of this inquiry, the author addresses two questions concerning the scope of permission to kill suspected terrorists afforded to a state under human rights law:

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1. When is the threat sufficiently proximate to justify the use of lethal force against the suspected terrorist?

2. Can a state engage in counter-terrorism operations that are likely to result in the unintentional killing of innocent persons?

I. INTRODUCTION

The prevailing view in the legal literature is that the current structure of international law–the law enforcement/armed conflict dichotomy–is ill-suited to address large-scale hostilities between a state and a terrorist organization.[1] The law enforcement model is governed by international human rights law.[2] This body of law, the argument goes, is simply not up to the task. The liberties to exercise lethal force required in order to contain grave, large-scale violence are not, and should not be, available to a state under human rights law.[3] Yet, it is argued, while human rights law allows states too little in their struggle against terrorist organizations, the law of war, which governs armed conflicts, allows them too much.[4] Indeed, the permission granted to a state to exercise lethal force is much broader under the law of war than it is under international human rights law. The main difference concerns the objects of permissible use of force. Human rights law allows the targeted killing of individuals only on the basis of their personal dangerousness.[5] By contrast, the law of war is governed by the principle of distinction between combatants and civilians,[6] which allows targeting combatants on the basis of their status as members of an armed force, regardless of whether their actions endanger the lives or interests of the other party to the conflict.[7] Moreover, the principle of proportionality in the law of war grants states a relatively broad permission to launch attacks that are likely to result in incidental killings of uninvolved civilians.[8] Under human rights law the permission to cause collateral damage is much narrower.[9]

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1. *See* David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT'L L. 171, 171, 174 (2005); Orna Ben-Naftali & Keren R. Michaeli, *'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings*, 36 CORNELL INT'L L.J. 233, 289 (2003).

2. Kretzmer, *supra* note 1, at 176.

3. Kretzmer, *supra* note 1, at 181, 201; Ben-Naftali & Michaeli, *supra* note 1, at 286.

4. *See* Marco Sassoli, *Use and Abuse of the Laws of War in the "War on Terrorism,"* 22 LAW & INEQ. 195, 195, 213 (2004); Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 719-20 (2004); Kretzmer, *supra* note 1, at 200.

5. Kretzmer, *supra* note 1, at 181-82.

6. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8) [hereinafter ICJ Advisory Opinion on Nuclear Weapons].

7. Kenneth Watkin, *Canada/United States Military Interoperability and Humanitarian Law Issues: Land Mines, Terrorism, Military Objectives and Targeted Killing*, 15 DUKE J. COMP. & INT'L L. 281, 310 (2005); Kretzmer, *supra* note 1, at 190-91.

8. David S. Koller, *The Moral Imperative: Toward a Human Rights-Based Law of War*, 46 HARV. INT'L L.J. 231, 236 (2005) ("The principle of proportionality permits the destruction of civilians

Warning against the application of the law of war to the conflict between the United States and al-Qaeda, Marco Sassoli thus observes that such application would have allowed the United States to kill the suspected terrorist Jose Padilla by an ambush attack "when he left his plane at a Chicago airport or at his grandmother's birthday party."[10] Hypothesizing potential aerial attacks against terrorists in the United States, Canada, or Germany, Sassoli concludes, "[t]his absurd result, permitting targeted assassinations in the midst of peaceful cities, proves once more that all those suspected to be 'terrorists' cannot be classified as combatants."[11]

There is also a formal obstacle to applying the law of war to the fight against terrorism. The application of the law of war depends on the existence of either an international armed conflict or a non-international armed conflict.[12] Yet large-scale hostilities between a state and a terrorist organization, which transcend the territory of the state involved–the recent conflict between Israel and Hamas in Gaza and the conflict between the United States and al-Qaeda represent such conflicts–do not fall neatly within the customary definitions of either an international or a non-international armed conflict. The conduct of parties to a non-international armed conflict is regulated under Common Article 3 of the Geneva Conventions,[13] as well as under the Second Additional Protocol to the Geneva Conventions[14] (Protocol II). The definitions of a non-international armed conflict contained in those treaties refer to a conflict occurring *within* the territory of a state party.[15] Some commentators thus argue that a conflict between a state and a non-state actor, which transcends the territory of the state party to the conflict, cannot be regarded as a non-international armed conflict.[16] Considering

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or civilian objects in attacks against a legitimate military objective."); COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 187 (Otto Triffterer ed., 1999) ("The fact that civilian casualties are caused during an attack does not, of itself, render the attack unlawful as proportional incidental casualties caused during an attack on a military objective are legally acceptable.").

9. Ben-Naftali & Michaeli, *supra* note 1, at 286 ("Human rights law cannot sustain actions that result in so high a death toll."). Regarding the scope of permission to engage in counter-terrorism operations that are likely to result in the unintentional killing of innocent individuals, see *infra* notes 174-188 and accompanying text.

10. Sassoli, *supra* note 4, at 213.

11. *Id.*; *see also* Brooks, *supra* note 4, at 719-20 ("[I]f the law of armed conflict is applicable even to actions taken by the United States on U.S. territory, there seems to be no legal bar to preemptive government killings of suspected al Qaeda operatives in the U.S. (including U.S. citizens) . . . . If such governmental . . . killings are permissible, this virtually eliminates the rule of law as we have come to know it.").

12. Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 67 (Oct. 2, 1995).

13. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

14. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art 1, ¶ 1, *adopted* June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

15. Fourth Geneva Convention, *supra* note 13, art. 3; Protocol II, *supra* note 14, art. 1, ¶ 1.

16. *See* Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal*

such conflict an international armed conflict is also problematic since, according to the prevailing definition of an international armed conflict, such conflict is waged between two or more states.[17]

The bulk of authority nevertheless favors the view that large-scale hostilities between a state and a terrorist organization should be considered armed conflict.[18]

Construction of War, 43 COLUM. J. TRANSNAT'L L. 1, 32 (2004) ("The [9/11] attacks seemed too trans-border in nature to be non-international."); Roy S. Schondorf, *Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?*, 37 N.Y.U. J. INT'L L. & POL. 1, 32, 35 (2004) (arguing that the law of non-international armed conflict only concerns purely internal conflicts.); Natasha Balendra, *Defining Armed Conflict*, 29 CARDOZO L. REV. 2461, 2472 (2008).

17. INT'L COMM. OF THE RED CROSS, COMMENTARY, GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 32 (Jean S. Pictet ed., 1952) [hereinafter COMMENTARY OF THE FIRST CONVENTION]; U.N. Comm'n on Human Rights, Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine: Report of the Human Rights Inquiry Commission Established Pursuant to Commission Resolution S-5/1 of 19 October 2000, ¶ 39 , U.N. Doc. E/CN.4/2001/121 (Mar. 16, 2001) ("Clearly, there is no international armed conflict in the region, as Palestine, despite widespread recognition, still falls short of the accepted criteria of statehood."); Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the "War on Terror,"* 27 FLETCHER F. WORLD AFF. 55, 58 (2003); Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT'L L. 1, 20 (2003); Chris Downes, *'Targeted Killings' in an Age of Terror: The Legality of the Yemen Strike*, 9 J. CONFLICT & SECURITY L. 277, 283 (2004); Balendra, *supra* note 16, at 2472.

In an effort to equate the legal status of members of national liberation movements with that of the soldiers of a state, Article 1(4) of the First Additional Protocol to the Geneva Conventions broadens the definition of an international armed conflict to include "conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 1(4), *adopted* June 8, 1977, 1125 U.N.T.S. 3, *in* INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 33 (Yves Sandoz et al. eds., 1987) [hereinafter Protocol I].

However, Article 1(4) generated much controversy. Thus, it is widely agreed that:

> [T]he considerable body of opposition in State practice to treating such conflicts, for the purposes of the *ius in bello*, as though they were conflicts between States suggests that Article 1(4) went well beyond customary law . . . and has not met the criteria for being absorbed into customary law since its inclusion in Protocol I.

Christopher Greenwood, *Customary Law Status of the 1977 Geneva Protocols*, *in* HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD: ESSAYS IN HONOUR OF FRITS KALSHOVEN 93, 112 (Astrid J. M. Delissen & Gerard J. Tanja eds., 1991). In discussing Article 1(4), Aldrich noted that "in effect, the provision is a dead letter." George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT'L L 1, 7 (1991). As it does not represent a rule of customary international law, Article 1(4) is inapplicable, for example, to the cases of the Israeli occupation of the Palestinian territories and the recent American occupation of Iraq, those occupying powers not being parties to Protocol I. *Id.* at 6, 19.

18. See, *e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 629-30 (2006) (concluding that the conflict between the United States and al-Qaeda was a non-international armed conflict to which Common Article 3 of the Geneva Conventions applied). The Israeli Supreme Court observed that hostilities between Israel and Palestinian armed groups amount to an international armed conflict. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. [2006] (2) IsrLR 459, 479, *available at* http://elyon1.court.gov.il/files_eng/02/690/007/e16/02007690.e16.pdf. *See also*, William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319, 320 (2003)

To that end, both courts and commentators have stretched the customary definition of either an international armed conflict (beyond inter-state conflicts) or a non-international armed conflict (beyond conflict occurring strictly *within* the territory of a particular state) to encompass such hostilities. Others advocate the development of a third, distinct category of armed conflict–that of "extra-state armed conflict"–to accommodate hostilities between a state and a transnational terrorist organization.[19]

The rationale underlying this approach turns on the alleged impracticality of the law enforcement model. All agree that a legal regime that imposes on states unrealistic law enforcement standards in the face of grave, large-scale violence will inevitably be ignored.[20] In reality, where law enforcement is impractical states will abandon the law enforcement model regardless of the requirements of international law. Commentators thus caution that unless international law presents realistic standards of conduct for states, "they will act in an environment infected by the lawlessness that characterizes terrorism."[21] According to this view, the purpose of recognizing the existence of an armed conflict is to provide governments with certain means-of-last-resort to control especially threatening violence. The law of war steps in, then, when law enforcement is not up to the task.[22]

Moreover, under the jurisprudence of both international and domestic courts, the threshold for the existence of an armed conflict between a state and a terrorist or guerrilla organization, in terms of the intensity of the violence and its level of organization, is relatively low.[23] Indeed, the sphere of armed conflict has come to

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("The law of armed conflict provides the most appropriate legal framework for regulating the use of force in the war on terrorism."); Jinks, *supra* note 17, at 9 ("I argue that the laws of war applicable in non-international armed conflict govern the September 11 attacks and that the attacks violated these laws."); Ben-Naftali & Michaeli, *supra* note 1, at 271 (arguing that the hostilities between Israel and Palestinian armed groups amount to a non-international armed conflict); Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT'L L. 319, 327-28 (2004); Emanuel Gross, *Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defense: Human Rights Versus the State's Duty to Protect Its Citizens*, 15 TEMP. INT'L & COMP. L.J. 195, 204-05 (2001); Norman G. Printer, Jr., *The Use of Force Against Non-State Actors under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 UCLA J. INT'L L. & FOREIGN AFF. 331, 359 (2003) (applying the law of war to U.S. military operations against al-Qaeda members); Downes, *supra* note 17, at 283-84 (arguing that hostilities between al-Qaeda and the U.S. constitute a non-international armed conflict).

19. Schondorf, *supra* note 16, at 5-7 (naming such conflicts extra-state armed conflicts, distinguishing them from inter-state armed conflicts on the one hand, and from purely internal armed conflicts on the other hand).

20. *Id.* at 21. The author observes that imposing a legal regime that strictly adheres to the law enforcement model regardless of the gravity of terrorist threats "will lead states to reject this legal regime as a whole." *Id.* at 22; Kretzmer, *supra* note 1, at 212 (warning against the adoption of "idealistic standards of behaviour" that cannot reasonably be demanded of states).

21. Kretzmer, *supra* note 1, at 212.

22. Commentators who view the hostilities between Israel and the Palestinians as an armed conflict contend that "[d]efining a conflict as war . . . has to do with the gravity of the threat to the vital interests of a given community and the absence of any other option for this community to defend itself against this threat." Daniel Statman, *Targeted Killing*, 5 THEORETICAL INQUIRIES L. 179, 197 (2004).

23. It was the International Committee of the Red Cross ("ICRC") that tried to lower the threshold

encompass hostilities that are far short of a full-scale war. Some courts take this approach in order to provide states with the broad liberties to exercise lethal force available under the law of war.[24] Others aim to bring into play the humanitarian protections afforded to the civilian population under the law of war.[25] Under the prevailing view, the law of war's field of application is thus very broad.

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for the existence of an armed conflict as much as possible. *See* COMMENTARY OF THE FIRST CONVENTION, *supra* note 17, at 32. Thus, the ICRC defined an international armed conflict as "[a]ny difference arising between two States and leading to the intervention of armed forces . . . . It makes no difference how long the conflict lasts, or how much slaughter takes place." *Id.* A commission of experts established by the ICRC to examine the issue of aid to the victims of internal conflicts concluded that the existence of a non-international armed conflict "cannot be denied if the hostile action, directed against the legal government, is of a collective character and consists of a minimum amount of organization." THEODOR MERON, HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION 121 (1987). Similarly, in its Commentary on the Geneva Conventions the ICRC advocated wide application of Common Article 3. COMMENTARY OF THE FIRST CONVENTION, *supra* note 17, at 50.

The criteria for the existence of a non-international armed conflict, pronounced by the International Criminal Tribunal for the Former Yugoslavia, concern the scale of the violence, its duration and the level of organization of the rival parties. Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995); Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment, ¶ 562 (May 7, 1997). Yet in applying the said criteria the Tribunal considered internal violence that was far short of a full-scale war as a non-international armed conflict. *See, e.g.*, Prosecutor v. Boskoski, Case No. IT-04-82-T, Judgment, ¶ 244, 247 (July 10, 2008). The Tribunal concluded that hostilities between the forces of the Macedonian government and a guerrilla group amounted to an armed conflict despite the fact that "there remained relatively few casualties on both sides and to civilians (the highest estimates put the total number of those killed as a result of the armed clashes at 168), and material damage to property and housing was of a relatively small scale." *Id.* ¶ 244.

In *Abella v. Argentina*, the Inter-American Commission on Human Rights concluded that a violent confrontation of brief duration (30 hours) between rebels and Argentinean government forces amounted to an armed conflict under Common Article 3. Abella v. Argentina, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L./V/II.95, doc. 7 rev. ¶ 147, 156 (1997). This case concerned an armed attack by an organized armed group against a government military base, which was an isolated incident. *Id.* ¶ 155. The Commission concluded that "application of Common Article 3 does *not* require the existence of large-scale and generalized hostilities or a situation comparable to a civil war in which dissident armed groups exercise control over parts of national territory." *Id.* ¶ 152.

24. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. [2006] (2) IsrLR 459, 475, 529, *available at* http://elyon1.court.gov.il/files_eng/02/690/007/e16/02007690.e16.pdf.

25. Hamdan v. Rumsfeld, 548 U.S. 557, 628-30 (2006) (concluding that the conflict between the United States and al-Qaeda was a non-international armed conflict to which Common Article 3 of the Geneva Conventions applied). The Court subscribed to the position of the International Committee of the Red Cross that "'nobody in enemy hands can be outside the law,'" and hence joined its conclusion that the scope of application of Common Article 3 "'must be as wide as possible.'" *Id.* at 631 (*quoting* COMMENTARY, CONVENTION (IV) RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR. GENEVA, 12 AUGUST 1949 51 (Int'l Comm. of the Red Cross ed. 1958); COMMENTARY, CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR. GENEVA, 12 AUGUST 1949 36 (Int'l Comm. of the Red Cross ed. 1960). It seems that the main concern of the Court was to ensure that Hamdan, assuming he is not entitled to a prisoner of war status, enjoys a minimum of humanitarian law protections granted under Common Article 3. *See id* at 628-630.

See also, *Abella*, Inter-Am. C.H.R., Report No. 55/97, ¶ 148. In an attempt to promote the "purpose of protecting human life and dignity" the Inter-American Commission on Human Rights subscribed to the view that the law of internal armed conflicts "should be applied as widely as possible." *Id.* ¶ 152,158.

Several commentators argue, however, that the existence of an armed conflict between a state and a terrorist group does not entail *full* application of the law of war.[26] Addressing situations such as the violent confrontation between Israel and the Palestinians (the "al-Aqsa Intifada"), David Kretzmer advocates the adoption of a normative middle ground between the law of war and international human rights law[27] (hereinafter "mixed model"[28]). According to the mixed model, conflicts such as the al-Aqsa Intifada should be recognized as armed conflicts and members of Palestinian terrorist organizations should be considered combatants.[29] However, Israel's war rights are qualified by the principles of international human rights law. The interaction between the law of war and human rights law produces new norms that differ substantially from those of the law of war. Other commentators share this view.[30]

Under this normative model, the relatively broad permission to exercise lethal force embodied in the law of war's principles of distinction and proportionality becomes much narrower. The mixed model departs from the law of war in allowing the targeting of combatants only on the basis of their personal dangerousness, rather than on the basis of their status. Thus, while the law of war allows attacking a combatant "whether or not he or she *personally* endangers the lives or interests of the other party to the conflict,"[31] according to the proposed mixed model lethal force may be used against terrorists who do not pose an imminent threat "only when a high probability exists that if immediate action is not taken another opportunity will not be available to frustrate the planned terrorist attacks."[32] Moreover, the mixed model allows the use of lethal force against terrorists only where there is no feasible possibility of arresting them (that is, where the suspected terrorist is not in a territory under the effective control of the victim state, and the state in which he stays is either unwilling or unable to thwart the threat he poses).[33] According to its proponents, the mixed model departs from

According to the Commission, an approach that allows the application of humanitarian law protections, in addition to human rights law, is captured by the "most-favorable-to-the–individual-clause." *Id.* ¶ 164.

26. *See* Kretzmer, *supra* note 1, at 204.

27. *Id.* at 201-04.

28. *Id.* at 204.

29. *Id.* at 208-09.

30. *See* Ben-Naftali & Michaeli, *supra* note 1, at 288; *see also* Schondorf, *supra* note 16, at 32, 64; Balendra, *supra* note 16, at 2468, 2480-81. In addressing the application of the armed conflict model to the fight against terrorism Brooks argues that "international human rights law provides some benchmarks . . . for developing a new analytical framework that can successfully balance the need to respond to new kinds of security threats with the equally important need to preserve and protect basic human rights." Brooks, *supra* note 4, at 684.

31. Kretzmer, *supra* note 1, at 191.

32. *Id* at 203. *See also* Ben-Naftali & Michaeli, *supra* note 1, at 280 ("[T]he laws of war seem to accept the legitimacy of targeting combatants and . . . it is not necessary for Israel to resort to alternative means in order to prevent them from carrying out their hostile plans or actions."). However, the new norm that emerges under the mixed model provides that "[c]ombatants are only legitimate targets if all other means to apprehend them fail." *Id.* at 290.

33. Kretzmer, *supra* note 1, at 203.

the norms of human rights law mainly in relaxing the requirement that the threat posed by the suspected terrorist be *imminent* as a condition for targeting him.[34]

Kretzmer further submits that "according to the demands of international human rights law, in every case of targeted killing a thorough legal investigation should be conducted."[35] Similarly, other commentators submit that the permission to cause collateral damage is more limited in the context of an armed conflict between a state and a terrorist group than in the context of other types of armed conflict.[36]

The Israeli Supreme Court has recently applied a legal regime tantamount to the mixed model, examining the legality of the Israeli policy of targeted killing of Palestinian suspected terrorists.[37]

The mixed model clearly rests on the assumption that the liberties to use force available to a state under this model are not available to it under human rights law. Under this approach the law of war and human rights law play fundamentally different, complementary roles in the fight against terrorism. It is the task of the law of war to provide states with the liberties to exercise lethal force required in order to contain grave, large-scale violence.[38] It is the task of human rights law to qualify those liberties beyond the limitations contained in the law of war itself. The law of war is the engine of a state's struggle against terrorism; human rights law is the brakes.

This article defends the traditional law enforcement/armed conflict dichotomy. Contrary to the prevailing view, I argue that the threshold for the existence of an armed conflict is very high (i.e., the purview of the law of war is very narrow). Only where the manifestations of the hostilities border on full-scale war can a conflict be properly termed armed conflict. Hostilities that do not meet the threshold for the existence of armed conflict–such as the conflict between the United States and al-Qaeda–are governed by human rights law, which can and should be imposed with the unpleasant burden of presenting realistic standards of conduct for states with regard to the targeting of suspected terrorists. Indeed, this article advances a view of human rights law that is fundamentally different from that presented by the proponents of the mixed model. The argument presented here is largely premised on the view that the liberties to use force afforded to a state under the mixed model (i.e., a permission to target terrorists who pose a lethal

34. *Id.* at 202-04.

35. *Id.* at 212.

36. Schondorf, *supra* note 16, at 66-67. Schondorf argued that in the cases of the al-Aqsa Intifada and the fight against al-Qaeda "the approach towards collateral damage should be informed, at least to a certain extent, by the approach applicable to the question of collateral damage in law enforcement operations . . . . [A] higher standard of care, and maybe even a more demanding proportionality test, should apply."

37. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. [2006] (2) IsrLR 459, 515-16, *available at* http://elyon1.court.gov.il/files_eng/02/690/007/e16/02007690.e16.pdf. Also see *infra* notes 62-91 and accompanying text.

38. *See* Brooks, *supra* note 4, at 692.

threat that is not imminent; a narrow permission to cause the death of uninvolved civilians as collateral damage) are also available to it under human rights law.

This article further submits that the law of war applies fully whenever a conflict between a state and a non-state actor amounts to an armed conflict. This article thus rejects the approach that advocates the development of a normative middle ground between the law of war and international human rights law.

The proponents of the mixed model submit that there are armed conflicts governed by a body of law that is more humanitarian than the law of war.[39] Part II shows that this assertion is conceptually flawed as the contours of the sphere of armed conflict are drawn by reference to the law of war: the sphere of armed conflict encompasses only those factual realities in which the law of war offers the best bargain from a humanitarian perspective, that is, only those situations in which violence allowed under the law of war is inevitable.

Part II further argues that the law of war presents the best bargain from a humanitarian perspective only where the manifestation of the hostilities borders on full-scale war. Only then can a conflict be properly termed an armed conflict.

Part III argues that while the proponents of the mixed model advocate its application to *armed conflicts* between a state and a non-state aggressor,[40] the mixed model cedes the legitimate aims of a just war, which include obtaining reasonable guarantees of future security. Such a concession seems unwarranted.

Part IV argues that the mixed model is inconsonant with the principle of equality in the application of the law of war, as it is only applicable to the conduct of states, while non-state actors would be allowed to exercise all of the war rights granted under the law of war.

None of the proponents of the mixed model advocate its application to traditional inter-state armed conflicts. The mixed model is presented in the literature mainly in the context of an armed conflict between a state and a terrorist group.[41] Part V argues that there is no sound basis for distinguishing an armed conflict between a state and a terrorist group from traditional inter-state armed conflict.

Part VI argues that human rights law presents realistic standards of conduct for states in the face of grave, large-scale violence that falls short of a full-scale war. It addresses two questions concerning the scope of permission to kill suspected terrorists afforded to a state under human rights law:

1. When is the threat sufficiently proximate to justify the use of lethal force against the suspected terrorist?

2. Can a state engage in counter-terrorism operations that are likely to result in the unintentional killing of innocent persons?

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39. *See* Kretzmer, *supra* note 1, at 185-86.

40. *Id.* at 171.

41. *Id.* at 201-202; Ben-Naftali & Michaeli, *supra* note 1, at 288-89.

In the course of this inquiry, Part VI explores the relationship between domestic criminal defenses and international human rights law. It concludes that the liberties to use force afforded to a state under the mixed model are also available to it under human rights law.

II. A CONCEPTUAL DIFFICULTY: CAN THERE BE AN ARMED CONFLICT TO WHICH THE LAW OF WAR DOES NOT APPLY FULLY?

A. The Nature and Purview of the Law of War

The proponents of the mixed model submit that there are armed conflicts to which the law of war does not apply fully.[42] Yet the contours of the sphere of armed conflict are drawn by reference to the law of war.

Some commentators posit that the law of war's role "is primarily not one of opposition [to war] but of construction–the facilitation of war through the establishment of a separate legal sphere immunizing some organized violence from normal legal sanction."[43] Yet the prevailing view is that the primary purpose of the law of war is promoting humanitarian protections.[44] The law of war exists mainly in order to set limits to wartime violence. According to the International Committee of the Red Cross ("ICRC"), the law of non-international armed conflict "has a purely humanitarian purpose and is aimed at securing fundamental guarantees for individuals in all circumstances."[45]

But why doesn't the law of war offer a better bargain from a humanitarian perspective? Why did it set the limits of wartime violence where they are now, rather than further constraining such violence?

War represents a reality in which large-scale violence is inevitable. Indeed, "[w]ar necessarily places civilians in danger; that is another aspect of its hellishness."[46] The law of war recognizes that the law cannot "unhell" the factual reality of war. Rather, it is designed to allow only that violence which is inevitable. It is tailored around a core of wartime violence that the law cannot realistically prevent. As stated by Yoram Dinstein:

> The paramount precept of the [Law of International Armed Conflict]–to reiterate again the language of the St Petersburg Declaration . . .–is 'alleviating as much as possible the calamities of war' . . . . However,

42. *See* Ben-Naftali & Michaeli, *supra* note 1, at 255; Kretzmer, *supra* note 1, at 201-204.

43. Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT'L L. 1, 1 (2004).

44. Christopher J. Greenwood, *International Humanitarian Law (Laws of War): Revised Report for the Centennial Commemoration of the First Hague Peace Conference 1899, in* THE CENTENNIAL OF THE FIRST INTERNATIONAL PEACE CONFERENCE: REPORTS & CONCLUSIONS 161, 229 (Frits Kalshoven ed., 2000) (observing that the provisions on the conduct of hostilities contained in Protocol Additional II to the Geneva Conventions "are intended exclusively for the benefit of the civilian population."); INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 1350 (Yves Sandoz et al. eds., 1987) (observing that the protection granted to victims of non-international armed conflicts is the *raison d'etre* of Protocol II).

45. *Id.* at 1344.

46. MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 156 (4th ed. 2000).

> the thrust of the concept is not absolute mitigation of the calamities of war (which would be utterly impractical), but relief from the tribulations of war 'as much as possible' . . . .[47]

In other words, the law of war was tailored to offer the best bargain, from a humanitarian perspective, in a factual reality in which widespread violence is inevitable. This bears on the construction of the sphere of armed conflict: the function of the definition of an armed conflict is to delineate the boundaries of a factual reality in which the law of war represents the best *realistic* bargain from a humanitarian perspective; that is, the boundaries of a reality in which the violence allowed under the law of war is inevitable.

In severing, at least in part, the definition of an armed conflict from the law of war the mixed model is thus conceptually flawed. Simply put, a factual reality in which the law of war's principles of distinction and proportionality do not offer the best bargain from a humanitarian perspective (i.e., a reality in which the mixed model is realistic), cannot be characterized as armed conflict.

The humanitarian nature of the law of war informs its relationship with human rights law: the law of war applies as *lex specialis*, taking precedent over human rights law,[48] only where it offers the best bargain from a humanitarian perspective. Some commentators posit that the application of the law of war has become much less attractive from a humanitarian perspective since the rise of human rights law, which applies to armed conflicts as well.[49] Those commentators observe that most of the humanitarian protections contained in the law of war are also available under human rights law.[50] However, the law of war has no alternative from a humanitarian perspective, not because it offers protections that cannot be found in human rights law but, rather, because it presents the strictest *realistic* limitations on violence in the face of the factual reality of war. It is the

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47. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 17 (2004).

48. *See infra* notes 99-101 and accompanying text.

49. Balendra, *supra* note 16, at 2470 ("When the provisions of the Geneva Conventions were drafted, the protections available under [human rights law] were not taken into account. Nor had the ICCPR and the ICESR, the first legally binding human rights instruments of universal applicability, been adopted yet. At that time, [international humanitarian law] was probably viewed as the only source of protection for individuals during times of violent conflict. However, if [human rights law] is also applicable in armed conflict, as appears to be the case, then individuals might be protected even in the absence of [international humanitarian law]. Therefore the humanitarian goals of the Geneva Conventions are not always furthered by a broad interpretation of the term 'armed conflict.'"); David Kretzmer, *Rethinking Application of IHL in Non-International Armed Conflicts*, 42(1) ISR. L. REV. 32 (2009) ("With the development of [international human rights law], we no longer need to introduce elements of [international humanitarian law] in order to place constrains on the use of force by States faced with internal armed conflicts . . . . While the original intention behind extension of [international humanitarian law] to non-international armed conflicts was to enhance the protection granted to potential victims of such conflicts, given the dramatic development of [international human rights law], categorization of a situation as one of armed conflict, rather than internal unrest, may serve to weaken the protection offered to potential victims rather than to strengthen it."). Kretzmer, *supra* note 1, at 202.

50. *Id.*

inevitability of wartime violence that renders the law of war the best bargain from a humanitarian perspective.

But *how* is violence that triggers the application of the law of war inevitable? How do we draw the line between situations in which violence allowed under the law of war is inevitable and situations in which it is not? Here I return to the main feature that distinguishes the mixed model from the law of war, which concerns the permissible basis for attacking people. While the law of war allows attacking combatants on the basis of their status, under both the mixed model and human rights law persons may only be targeted on the basis of their personal dangerousness.

Yet it is not entirely accurate to say that the law of war is indifferent to the question of the personal dangerousness of combatants. The warring parties are always bound by the requirement of military necessity.[51] An unnecessary killing of *any individual*, that is, a killing that does not tend to undermine the war effort of the enemy, and thereby facilitate victory, is always prohibited.[52] In other words, the law of war only allows the killing of individuals who are dangerous in the sense that they lend a meaningful contribution to the war effort of the enemy. This is the reason why soldiers who are wounded, and therefore are unable to fight, may not be attacked.[53]

A strict application of the military necessity requirement would preclude the killing of soldiers solely on the basis of their status. However, a reality of actual warfare–a clash of two armies–does not lend itself to individualized assessment of the dangerousness of each person. Under the pressure of actual warfare, an extra-judicial individualized assessment of dangerousness–the second best to due process–is also not feasible. It is this feature of war that renders the indiscriminate targeting of soldiers inevitable. The principle of military necessity was relaxed to allow the killing of combatants at all times *because* of this lack of capacity to determine, with regard to each enemy soldier, whether and to what extent he actually contributes to the enemy's war effort.[54]

Yet not all situations of grave violence between organized parties preclude an individualized assessment of dangerousness. The criteria for distinguishing situations that are amenable to such assessment from those that are not mainly concern the size of the parties' armed forces as well as the volume and intensity of the violence. The violence allowed under the law of war's principle of distinction is inevitable only in situations that are not amenable to an individualized assessment of dangerousness. Only such situations can be properly termed armed conflict.

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51. DINSTEIN, *supra* note 47, at 18.

52. Id.

53. Fourth Geneva Convention, *supra* note 13, art. 3.

54. Similarly, the permission granted to a state engaged in an inter-state armed conflict to detain *all* captive enemy combatants for the duration of the conflict presupposes lack of capacity for an individualized assessment of the dangerousness of each combatant. Curtis A. Bradley, *The United States, Israel and Unlawful Combatants,* 12 GREEN BAG 2d 397, 409-410 (2009).

The inevitability of violence allowed under the law of war inheres in a violent clash of two armies. The author submits that the reality of Israel's confrontations with the Hezzbullah in Lebanon (2006) and Hamas in Gaza (2009) precluded individualized assessment of dangerousness. The Israeli army that entered Lebanon and Gaza was facing thousands of fighters simultaneously engaging in an intense war effort.[55] The manifestations of the hostilities between Israel and those organizations bordered on full-scale war.[56] Under such circumstances, the targeting of individuals on the basis of their affiliation to the military forces of Hamas or Hezzbullah was inevitable. Those conflicts are situations in which the law of war's principle of distinction between combatants and civilians represents the best bargain from a humanitarian perspective, and they must therefore be termed armed conflicts.

By contrast, it seems that the violent conflict between the U.S. and al-Qaeda, notwithstanding its high death toll, cannot be characterized as an armed conflict, as it does not produce the unique pressure of warfare that precludes individualized assessment of dangerousness.

My analysis presents a very high threshold for the existence of an armed conflict: for a conflict to be considered an armed conflict, it must not stray far from the paradigm of a full-scale war, that is, a clash of two armies.

The conflict between Israel and the Palestinians in the years 2001-2007 (the "al-Aqsa Intifada"), prior to the Hamas takeover of Gaza, is a difficult, borderline case. Considering the scale and organization of the violence in the case of the al-Aqsa Intifada, commentators observed that the said conflict "is a full-scale 'armed conflict,' even under the harshest of terms."[57] Relying in particular on the scale

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55. *See* Jill Lawless, *Hezbollah Arsenal Growing in Size and Punch*, SEATTLE TIMES, July 20, 2006, *available at* http://seattletimes.nwsource.com/html/nationworld/2003137807_webhezbollah19.html; Amos Harel & Avi Issacharoff, *Analysis: A Hard Look at Hamas' Capabilities*, HAARETZ, Dec. 26, 2008, http://www.haaretz.com/hasen/spages/1050282.html.

56. Hostilities between Israel and the Hezbollah lasted for one month. During this period, nearly 4,000 Hezbollah rockets hit northern Israel. According to Lebanese officials, one million people were displaced by the conflict. The conflict resulted in approximately 1200 Lebanese deaths and 159 Israeli deaths, according to authorities in the two countries. Maher Chmaytelli & Daniel Williams, Hezbollah, *Israel Try to Play Down Lebanon Rockets, For Now*, BLOOMBERG.COM, Jan. 9, 2009, http://www.bloomberg.com/apps/news?pid=20601087&sid=aa8phfEhs3.M (last visited Feb. 20, 2010). In the course of this conflict, the Israeli Air Force launched more than 7,000 air strikes on targets in Lebanon. Amnesty Int'l, *Lebanon: Deliberate Destruction or "Collateral Damage"? Israeli Attacks on Civilian Infrastructure*, AI Index MDE 18/007/ 2006, Aug. 22, 2006, *available at* http://www.amnesty.org/en/library/info/MDE18/007/2006/en [hereinafter Report by Amnesty International]. With regard to the size of Hamas' military forces in Gaza, which took part in the fighting during the confrontation in January 2009, *see* ISRAEL MINISTRY OF FOREIGN AFFAIRS, THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS, ¶¶ 73-80 (2009), *available at* http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Operation_Gaza_Context_of_Operation_5_Aug_2009.htm#E.

57. Ben-Naftali & Michaeli, *supra* note 1, at 259. Ben-Naftali and Michaeli elaborate:

> There can be little doubt that the Palestinian Authority qualifies as an "organized armed group." The Palestinian Authority, far from resembling an unorganized insurrection group, is as close to a State as an entity can be. It is the undisputed leader of the Palestinian people, retaining control over the Palestinian population

and duration of the violence, the Israeli Supreme Court observed with regard to the al-Aqsa Intifada, "[s]ince the end of September 2000, fierce fighting has been taking place in Judaea, Samaria and the Gaza Strip. This is not police activity. It is an armed conflict. Within this framework, approximately 14,000 attacks have been made against the life, person and property of innocent Israeli citizens . . . . The Palestinians have also experienced death and injury."[58]

Indeed, it seems that the manifestations of the hostilities between Israel and the Palestinians throughout the years 2001-2003 warrant the application of the law of war. Yet, as noted by one commentator, hostilities between an occupant and guerrilla forces "often go through a variety of phases, involving greater or lesser resemblance to military conflict, ranging from organized to disorganized actions, from violent to non-violent confrontations, from war-like periods marked by high intensity violence to less turbulent periods marked by erratic violence, civil disobedience, or even relative quiescence."[59] Indeed, the scale of hostilities between Israel and the Palestinians has been substantially reduced since 2003.[60] It thus seems that the later phases of the al-Aqsa Intifada (2004-2007) prior to the Hamas takeover of Gaza did not meet the threshold for the existence of armed conflict advanced here.

The conceptual difficulty arising with regard to the mixed model's severing of the definition of an armed conflict from the law of war only underscores the main problem with the mixed model: it fails to provide realistic standards of conduct for states where the manifestation of the hostilities between the state and a terrorist entity borders on full-scale war, as were the cases of Israel's confrontations with the Hezzbullah in Lebanon (2006) and Hamas in Gaza (2009). Applied to such conflicts, which clearly qualify as armed conflicts, the mixed model would prohibit violence that is inevitable. As proponents of the mixed model themselves observe, an international legal regime that does not present realistic standards of conduct for states will inevitably be ignored.[61]

> and, at least until the recent reoccupation of the territories, it exercised control over most of the Palestinian designated territory, especially the "A" territories. Note that while only the Tanzim Organization is officially affiliated to the Palestinian Authority, all other military organizations operating in the Palestinians territories are united by the same goals of self-determination and compose a united front of resistance. These groups are highly organized, thus fulfilling the condition of "organized military force under responsible command." There can also be little doubt as to the severity of the conflict, as indicated by the high number of casualties and the massive use of arms on both sides.

Id. at 258.

58. HCJ 7015/02 Ajuri v. IDF Commander in West Bank [2002] IsrSc 56(6) 352, ¶ 1, *available at* http://elyon1.court.gov.il/files_eng/02/150/070/A15/02070150.a15.pdf.

59. Berman, *supra* note 16, at 26.

60. Hostilities between Israel and the Palestinians in the year 2002 resulted in the killing of 1,019 Palestinians and 420 Israelis. Hostilities between Israel and the Palestinians in the year 2005 resulted in the killing of 190 Palestinians and 50 Israelis. *See* B'tselem – The Israeli Information Center for Human Rights in the Occupied Territories, Statistics: Fatalities, http://www.btselem.org/English/Statistics/Casualties.asp (last visited Feb. 8, 2010).

61. Kretzmer, *supra* note 1, at 212.

B. The Israeli Supreme Court's Construction of the Law of War: The Equivalent of the Mixed Model

A decision of the Israeli Supreme Court seems to implicitly adopt the mixed model. In *Public Committee Against Torture in Israel v. Government of Israel*[62] the Court examined whether the Israeli policy of targeted killing of Palestinian suspected terrorists, carried out in the course of the al-Aqsa Intifada, was lawful under international law.[63] Concluding that the hostilities characterizing the al-Aqsa Intifada amounted to an armed conflict, the Court opined that this conflict is of *international* character.[64] It then proceeded to examine the status of Palestinians taking part in the hostilities.[65]

The customary definition of combatants in international armed conflicts is provided by the Hague Regulations Respecting the Laws and Customs of War on Land ("Hague Regulations").[66] According to Article 1 of the Hague Regulations, the category of combatants extends beyond the regular armed forces of a state and includes members of "militia and volunteer corps" provided that they fulfill all of the following conditions:

> a. being under responsible command;
>
> b. wearing a fixed distinctive sign recognizable at a distance;
>
> c. carrying arms openly; and
>
> d. conducting their operations in accordance with the laws and customs of war.[67]

The same definition of "combatants" may be inferred from the categories of persons who have the right to prisoner of war status pursuant to Article 4 of the Third Geneva Convention Relative to the Treatment of Prisoners of War.[68]

The Court observed that members of Palestinian terrorist organizations do not meet all of the above conditions, as they do not wear a fixed distinctive sign recognizable at a distance and, moreover, as they do not refrain from targeting civilians and therefore do not meet the requirement that their operations be "in accordance with the laws and customs of war."[69] The Court thus concluded that members of Palestinian terrorist organizations cannot be considered combatants, and must therefore be considered civilians.[70] The law of war prohibits attacks

62. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. [2006] (2) IsrLR 459, *available at* http://elyon1.court.gov.il/files_eng/02/690/007/e16/02007690.e16.pdf.

63. *Id.* at 464.

64. *Id.* at 476-77.

65. *Id.* at 486-90.

66. Regulations Annexed to the Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2295, T.I.A.S. No. 539, art. 1 [hereinafter Hague Regulations].

67. *Id.*

68. Geneva Convention Relative to the Treatment of Prisoners of War art. 4(A)(2), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; *see also* Kretzmer, *supra* note 1, at 191.

69. HCJ 769/02 *Pub. Comm. Against Torture in Isr.* at 485.

70. *Id.* at 486-88.

directed at civilians "unless and for such time as they take a direct part in hostilities."[71] Applying this rule, the Court broadly interpreted the circumstances under which a member of a terrorist organization should be viewed as directly participating in hostilities and thus subject to targeting.[72] The Court reasoned that this concept includes not only persons who carry out terrorist attacks but also those who recruit them and provide them with weapons as well as those who plan and direct the attacks.[73] The Court further concluded that persons involved in ongoing terrorist activities are subject to targeting even during the time in between hostile acts.[74]

Finally, the Court concluded that the law of war permits the targeted killing of civilians who are, at the time, directly participating in hostilities only where the following cumulative requirements are fulfilled. First, reliable and verified information is needed regarding the identity and activity of the civilian who is allegedly taking part in the hostilities, which places a heavy burden of proof on the attacking army.[75] Second, even a civilian who is taking a direct part in hostilities cannot be attacked if less harmful means, such as arrest, interrogation and trial, can be employed.[76] Third, after each targeted killing, a retroactive, thorough and independent investigation must be conducted regarding the precision of the identification of the target and the circumstances of the attack.[77] And fourth, any collateral damage inflicted must withstand the proportionality test.[78]

The Court did not explicitly accept the main argument advanced by the proponents of the mixed model, namely, that the application of the law of war is qualified by its interaction with human rights law. Having concluded that an armed conflict exists between Israel and the Palestinian organizations, the Court observed that the law of war applies fully as *lex specialis*, taking precedent over human rights law.[79] At the end of the day, however, the liberties to use lethal force afforded to the state by the Court are similar, if not identical, to those available to it

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71. Protocol I, *supra* note 17, art. 51 (providing that civilians "shall not be the object of attack . . . unless and for such time as they take a direct part in hostilities."). This rule is now considered a customary norm of international humanitarian law. *See, e.g.* JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOL. 1: RULES 19 (2005).

72. HCJ 769/02 *Pub. Comm. Against Torture in Isr.* at 494-98.

73. *Id.* at 496-99.

74. *Id.* at 499-500.

75. *Id.* at 500-01.

76. *Id.* at 501.

77. *Id.* at 502.

78. *Id.*

79. *Id.* at 476-77. The Court observed that "[t]he normative arrangements that apply to the armed conflict between Israel and the terrorist organizations . . . [is the] international law concerning an international armed conflict . . . . These laws constitute a part of the laws of the conduct of war (*jus in bello*). From the humanitarian viewpoint, they are a part of international humanitarian law." *Id.* The Court emphasized that "humanitarian law is a special law (*lex specialis*) that applies in an armed conflict," and that *only* "[w]here this law has a lacuna, it can be filled by means of international human rights law." *Id.* Throughout its analysis, the Court exclusively applied the customary norms of the law of war. *Id.*

under the mixed model: members of the enemy's armed forces may only be targeted on the basis of their personal dangerousness, rather than on the basis of their status; they may be targeted even when the threat they pose is not imminent, provided that use of lethal force is the only way to thwart that threat; and an independent, retroactive investigation must follow each targeted killing operation. The legal regime laid out by the court is clearly the equivalent of the mixed model.

The classification of the terrorists by the Court as civilians resulted from the Court's decision to consider the hostilities an international, rather than a non-international, armed conflict.[80] There is no doubt that in applying the principle of distinction in *non-international* armed conflict, all full-fledged members of the armed forces of parties to the conflict are considered combatants, regardless of whether they distinguish themselves from the civilian population and abide by the laws of war.[81] Indeed, the U.S. Supreme Court considers large-scale hostilities between a state and a transnational terrorist organization–al-Qaeda–a non-international armed conflict, and therefore regards members of this organization as combatants.[82] This seems to be the prevailing view among commentators.[83]

It is striking, then, that the Israeli Court failed to provide any reasoning to its decision to consider the conflict an international, rather than a non-international, armed conflict. As noted by one commentator:

> [T]he Court's preliminary assumption that the targeted killing of Palestinian non-State actors must be governed by [international humanitarian law] applicable to international, rather than non-international, armed conflict remains largely unsubstantiated and alternative approaches, though mentioned, are discarded without discussion. The very same assumption subsequently forces the Court to qualify all Palestinian armed actors as civilians.[84]

Moreover, the Court failed to provide any reasoning to its holding that civilians who are taking a direct part in hostilities may only be targeted when there is no feasible possibility of arresting them, as well as to its determination that an attack directed at a civilian who is taking a direct part in hostilities must be

80. *Id.* at 516.

81. Ben-Naftali & Michaeli, *supra* note 1, at 271; Watkin, *supra* note 7, at 313; Protocol I, *supra* note 17, at 1453; Kretzmer, *supra* note 1, at 197-198 ("The logical conclusion of the definition of a non-international armed conflict as one between the armed forces of a state and an organized armed group is that members of both the armed forces and the organized armed group are combatants. While these combatants do not enjoy the privileges of combatants in an international armed conflict, they may be attacked by the other party to the conflict. This is indeed the view adopted in the ICRC Commentary on [Additional Protocol II], which states that '[t]hose who belong to armed forces *or armed groups* may be attacked at any time'. According to this view, if an armed conflict exists between the United States and al-Qaeda, active members of al-Qaeda are combatants who may be targeted. Similarly, if an armed conflict exists between Israel and Hamas, Islamic Jihad and the Fatah/Tanzim in the West Bank and Gaza, active members of these groups are combatants who may legitimately be attacked.").

82. Hamdan v. Rumsfeld, 548 U.S. 557, 629-32 (2006).

83. Jinks, *supra* note 17, at 9; Ben-Naftali & Michaeli, *supra* note 1, at 258-59; Downes, *supra* note 17, at 282-83; Kretzmer, *supra* note 1, at 204.

84. NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 35 (2008).

followed by a retroactive investigation regarding the circumstances of the attack. Such requirements are not contained in any of the humanitarian law conventions and are not mentioned in the Commentary of the ICRC on Customary International Humanitarian Law.[85]

Clearly, the Court took the view that the liberties to use lethal force afforded to a state engaged in an armed conflict with a terrorist organization should be narrower than those available to a state engaged in a "traditional" inter-state war, subscribing to the view of the proponents of the mixed model regarding the scope of permissible use of lethal force. While the Court purported to fully apply the law of war, it endeavored to construct it in a manner that produces a legal regime equivalent to that of the mixed model. The Court opted for an *international* armed conflict legal regime, as only such regime allows the classification of Hamas militants as civilians. The central feature of the law of war–the permission to target combatants on the basis of their status–was taken from it, simply because under the Court's construction of the law of war, an armed conflict between a state and a terrorist group is one in which only one party to the conflict has combatants. This construction seems peculiar. As noted by David Kretzmer, "[w]hen the armed conflict is essentially between a state and the terrorist group, the theory that the terrorists are civilians simply does not make sense. An armed conflict model of law . . . cannot be applicable if only one party to the conflict has combatants."[86] Curtis Bradley further observes that the Israeli Court's construction of the law of war "may create perverse incentives. One of the central purposes of the laws of war is to encourage fighters both to distinguish themselves from civilians and to avoid attacking civilians."[87] Yet under the approach taken by the Israeli Court, "a nation engaged in an armed conflict has *less* ability to target and detain fighters who fail to wear uniforms or who purposefully target civilians than if those fighters observe the principles of distinction." [88] This approach thus "seems to reward the very conduct that the laws of war are designed to prevent."[89]

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85. *See, e.g.*, HENCKAERTS & DOSWALD-BECK, *supra* note 71, at19-23.

86. Kretzmer, *supra* note 1, at 194; Curtis A. Bradley, *The United States, Israel, and Unlawful Combatants* 276 (Duke Law School Public Law & Theory Paper No. 249, 2009), *available at* http://ssrn.com/abstract=1408135. Professor Curtis Bradley elaborates that:

> [T]he conception of 'civilians' in the Geneva Conventions does not fit well with the reality of an armed conflict with a terrorist organization. While the Conventions envision that civilians might sometimes take part in hostilities, they envision that this combatancy is a temporary deviation for these individuals, and that there is some separate group of full-time fighters. For a terrorist organization engaged in an armed conflict with a nation, however, the involvement of the members of such an organization in hostilities is not some temporary deviation from their normal circumstances . . . . Nor is there any separate set of full-time fighters – the members of the terrorist organization are themselves the full-time fighters.

Id.; *see also*, Watkin, *supra* note 7, at 312-13.

87. Bradley, *supra* note 86, at 275.

88. *Id.*

89. *Id.* at 275-76.

But more importantly for the purposes of this article, the legal regime laid out by the Court, which is premised on a perception of the terrorists as civilians, crumbled under the weight of hostilities between Israel and Hezzbullah in Lebanon ("Second Lebanon War") and between Israel and Hamas in Gaza ("Operation Cast Lead"), which followed the Court's holding. In the face of a reality bordering on full-scale war, which was not amenable to an individualized assessment of dangerousness, the official rules of engagement issued by the Israeli army during Operation Cast Lead explicitly considered Hamas fighters as combatants that can be targeted at all times.[90] Applying the law of war's principle of distinction, the Rules of Engagement stated, "[s]trikes shall be directed against military objectives and combatants only. It is absolutely prohibited to intentionally strike civilians or civilian objects (in contrast to incidental proportional harm)."[91]

Those experiences prove that the legal regime envisioned by the proponents of the mixed model–or any other equivalent legal regime–is unrealistic where hostilities between a state and a non-state actor resemble a traditional, inter-state war.

III. THE MIXED MODEL AND THE AIMS OF A JUST WAR

The proponents of the mixed model advocate its application to *armed conflicts* between a state and a non-state aggressor. Yet the mixed model cedes the legitimate aims of a just war.

The purpose of a wartime military operation is to facilitate victory. Exploring the meaning of victory in a just war (*i.e.*, the legitimate ends of a just war), Michael Walzer concludes:

> 'The object in war is a better state of peace.' And *better*, within the confines of the argument for justice, means more secure than the *status quo ante bellum*, less vulnerable to territorial expansion, safer for ordinary men and women and for their domestic self-determinations. The key words are all relative in character: not invulnerable, but less vulnerable; not safe, but safer. Just wars are limited wars.[92]

This means that "[i]n responding to an armed invasion, one can legitimately aim not merely at a successful resistance but also at some reasonable security against future attack."[93] Reasonable guarantees of future security include "disengagement, demilitarization, arms control, external arbitration, and so on. Some combination of these, appropriate to the circumstances of a particular case, constitutes a legitimate war aim."[94]

90. ISRAEL MINISTRY OF FOREIGN AFFAIRS, THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS ¶ 245 (2009), *available at* http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Operation_in_Gaza-Factual_and_Legal_Aspects .htm.

91. *Id.* at ¶ 222.

92. WALZER, *supra* note 46, at 121-22.

93. *Id.* at 118.

94. *Id.* at 121.

These ends obviously extend far beyond short-term cost-benefit analysis that concerns the loss of lives. A state fighting a just war is entitled to sacrifice the lives of its own soldiers, intentionally kill enemy combatants and cause the incidental death of non-combatants in order to obtain reasonable long-term guarantees of its future security.

Whilst it is doubtful whether there exists a *jus ad bellum* of non-international armed conflicts,[95] the legitimate purposes of a just war arguably apply to armed conflicts between a state and a non-state aggressor. Note that obtaining guarantees of its future security was the main aim of Israel's military operations throughout its recent large-scale confrontations with the Hezzbullah in Lebanon (2006) and Hamas in Gaza (2009).

When it comes to the grounds for using lethal force, human rights law stands in sharp contrast with the law of war. While the purpose of the use of lethal force under the law of war is to facilitate the winning of the war, under human rights law "the primary aim of the operation should be to protect lives from unlawful violence."[96]

With regard to the purpose of the use of force, the mixed model is not really mixed. Rather, it is indistinguishable from human rights law. The mixed model allows the killing of a terrorist only where such action is necessary to thwart a concrete plan to commit a terrorist attack and where the benefit in terms of saving human lives outweighs the risk to human lives inherent in the operation.[97] In other words, the mixed model allows resorting to lethal force on no other basis than short-term cost-benefit analysis that concerns the loss of human lives.

The permission to resort to lethal force granted to a state under the mixed model does not correspond with the legitimate purposes of a just war as described by Walzer. Under the mixed model, a state fighting a just war is not entitled to exercise lethal force in order to advance aims such as obtaining guarantees of future security (through, say, disarmament of the terrorist entity). In other words, the mixed model cedes even the limited concept of victory defined by Walzer's Just War Theory.

Such concession seems unwarranted. "In a just war, its goals properly limited, there is indeed nothing like winning. There are alternative outcomes, of course, but these are accepted only at some cost to basic human values."[98]

Indeed, one could argue that even the limited aims of a just war presented by Walzer are largely unrealistic in the context of an armed conflict between a state and a terrorist organization. Such factual assertion is debatable. However, it is important to note that only under such view is the mixed model tenable.

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95. William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUR. J. INT'L L. 741, 765 (2005).

96. Isayeva v. Russia, App. No. 57950/00, 41 Eur. H.R. Rep. 791, 836 (2005).

97. Kretzmer, *supra* note 1, at 203-05, 211.

98. WALZER, *supra* note 46, at 122.

IV. THE PRINCIPLE OF EQUALITY IN THE APPLICATION OF THE LAW OF WAR

The mixed model represents a departure from a basic principle of international law: The International Court of Justice ("ICJ") has repeatedly held that the law of war governs within its field of application as *lex specialis*, taking precedent over the norms of international human rights law.[99] The ICJ's decisions do not distinguish between international and non-international armed conflicts. The International Criminal Tribunal for the Former Yugoslavia has recently relied on the jurisprudence of the ICJ in concluding that the law of war governs non-international armed conflicts as *lex specialis*.[100] Importantly, in the Israeli Wall Advisory Opinion, the ICJ expressly recognized the status of international humanitarian law as *lex specialis* in the context of the al-Aqsa Intifada.[101] Hence, while the law of war may be interpreted in light of the general principles of international human rights law, it is not amenable to substantial amendments as a result of its interaction with the latter. The mixed model is inconsistent with the superiority of the law of war as *lex specialis*. There is, however, a substantive argument for maintaining such superiority.

Recognizing the law of war as *lex specialis* is an essential guarantee of the principle of equality in the application of the law of war. A fundamental principle of the law of war is the equal application of its rules (i.e., *jus in bello*) to all parties to an armed conflict.[102] This principle applies to both international and non-international armed conflicts.[103] As noted by Lindsay Moir:

> [T]he humanitarian laws of internal armed conflict are equally binding upon the government and insurgents, and can also . . . apply to a conflict

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99. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 240 (July 8) (observing that, while human rights law applies in principle to armed conflicts, the war rights embodied in humanitarian law are *lex specialis*, taking precedent over general human rights norms); *see also* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 177-78 (July 9); Jochen Abr. Frowein, *The Relationship Between Human Rights Regimes and Regimes of Belligerent Occupation, in* 28 ISR. Y.B. HUM. RTS. 9-10 (1998); Balendra, *supra* note 16, at 2482 ("The consensus among many international tribunals and international organizations appears to be that both [human rights law] and [international humanitarian law] are directly applicable in armed conflict but when the two sets of laws conflict, [international humanitarian law] takes priority as the more specialized law or the lex specialis.").

100. Prosecutor v. Boskoski, Case No. IT-04-82-T, Judgment, ¶ 178 (July 10, 2008). The tribunal observed that in situations falling short of an armed conflict human rights law restricts the usage of lethal force by state agents "to what is no more than absolutely necessary and which is strictly proportionate to certain objectives." *Id.* However, when hostilities amount to an armed conflict "the question what constitutes an arbitrary deprivation of life is interpreted according to the standards of international humanitarian law, where a different proportionality test applies." *Id.*

101. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 177-78 (July 9); *see also* Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580, 593 (2006). Roberts explains that where the provisions of the Fourth Geneva Convention are inconsistent with those of the ICCPR, the former "has to be considered the *lex specialis* for occupations."

102. Judith G. Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 394 (1993); Marco Sassòli, *Use and Abuse of the Laws of War in the "War on Terrorism"*, 22 LAW & INEQ. 195, 196 (2004).

103. Sassòli, *supra* note 102, at 196.

> between two parties, neither of which is the government of the State concerned. There is therefore a degree of reciprocity as far as the application of humanitarian law is concerned.[104]

Such equality between state and non-state actors does not exist, however, in the context of international human rights law. The obligations contained in this body of law are binding on governments only.[105] As noted, the mixed model contains norms inconsistent with the law of war, which are largely based on principles of international human rights law. Thus, the mixed model can only apply to the conduct of states, while non-state actors would be allowed to exercise all of the war rights granted under the law of war. This would render the principle of equality in the law of war meaningless. Upholding this principle requires rejecting the mixed model.

V. ARMED CONFLICT BETWEEN A STATE AND A TERRORIST ORGANIZATION V. INTER-STATE ARMED CONFLICT

None of the proponents of the mixed model advocate its application to traditional inter-state armed conflicts. The mixed model is presented in the literature mainly in the context of an armed conflict between a state and a terrorist group.[106] Kretzmer views the al-Aqsa Intifada as such a conflict, defining terrorism as "the deliberate causing of death, or other serious injury, to civilians for political or ideological ends,"[107] and a terrorist group as one that "regularly employs terror as a means of achieving its aims."[108] The proponents of the mixed model generally classify a conflict between a state and a terrorist group as a non-international armed conflict.[109]

But what is the basis for distinguishing an armed conflict between a state and a terrorist group from traditional inter-state armed conflict? Commentators mainly proffer a practical argument in support of such distinction.[110] This argument points to risks in the application of the law of war that are unique to a conflict between a state and a terrorist group.[111] According to such an argument, the application of the law of war to such a conflict would result in adverse consequences that were not contemplated by the framers of the laws of war. Presenting the practical argument, Kretzmer argues:

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104. LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 194 (2002).

105. *Id.* ("[H]uman rights obligations are binding on governments only, and the law has not yet reached the stage whereby, during internal armed conflict, insurgents are bound to observe the human rights of government forces."); Abresch, *supra* note 95, at 752-53 ("Under humanitarian law, the rules apply to all parties to a conflict - government forces and dissident armed groups alike. Under human rights law, the rules apply only to the government.").

106. *See* Kretzmer, *supra* note 1, at 201-204; *see also* Ben-Naftali & Michaeli, *supra* note 1, at 287-91.

107. Kretzmer, *supra* note 1, at 175.

108. *Id.*

109. *Id.* at 210; Ben-Naftali & Michaeli, *supra* note 1, at 257-59.

110. *See* Kretzmer, *supra note* 1, at 200; *See* Ben-Naftali & Michaeli, *supra* note 1, at 257-58.

111. Kretzmer, *supra* note 1, at 200.

> How can we be sure that the targeted persons are indeed real terrorists? Doesn't this licence [sic] [to target terrorists] create an incentive for victim states to jump as soon as possible from the law-enforcement to the non-international armed conflict model, thus allowing them to ignore due process guarantees and to enjoy almost unrestricted discretion in targeting their suspected enemies?[112]

Other commentators submit that as counter-terrorism operations are often carried out in densely populated areas, such operations involve an especially high risk of incidental injuries to innocent civilians.[113]

Yet the assertion that an "almost unrestricted discretion in targeting . . . suspected enemies"[114] is more dangerous in the context of the war on terror than in other types of armed conflict seems unfounded. The experience of recent traditional wars demonstrates that the number of uninvolved civilians either erroneously targeted or killed as collateral damage in such wars exceeds the number of innocent civilians erroneously targeted or collaterally killed in the war on terror.[115] The argument that soldiers of regular armies wear uniforms or other distinguishing marks that preclude erroneous targeting of civilians weakens in an age where thousands are killed by long-range precision weapons. As for collateral damage, the targeting of a suspected terrorist in the heart of a Palestinian residential area obviously entails a high risk of such damage. Such a risk must be brought into account in applying the proportionality requirement under the law of war. However, such a risk by no means exceeds the risk of collateral damage that existed (and materialized) in the cases of the American aerial bombardments of

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112. *Id.*

113. Ben-Naftali & Michaeli, *supra* note 1, at 291 ("In light of the fact that the Palestinian territories are densely populated, and that most [targeted killing] operations can only take place within these territories, only exceptional circumstances will enable the execution of such operations that have little harmful effects."); *see* Vincent-Joel Proulx, *If the Hat Fits, Wear It, If the Turban Fits, Run for Your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists*, 56 HASTINGS L.J. 801, 888 (2005); *see also*, Schondorf, *supra* note 16, at 66-67.

114. Kretzmer, *supra* note 1, at 200.

115. Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. REV. 1, 43-44 (2005) (reviewing surveys indicating that at least 3,420 civilians were killed as collateral damage in the course of the American invasion of Iraq in spring of 2003); Human Rights Watch, *Needless Deaths in the Gulf War: Civilian Casualties During the Campaign and Violations of the Laws of War*, Introduction, (1991), *available at* http://www.hrw.org/legacy/reports/1991/gulfwar/INTRO.htm (alleging up to 3,000 civilians were killed during the 1991 Gulf War); Human Rights Watch, *Civilian Deaths in the NATO Air Campaign*, Summary, The Civilian Deaths, *available at* http://www.hrw.org/legacy/reports/2000/nato/index.htm (concluding that as few as 488, and as many as 527 civilians were killed in approximately ninety incidents of collateral damage during the three months of NATO operations against Serbia); Marco Roscini, *Targeting and Contemporary Aerial Bombardment*, 54 INT'L COMP. L. Q. 411, 420 (2005) ("[T]he Iraqi Al Firdos bunker was bombed by the Allied forces on 13 February 1991 as it was thought to be the headquarters of the Ba'ath Party's secret police: unfortunately, also their wives and children were there and 200-300 civilians died in the attack"). It should be noted, however, that the military operations carried out by Israel in the course of its recent conflicts with the Hezbollah in Lebanon (2006) and Hamas in Gaza (2009) resulted in a number of civilian casualties characteristic of a full scale inter-state war.

Baghdad in the course of the two Gulf wars, and in the case of the NATO bombardments of Belgrade.[116]

VI. THE PERMISSION TO USE DEADLY FORCE UNDER HUMAN RIGHTS LAW

Under the mixed model, a state may use lethal force against terrorists who pose a threat that is not imminent when there is no feasible possibility of arresting them and it is likely that "if immediate action is not taken another opportunity will not be available to frustrate the planned terrorist attacks."[117] The author agrees that this standard of conduct is both realistic and desirable with regard to situations such as the confrontation between the United States and al-Qaeda. Yet the author argues that the unpleasant burden of sanctioning such killings should be placed on international human rights law.

This part rejects the assumption, which underlies the mixed model, that the liberties to use force available to a state under the mixed model are not available to it under human rights law. The analysis below addresses two questions concerning the scope of permission to kill suspected terrorists afforded to a state under human rights law:

> 1. When is the threat sufficiently proximate to justify the use of lethal force against the suspected terrorist?
>
> 2. Can a state engage in counter-terrorism operations that are likely to result in the unintentional killing of innocent persons?

A. The temporal requirement

Human rights law allows a state to exercise lethal force against a suspected terrorist where such use of force is "no more than absolutely necessary" in order to protect the lives of other persons.[118] Exploring the scope of this permission, David

116. *See supra* text accompanying note 115.

117. Kretzmer, *supra* note 1, at 203.

118. Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides:

Article 2

> (1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> (2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defense of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Convention for the Protection of Human Rights and Fundamental Freedoms art. 2(2), Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention].

Article 6(1) of the International Covenant on Civil and Political Rights prohibits deprivation of life only where such deprivation is "arbitrary." International Covenant on Civil and Political Rights, Dec. 16, 1966 art. 6, 999 U.N.T.S. 171 [hereinafter ICCPR]. It was observed that Article 2 of the European Convention "provides a fair statement of cases in which such force may be regarded as non-arbitrary."

Kretzmer subscribes to the view that such permission is limited to "cases in which lethal force is used to thwart an imminent attack. Absent imminency, pre-emptive targeting of a suspected terrorist will be regarded as not being absolutely necessary, or as an arbitrary deprivation of life, no matter how strong the evidence that he is planning further terrorist attacks and how high the probability that there may not be another opportunity to prevent such attacks."[119]

Yet neither the language of the main human rights conventions nor the jurisprudence of international human rights tribunals provides ample support for such conclusion.

1. The Approach Taken By Human Rights Treaty-Bodies

The Jurisprudence of the European Court of Human Rights has produced extensive case law regarding the limitations on the use of lethal force imposed on a state under human rights law. Applying Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[120] ("European Convention"), which allows a state to use lethal force "which is no more than absolutely necessary . . . in defense of any person from unlawful violence," the Court has stressed that "[t]he circumstances in which deprivation of life may be justified must therefore be strictly construed."[121] Hence, use of lethal force against an aggressor is only permitted when absolutely necessary in order to thwart a lethal threat he poses to others.[122] Such use of force must be "strictly proportionate" to the achievement of this aim.[123] The Court has repeatedly held that use of lethal force against a person whom it is possible to arrest would never be "absolutely necessary."[124] Yet the Court has never held that a state's use of deadly force against a person who poses a lethal threat that is not imminent violates human rights law even where there is no feasible possibility of arresting him and there is a high probability that if action is delayed there will not be another opportunity to thwart that threat.[125]

In its periodic report of Israel in July 2003, the U.N. Human Rights Committee addressed the question of whether Israel's policy of targeted killing of suspected terrorists violates Israel's obligations under human rights law.[126] Israel's representative submitted to the Committee that "[i]t would, of course, be preferable to arrest such persons, but in areas like the Gaza Strip, over which Israel had no

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Kretzmer, *supra* note 1, at 177.

119. Kretzmer, *supra* note 1, at 183.

120. European Convention, *supra* note 118, at art. 2.

121. Isayeva v. Russia, App. No. 57950/00, 41 Eur. H.R. Rep. 791, 832 (2005).

122. *Id.* at 836 ("[T]he primary aim of the operation should be to protect lives from unlawful violence.").

123. *Id.* at 832; McCann v. United Kingdom, App. No. 18984/91, 21 Eur. H.R. Rep. 97, 98 (1996).

124. *See McCann*, App. No. 18984/91, 21 Eur. H.R. Rep. at 97-98; *see also* Ergi v. Turkey, App. No. 23818/94, 32 Eur. H.R. Rep. 388, 430-31 (1998).

125. *See McCann*, App. No. 18984/91, 21 Eur. H.R. Rep. at 97-98; *see also* Ergi v. Turkey, App. No. 23818/94, 32 Eur. H.R. Rep. 388, 430-31 (1998).

126. U.N. Human Rights Comm. [U.N.H.R.C.], *Concluding Observations of the Human Rights Committee: Israel*, ¶ 15, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003), [hereinafter UNHRC].

control, his Government did not have that option."[127] Israel's representative further assured the Committee that Israel carried out targeted killing operations against suspected terrorists "only if there was reliable evidence linking them directly to a hostile act" and only "when no less harmful alternative was available to avert the danger posed by the terrorists."[128] Israel's description of the circumstances underlying its targeted killing operations clearly provided the Committee with ample opportunity to state plainly and explicitly, had it chosen to do so, that human rights law always prohibits the targeted killing of a terrorist who poses a lethal threat that is not imminent, "no matter how strong the evidence that he is planning further terrorist attacks and how high the probability that there may not be another opportunity to prevent such attacks." [129] The Committee, however, clearly chose to refrain from such determination. In its Concluding Observations the Committee stated: "The Committee is concerned by what the State party calls 'targeted killings' of those identified by the State party as suspected terrorists in the Occupied Territories. This practice would appear to be used at least in part as a deterrent or punishment, thus raising issues under article 6."[130]

The Committee then proceeded to recommend:

> The State party should ensure that the utmost consideration is given to the principle of proportionality in all its responses to terrorist threats and activities. State policy in this respect should be spelled out clearly in guidelines to regional military commanders, and complaints about disproportionate use of force should be investigated promptly by an independent body. *Before resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted.*[131] (emphasis added)

The first part of the Committee's observation seems to suggest that the exercise of lethal force against a terrorist, which is not used as a deterrent or punishment but, rather, as a means of preventing an attack that cannot be otherwise thwarted, does not violate human rights law. In its recommendation, the Committee refers to use of deadly force against a "person suspected of being in the process of committing acts of terror."[132] Yet this does not suggest that the Committee took the view that under human rights law preventive lethal force may only be used in the face of an imminent attack. It is important to recall that the Israeli practice of targeted killing of suspected terrorists, addressed by the Committee, was largely directed against individuals who recruited suicide bombers, planned or ordered the suicide attack, or manufactured the explosives

127. MELZER, *supra* note 84, at 31 (*quoting* U.N. Human Rights Comm., *International Covenant on Civil and Political Rights, Summary Record of the 2118th Meeting,* ¶ 40, U.N. Doc. CCPR/C/SR.2118 (July 23, 2003)).

128. *Id.*

129. Kretzmer, *supra* note 1, at 183.

130. UNHRC, *supra* note 126, ¶ 15.

131. *Id.*

132. *Id.*

used by the suicide bombers.[133] It seems that those individuals are "in the process of committing acts of terror"[134] when performing their part in the terrorist scheme, even though their role is typically performed when the threat is not yet imminent. It is hardly arguable that those who are "in the process of committing acts of terror" are only the suicide bombers themselves.

In its *Report on Terrorism and Human Rights*,[135] the Inter-American Commission on Human Rights addressed the limitations on the use of lethal force against suspected terrorists under Article 4 of the American Convention on Human Rights, which provides that "[n]o one shall be arbitrarily deprived of his life."[136] Even proponents of a strict imminence-of-harm requirement in human rights law concede that the Commission's observations regarding this matter were "ambiguous."[137] The Commission stated:

> [I]n situations where a state's population is threatened by violence, the state has the right and obligation to protect the population against such threats and in so doing may use lethal force in certain situations. This includes, for example, the use of lethal force by law enforcement officials where strictly unavoidable to protect themselves or other persons from imminent threat of death or serious injury, or to otherwise maintain law and order where strictly necessary and proportionate.[138]

The first example of permissible use of lethal force provided by the Commission seems to suggest that in the Commission's view the targeted killing of a suspected terrorist is generally allowed only where the terrorist poses an imminent threat. The second example (" . . . to otherwise maintain law and order"), with regard to which the Commission does not mention the imminence requirement, seems to imply, however, that in the face of large-scale, organized violence between a government and a terrorist or guerrilla group, or other types of large-scale violence, the imminence requirement is relaxed.

The Commission then proceeded to provide examples of impermissible use of lethal force against suspected terrorists:

> [T]he state may resort to the use of force only against individuals that threaten the security of all . . . in their law enforcement initiatives, states must not use force against individuals who no longer present a threat as described above, such as individuals who have been apprehended by authorities, have surrendered, or who are wounded and abstain from hostile acts. The use of lethal force in such a manner would constitute

133. Kretzmer, *supra* note 1, at 172.

134. UNHRC, *supra* note 126, ¶ 15.

135. Inter-American Comm'n on Human Rights, *Report on Terrorism and Human Rights*, at ¶ 22, OEA/Ser.L/V/II.116 (Oct. 22, 2002), *available at* http://www.cidh.oas.org/Terrorism/Eng/exe.htm.

136. American Convention on Human Rights art. 4, Nov. 22, 1969, 9 I.L.M. 673.

137. Kretzmer, *supra* note 1, at 180.

138. Inter-American Comm'n on Human Rights, *supra* note 135, at ¶ 87.

> extra-judicial killings in flagrant violation of Article 4 of the Convention and Article I of the Declaration. [139]

The Commission's observations "left matters unclear."[140] Kretzmer notes that "[t]he examples given are impeccable. However, what about suspected terrorists who have not been apprehended or wounded and have not surrendered? If there is an assessment that they 'threaten the security of all' may lethal force be used against them?"[141]

2. The Relationship Between International Human Rights Law and Domestic Laws

The author submits that the construction of the right to life under human rights law should be informed by the domestic laws of the various states.

The prevailing interpretive approach to human rights conventions looks to the standards and values commonly accepted by Member States. The European Court of Human Rights has thus noted that in determining the scope of the prohibition on "degrading punishment" contained in Article 3 of the European Convention,[142] "the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field."[143] Commentators have observed that the European Court's interpretive approach "is closely linked to a search for common European standards on the basis of domestic law and practice in the Member States of the Council of Europe,"[144] and that the Court interprets the Convention "to accommodate changing social attitudes."[145] This interpretive approach also applies to the human right to life.[146] As noted by one commentator, the legal regime applicable to the use of force by law enforcement agents should not be examined "from an either/or perspective–either as an international law issue or as one of domestic law. In fact, it is an issue that resides equally in both spheres, and decisions made as to legal characterizations and authorizations in each sphere are neither independent nor discrete. Such issues must be looked at holistically and the consequences of a legal characterization in one sphere must be traced through the other."[147]

The domestic law of self-defense is indicative of the social attitudes in the various states toward the use of lethal force. The criminal defense of self-defense

139. *Id.* at ¶¶ 90-91.

140. Kretzmer, *supra* note 1, at 182.

141. *Id.* at 181.

142. European Convention, *supra* note 118, art. 3.

143. Tyrer v. United Kingdom, 2 Eur. H.R. Rep. (ser. A No. 26) at 10 (1978); RICHARD CLAYTON & HUGH TOMLINSON, THE LAW OF HUMAN RIGHTS 270 (2000); *see also* P. VAN DIJK & G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 78 (1998).

144. VAN DIJK & VAN HOOF, *supra* note 143, at 78.

145. CLAYTON & TOMLINSON, *supra* note 143, at 270.

146. Rob McLaughlin, *The Legal Regime Applicable to Use of Lethal Force When Operating Under A United Nations Security Council Chapter VII Mandate Authorizing 'All Necessary Means,'* 12 J. CONFLICT & SECURITY L. 389, 395-97 (2007).

147. *Id.* at 392.

is a justificatory, rather than an excusing, norm.[148] Hence, the availability of the defense of self-defense with regard to certain killings indicates that society considers the conduct that resulted in such killings a desirable conduct.[149] Explaining the nature of justificatory norms, Antonio Cassese observes that:

> When the law provides for a justification, an action that would per se be considered contrary to law because it causes harm or damage to individuals or society is regarded instead as lawful and thus does not amount to a crime. Society, and the legal system it has created, positively wants a person to do the otherwise illegal act . . . . [S]ociety and its legal system make a positive appraisal of what would otherwise be misconduct.[150]

To be sure, a state's domestic law of self-defense may simply violate human rights law.[151] Yet where numerous democracies parties to a human rights treaty pronounce a certain conduct desirable, by affording it a self-defense justification, such conduct can hardly be considered contrary to the standards and values commonly accepted by Member States. Hence, such conduct should not be considered a violation of the human right to life. This view is also supported by the status of the human right to life as a customary norm of international law.[152] Customary international norms are only those that have gained broad acceptance, which is largely reflected in domestic laws.[153] Hence, any assessment of the scope of permission to use lethal force available to states under human rights law should be informed by the domestic laws of self-defense.[154]

Some domestic jurisdictions recognize a right to use force in self-defense only where the threat posed by the aggressor is imminent.[155] Other jurisdictions,

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148. GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 132-133 (1998).

149. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 255 (2nd ed. 2008).

150. *Id.*

151. *See, e.g.*, FIONA LEVERICK, KILLING IN SELF-DEFENSE 192-94 (2006) (arguing that English law, which affords the defense of self-defense to a person who killed another in the unreasonably mistaken belief that the latter was an aggressor, violates the United Kingdom's obligation under human rights law to take appropriate steps to safeguard the lives of those within its jurisdiction).

152. With regard to the status of the human right to life as customary international law, *see* MELZER, *supra* note 84, at 189; Kretzmer, *supra* note 1, at 184-85 ("some of the substantive norms in human rights treaties that have been ratified by the vast majority of states in the world, have now become peremptory norms of customary international law. The duty to respect the right to life is surely one of these norms."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702(c) (1987) ("A state violates international law if, as a matter of state policy, it practices, encourages or condones . . . the murder . . . of individuals.").

153. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1987); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 6 (7th ed. 2008).

154. McLaughlin, *supra* note 146, at 389 ("The 'law enforcement' paradigm . . . essentially countenances the use of lethal force within the limitations of self-defense.").

155. LEVERICK, *supra* note 151, at 88. An imminence of harm requirement exists in Scotland. Thus, the Scottish Appeal Court held that "self-defense is made out when it is established to the satisfaction of the jury that the panel believed that he was in imminent danger and that he held that belief on reasonable grounds." Owens v. HM Advocate 1946 J.C. 119, 125. A requirement that harm be imminent can also be found in the self-defense laws of some US states. *See* Whipple v. Indiana 523 N.E.2d 1363, 1367 (1988); ALA. CODE § 13A-3-23(a) (1975); ARK. CODE ANN. § 5-2-606(a)(1)

however, do not introduce an imminence requirement and only require that force used in self-defense be "necessary."[156] This is the approach taken in English law where imminence of harm is one factor for the jury to take into account in deciding whether or not defensive action was reasonably necessary.[157] This approach also prevails in Canadian law. [158] The Supreme Court of Canada thus held in *R. v. Petel*: "There is . . . no formal requirement that the danger be imminent. Imminence is only one of the factors which the jury should weigh in determining whether the accused had a reasonable apprehension of danger and a reasonable belief that she could not extricate herself otherwise than by killing the attacker."[159]

The holding in *Petel* addressed a case involving a battered woman.[160] Yet in a later case, *R. v. Cinous*, the Supreme Court held that the approach taken in *Petel* represented the law in all cases of self-defense.[161]

Similarly, the American Model Penal Code ("MPC") as well as the Israeli Penal Code substituted a requirement that the use of force in self-defense be "immediately necessary" for a requirement of imminence.[162] The approach taken in the MPC was followed by a number of U.S. states.[163] Many commentators believe that "immediately necessary" will encompass those cases in which the violence is not imminent, but the need to use lethal force in order to prevent that violence is immediate, since if such force is not used now it may not be possible to prevent the violence later.[164]

Yet even proponents of a strict imminence requirement agree that this requirement presupposes the availability of non-lethal law-enforcement measures when the danger is not imminent. George Fletcher argues that what underlies the imminence requirement is the notion that the citizen may use force in self-defense only when the state lacks the opportunity to do so.[165] Hence, according to Fletcher,

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(1975); COLO. REV. STAT. § 18-1-704(1) (1975); GA. CODE ANN. § 16-3-21(a) (2001); ME. REV. STAT. ANN. tit. 17-A, § 108(1) (2006); MONT. CODE ANN. § 45-3-102 (2009); NY PENAL LAW § 35.15(1) (McKinney 2009); OR. REV. STAT. § 161.209 (2003); UTAH CODE ANN. § 76-2-402(1) (1953).

156. *See* LEVERICK, *supra* note 151, at 96.

157. *Id.*; Shaw v. R [2001] UKPC 26, 19; Palmer v. R [1970] A.C. 814, 831.

158. LEVERICK, *supra* note 151, at 96.

159. R. v. Petel, [1994] 1 S.C.R. 3 (Can.); *see also* R. v. Lavallee, [1990] 1 S.C.R. 852 (Can.).

160. *See* Petel, 1 S.C.R. 3.

161. R. v. Cinous [2002] 2 S.C.R. 3, 40 (Can.); LEVERICK, *supra* note 151, at 97.

162. MODEL PENAL CODE § 3.04(1) (2001); Penal Law of Israel § 34(J) (1996).

163. TEX. PENAL CODE ANN. § 9.31(a) (Vernon 2003); ARIZ. REV. STAT. ANN. § 13-404(A) (1977); DEL. CODE ANN. tit. 11, § 464(a) (1972); NEB. REV. STAT. § 28-1409(1) (1972); 18 PA CONS. STAT. § 505(a) (1972).

164. *See, e.g.*, Stephen J. Schulhofer, *The Gender Question in Criminal Law*, 7 SOC. PHIL. & POL'Y 105, 127 (1990); PAUL H. ROBINSON, CRIMINAL LAW DEFENSES 78-79 (1984); Peter D.W. Heberling, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914, 932 (1975).

165. George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553, 570 (1996) ("[T]he imminence requirement expresses the limits of governmental competence: when the danger to a protected interest is imminent . . . the police are no longer in a position to intervene and exercise the state's function of securing public safety. The individual right to self-defense kicks in precisely because immediate action is necessary.").

the imminence requirement "properly falls into the domain of political rather than moral theory. The issue is the proper allocation of authority between the state and the citizen."[166]

This fundamental premise of the imminence requirement is invalid, however, where the suspected terrorist is not in a territory under the effective control of the victim state, and the state in which he stays is either unwilling or unable to thwart the threat he poses. Commenting on the conditions for a state's right of self-defense (which are similar to the conditions for a right of self-defense under domestic law[167]), Mordechai Kremnitzer argues that under such circumstances the imminence requirement ought to be replaced by a more relaxed requirement that the use of lethal force by the state be "immediately necessary" in order to thwart the threat.[168] The latter requirement allows the state to act even where the threat posed by the terrorist is temporally remote if there is a high probability "that delaying action will prevent the possibility of eliminating the threat later on."[169]

In *Tennessee v. Garner*, the U.S. Supreme Court examined the constitutional limitations on the use of lethal force by law enforcement agents attempting to apprehend a fleeing suspect.[170] The Court held that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others . . . deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."[171] The Court determined that a law enforcement officer may conclude that a suspect poses such threat not only where "the suspect threatens the officer with a weapon,"[172] but also where "there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm . . ."[173] The author submits that permission to use lethal force against a fleeing suspect in order to thwart a threat inferred solely from her alleged past conduct is inconsistent with an imminence-of-harm requirement.

B. Collateral Damage

1. The Approach Taken By the European Court of Human Rights

The issue of collateral damage in the course of anti-insurgency operations was discussed by the European Court of Human Rights in the case of *Isayeva v. Russia*.[174] Engaging a group of over a thousand Chechen insurgents, the Russian military resorted to air bombardment using heavy, free-falling, high-explosive bombs with a damage radius exceeding 1,000m, notwithstanding the proximity of

166. *Id.*

167. *Id.* at 557.

168. Mordechai Kremnitzer, *Are All Actions Acceptable in the Face of Terror? Israel's Policy of Preventative (Targeted) Killing in Judea, Samaria and Gaza* (Israel Democracy Institute, Policy Research Paper 60, 2005).

169. *Id.*

170. Tennessee v. Garner, 471 U.S. 1, 3 (1985).

171. *Id.* at 11-12.

172. *Id.* at 11.

173. *Id.*

174. *See* Isayeva v. Russia, App. No. 57950/00, 41 Eur. H.R. Rep. 791, 791 (2005).

the fighters to civilian population.[175] There is little doubt that the large-scale hostilities in Chechnya qualified as an armed conflict. However, as neither Russia nor the Applicants in those cases argued for the existence of an internal armed conflict, the Court did not recognize the existence of such conflict.[176] Applying human rights law, the Court observed that the Russian military activity was carried out "outside wartime"[177] and thus "has to be judged against a normal legal background." [178] The Russian military, held the Court, was bound to exercise "the degree of caution expected from a law enforcement body in a democratic society."[179]

Article 2 of the European Convention, which protects the right to life, permitted Russia to use deadly force against the Chechen fighters provided that such force was "no more than absolutely necessary" in order to protect either the lives of the Russian soldiers or the lives of Chechen civilians in the hands of the insurgents.[180] The Court observed that Article 2 further requires that the use of force be "strictly proportionate" to the achievement of this aim.[181]

Yet, while the Court concluded that the indiscriminate use of lethal force by Russia violated Article 2 of the European Convention[182]–indeed, the Russian operation stood in clear violation of the law of war as well[183]–its judgment implies that human rights law does not always prohibit military operations that involve significant risk to the lives of innocent persons. Applying the "strict proportionality" standard, the Court held that human rights law requires a state to "take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, *in any event, minimizing*, incidental loss of civilian life"[184] (emphasis added – A.Z.). The Court recognized that "the situation that existed in Chechnya at the relevant time called for exceptional measures on behalf of the State in order to regain control over the Republic and to suppress the illegal armed insurgency."[185] These measures, the Court added, "could presumably include employment of military aviation equipped with heavy combat weapons," as well as artillery.[186] The limited requirement merely to "minimize" incidental loss of civilian lives, read together with the permission to use weapons that inherently create substantial risk of collateral damage, is inconsistent with the view that any foreseeable incidental

175. *Id.* at 794, 817.
176. *See id.* at 824-30.
177. *Id.* at 836.
178. *Id.*
179. *Id.*
180. *Id.* at 832; European Convention, *supra* note 118, art. 2(2).
181. *Isayeva*, App. No. 57950/00, 41 Eur. H.R. Rep. at 832.
182. *Id.* at 791.
183. David Kaye, *Khashiyev & Akayeva v. Russia; Isayeva, Yusupova & Bazayeva v. Russia, Isayeva v. Russia*, 99 AM. J. INT'L L. 873, 881 (2005).
184. *Isayeva*, App. No. 57950/00, 41 Eur. H.R. Rep. at 832.
185. *Id.* at 833; Isayeva, Yusopova and Bazayeva v. Russia, App. Nos. 57947/00, 57948/00, 57949/00, 41 Eur. H.R. Rep. 847, 884 (2005) [hereinafter Isayeva II].
186. *Supra* note 185; *See* also Kaye, *supra* note 183, at 879.

death of an innocent person in the course of a military operation amounts to a violation of Article 2.[187]

The Court emphasized that "the primary aim of the operation should be to protect lives from unlawful violence."[188] The Court's holding is not inconsistent with the view that, in situations of large-scale violence such as the Chechnya conflict, human rights law allows foreseeable incidental killing of innocent persons in the course of a military operation that is guided by a cost-benefit analysis in terms of loss of innocent lives. Such permission is not narrower than the one afforded under the mixed model.

The author submits that where a law enforcement operation is likely to result in the unintentional killing of innocent bystanders, human rights law requires a society to cede its interests in preserving law and order only to a certain point. Indeed, asserting the contrary would render most hostages rescue operations a violation of human rights law, as the risk to the lives of innocent individuals inherent in such operations can often be avoided simply by yielding to the demands of the hostage-takers.

Thus, no international tribunal has ever suggested that human rights law requires state law enforcement agencies to refrain altogether from confronting a guerrilla group, a criminal organization, or any other armed group illegally operating within the borders of the state, where there is no possibility to conduct such law enforcement operations without a high risk to the lives of innocent individuals. All that is required from state forces initiating a military operation against guerrilla forces is to plan and conduct such operations in a manner that minimizes as far as possible incidental injuries to uninvolved individuals.[189] Only where law enforcement operations do not demonstrate such an effort does a violation of the right to life occur.

2. Domestic Laws

The domestic laws of the various states do not reveal a *commonly accepted* attitude toward law enforcement operations that are likely to result in the incidental death of innocent persons, and which are carried out on the basis of cost-benefit analysis in terms of the loss of human lives. The German Federal Constitutional Court seems to have taken the position that such operations are never permissible in situations not governed by the law of war.[190] Following the terrorist attacks of September 11, 2001, the German legislature passed a new aerial security law which expressly authorized the German armed forces, as a law enforcement measure of last resort, to shoot down civil aircraft which have come under the control of individuals intending to use them as weapons by deliberately causing

187. *Id.* Kaye notes that the language of the Isayeva Court "could just as well come from a court doing the typical balancing of military requirements and humanitarian concerns required under [international humanitarian law]." *See also* Abresch, *supra* note 95, at 762.

188. *Isayeva*, App. No. 57950/00, 41 Eur. H.R. Rep. at 836.

189. *See* Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L. L. 1, 18 (2004).

190. Melzer, *supra* note 84, at 17-18.

them to collide with selected targets.[191] The German Federal Constitutional Court declared the said law unconstitutional to the extent that it permitted the incidental killing of innocent crew and passengers on board of the "renegade" aircraft. The Court reasoned that such killing would degrade the innocent individuals on board of the airplane to mere objects of state actions, and would thus be incompatible with the notion of human dignity, enshrined in the German Basic Law.[192]

Moreover, in some jurisdictions no criminal justification applies to unintentional injuries suffered by innocent third parties in the course of self-defense.[193] This, however, is not the prevailing approach in U.S. criminal law. Under the laws of most U.S. jurisdictions, a person using a firearm in the exercise of self-defense is not liable for an injury unintentionally inflicted on a bystander unless he acted carelessly or negligently.[194] In this regard, the fact that the defending party knew of the presence of the bystander does not of itself render his conduct careless or negligent.[195] The defense available to the defending party relies on the doctrine of transferred intent.[196] According to this doctrine, "the fact

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191. *Id.* at 16.

192. *Id.* at 17-18.

193. This is the position taken by German law as well as by English law. *See* Klaus Bernsmann, *Private Self-Defense and Necessity in German Penal Law and in the Penal Law Proposal – Some Remarks*, 30 ISR. L. REV. 171, 176 (1996); *Re: A (Conjoined Twins Case)* [2001] 2 WLR 480.

194. Ferdinand S. Tinio, Annotation, *Unintentional Killing Of or Injury to Third Person During Attempted Self-Defense*, 55 A.L.R. 3d 620 (2008):

> If, then, the perpetrator of the homicide or of the assault had no criminal intent in attempting to injure or kill another person, as where the perpetrator was lawfully defending himself from the harm sought to be inflicted upon him by such other person, the fact that, on that occasion, a third person was unintentionally injured or killed by the perpetrator would not make him liable, unless the perpetrator acted carelessly or without regard to the safety of innocent bystanders. This view has been applied in a variety of circumstances in which the perpetrator of the homicide or assault has been prosecuted for murder, manslaughter, or assault, based upon injury to, or death of, a third person.

See also 13 AM JUR. 3D *Proof of Facts* 219, § 7 (comment).

195. 13 AM. JUR. 3D *Proof of Facts* 219, §7 (comment):

> A person using a firearm or other weapon in the exercise of self-defense is not liable for an injury unintentionally inflicted on a bystander unless he is guilty of some negligence or folly in the use of the weapon. Thus, when a person, in lawful self-defense, shoots at an assailant, and, missing him, accidentally wounds an innocent bystander, he is not liable for the injury if not guilty of negligence. *It has been held in such circumstances that the fact that the person knew or was chargeable with knowledge of the presence of the bystander does not of itself constitute want of due care or actionable negligence per se.* (emphasis added – A.Z.)

196. Tinio, *supra* note 194:

> The general rule in criminal law that one who does an unlawful act is liable for the consequences even though they may not have been intended may have a more specific counterpart in the rule in homicide and assault cases that a homicide or assault partakes of the quality of the original act, so that the guilt of the perpetrator of the crime is exactly what it would have been had the blow fallen upon the intended victim instead of the bystander. Under this rule the fact that the bystander was killed or injured instead of the intended victim becomes

that the bystander was killed or injured instead of the intended victim becomes immaterial, and the only question at issue is what would have been the degree of guilt if the issue intended had been accomplished; the intent is transferred to the person whose death or injury has been caused."[197] It thus seems that the defense available to the defending party is the criminal justification of self-defense. In the words of one commentator, "[i]n essence, the defendant's privilege of self-defense is transferred from the attacker to an innocent bystander injured by the defendant's response."[198]

A similar approach prevails in American tort law. It has been observed that "[u]nder established tort principles, the reasonable use of force in self-defense does not create liability for any resultant bodily injuries, even if suffered by an innocent bystander."[199] In this context, Mark Giestfeld noted that "as a matter of law, abnormally dangerous activities involve reasonable risks."[200] Indeed, the jurisprudence of U.S. courts indicates that a substantial risk to the life of an innocent third party is not necessarily an unreasonable one: if shooting at an aggressor is a *necessary* means of self-defense, such use of force does not create liability for resultant injuries suffered by an innocent bystander, even if the risk of such injuries was foreseeable and substantial.[201] It seems, then, that "tort law has

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> immaterial, and the only question at issue is what would have been the degree of guilt if the issue intended had been accomplished; the intent is transferred to the person whose death or injury has been caused.

197. *Id.*

198. Alan Calnan, *The Fault(s) in Negligence Law*, 25 QUINNIPIAC L. REV. 695, 712 n.91 (2007).

199. Mark Geistfeld, *Negligence, Compensation, and the Coherence of Tort Law*, 91 GEO. L.J. 585, 596 (2003); DAN B. DOBBS, THE LAW OF TORTS 77 (2000) ("[T]he defendant must not be held liable if his conduct was protected by a privilege and the plaintiff is injured without fault. For example, the defendant may act intentionally in justified self-defense; if his act of self-defense causes injury to a bystander, there is no reason to impose liability unless the defendant was negligent.").

Section 75 of the Restatement (Second) of Torts (1965) thus provides:

> An act which is privileged for the purpose of protecting the actor from a harmful or offensive contact or other invasion of his interests of personality subjects the actor to liability to a third person for any harm unintentionally done to him only if the actor realizes or should realize that his act creates an unreasonable risk of causing such harm.

RESTATEMENT (SECOND) OF TORTS § 75 (1965).

200. Mark Geistfeld, *Tort Law and Criminal Behavior (Guns)*, 43 ARIZ. L. REV. 311, 335 (2001).

201. Whittington v. Levy, 184 So. 2d 577, 579 (La. Ct. App. 1966) ("If, in defending himself, the defendant accidently shoots a stranger, there is no liability in the absence of some negligence, and on the issue of negligence, the necessity of defending against the assailant must be considered in determining whether he has acted reasonably.").

The example provided in the Comments on Section 75 of the Restatement (Second) of Torts (1965) is illuminating:

> A points a pistol at B, threatening to shoot him. B attempts to shoot A, but his bullet goes astray and strikes C, an innocent bystander. B is not liable to C unless, taking into account the exigency in which A's act placed B, B fired his self-defensive shot in a manner *unnecessarily* dangerous to C. (emphasis added – A.Z.).

RESTATEMENT (SECOND) OF TORTS § 75 cmt. (1965).

> This example clarifies that if shooting at an aggressor is a *necessary* means of self-defense, such use of force does not create liability for resultant injuries

decided in favor of self-defense,"[202] so that "[t]he interest in self-defense has priority, for purposes of tort liability, over the competing security interest of a third party."[203] Importantly, some decisions indicate that this also applies to the use of defensive force by a law enforcement agent.[204]

It seems, then, that domestic laws do not reflect a common sentiment in the international community that regards an attack directed at an aggressor, which involves a substantial risk of unintentional injury to an innocent third party, as always unreasonable. At the very least, it can be said that domestic laws do not preclude an interpretation of human rights law that grants a state the same permission to kill afforded to it under the mixed model.

C. Should We Keep Human Rights Law "Unstained"?

The language of the human rights conventions allows us a choice: we can place the burden of relaxing the imminence requirement either on human rights law or on a new body of law–the mixed model–created in order to shield human rights law.

We saw that classifying hostilities between a state and a terrorist group as an armed conflict requires stretching the customary definition of either an international armed conflict or a non-international armed conflict. As indicated above, there is a good reason to stretch the definition of armed conflict to encompass violence that borders on full scale war. In such situations it is essential to apply the law of war as it represents the strictest realistic limitations on violence. But what about conflicts characterized by a scale of violence that is somewhere in between peace and full scale war, such as the conflict between the U.S. and al-Qaeda? Is there a good reason to stretch the definition of an armed conflict in order to apply the mixed model to such conflicts?

In the wake of September 11th, human rights law was hurried to a secured location, while other bodies of international law–the law of war or the mixed model–were dispatched to do the dirty work. The proponents of the mixed model go long way in order to keep human rights law unstained. Is there a good reason to relieve human rights law of the unpleasant responsibility to sanction realistic standards of conduct in the fight against terrorism?

One could argue that sanctioning targeted killing under the mixed model rather than under human rights law is necessary in order to protect the legal

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suffered by an innocent bystander, even if the risk of such injuries was foreseeable.

202. Geistfeld, *supra* note 200, at 313.

203. *Id.* at 335. *See also* Calnan, *supra* note 198, at 712 ("In cases of self-defense, the imperiled party is entitled to use whatever force is necessary to stop an aggressor in her tracks. However, her entitlement does not stop there. She also may commandeer the interests of innocent bystanders. For example, a party claiming self-defense may endanger or even injure a passerby. The only limit is that she act reasonably under the circumstances. In this situation, the passerby cannot recover damages for her harm. Instead, she must sacrifice her interests for those of the privilege-holder.").

204. Gordon v. City of New Orleans, 363 So. 2d 235, 241 (La. Ct. App. 1978); Gordon v. City of New Orleans, 371 So. 2d 768, 768 (La. 1979).

structure of "due process – rule, extrajudicial killings – exception." Removing a norm that relaxes the imminence requirement with regard to targeted killing from the body of law that mainly regulates situations of normalcy, and confining it to a body of law that regulates armed conflicts, emphasizes the norm's status as the exception. It provides a buffer between that norm and situations of normalcy.

Yet this argument presupposes the exceptional nature of large-scale violence that renders due-process law enforcement measures impractical. It relies on "a vision of spasms of crises–episodic and sporadic events, albeit very serious in nature–that last for a relatively brief period of time before the restoration of normalcy."[205] Such vision hardly comports with reality. As observed by Oren Gross with regard to the Derogation Regime in human rights law, "the exception has swallowed the general rule . . . . Crisis and emergency are no longer sporadic episodes in the lives of many nations; they are increasingly becoming a permanent fixture in the unfolding story of humanity." [206] Gross further observes that "a substantial number of states of emergency in the modern world do not follow the 'normalcy-rule, emergency-exception' paradigm. Rather than provisional and temporary emergencies, the world increasingly faces de facto, permanent, institutionalized, or entrenched emergencies."[207]

Grave, large-scale hostilities between a state and terrorist or guerrilla organizations have become in many regions of the world the rule, not the exception.[208] It seems, therefore, that a careful yet *realistic* application of the concepts of "absolute necessity" and "strict proportionality" in human rights law would not compromise the legal structure of "due process–rule, extrajudicial killings–exception" more than a model that stretches the definition of an armed conflict so that it encompasses conflicts such as the one between the U.S. and al-Qaeda.

The main rationale for the mixed model turns on the impracticality of due process law enforcement measures in the face of grave, large-scale violence. Opting for the mixed model on the basis of this rationale seems to be precluded by the derogation regime applicable in international human rights law: The main international human rights conventions allow a signatory state to derogate from some of its human rights obligations "in time[s] of public emergency which threatens the life of the nation . . ."[209] Such derogation must be limited "to the extent strictly required by the exigencies of the situation."[210]

An adoption of the mixed model triggered by the impracticality of due process law enforcement measures would circumvent the derogation regime. The

205. Oren Gross, *"Once More Unto the Breach": The Systematic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 YALE J. INT'L L. 437, 453 (1998).

206. *Id.* at 443.

207. *Id.* at 455.

208. *See* Savitri Taylor, *Guarding the Enemy from Oppression: Asylum-Seeker Rights Post-September 11*, 26 MELB. U. L. REV. 396, 406 (2002).

209. ICCPR, *supra* note 118, art. 4; European Convention, *supra* note 118, art. 15(1); American Convention on Human Rights art. 27, Nov. 22, 1969, 9 I.L.M. 673.

210. *See* ICCPR, *supra* note 118, art. 4.

derogation regime contained in human rights law was conceived precisely for situations such as large-scale violence that threatens the life of the nation (i.e., violence that renders the law enforcement model impractical).[211] It implies a judgment, made by the framers of the human rights conventions, that such violence does not warrant a shift from a legal regime governed by human rights law to any other legal regime. Rather, such violence should be tackled within the contours of human rights law and its derogation regime. This judgment also suggests the confidence of the framers of the human rights conventions that human rights law and its derogation regime present realistic standards of conduct for states in the face of violence that threatens the life of the nation.[212]

In this regard, it is of no significance that the right to life is not subject to the special derogation regime.[213] Article 6 of the International Covenant on Civil and Political Rights, which protects the right to life, prohibits only "arbitrary" killings.[214] Given the loose language of this provision, it is clear why the derogation regime does not apply to it. Obviously, no emergency justifies arbitrary killings.

The analysis in this part suggests, then, that international human rights law allows states to target and kill terrorists who pose a lethal threat that is not imminent, provided that there is no feasible possibility of arresting them and there is a high probability that delaying action will prevent the possibility of thwarting the threat later. Moreover, human rights law does not contain an absolute prohibition on law enforcement operations that are likely to result in the unintentional killing of innocent persons. Rather, state forces engaging a terrorist or guerrilla group are required to plan and conduct their operations in a manner that *minimizes*, as much as possible, incidental injuries to uninvolved individuals. Hence, the liberties to use force afforded to a state under the mixed model are also available to it under international human rights law.

VII. CONCLUSION

This article argues that terrorism should be tackled within the contours of the traditional armed conflict/law enforcement dichotomy. The application of the law of war is triggered where hostilities border on full-scale war. Within the law of war's proper field of application it does not allow a state too much. It represents

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211. The derogation regime contemplates the harshest of circumstances. See Gross, *supra* note 205, at 453-54 ("[T]he emergency must threaten the very existence of the nation, that is, the 'organized life of the community constituting the basis of the State."); *see also* Joan F. Hartman, *Derogation from Human Rights Treaties in Public Emergencies*, 22 HARV. INT'L L.J. 1, 2 (1981).
The derogation regime may apply to the conduct of security forces only where normal due-process measures are impractical. *See* Gross, *supra* note 205, at 453 (Addressing the conditions for the application of the derogation regime to situations of grave violence, Gross observed, "normal measures available to the state should be manifestly inadequate and insufficient to respond effectively to the crisis.").

212. Ariel Zemach, *Taking War Seriously: Applying the Law of War to Hostilities Within an Occupied Territory*, 38 GEO. WASH. INT'L. L. REV. 645, 677 (2006).

213. *See, e.g.*, ICCPR, *supra* note 118, art. 4(2).

214. *Id.* art. 6.

the best bargain from a humanitarian perspective regardless of whether the conflict is an inter-state conflict or a conflict between a state and a non-state entity. Outside the purview of the law of war, human rights law does not allow states too little. It provides states with realistic standards of conduct even in the face of grave, large-scale violence, so long as the reality of hostilities lends itself to an individualized assessment of dangerousness.

The development of a new body of law, a normative middle ground between the law of war and human rights law applicable to armed conflicts between a state and non-state actors, is therefore superfluous. Furthermore, such new body of law would suffer from a number of inherent flaws: it cedes the legitimate ends of a just war, compromises the principle of equality in the application of the law of war, and is, most importantly, unrealistic where hostilities between a state and a non-state actor resemble a full-scale war, as it requires an individualized assessment of dangerousness in a reality that is not amenable to such assessment.

EXPORTING THE RULE OF LAW TO MONGOLIA: POST-SOCIALIST LEGAL AND JUDICIAL REFORMS

SEBASTIAN R. ASTRADA*

This article analyzes Mongolia's legal and judicial reforms and the efforts of international organizations and outside states to assist or encourage those reforms. Most international organizations and outside states predicate their legal assistance on establishing the "rule of law," but they rarely operate from a developed definition of this concept. This article analyzes what the concept of "rule of law" commonly means, and establishes a cogent and tangible, and procedurally-minimalist, rule of law definition. This article then uses this formulation to analyze Mongolia's legal and judicial reforms. Mongolia's experiences demonstrate four important best practices for future rule of law promotion: (1) judicial independence is the cornerstone of the rule of law; (2) formal government action plans offer "more bang for your buck;" (3) public participation and sentiment is a proxy for the institutionalization of the norms and culture of the rule of law; and (4) the leverage of donor coordination pays dividends.

I. INTRODUCTION

From the time of its independence on July 11, 1921,[1] and throughout 70 years as a socialist state, Mongolia was something of an enigma to the rest of the world, having withdrawn inward. Mongolia engaged in diplomatic relations almost exclusively with one state: the Union of Soviet Socialist Republics (U.S.S.R. or Soviet Union).[2] Then, after the Sino-Soviet split, Mongolia primarily acted under Soviet direction as a buffer state between the U.S.S.R. and its other large communist neighbor, China.[3] During that time, only the U.S.S.R. knew anything about Mongolia and its people.[4] Mongolia stumbled onto the world scene during the remarkable antecedents which led to the dismantling of the Soviet Union and

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1. Thomas E. Ewing, *Russia, China, and the Origins of the Mongolian People's Republic, 1911-1921: A Reappraisal*, 58 SLAVONIC & E. EUR. REV. 399, 421 (1980).

2. Henry S. Bradsher, The Sovietization of Mongolia, 50 FOREIGN AFF. 545, 548 (1971-1972); Tom Ginsburg, *Political Reform in Mongolia: Between Russia and China*, 35 ASIAN SURV. 459, 459 (1995).

3. Ginsburg, *supra* note 2, at 461.

4. *See* Bradsher, *supra* note 2, at 548.

its satellites.[5] Only then did the world awaken to Mongolia and its status as an independent state.

Following the lead of the former satellites, in 1990, Mongolia undertook a joint transition from socialism and a centrally-planned economy to democracy and a free-market economy.[6] At its outset, the parliamentary leaders envisioned a sustainable and modest transition. After the transition began with a basic amendment to the Constitution to provide for a multi-party state, subsequent events enlarged the initial scope of the shift.[7] Put simply, Mongolia collapsed. Mongolia's economic implosion and social structure dissolution resulted from a unique combination: Eastern Europe's rejection of communism; the Soviet Union's disintegration; the resultant destruction of the Soviet trading bloc, the Council for Mutual Economic Assistance ("CMEA"); and the Soviet Union's cessation of aid to Mongolia.[8] As a result, Mongolia probably suffered the worst peacetime economic collapse of any nation this century.[9] By the time the dust settled, the transition had to undertake the goal of completely rebuilding all of Mongolia's internal structures.

As a result, Mongolia's leaders lacked the advantage of gradual change. Instead, they chose a "shock therapy" approach by opening its borders, dismantling trade barriers, ceasing price controls, and privatizing the state's holdings.[10] Throughout this process, over the last twenty years, Mongolia received massive influxes of donor aid in the form of human, technological and financial capital.[11] Surprisingly, Mongolia's transition has been lauded as achieving remarkable success; and its institutions are democratic, widely-established and domestically and internationally respected.[12] However, Mongolia still cannot stand on sturdy legs if the support of donor aid is reduced or retracted.

In order for the government of Mongolia to understand how foreign aid influences its economy, society and government, and what level of dependence or interaction exists, this article addresses certain questions. How did foreign aid influence, assist and advance Mongolia's legal transition? Was foreign aid predicated on a firm understanding of what Mongolia's economy and legal system needed, or did foreign donors merely advance general, and western notions of legal, democratic and capitalistic reforms? Are these systems appropriate for the Mongolian people, its culture and its institutional history?

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5. Julia S. Bilskie & Hugh M. Arnold, *An Examination of the Political and Economic Transition of Mongolia Since the Collapse of the Soviet Union*, 19 J. OF THIRD WORLD STUD. 205, 209 (2002).

6. *See, e.g.*, Ginsburg, *supra* note 2, at 459; *id.*

7. Bilskie & Arnold, *supra* note 5, at 209.

8. *Id.* at 211.

9. Ginsburg, *supra* note 2, at 459.

10. *See e.g.*, Ginsburg, *supra* note 2, at 465; Tae Ming Cheung, *The Cure Hurts*, 153 FAR E. ECON. REV. 70, 71-72 (1991); Hari D. Goyal, *A Development Perspective on Mongolia*, 39 ASIAN SURV. 633, 635-43 (1999); Bilskie & Arnold, *supra* note 5, at 211-12.

11. Goyal, *supra* note 10, at 647.

12. *See, e.g.*, President George W. Bush, Remarks by the President in Ulaanbaatar, Mongolia (November 21, 2005), *available at* http://www.mongolianembassy.us/mongolia_and_ usa/us_presidents _visit_to_mongolia.

Most international organizations and outside states predicate their legal assistance on establishing the "rule of law," but they rarely operate from a well-thought definition of this concept. This article analyzes what the concept of "rule of law" commonly means, and establishes a cogent and tangible rule of law definition. This article then uses this procedurally-minimalist formulation to analyze Mongolia's post-socialist rule of law reforms that focus on the judiciary in particular.[13]

This article is divided into five parts. Part II discusses the concept of the rule of law and conceives of an appropriate rule of law formulation for post-socialist or transitional states. Part III provides a brief summary of Mongolia's institutional background. Pursuant to the procedurally-minimalist rule of law definition that this article establishes, Part IV addresses Mongolia's legal and judicial reforms and the efforts of international organizations, states and domestic NGOs to assist or encourage those reforms, and identifies lessons learned and significant issues or stumbling blocks that remain in Mongolia's reform process. Finally, Part V offers some conclusions. For a more in depth analysis to Mongolia's transition, this article provides various appendices. Appendix A lays the institutional and legal bases of Mongolia's socialist times. Appendix B delineates the specific reforms that Mongolia and the donor community implemented.

II. THE THEORY OF RULE OF LAW REFORM

The rule of law is a concept that gained widespread credence and revival following the dismantling of the former Soviet Union.[14] Prior to September 11, 2001, the United States and other members of the international community began a massive program of foreign aid (including rule of law programs) to states that were transitioning to democracy or that were newly democratic, particularly the former republics of the U.S.S.R.[15] The post-911 environment further intensified the exportation and implementation of law reforms – mostly under the rubric and with the final goal of establishing a "rule of law."[16] In the present international relations environment, there is an increased emphasis on creating and sustaining democratic states. Western powers in particular believe they can accomplish this through the exportation of the rule of law to states which lack democracy or market-friendly institutions or where they are emerging from conflict.[17] Thus, rule of law

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13. This article derives from my experience working at the Supreme Court of Mongolia, and my many months of research and studies afterward. It owes its completion to a great many people who guided me during my time in Ulaanbaatar and again back in Washington D.C. I'd like to thank Ganzorig Gombosuren, who initiated this experience, Chief Judge Ganbat Chimedikham, Munkhbold Ganbat and their families, who took me in as one of their own, Judge Ts. Tsogt, Judge Enkhbayar and Munkhzorig for their guidance and explanations, and Eggy, who provided me with warm housing for my stay in Ulaanbaatar.

14. *See, e.g.*, Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95, 110 (1998).

15. *Id.*

16. *See* Dan E. Stigall, *The Rule of Law: A Primer and a Proposal*, 189 MIL. L. REV. 92, 92 (2006).

17. *See Id.*; Jane Stromseth, *Constitution Drafting in Post-Conflict States Symposium: Post-Conflict Rule of Law Building: The Need for a Multi-Layered, Synergistic Approach*, 49 WM. & MARY L. REV. 1443, 1443 (2008); Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms and the*

promotion becomes an element of foreign policy or an unofficial response to the rise of the leftists in Latin America, the autocracies in the remaining communist states, and the dictatorships and sultanates of Africa and the Middle East.[18]

Additionally, rule of law reform has been an important by-product of globalization. In fact, the concept of the rule of law in modern times invariably is tied to the recent phenomenon of globalization of law. Globalization of law is the "degree to which the whole world lives under a single set of legal rules."[19] It refers to the trend where "what is sought globally is increased transparency of, and increased public participation in, bureaucratic decision-making."[20]

Before the globalization of law, most states did not require a legal system or legal rules that complemented or interlocked neatly with the global economic rules in place. In no small part due to increased globalization, states increasingly have been encouraging their allies and development organizations to assist in their domestic reform process.[21] Normally, their purpose is to leverage the expertise of their allies and the international community to their specific needs and general benefit.[22]

This process is compounded by the fact that, in the last twenty or so years, a number of regions naturally have undergone catastrophic implosions or drastic changes.[23] Countries in the former Soviet Union, Asia, Eastern Europe, Latin America and parts of Africa all have undertaken recent transformations, mostly resulting in the creation of democratic institutions, if not democracy itself.[24] Complementing these transformations has been a high degree of donor activity, and of course, what generally follows, rule of law reform.[25]

However, as frequently and rightly noted, donors have spent billions of dollars promoting the rule of law without fully understanding or defining the concept.[26] Regardless, the promotion of the rule of law has become a *de facto* rally cry for the international development, human-rights and foreign-policy

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"Rule of Law", 101 MICH. L. REV. 2275, 2275-77 (2003).

18. *See, e.g.*, Carothers, *supra* note 14, at 97-99; Thomas Carothers, *Rule of Law Temptations*, 33 FLETCHER F. WORLD AFF. 49, 50-51 (2009).

19. Martin Shapiro, *Globalization of Law*, 1 IND. J. GLOBAL LEGAL STUD. 37, 37 (1993).

20. *Id.* at 46 (describing the demise of the technocracy, where the government was the technical expert in all fields – that gave rise to the new globalization of law, where law is the instrument for achieving greater transparency and participation in bureaucratic decisions). Given the responses to the credit crisis that began in 2007, however, the technocracy of national governments is resurgent.

21. *See* Carothers, *supra* note 18, at 50-51.

22. *See id.* at 49-51.

23. Carothers, *The Rule of Law Revival*, *supra* note 14, at 100-101; *see* Carothers, *Rule of Law Temptations*, *supra* note 18, at 50.

24. *See* Carothers, *supra* note 14, at 100-02.

25. In their use of rule-of-law ideals, legal and development scholars, western governments and multilateral organizations have attacked one another for being imperialistic, ethnocentric, or motivated by *parti pris*.

26. Brooks, *supra* note 17, at 2283 (describing the confusion and conflation of those who claim to promote the rule of law).

communities.[27] For instance, the mission statement of the international section of the National Center for State Courts of the United States is "to strengthen the rule of law and administration of justice throughout the world." [28] To be sure, most aid donors operate with a common sense understanding the concept of the rule of law, but their assumptions rarely are grounded in empirical research.[29] Nor is there consensus on the rule of law's definitive academic conception.

Thus, this section conceives a working rule of law definition for analysis of post-socialist or transitional legal reforms. The benefit of proceeding from a developed conception of the rule of law is that its use can be understood easily for subsequent comparative studies of post-Socialist or other transitional states undergoing legal and judicial reforms.[30]

A. What is the Rule of Law?

The original meaning of rule of law is simply that persons and institutions should be accountable to predetermined standards – and that those standards must apply to everyone equally.[31] However, scholars strongly differ over the character and the elements of the rule of law in modern conceptions.[32]

This article's formulation represents a refinement of the best procedurally-minimalist definitions of the rule of law. This minimalist approach encompasses two essential requirements or values: (1) transparency of government decisions and law-making, which creates a system of rules; and (2) meaningful access to redress and justice through an independent judiciary or other body.[33]

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27. *Id.*

28. National Center for State Courts, Mission and History, http://www.ncsc.org/Web Document Library/AboutUs_Mission.aspx (last visited March 4, 2010). The National Center for State Courts (NCSC) works with the USAID in Mongolia on the Judicial Reform Project. Such an exercise could be undertaken for many institutes, organizations or government ministries.

29. John Hewko, *Foreign Direct Investment: Does the Rule of Law Matter?* 1 (Carnegie Endowment for Int'l Peace, Rule of Law Series, Democracy and Rule of Law Project, Paper No. 26, 2002), *available at* http://www.carnegieendowment.org/files/wp26.pdf.

30. The alternative would be to proceed with a common sense understanding of the rule of law. In that case, however, subsequent studies would struggle with an analysis based on uncertain formulations.

31. William C. Whitford, *The Rule of Law*, 2000 WIS. L. REV. 723, 724 (2000) (explaining the roots of the term).

32. *See e.g.*, Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, *in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 31-73 (Thomas Carothers ed., 1996) (discussing the different conceptions and their implications).

33. *See* Richard Bilder & Brian Z. Tamanaha, *Book Review and Note*, 89 AM. J. INT'L L. 470, 484 (1995) (reviewing ANTHONY CARTY, LAW AND DEVELOPMENT (1992), and SAMMY ADELMAN & ABDUL PALIWALA, LAW AND CRISIS IN THE THIRD WORLD (1993)) (setting forth two elements: first, that the government acts pursuant to rules produced in the political arena and respects the civil rights of its citizens; and second, that there is a judicial party to resort to that embodies the ethic of treating all before it neutrally and fairly). *See also* Carothers, *supra* note 14, at 96 (reaching the same procedurally-minimalist rule of law as Tamanaha albeit with more defining substance. Carothers defines the rule of law as a system, where laws uphold the political and civil liberties pursuant to universal human rights recognitions, which are clear in meaning and apply equally to everyone. Further, he calls for the central institutions of the legal system to be fair, competent, and efficient, and for an accused to have the right to a fair, prompt trial with a presumption of innocence. Finally, governance must be integrated into the legal framework and officials must be subject to and accepting of the law); Richard H. Fallon, Jr., *"The*

Additionally, there are primary qualities that support the two essential requirements. These bedrock concepts advancing the minimalist definition are: procedural fairness in the passage of fair, equal and nondiscriminatory laws and decisions with the effect of law; and procedural fairness in access to the courts or other body for meaningful, fair, impartial and equal redress and justice.[34]

Apart from the bedrock concepts, there is a penumbra of other secondary or supporting qualities.[35] For the most part, academics conceive of elements that primarily support the procedural quality of rule of law.[36] Importantly, the rule of law is a system of rules – rules should govern certain relationships and events. Thus, the rule of law: must theoretically and actually guide people through legal rules, standards and principles; must be reasonably stable; must be supreme; and must utilize impartial justice through courts or other bodies with fair procedures.[37] Further, supporting the condition of transparency is the principle that people should know what the government's decisions are – they must be pre-announced, preexisting (no retroactive laws) and made publicly available.[38] Additionally, meaningful access to justice requires the practical availability of process to judge the government's action with the law.[39] Institutionally, actors must have regular availability of tribunals, agencies or courts to resolve disputes, which have impartial judges, and whose decisions are promptly and effectively implemented.[40] The agency that judges the government's actions must be independent from the actor being evaluated.[41] Accessibility, usually found through the courts, should be supported by an active and independent bar association. A series of strictly procedural standards sustain these principles: "adequate record-keeping, fair trial practices, the publicity of proceedings, seasoned explanations of results, and the right of appeal."[42]

Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 7-8 (1997) (explaining that definitions of the rule of law generally consist of three values: protection against anarchy; the creation of conditions where people have confidence in their knowledge of the legal consequences of their actions; and protection against official arbitrariness); David Kairys, *Searching for the Rule of Law*, 36 SUFFOLK U. L. REV. 307, 318 (2003) (listing "three essential requirements for the rule of law: certain relationships, events and transactions should be subject to rules; the rules laid down should be followed and should apply to everyone, including limits on the government and on the powerful; and the rules should be enforced with some mechanism for seeking redress").

34. *See* Kairys, *supra* note 33, at 312-14.

35. *Id.* at 311-14 (collecting and detailing the fourteen most oft-listed conceptions of the rule of law, which includes some substantive elements and some western beliefs, such as the need for judicial decision-making and judicial review).

36. *See, e.g., id.* at 312-14; Brooks, *supra* note 17, at 2284 n.43.

37. Brooks, *supra* note 17, at 2284 n.43 (contrasting other authors' conceptions of the rule of law).

38. Whitford, *supra* note 31, at 725-26 (discussing how laws must be made *ex ante*, or before they are applied).

39. *Id.* at 726 (noting that this is a practical condition – an aggrieved person or someone on their behalf must be able to complain).

40. John V. Orth, *Exporting the Rule of Law*, 24 N.C. J. INT'L L. & COM. REG. 71, 79 (1998).

41. Whitford, *supra* note 31, at 726 (explaining that independence means freedom from fear).

42. Orth, *supra* note 40, at 79 (discussing the "policy framework" of the rule of law).

The benefit of a minimalist, procedurally-oriented conception of the rule of law is that it moderates charges of ethnocentrism or cultural imperialism.[43] In particular, any substantive conception inherently brings into a definition the values and ideals of the culture or professional and personal background of the definer. A minimalist definition also defends against the criticism that a substantive conception leads to transplantation of large bodies of law that may not suit the host environment, and certainly does not suit every host environment.[44]

The value of such a minimalist, procedural rule of law is generally recognized, but not frequently applied.[45] Practitioners frequently jump directly into a substantive conception of the rule of law. Importantly, such a practice skips the creation of a foundation for a substantive conception. Overall, the rule of law is grounded firmly in procedural fairness – categorically referred to as justice. Anything above that would be a substantive or normative addition to the procedural foundation of the rule of law.[46] The lesson here is that any normatively coherent or defensible *substantive conception* of a just legal system should be predicated on the pre-existence of a *procedurally-just conception* of the rule of law.[47] As such, any substantive conceptions above this basic structure are appropriate only after the minimalist, procedurally-oriented rule of law has been established.

Writers and scholars have advanced the notion of the rule of law from imperialism onwards and imperialist states transplanted their legal codes onto their subjects pursuant to this notion.[48] So why has the world once again turned to expounding the benefits of and exporting the rule of law?

43. Ronald J. Daniels & Michael Trebilcock, *The Political Economy of Rule of Law Reform in Developing Countries*, 26 MICH. J. INT'L L. 99, 105 (2004).

44. *Id.*

45. *See, e.g.*, Brooks, *supra* note 17, at 2283-84.

46. Daniels & Trebilcock, *supra* note 43, at 107.

47. *Id.*

48. *See, e.g.*, Daniel Berkowitz et al., *Economic Development, Legality and the Transplant Effect*, 47 EUR. ECON. REV. 165, 165 (2003) (analyzing the determinants of effective legal institutions in forty-nine countries).

THE RULE OF LAW – MINIMALIST APPROACH[49]	
2 Essential Values Transparency of government decisions and lawmaking, which creates a system of rules, AND Meaningful access to redress and justice through an independent judiciary or other body.	
PRIMARY QUALITIES	
PROCEDURAL FAIRNESS IN:	
Passage of fair, equal and nondiscriminatory laws and decisions with the effect of law, AND	
Access to the judiciary or other body for meaningful, fair, impartial and equal redress and justice.	
SECONDARY QUALITIES	
System of Rules that Govern relationships and events, Actually guide people, Are reasonably stable, AND Are supreme.	Transparency Principles in Government Decisions, that Are preannounced, Are preexisting, AND Are publicly available.
Meaningful Access to Justice Principles: Practical availability of process, Active and independent bar, Regular availability of tribunals, agencies or courts to resolve disputes, Impartial judges, AND Prompt and effective implementation of decisions.	Procedural Standards: Adequate record-keeping, Fair trial practices, Publicity of proceedings, Seasoned explanations of results, AND The right of appeal.

49. This is the author's conception of a minimalist, procedurally-oriented conception of the rule of law, distilled from the best academic formulations as discussed above.

B. What is the Role of Rule of Law Reform?

Western legal theorists believe that rule of law reform will allow states to transition from "the first stage of political and economic reform to consolidate both democracy and market economics."[50] The "rule of law revival" occurred with the political openings of different regions – Latin America, Sub-Saharan Africa, parts of the Middle East, and parts of Asia.[51] The escalation of rule of law reform appears to have grown principally with the fall of the ex-Soviet satellites, whose transitions to market economies and democracy (or some vestige of it) spurred a newfound interest in the role of the rule of law in the development of the twin towers of political and economic reform.[52]

Because of the total or near absolute dismantling of the economies and social institutions of the ex-Soviet states, they immediately needed large amounts of donor aid, primarily in the form of money and technical advisors.[53] Legal advisors, motivated partly by altruism and partly by self-interest, literally poured into the former U.S.S.R. from donor states, bilateral aid agencies, multilateral development banks, and nongovernmental aid organizations.[54] Some legal advisors came from government agencies to assist in the development of their new systems. Others were sent by multilateral donor agencies as strings attached to much needed large-scale financial aid.[55] Of course, legal and development theorists followed their lead in devising new formulations of the proper scope and strategy of legal reform.[56] In any case, the rhetoric of rule of law was used as a catch-all phrase to embody or consolidate democracy, achieve economic growth and expand social progress.

1. Democratic Reform

Democracy is the (broadly speaking) principle of "popular control over public decision making and decision makers; and equality between citizens in the exercise of that control."[57] The institutional means of accomplishing the basic democratic

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50. Carothers, *supra* note 14, at 97. *But see* Thomas Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge* 6 (Carnegie Endowment for Int'l Peace, Working Paper No. 34, 2003) (explaining how the proposition that rule of law is necessary for economic development and democracy is not as axiomatic as first appears).

51. Carothers, *supra* note 14, at 97-98.

52. *Id.* at 95.

53. *See, e.g.*, Tom Ginsburg, *Political Reform in Mongolia: Between Russia and China*, 35 ASIAN SURV. 459, 459-60 (1995).

54. Carothers, *supra* note 14, at 103.

55. *Id.* at 103-04.

56. *See, e.g.*, Orth, *supra* note 40, at 71; Whitford, *supra* note 31, at 723; Kairys, *supra* note 33, at 307-08; Brooks, *supra* note 17, at 2276-79.

57. Int'l Inst. for Democracy & Electoral Assistance [IDEA], *Democracy Assessment: The Basics of the International IDEA Assessment Framework*, at 3 (2002), *available at* http://www.idea.int/publications/sod/upload/demo_ass_inlay_eng_L.pdf (providing a methodology for citizens of any democracy in the world to assess the functioning of their own democratic systems. The Government of Mongolia invited representatives from all over the country, officials, civil society and private sector on June 30 – July 1, 2005, to discuss a Draft National Plan of Action to Consolidate Democracy in Mongolia. The focus of this plan is a national research project conducted according to the Democracy

principle are realized through legal institutions.[58] Rule of law reform is intrinsically attached to democratic ideals, if not to democracy itself. Democratic institutions are protected by law and necessarily dependent on the rule of law.[59] States that have backslid – or are struggling with weak rule of law reform – are generally those that are becoming authoritarian or disrespectful of their constitutional underpinnings and thus, undemocratic.[60] Additionally, the globalization of the humanitarian regime and human rights law has influenced the definition of a rule of law. The consecration and protection of individual rights is a core tenet of democracy, and has become intertwined irreducibly from the rule of law ideal.[61] Overall, there is a substantial grey area between democracy and the rule of law. Nonetheless, undertaking rule of law reforms invariably strengthens and consecrates already-established democratic institutions.

Mongolian citizens understood that they had joined the worldwide democratic movement. The government of Mongolia's denouncement of the communist state and its subsequent successful elections with full suffrage signaled so much.[62] To a great extent, the impetus for change took place in Ulaanbaatar, in the universities and with the young, moderate leaders.[63] Although the state began a democratic transition, the countryside itself still was mired in its communist recent past, and most, if not all of the population still was attached to Mongolia's socialist institutions.[64] In Mongolia, the attainment of procedurally-minimalist rule of law would encourage and assist the success of their democratic transition.[65]

2. Economic Reform

It is "regarded as a truism that the 'rule of law' is causally related to economic development."[66] At the very least, legal reforms of post-Leninist or post-

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Assessment methodology).

58. *Id.* at 3-4 (describing the values that create democratic legal institutions; examples of democratic legal institutions include civil and political rights systems, economic and social rights, electoral and party systems, NGO rights, anti-discrimination laws, effective and appropriate avenues to legal redress, and an appropriate domestic and international human rights framework).

59. *See* United States Agency International Development [USAID], Rule of Law Program, http://www.usaid.gov/our_work/democracy_and_governance/technical_areas/rule_of_law/ (last visited Feb. 11, 2010) ("The rule of law is the cornerstone for all other elements of democracy. A free and fair political system, protection of human rights, a vibrant civil society, public confidence in the police and the courts and economic development all depend upon accountable governments, fair and accessible application of the law and respect for international human rights standards. In post-conflict settings, reestablishing the rule of law is the first step in the rebuilding process. Establishing peace and security and rebuilding justice institutions can help to develop the necessary climate for reconciliation, public confidence and subsequent economic growth.")

60. Carothers, *supra* note 14, at 98 (describing regional experiences with rule-of-law reforms).

61. *See, e.g.*, BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 1-2 (2004).

62. *See, e.g.*, Ginsburg, *supra* note 53, at 463; Bilskie & Arnold, *supra* note 5, at 205.

63. Ginsburg, *supra* note 53, at 462-63.

64. *Id.* at 463-64.

65. *See* Bilskie & Arnold, *supra* note 5.

66. Daniels & Trebilcock, *supra* note 43, at 102 (referring to evidence of a negative correlation between individuals' perceptions of judicial unpredictability and growth and investment; evidence of a negative correlation between corruption and investment; and evidence of positive correlation between

authoritarian societies are necessary to establish a fair, functioning market economy.[67] In other developing or transitional countries, extensive legal reforms are undertaken to establish more market-friendly legal systems, rather than to create a market economy from scratch.[68]

The rule of law is essential because it provides the necessary elements to a market system, including: "universal rules uniformly applied, which generates predictability and allows planning; a regime of contract law that secures future expectations; and property law to protect the fruits of labor."[69] With the large-scale promotion of rule of law by the international aid community, the conventional understanding is that a fair, transparent, stable and accountable legal and judicial system is necessary to attract foreign direct investment, itself a crucial factor in economic growth and development in transitional and developing states.[70] The pressure to create this framework comes not just from institutional advisors and requirements within the aid packages, but from the organic demands that economic globalization puts on governments to accommodate or lose out.[71]

In Mongolia, economic collapse was the primary influence on the minds of the population. Resultantly, to achieve the long-term goals of a market economy and a political democracy, Mongolia's leaders realized that its initial reforms must achieve, in the short term, economic stability and a fundamental change in the psychology of its citizens.[72] The procedurally-minimalist rule of law would achieve these necessary economic reforms.

It is important to note that the economic agenda of the rule of law also achieves democratic benefits. For instance, the rule of law protects the functioning of major economic institutions and guards businesses and individuals from discriminatory, inefficient or illegal actions of government in the economy.[73] Indeed, as there are substantial political, economic and social benefits from rule of law reforms, a more appropriate view is that the rule of law achieves integrated benefits.

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de facto independence of a state's highest court and economic growth).

67. *See* Hewko, *supra* note 29, at 3.

68. *Id.*

69. Bilder & Tamanaha, *supra* note 33, at 473. *See also id.* at 484 (arguing that beyond protecting economic development and the liberal-democratic framework, law is of secondary status, where lawyers are "technicians who effectuate decisions made by others").

70. *See* Hewko, *supra* note 29, at 3. Of course, when accounting for the realities of economic globalization – there is an increased need for a country to create the legal and judicial framework to take advantage of the free flow of goods, labor and capital. Without this framework in place and protected, risk-averse investors will refuse to invest.

71. Governments that do not accommodate globalization through liberal foreign investment laws, accession to the WTO and its obligations, etc., invariably lose the benefits of globalization like increased trade and investment.

72. *See, e.g.*, Ginsburg, *supra* note 2, at 459; Bilskie & Arnold, *supra* note 5, at 205; Goyal, *supra* note 10, at 633.

73. Carothers, *supra* note 14, at 97.

3. Integrated View of Reform

The rule of law fulfills more than the creation of a democratic or economic framework. Development should be seen in a comparative integrated view, and legal development should not be analyzed in isolation nor only connected to economic development. Amartya Sen argues that there is a need for conceptual integrity in the development of a successful legal and judicial system, one that views legal development not merely by its achievements through the passage of laws and their successful exercise, but through the enhancement of personal capabilities – "[the] freedom - to exercise the rights and entitlements that we associate with legal progress."[74] In this integrated view, the development of a successful legal and judicial system has a peripheral effect on all aspects of development, and should be valued and judged by its peripheral as well as its intrinsic effects.[75]

Legal reforms of stable states generally have a specific focus, such as amendment to the constitution or the modernization of the criminal code.[76] In a post-socialist environment like that of Mongolia, the government tables every aspect of society for reform. After completing its constitution, Mongolia engaged its political, economic and social spheres in a comprehensive reformation, to achieve its goals of a political democracy and a market economy.[77] Transformation to a market economy and a capitalist system results in winners and losers, and resultant social inequities occur. Particularly because socialism ensured that most (if not all) Mongolians had basic necessities, for legal reforms to be successful, any arising social concerns in a transition must also be countered.[78]

The goal of rule of law initially must be the achievement of the minimalist requirements. However, the rule of law reform should be valued by its fundamental effects arising from its definition, as well as its peripheral effects – primarily social progress. Having discussed both the elements of a procedurally-minimalist rule of law and the judgment methodology, the actual consummation of the rule of law reform program is the critical problem for post-Socialist or transitional states.

C. How Do We Achieve the Rule of Law?

Simply conceptualized, to achieve the rule of law, a state must undergo judicial and legal reforms with the intent of realizing its minimalist requirements.[79]

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74. Amartya Sen, Keynote Address, World Bank Conference- Comprehensive Legal and Judicial Development: What is the Role of Legal and Judicial Reform in the Development Process? (June 5, 2000), *available at* http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/legaland judicial .pdf (explaining that legal development, like economic or political development, is a constitutive part of development as a whole, which resembles a "thickly interwoven textile").

75. *Id.*

76. Carothers, *supra* note 14, at 99-100.

77. *See, e.g.,* Ginsburg, *supra* note 2, at 459; Bilskie & Arnold, *supra* note 5, at 205; Goyal, *supra* note 10, at 633.

78. *See, e.g.,* Sen, *supra* note 74.

79. *See, e.g.,* Orth, *supra* note 40, at 71; Whitford, *supra* note 31, at 725; Kairys, supra note 33, at 307; Brooks, *supra* note 17, at 2275.

For post-autocratic states, the central task is to introduce the over-arching concept of accountability that "requires public officials to obey laws and their own rules and calls them to account when they do not."[80] To achieve this, the reforms have to be sanctioned and supported from above – from those who categorically lead the state, politically and economically.[81] Ultimately, rule of law reform is (at least partly) a political enterprise aimed at constraining public authority. The danger inherent in holding accountable public authority is that those who wield public power generally will resist any reforms which deny them the benefits of their authority.[82] Consequently, reforms have to combat or temper such resistance at the outset. In addition to being a political exercise, achieving a rule of law is a process-oriented development.

1. Rule of Law Realization Theories

Rule-Based Economic Realization: Richard Posner advocates a strict rule-based reform, whereby existing institutions, however inefficient themselves, will administer newly created, efficient rules.[83] The benefit lies in the small fixed costs of creating and instituting a rule, as compared with the very costly and time-consuming reforms of legal institutions.[84] Thus, legal reform can stimulate economic growth through rule reforms, at a smaller expense. Increased economic growth will in turn add stability to the nation, increasing its human and economic resources, and creating a framework for more ambitious legal reforms in the longer run.[85]

Posner seems to advocate a more ambitious rule-based reform at the expense of legal institutional strengthening – particularly of the judiciary.[86] However, Posner's rule-based reform agenda leans heavily on a substantive conception of the rule of law, thus it encounters the difficulties of transplantation and cultural imperialism.[87] If the rules are not appropriate for the host country or enforceable, then all is practically for naught, at the expense of possible institutional strengthening.[88] Especially in the face of a poor-track record of rule of law reform over the past two decades, it appears rather more propitious to hedge the risk of failure through active reforms of multiple sectors. Because of these criticisms, the realization theory that this article promotes does not include this formulation.

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80. Shapiro, *supra* note 19, at 57.

81. *See* Carothers, *supra* note 14, at 96.

82. *Id.*

83. Richard Posner, *Creating a Legal Framework for Economic Development*, 13 WORLD BANK RES. OBSERVER 1, 4–5 (1998).

84. *Id.* at 4.

85. *Id.* at 3.

86. *Id.* at 5-7.

87. *Id.* at 6.

88. *But cf.* Daniels & Trebilcock, *supra* note 43, at 101-09 (criticizing the typical conception of viewing institutional strengthening as a necessity to attract FDI, and arguing for legal reform to emphasize the details and not general concepts; e.g., specific, even mundane changes that are necessary for "existing legislation to function within the cultural, political, and economic realities of the host countries"). This argument seems to defend against charges of cultural imperialism while advocating a rule-based reform agenda.

Rule-Based Formalistic Realization: Carothers forcefully argues that the concentration of donors and reforming states should be on the depth of the reforms, in three categories: type-one reform concentrates on the laws themselves; type-two reform strengthens the law-related institutions to make them more competent, efficient, and accountable; and type-three reform has a deeper goal of enforcing government's compliance with law.[89] This reformation agenda is rule-driven as well, concentrating on technical and institutional reforms that primarily affect the formalistic legal system.

Norm-Creation Realization: There is little evidence that formalistic reforms or institutional strengthening is effective without a culture of support for the rule of law.[90] Another and perhaps more cogent methodology of rule of law reform operates from a general rule of law theory to specific applications. First, there are norms of universal application, usually stated in great generality – in particular the notion of fairness which underlies transparency, accountability and inclusion– which must permeate the bureaucratic decision-makers and the legal culture.[91] Second, there are specifically-tailored reforms that achieve particular, defined goals while continuing to uphold the norms of universal application.[92] Aptly, this type of reform focuses on norm creation. Institutional strengthening, while certainly necessary, is neither a condition precedent nor a by-product of norm creation.

Particular rules should be reformed or created *only* to meet particular societal challenges or shortcomings in the existing framework.[93] In this formulation, the rule of law is a culture, and the stimulation and creation of that culture is the over-arching goal within which the state undertakes the judicial and legal reforms.[94]

Integrated Realization: However, these models are not in a zero-sum game. A more appropriate methodology for realizing the procedurally-minimalist rule of law combines formalistic reform theory with the norm creation theory.[95] If the umbrella paradigm of norm creation is indeed the universal and ubiquitous concept that it seems, institutional strengthening and formalistic reforms will help expand and support it.[96] In this view, norm creation is the umbrella paradigm overseeing

89. Carothers, *supra* note 14, at 99-100 (discussing rule of law reforms by focusing on the depth of reforms).

90. *See* Brooks, *supra* note 17, at 2284-85 (positing that Thomas Carothers' "Rule of Law Assistance Standard Menu" is an untenable model and arguing that rule-of-law reform is fundamentally an issue of norm creation); Stromseth, *supra* note 17, at 1443-44.

91. Brooks, *supra* note 17, at 2285 (criticizing the formalistic rule of law conception: "[t]he rule of law is not something that exists "beyond culture" and that can be somehow added to an existing culture by the simple expedient of creating formal structures and rewriting constitutions and statutes").

92. *Id.*

93. Thus, specific rule-creation controls the typical problem of adequate or well-formulated laws with inefficient enforcement mechanisms which undermines the rule of law by lowering individual or investor confidence in the sanctity of the legal system.

94. *See* Brooks, *supra* note 17, at 2285.

95. This is the authors' conception distilled from the best academic formulations as discussed *supra*.

96. *See also* Bilder & Tamanaha, *supra* note 33, at 484 (urging the importance of the development

the long and difficult process of creating efficient legal institutions, which requires heavy doses of capital and expensive, educated labor.[97]

Of course, the criticism of the rule-based and formalistic conceptions is that they work at the expense of concentrating on norm creations, since the rewriting of laws and upgrading of the courts does not cause judges, ministers and parliamentarians to "absorb" the doctrines underlying the rule of law.[98]

In an integrated view, the focus is on norm creation, but the typical formalistic reforms are both suitable and needed to establish an appropriate legal culture. The actual reforms should follow the integration and development of the intellectual norms – not only the training in market economics and democratic institutions – but also a thorough understanding of governmental and judicial accountability, transparency, responsiveness, and accessibility. To put it another way, the focus should be on the creation of a rule of law culture while accomplishing necessary institutional and particular reforms.

2. The Path of Realization

The reform of legislation is a natural starting point in transforming a society from socialist legal traditions and a centrally-planned economy to a market economy. In Mongolia, before legal reforms could occur, Mongolia's leaders had to meet the preconditions to reform discussed above, which culminated with the establishment of a multi-party system and the adoption of a new Constitution.[99] The difficulty then lay in conveying the provisions of this modern Constitution to a restructured economic, political and legal system that could implement and enforce these new rights.[100]

Many donor organizations and academics utilize a version of the following chronology for the undertaking of rule of law reforms.[101]

Stage One: Rewrite the constitution, laws (including modernizing the civil and criminal code) and regulations.

Stage Two: Undertake judicial reforms through: creating an independent judiciary; professionalizing the bar and the bench; increasing judicial efficiency; increasing judicial accessibility; increasing the competence and professional standards of the judiciary through a reformed law school curriculum, support for bar associations, and judicial training; and establishing alternative dispute resolution mechanisms.

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of the body of legal doctrine in addition to the basics of institution building).

97. *See, e.g.*, Brooks, *supra* note 17, at 2275.

98. *Id.*

99. *See also*, B. Chimid, Advisor to Parliament, Speech at Conference in Celebration of Tenth Anniversary of Asian Foundation's Mongolian Program, (Sep. 11, 2000), *in* THE ASIA FOUNDATION, MONGOLIA'S POLITICAL AND ECONOMIC TRANSITION: CHALLENGES AND OPPORTUNITIES, 18-22 (2000).

100. *See, e.g.*, Ginsburg, *supra* note 2, at 459; Bilskie & Arnold, *supra* note 5, at 205.

101. In addition to this chronology, and what is not focused on by donors, the rule-of-law definition and realization theory proposed by this article require overarching emphasis on norm creation.

Stage Three: Encourage legislative and executive reform through good governance programs.

Stage Four: Increase legal representation and accessibility through legal aid programs and nongovernmental organizations.

Stage Five: Embark on other institutional reforms such as police, prosecutor, and prison reforms.[102]

Additionally there are other factors, not perfectly congruent with the universal notions embodied in rule of law, but tangential and supportive. First, an independent, active media can do much to push for transparency of government decisions and advance meaningful participation in the decision-making.[103] At the least, an independent media can create a meaningful dialogue that can lead to increased participation in governance. An active media can make public criticisms, raise awareness levels, be a voice to the poor and vulnerable, and most importantly, force the government to be accountable, transparent and inclusive.[104] Of course, the right of free speech must be judicially protected for this outlet to carry its weight. Second, public interest in social responsibility can create social challenge and change, thus stimulating a rule of law culture.[105] Further, sensitivity to the actual social environment is an important aspect in these legal reforms.

3. The Problem of Constraining the Leaders

Owing to the limited successes by rule of law reforms over the last two decades, it is commonly accepted that "rule of law reform will succeed only if it gets at the fundamental problem of leaders who refuse to be ruled by the law."[106] Emphasis on a notion-based rule of law aims to achieve precisely this – to reduce and eventually eliminate unreceptive leaders and officials.[107] To be sure, these individuals will only surrender their "traditional impunity" under great pressures.[108] More often than not, domestic pressure alone will not suffice in achieving this surrender, thus there is a clear role for foreign sources.[109] The underlying assumption, as discussed above, is that rule of law reform is a political endeavor and not a technical or bureaucratic enterprise, so its success is subject to inherent and internal political uncertainties.[110] Changing the mindset of leaders is

102. *See, e.g.*, Orth, *supra* note 40, at 77; Whitford, *supra* note 31, at 725; Kairys, *supra* note 33, at 312-14; Brooks, *supra* note 17, at 2284-85; Carothers, *supra* note 14, at 99-100.

103. *See* Sen, *supra* note 74, at 19 (arguing that a vigorous media can strengthen economic security, political liberties, legal and human rights, etc., but judicial guarantees must protect the right of fair speech, fair comment and public criticism).

104. *Id.*

105. *Id.*

106. Carothers, *supra* note 14, at 96.

107. *See id.* at 100.

108. *Id.* at 96 (describing the primary obstacles to achieving the rule of law).

109. Daniels & Trebilcock, *supra* note 43, at 128-34 (arguing that because of the importance of historical, cultural and social impediments, rule-of-law reforms need effective monitoring and assessment by a credible, and likely multilateral, institution). One need only look at the example of Mobutu in Zaire / Democratic Republic of the Congo to see what could occur when foreign donors do not exert pressure on leaders to surrender their impunity.

110. *See id.*

necessarily a political exercise, where the actors will weigh the benefits, costs, and realities of ceding to the rule of law. Consequently, this formulation leads credence to the general understanding that the success of reforms relies not on technical or financial support, but on combating political and human obstacles.[111]

4. The Use of Pre-Conditions for Constraining the Leaders

Leaders and non-receptive officials can be constrained through a combination of domestic and foreign influence. Domestic interest groups play an important role in exerting bottom-up pressures. Nongovernmental organizations, domestic investors, minorities, and entrepreneurs should agitate for suitable changes and form broad coalitions with the populace and government officials. The goal is to stimulate change horizontally and ultimately vertically using a broad section of alliances, rather than fractured interest groups clamoring for specific favors and changes, what usually supports or results in corruptive political exchanges.

To augment domestic efforts, there is a clear role for international pressure. Foreign governments, multilateral banks, bilateral organizations, nongovernmental organizations, and foreign citizens should exert top-down pressures on the leaders of host countries through conditionality, to push for specific and traceable rule of law reforms. Of course, by no means does this formulation intend for loans and grants to be conditioned on the *creation* of a rule of law program. The host country should conceive of and establish a rule of law program on its own, lest the reforms be reduced to mere formalities. Only after a consensus of high-level support is in place will international pressure serve any purposes. In the absence of upper-level sponsorship, or at least acceptance, rule of law reforms will be diametrically opposed by those whose power, influence, or economics will be affected.[112]

When domestic support for a rule of law program is lacking, legal advisors should forgo imposing or conditioning donations on legal and judicial reform, and focus on encouraging a grass roots movement for reform, through discourse with the host country's bar associations, nongovernmental associations and government officials.[113] However, where a rule of law program is in place, foreign organizations and groups should exert influence to set in motion a rule of law culture.[114]

Use of condition precedents is a potentially successful method for foreign donors and states to achieve the rule of law.[115] To illustrate, consider the area of nongovernmental organizations. Where restructuring is taking place, and some elites do not want a comprehensive nongovernmental organization law for fear of

111. Carothers, *supra* note 14, at 96 (explaining the human obstacle as the central difficulty in the establishing the rule of law); *see also* Daniels & Trebilcock, *supra* note 43, at 119 (creating a five-part strategy to address the political barriers to rule-of-law reform).

112. Carothers, *supra* note 14, at 96; Daniels & Trebilcock, *supra* note 43, at 119.

113. Richard E. Messick, *Judicial Reform and Economic Development: A Survey of the Issues*, 14 THE WORLD BANK RESEARCH OBSERVER 117, 123-28 (1999).

114. *See id.* at 124-25.

115. Daniels & Trebilcock, *supra* note 43, at 132.

losing political control, serious pressure should be placed on those elites to cede their opposition through conditions precedents.[116] Condition precedents can be desirable benefits from industrialized countries, the international aid community, accession to regional trade blocs, bilateral trade deals, or accession to the WTO. These pressures should be used to disrupt opposition only to the reforms which are necessary to create the rule of law culture and framework – in this case, the legal basis for nongovernmental organizations to operate domestically.

Even though the underlying doctrine will surely not be the influential factor in an actor ceding opposition, there are fringe benefits that actually support the creation of a rule of law culture. Younger generations will have a needed reform in place (the inclusion of nongovernmental organizations in the dialogue of society), thus increasing transparency, participation and redress in the future.[117] At least in this way, the notion of inclusive governmental rule will be experienced by the individuals who publicly participate in society and those in government who are receptive to such ideas. Resultantly, the rule of law culture increasingly develops, deepens and strengthens.[118]

D. The Role of the Judiciary in Implementing the Rule of Law

> *"The Rule of Law depends on judges willing to decide cases in accordance with principle, despite occasionally incurring official displeasure, and sometimes at real personal risk."*[119]

While the rule of law necessitates the constraint of leaders, it depends on the judiciary. A close study of the rule of law chart demonstrates that the judiciary is the focus of most of the rule of law reforms.[120] By and large, judicial reforms play a determinative role in the establishment of a rule of law culture.

An underlying goal of judicial reforms is to achieve government compliance with the law and create acceptance of the rule of law values at the top echelon of government.[121] This is possible through the integrated combination of institutional reforms and the creation of norms.[122] Institutional judicial reforms are capital and labor intensive, and demand sophistication and patience. An impartial administration of the rule of law is only accessible through the creation of a strong

116. *Id.* at 129-33.

117. *See* Carothers, *supra* note 14, at 100.

118. It appears that many Central Asian post-Leninist states that embraced rule-of-law reform during their transitions and that have backslid into increasing authoritarianism, would have benefited by a more strict and principled focus on rule-of-law doctrine and the creation of a notion-based legal culture. This study is formulated precisely for such purpose – to create a theoretical framework to compare the experiences of post-socialist states. Here, the author focuses on Mongolia, probably the least written about ex-Soviet "satellite."

119. Orth, *supra* note 40, at 81.

120. This assessment is pursuant to the author's formulation for the rule-of law chart. Other rule-of-law formulations do not *necessarily* focus on the judiciary though it is hard to conceive a formulation that does not impact the judiciary.

121. Daniels & Trebilcock, *supra* note 43, at 110-11.

122. *See* Brooks, *supra* note 17, at 2283-87.

legal culture that supports the rule of law notions.[123] The following factors constitute the principal judicial reforms that a country can undertake and that assist in the establishment of a procedurally-minimalist rule of law.

Judicial Independence: Principally, achieving judicial independence is a key reform that ensures a strong apolitical judiciary, which is free to mete out justice.[124] Judicial independence is one of the essential values to the above formulation of a procedurally-minimalist rule of law. The constitution or other legislation usually assures judicial independence. Above all, a strong and independent judiciary embodied with the ethos of rule of law will have the freedom and strength to challenge governmental actions that hinder the rule of law. Thus, a high level of support is necessary from the ministry of justice, judges and judicial employees, in addition to the legislature and senior executive branch officials, for judicial reform to succeed.[125] Judicial independence reforms in societies which previously lacked it depends on executive and legislative actors willing to allow an independent judiciary.[126] This usually occurs through the provision of a sufficient budget, compliance with judicial decisions and support for institutional strengthening.[127]

Judicial Council: The creation and implementation of a judicial council supports an independent judiciary.[128] This reform is of particular importance in post-Socialist societies that historically have not had an independent judiciary.[129] The institution of a judicial council assists judicial independence, since a cross-section of government screens judicial appointments, monitors the judiciary, institutes disciplinary proceedings and sets the budget.[130] The procedures for selection of judges must be refined to limit improper influence and achieve genuine judicial independence. If judges and judicial employees are sufficiently secure in their tenure, and have a sufficiently high salary, they will be more independent, competent, and honest.[131]

Judicial Efficiency: Increasing judicial efficiency embraces the notion of fairness, which underlies the rule of law culture. Technical and material aid increases the resources and capabilities of courts, by disseminating computers, copiers and fax machines; streamlining court processing times; and creating a framework for public access to printed judicial decisions.[132] These reforms are fundamentally

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123. *Id.*

124. Danielle Conway-Jones, *Mongolia, Law Convergence, and the Third Era of Globalization*, 3 WASH. U. GLOBAL STUD. L. REV. 63, 71 (2004) (expressing that the flexibility inherent in the Mongolian Constitution under Article 49, judicial independence, is a hallmark of common law traditions). Indeed, judicial independence is grounded in the ideal of fairness.

125. *See* Messick, *supra* note 113, at 117-36 (summarizing a six case study of USAID judicial reform projects and holding so).

126. *See* Messick, *supra* note 113, at 124; Thomas Carothers, *supra* note 14, at 96.

127. *See* Daniels & Trebilcock, *supra* note 43, at 120-21.

128. *Id.* at 120.

129. *See id.* at 120-21.

130. *Id.* at 120.

131. *See id.* at 120-21.

132. *But see* Messick, *supra* note 113, at 124-25 (explaining that the authors of the six case study

important as they increase judicial efficiency. "Protracted case processing times and overburdened administrative staff may lead to resource-privileged individuals dominating the court's time to the detriment of those who have fewer resources with which to exert influence."[133] Reforming judicial procedures also can increase efficiency by eliminating duplicative or contradictory procedures.[134] Overall, judicial efficiency reduces possibilities for corruption, increases accessibility to the courts, and ensures that decisions are consistent throughout the country.[135]

Alternative Dispute Resolution (ADR) Mechanisms and the Informal Society: Improving access to justice through new procedures and the creation of alternative dispute resolution mechanisms increases individuals' ability to achieve meaningful redress – and hold government and other individuals responsible for their actions.[136] In many countries, informal dispute mechanisms must be studied and brought into the formal legal environment, so that extra-judicial remedies are limited in size and context, thus entrenching the rule of law firmly in the judiciary.[137] Of course, these informal mechanisms can be kept in local or neighborhood governments or councils, but reforms at the least should create the ability to appeal decisions to a judicial body.

Professionalizing the Judiciary: Professionalizing the judicial system is an important reform for creating a fair and impartial judiciary.[138] Raising accreditation standards, reforming legal education, creating ethics standards and monitoring committees, increasing the status of bar associations and raising the status of the judge in society will contribute to both an increased professionalism within the judiciary and an increased public perception of the profession.[139]

Legal Education: Reforming and modernizing the curriculum of the legal education creates a new awareness of modern legal norms, issues, and the nuances of a market economy, and encourages a more sophisticated rule of law culture.[140] As well, reformation of legal education ensures that all law schools offer coursework that meets predetermined standards. There is a need to coordinate the legal education so that law schools teach substantially the same subject matter, to reduce discrepancies in knowledge and in the practice of law once the students become accredited lawyers. The creation of a required bar examination will ensure that these minimum standards are met by all legal graduates.

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found that these types of reforms have little impact where there is a lack of a consensus for judicial reform).

133. *See* Daniels & Trebilcock, *supra* note 43, at 111.

134. *Id.*

135. *Id.*

136. USAID, OFFICE OF DEMOCRACY & GOVERNANCE, ALTERNATIVE DISPUTE RESOLUTION PRACTITIONERS GUIDE 1 (1988), *available at* http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacp335.pdf.

137. *See id.* at 28, 49.

138. *See* Carothers, *supra* note 14, at 100.

139. *See id.*; OFFICE OF DEMOCRACY & GOVERNANCE, *supra* note 136, at 35.

140. Daniels & Trebilcock, *supra* note 43, at 117-18.

Bar Associations: Bar associations regulate the legal profession, and create and administer the standards for accreditation and professional licensing.[141] Increasing their scope and role as an oversight committee will generate an infrastructure of accountability and professionalism. Bar associations also provide Continuing Legal Education (CLE) programs, which help to educate the judiciary in how to understand, implement and judge newly-passed legislation and ensure that accredited attorneys continue to meet minimum knowledge and training requirements.[142] Perhaps most importantly, CLE programs can emphasize rule of law notions, and over time these can influence acceptance for the rule of law.

Accountability: Since rule of law reform is in part a political activity, proper performance is dependent on political actors deciding to comply or being forced to comply with the law. Thus, accountability of officials is predicated on the psychological willingness of the individual judge to rule honestly and professionally.[143] But it would be folly to predicate the establishment of the rule of law wholly on the judiciary, since ultimately high-level officials must accept living subject to the law. As such, weak judicial commitment to rule of law reform will undermine the efficacy of the whole premise.[144]

Overall, the judiciary is fundamentally important for achieving a procedurally minimalist rule of law. The judiciary is prevalent in the rule of law's essential values (meaningful access to redress and justice through an independent judiciary), in its primary qualities (access to the courts or other bodies for meaningful, fair, impartial and equal redress and justice), and overwhelmingly so in its secondary qualities (procedural standards and meaningful access to justice principles).[145]

"Rewriting constitutions, laws, and regulations is the easy part. Far-reaching institutional reform, also necessary, is arduous and slow."[146] The accumulation of the appropriate legal doctrine and professional norms and institutional "upgrading" takes time, and necessarily, donor organizations must be patient and supportive of the whole process of legal assistance, and host states must be committed to the full stage and scope of reforms.

III. MONGOLIA'S TRANSITIONAL AND INSTITUTIONAL BACKGROUND[147]

The reformists agitating a transformation to democracy advocated four main policy changes: a multiparty system and free and fair elections – i.e. inclusion in the government; a free-market economy; democracy; and the end of bureaucratic

141. *Id.* at 115-16 (describing several functions of a bar association in the legal system of a nation).

142. *Id.* at 116.

143. Orth, *supra* note 40, at 81.

144. *See* Carothers, *supra* note 14, at 100-03 (painting a global picture of rule-of-law reform by making continental and regional observations, and opining that the movement toward rule of law is broad but shallow); Carothers, *supra* note 18, at 50 (noting that over the last 10 years, political leaders worldwide have asserted a commitment to building the rule of law).

145. *See supra* text accompanying note 49.

146. Carothers, *supra* note 14, at 95-96.

147. *See infra* pp. 80-86.

control.[148] Indeed, when the reformists in the Mongolian People's Revolutionary Party ("MPRP") persuaded the party to accept the democratic demands, the government's subsequent acts primarily sought to establish a (facially) democratic system.[149]

The first parliamentary act inspired by the reformists' pressure was purely symbolic. In 1990, Parliament amended its 1960 constitution, deleting the article which stated that the MPRP was the guiding force of the Mongolian state and its society – Mongolia was to be a multi-party, democratic society.[150] During July – September of 1990, Mongolia experienced its first free parliamentary elections, following other amendments that restructured the government and that allowed the legal formation of opposition parties.[151] The MPRP earned a majority of the seats in the People's Great Hural, but the Little Hural (the lower house of Parliament, subsequently abolished) was representative of the competing political parties.[152]

The first sessions of the Mongolian People's Great Hural (the new unicameral Parliament) formally abolished the directives, ordinances and decisions that constituted Mongolian law.[153] "The society had once and for all decided to take a leap from the rule of leaders to the rule of law."[154]

The first MPRP government's level of inclusiveness was astounding for a party accustomed to full political control – the MPRP assigned four cabinet posts to opposition parties.[155] Much has been speculated about the reason for this inclusive governing style.[156] Suffice it to say, it also invited a coalition government after sweeping local elections two years later, in 1992.[157] At a minimum, the MPRP leaders have proven more adept at massaging the democratic institutions to their favor than have the opposition leaders that initiated those institutions.

Further, immediately following the elections, then-President Ochirbat created a Constitution Drafting Commission, led by three majority MPRP members, but

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148. Joseph E. Lake, First Resident U.S. Ambassador to Mongolia, Perspectives on Early Political Change, Speech at A Conference in Celebration of Tenth Anniversary of The Asian Foundation's Mongolian Program (Sep. 11, 2000), in THE ASIA FOUNDATION, MONGOLIA'S POLITICAL AND ECONOMIC TRANSITION: CHALLENGES AND OPPORTUNITIES 5 (2000).

149. *Id.* at 4-5.

150. Alan J.K. Sanders, *Mongolia's New Constitution*, 32 ASIAN SURV. 506, 510 (1992) (explaining how amendments to the 1960 constitution created a bicameral government for a short time and created the posts of president and vice-president).

151. Ginsburg, *supra* note 2, at 463.

152. *Id.* at 464.

153. Sanders, *supra* note 150, at 506.

154. WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT 5 (2000).

155. Ginsburg, *supra* note 2, at 464.

156. *Id.* at 464-65 (listing the possibilities as such: first, because of a generational change in the MPRP, the young party leaders actually had more in common with their opponents; second, that the only free-market economics experts were in opposition parties, thus necessitating a coalition government; and third, that the MPRP deftly put opposition leaders in charge of economics posts, in order to have a scapegoat in the inevitable case of economic decline).

157. *Id.* at 467.

with representation from all political parties.[158] Additionally, any proposed amendments to drafts were open to the public, with the only requirement that they be submitted through the proper channels to the Commission by September 1, 1991.[159]

Mongolia's natural path towards effective democratic governance was impressive, given its history. Not only did Mongolia's initial reforms kick off with panache, the government officials in charge were serious about the thoroughness of their tasks, completely remaking their constitution in the modern mold after the Constitutional Committee reviewed one hundred foreign constitutions for comparison.[160]

Mongolia's new constitution was formally ratified in early 1992, rescinding immediately the 1960 constitution.[161] The 1992 constitution is a modern constitution in the new European style, giving elevated status to human rights and social safety. The Asia Foundation supported the drafting of the new constitution.[162] The Foundation assisted the delegation of Mongolian parliamentarians who visited the U.S. to study its Congress and government institutions, and funded an American delegation of legal specialists who gave lectures and seminars in Mongolia on constitutional law and human rights.[163] After the draft constitution was circulated to the public for comment in June of 1991, The Foundation had several leading American constitutional experts contribute their commentary for the parliamentarians to consider.[164]

With their new Constitution firmly established but untested, Mongolia turned its attention to creating a market economy and enacting legislation to implement the Constitution. Mongolia, like other post-Leninist countries, searched for an optimal law regime in an era of globalization and law convergence.[165] For this intricate task, Mongolia's leadership was ill-equipped to make the transition alone.

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158. Sanders, *supra* note 150, at 511.

159. *Id.* at 510 (discussing the different drafts and the changes made to them, and noting that the International Commission of Jurists assisted the formation of the first draft). In fact, in addition to the International Commission of Jurists, representatives from the Asia Foundation, USAID, the diplomatic community in Ulaanbaatar and foreign experts reviewed the constitution's drafts and made suggestions. This was probably the first collusion in legal reform between the Mongolian government and international organizations and foreign governments.

160. Tom Ginsburg and Ganzorig Gombosuren, *When Courts and Politics Collide: Mongolia's Constitutional Crisis*, 14 COLUM. J. ASIAN L. 309, 310 (2000).

161. Sanders, *supra* note 150, at 506.

162. THE ASIA FOUNDATION, THE ASIA FOUNDATION & MONGOLIA: A TEN YEAR HISTORY 1 (2000).

163. *Id.*

164. *Id.*

165. There are numerous foundations, international organizations and governmental agencies and groups assisting legal and judicial reform in Mongolia, all ostensibly advancing the rule of law. *See* United Nations Dev. Programme [UNDP], Human Development Report Mongolia 51-52 (2003). The ones who have been the most contributory are, in no particular order: the National Center for State Courts of the United States; United States Agency for International Development (USAID); Asian Development Bank; World Bank; The Asia Foundation; United Nations Development Program (UNDP); Hans Siedel Foundation; German Technical Cooperation Association (GTZ); the Soros

Mongolia received extensive technical assistance from international organizations and used its newly formed bilateral relationships to enlist the legal and technical assistance of donor countries.[166] To its benefit, Mongolia had a respectable starting point: Eastern Europe and Central Asian ex-Soviet satellites already had stumbled through a few years of growing pains. Indeed, the United States Agency for International Development (USAID) and German Development Corporation (GTZ) were experienced legal reform advisors by the time they entered Mongolia in 1990.[167] The Asian Development Bank (ADB) began working with Mongolia's government in 1991.[168] To all parties involved, the goal was to create a market economy, a multi-party system, and a democratic governance structure.[169]

IV. LESSONS LEARNED FROM MONGOLIAN LEGAL REFORMS AND THE WORK OF DONOR ORGANIZATIONS

The justice of Mongolia should become a Mongolian product.[170]

It is neither apparent nor likely that Mongolia or its donors used any procedurally-minimalist formulation of rule of law or any analogous guide for its initial reforms.[171] Instead, they engaged in many reforms on an as-needed basis.[172] Nonetheless, over time, Mongolia and its donor agencies touched on nearly every single stage of rule of law promotion.[173]

Mongolia's experiences demonstrate four important lessons to future rule of law promotion: (1) judicial independence is the cornerstone of the rule of law; (2) formal government action plans offer "more bang for your buck;" (3) public participation and sentiment is a proxy for the institutionalization of the norms and culture of the rule of law; and (4) the leverage of donor coordination pays dividends.

A. Lesson One: Judicial Independence Is The Cornerstone of the Rule of Law

The importance of judicial independence seems self-evident, but a remarkable number of rule of law definitions omit it as a factor or put it very low on the

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Foundation and Open Society Institute (OSI); and PACT.

166. WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 7.

167. *See* USAID, Brief Chronology and Highlights of the History of U.S. Foreign Assistance Activities, http://www.usaid.gov/about_usaid/chronology.html (last visited Mar. 15, 2010); GTZ, The 1990s – A Dynamic Decade, http://www.gtz.de/en/unternehmen/29091.htm (last visited Mar. 15, 2010).

168. ASIAN DEVELOPMENT BANK, ASIAN DEVELOPMENT BANK & MONGOLIA: FACT SHEET 6 (2008).

169. Lake, *supra* note 148, at 5.

170. B. Chimid, Advisor to the Parliament, The New Constitution of Mongolia and Legal Reform, Speech at A Conference in Celebration of Tenth Anniversary of The Asian Foundation's Mongolian Program (Sep. 11, 2000), *in* THE ASIA FOUNDATION, MONGOLIA'S POLITICAL AND ECONOMIC TRANSITION: CHALLENGES AND OPPORTUNITIES 26-30 (2000).

171. *See Cheung, supra* note 10, at 70-72.

172. *See infra* Appendix B for a detailed summary of Mongolia's rule-of-law reforms and the donor institutions that assisted these reforms.

173. *Id.*

hierarchy of essential values.[174] The Mongolian experience highlights the importance of judicial independence.

Mongolia has had some difficulties with judicial independence for a few fundamental reasons. First, during its socialist past, the executive controlled the judiciary, which the executive utilized as another way for the state to exercise control over the country. Accordingly, judges occupied a lower status and decided cases and implemented decisions based on party lines and executive directives. Second, the continuity of the Mongolian communist party and continued party affiliation negatively affect judicial independence. The MPRP continues to be in power (although under a reformulated democratic basis) and many of the present judges on the bench were and continue as MPRP members. Thus, there is a close interrelation between the past and the present, and the executive and legislative branches continue to influence the attitudes and decisions of some judges. The third main factor affecting judicial independence is the difficulty in changing legal psychology from communist times.

In Mongolia and other similarly situated states, an early and targeted focus on judicial independence would be appropriate. The fundamental barriers to the establishment of judicial independence in Mongolia were not adequately dealt with during the first six years of reforms, until the government of Mongolia and the donor community had turned to judicial reform projects. But, two failures have resulted in Mongolia's judiciary having a precarious independence: the failure to acknowledge the fact that judicial independence is a cornerstone to the rule of law; and the failure to acknowledge the seriousness of the impediments to the establishment of judicial independence in Mongolia and then dedicate money and programs to removing those impediments.

Donors provided a great deal of focus on the General Council of Courts (GCC), which controls the management of the judiciary, including the budget, selects judges and undertakes disciplinary proceedings of justice sector employees.[175] As mentioned above, the creation and implementation of a judicial council supports an independent judiciary and embodies it with the freedom and strength to challenge governmental actions that hinder the rule of law.

The General Council of Courts, mandated by Article 49 of the Constitution of Mongolia to assure judicial independence, has twelve members: the Chief Justice, the General Prosecutor, the Minister of Justice and Home Affairs (MOJHA), a Secretary appointed by the President, two members appointed by the Supreme Court, two by the Parliament, two representing the *Aimag* and Capital City courts, and two representing the courts of first instance.[176]

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174. *See* discussion *supra* Part II.A.

175. *See* USAID, THE JUDICIAL REFORM PROGRAM IN MONGOLIA: ACCOMPLISHMENTS, LESSONS LEARNED, AND RECOMMENDATIONS FOR THE FUTURE 10 (2009), *available at* http://pdf.usaid.gov/pdf_docs/PDACO255.pdf.

176. WORLD BANK, LEGAL AND JUDICIAL REFORM PROJECT 7 (2001) (discussing the state of the judiciary).

Although the majority of the membership comes from the judiciary, there is significant representation by the executive and legislative branches, compromising the independence of this body and the judiciary branch.[177] There has not been any indication that the membership composition will change in the near future. Indeed, Ganzorig Gombosuren, a former Supreme Court Justice, argued that this executive oversight influenced the GCC and reduced its independent decision-making capacity, resulting in its decision not to renew his nomination.[178] The International Commission of Jurists relates this incident.

Ganzorig Gombosuren – Retired Judge of the Supreme Court of Mongolia:

> Mr. Ganzorig Gombosuren served as a Judge of the Supreme Court of Mongolia for eight years and left the Court in 1998 to take a master in law degree in the United States. When he returned to Mongolia in March 2001 he was nominated by the Supreme Court to be appointed as a judge again. In spite of his prior service, he had to take a test that the Judicial Professional Committee has established as a first step in order to ensure the adequate qualification of candidates. He was unsuccessful on the test and was therefore not recommended by the General Council of Courts to the President for renewed appointment. The General Council of Courts rejected his request to reconsider this decision. Reportedly, the majority of the members of the General Council of Courts at first voted in his favour, but after the Minister of Justice, who was Chairman of this body, made comments to his disadvantage, the second round of voting confirmed the negative decision not to renew his nomination . . . . According to Ganzorig Gombosuren, the de facto reason behind his rejection is that he has been active in promoting the independence of the judiciary in Mongolia. In December 1993 he and his colleagues established the Mongolian Group for the Independence of Judges and Lawyers to support judicial independence and legal reform in Mongolia. He has also written a number of articles in newspapers and law journals, spoken on TV and on the radio, and in law schools and conferences.[179]

As this anecdote demonstrates, judicial independence is precarious in Mongolia, in part because of executive oversight of the judiciary by the Ministry of Justice. Donors have had to implement reforms within the reality of this framework, and have thus focused on increasing transparency and accountability and improving public relations.[180]

The GCC has been criticized for having a hierarchical management style, an inadequate budget and a small and poorly trained staff, all of which constrain the

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177. INTERNATIONAL COMMISSION OF JURISTS, MONGOLIA: ATTACKS ON JUSTICE 263-64 (2002), *available at* http://www.icj.org/IMG/pdf/mongolia.pdf.

178. *Id.* at 268-69.

179. *Id.*

180. USAID, THE JUDICIAL REFORM PROGRAM IN MONGOLIA: ACCOMPLISHMENTS, LESSONS LEARNED, AND RECOMMENDATIONS FOR THE FUTURE, *supra* note 175, at 5.

creation or implementation of the rule of law.[181] The other branches of government have not made enough human and fiscal resources available to the GCC, to assist in its judicial reforms of accountability and transparency.[182] As well, within the leadership of the GCC, there has not been significant willingness to modernize its decision-making process to give the judiciary more control over its branch and independence vis-à-vis the other branches of government.[183] This could result from the existence of membership from the executive and the legislative branches in the Council.

Apart from institutional issues with the judicial council, status, continuity, and legal psychology were barriers to an independent judiciary. At the time of its transformation, Mongolia's judges and legal professionals had no training in adjudicating disputes in a market economy, and their mindset remained that of the communist era – viewing the judiciary is an instrument of state power, not an independent branch of government.[184] In addition to basic market-economy training and changing the mentality of the judiciary, the donors focused on teaching the many newly-passed laws, which included whole sectoral changes.[185]

Judges have "had to adjust to a rapidly changing legislative environment, particularly in the civil area. Although most of the judges have attempted to familiarize themselves with the new legislation, there are still some who base decisions on their old knowledge as they find it difficult to keep up with the changes. Their experience in the application of commercial laws is limited, and many find the unfamiliar situations of a market economy that they are faced with confusing."[186] Mongolia's judges and other legal professionals have had to absorb the many changes in the law, and then decide how to prosecute, administer, or implement these laws. This was particularly difficult since many of the new laws were poorly drafted, overlapping or inconsistent.[187] Mongolia and the donor organizations have managed these challenges through the creation of judicial training centers, as further discussed in the lesson on donor coordination.[188]

Overall, given Mongolia's unique cultural and institutional attributes, the donor community should have recognized the fundamental value of judicial independence and dedicated attention and resources to identifying and then overcoming impediments to the independence of the judiciary in Mongolia.

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181. *Id.* at 12, 17-18, 20-21.

182. *Id.* at 17

183. *Id.* at 18-20

184. *See* USAID, THE JUDICIAL REFORM PROGRAM IN MONGOLIA: ACCOMPLISHMENTS, LESSONS LEARNED, AND RECOMMENDATIONS FOR THE FUTURE, *supra* note 175, at 4-8 (discussing how the attitudes of the judiciary were slow to respond to the Constitution's adoption of an independent judiciary as a third branch of government).

185. *See infra* Appendix B.

186. DEVELOPING MONGOLIA'S LEGAL FRAMEWORK: A NEEDS ANALYSIS, ASIAN DEVELOPMENT BANK 32 (1995), *available at* http://www.adb.org/Documents/Papers/Mongolia_Legal _Framework /the_judges.asp?p=lawdevt.

187. *See e.g., infra* note 345 and accompanying text.

188. *See infra* Part IV.D.

Instead, work on the judiciary was largely ignored during the first six years of independence while necessary legislative reforms took precedence.

As will be further shown in the other rule of law lessons, the precariousness of judicial independence leads to serious societal problems, namely corruption and perceptions that there is no rule of law, thereby ensuring that people do not access the judiciary in the case of disputes, and instead engage in corrupt exchanges or "black market justice."

B. Lesson Two: Formal Government Action Plans Offer "More Bang for Your Buck"

This lesson recognizes the inherent limitation of exhaustible resources of a donor state or donor institution. The resources that a donor would be able to offer is limited to budget constraints and the political willingness to commit money, resources and personnel to the establishment of the rule of law in a donor-recipient country. For instance, after September 11, 2001, the United States focused its state-promoted programs and money predominantly on Afghanistan and Iraq, its two main foreign policy commitments.[189] In that regard, resources and even commitments can be pulled from recipient states and recommitted elsewhere. Recognition of the inherent limitation of exhaustible resources would aid the provision of rule of law assistance. The experience of Mongolia demonstrates that formal government action plans offer one method of counteracting that inherent limitation.

Mongolia's legislative reforms can be divided into two phases, each with a distinct hallmark.[190] Phase one was the "uncoordinated emergency reforms," and had as its hallmark ongoing political strife and disorganization between the government and its donors, as well as among the donor community itself.[191] Phase two was the "government reform plans" that had as its hallmark formal government plans to direct the various branches of government and its government agencies and employees, as well as civil society and the donor community, which resulted in a more dynamic, lasting and comprehensive reform process.[192] The formal government action plans resulted in numerous benefits, including by signaling formal government "buy-in" of some of the earlier reforms and norm creation; offering guidance to the executive, legislation and judicial branches as to the next phase of reform; broadening and deepening the reform process; and pushing the donor community to work together as an effective "single organism."[193]

189. *See generally* CONGRESSIONAL RESEARCH SERVICE, FOREIGN AID: AN INTRODUCTORY OVERVIEW OF U.S. PROGRAMS AND POLICY (2004), *available at* http://fpc.state.gov/documents/organization/31987.pdf.

190. The phases discussed herein are the author's conclusions concerning the effectiveness of Mongolia's legal reforms. *See* B. Chimid, *supra* note 170, at 12.

191. *Id.* at 12-13.

192. *Id.* at 12-14.

193. *Id.* at 13-14.

Judicial reforms mostly occurred during phase two and as such, have been more thoughtful and complete. Reforms of the judiciary began modestly with the 1993 Law on Courts, which mandated a reduction in the number of courts, an increase in the number of judges and the establishment of higher eligibility standards for appointment to the bench.[194] After the passage of this restructuring, Parliament did little to advance the judiciary and its legal institutions. For some reason, there seems to have been a lack of attention to judicial reform between 1994 and 1998. This could be the result of the balance of powers crisis and deadlock in Parliament during those years. Conversely, it could be the result of needed attention to reforming the economic system to become a market-based system and reforming the political system to become a multi-party democracy. Regardless, the institutional strengthening of the judiciary stalled, while free market and economic reforms continued.

The lesson to be learned by the power of formal government action plans, however, begins with the reform of legislation. From 1992 to 1998, the State Great Hural enacted nearly 180 independent laws and approved over 200 amendments, and Mongolia joined nearly 60 international agreements and treaties.[195] Following Mongolia's democratic transition, the legal reform process was intense and immediate. On the whole, the GTZ has been the greatest stimulus of the legislative reforms in Mongolia, and much of the new civil legal code closely approximates German law.[196] A likely reason for the prevalence of the GTZ in legislative reform is the fact that the GTZ undertook similar reform projects in the former Soviet republics.[197] Essentially, the GTZ's previous expertise in the recodification of the civil and criminal codes in Eastern Europe and Central Asia was available immediately to Mongolia.[198]

Despite the success in the sheer number and breadth of the passage of new laws, Mongolia had substantial difficulty with its phase one legislative reforms. This was due in large part because, for the first six years of its democracy, the government undertook reforms without a comprehensive program in place.

> All donor outcomes could have been better if agreements on strategic frameworks could have been reached for more sectors . . . . While initial technical assistance . . . helped to change the thinking toward a market-based economy (particularly within the Ministry of Finance and the Central Bank), many aspects of the institutional framework for a market-based economy remain fragile (lack of compliance with new

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194. THE ASIA FOUNDATION, *supra* note 162, at 2.

195. *See* Tsend Munkhorgil, Justice Minister, Government of Mongolia, Speech at the Investor's Forum: Legal Reform in Mongolia, *available at* http://www.mol.mn/modules.php?name=News&file=print&sid=7611. (A noteworthy piece of legislation is Mongolia's liberal Mining Law, said to be among the best in the world).

196. *See* WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 22.

197. *See* GTZ, Europe, Caucasus and Central Asia, http://www.gtz.de/en/weltweit/574.htm (last visited Feb. 13, 2010).

198. *Id.*

laws and regulations, weak institutional capacity and resources, and poor accountability of public service delivery).[199]

Inadequate methods and practice of legislative drafting has been an additional major cause of legal disorder. "Legal science is just not present there."[200] In addition to better legal drafting, there was little coordination of legislative drafting among the donors and all members of parliament, which could have been a system for checking the consistency and relevance of legislation.[201]

Indeed, much of donors' subsequent assistance in legislative reforms occurred to amend previously enacted laws that were poorly drafted, inconsistent with other obligations and laws, or simply improper for Mongolia given its unique history and cultural attributes.[202] These early laws were developed without any single policy in mind, and without effective planning or integration.

Then-Deputy Justice Minister, Ts. Munkhorgil, later concluded that during the early years of reform, the "failure to enact economic laws in mutually consistent and comprehensive ways so as to be able to set up a legal framework of market relations, with the enforcement mechanism defined optimally . . . might have a negative impact on economic reform."[203] Further, he considered that "the differences and specific features of [foreign] legal systems were disregarded with laws and regulations of different countries taken as a model. All this led to such negative consequences, as incompatibility of laws and inappropriate mechanism for their enforcement."[204]

It seems that reforming the legal code with assistance from donor countries has resulted in transplantation effects – whereby laws from Germany, for example, were not appropriate for Mongolia's culture. In fact, one can easily surmise that much of the impetus in specific legal reforms – as well as in the pace and direction of reforms – came not from Mongolian leadership but from donor countries and donor organizations willing and hoping to remake Mongolia in its own vision.

To be fair, most Mongolian government officials had little expertise in market systems and did not understand even the patent impact that certain legislation would have.[205] Thus, it is fair to say that these leaders did not foresee the latent

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199. WORLD BANK, MEMORANDUM OF THE PRESIDENT OF THE INTERNATIONAL DEVELOPMENT ASSOCIATION TO THE EXECUTIVE DIRECTORS OF A COUNTRY ASSISTANCE STRATEGY OF THE WORLD BANK GROUP FOR MONGOLIA 12 (2004) [hereinafter WORLD BANK COUNTRY ASSISTANCE STRATEGY 2004], *available at* http://siteresources.worldbank.org/MONGOLIAEXTN/Resources/CAS_ Mongolia 2004.pdf.

200. WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 28-29 (quoting Supreme Court Justice Hon. A. Dorjgotov. A course on legislative drafting is no longer taught in the standard law-school curriculum, and needs to be reintroduced in the curriculum to cure drafting in the future. Law students need to be taught critical and analytical thinking, to understand the policies underlying the laws, for better legal drafting, coordination of laws and interrelating of laws.)

201. *Id.*

202. *See e.g.*, Munkhorgil, *supra* note 195.

203. *Id.*

204. *Id.*

205. Dan Southerland, *Mongolia: A Democratic Breakthrough*, CHRISTIAN SCI. MONITOR, Dec. 31, 2009,http://www.csmonitor.com/Commentary/Opinion/2009/1231/Mongolia-a-democratic

and long-term implications of certain legislation. Whether or not the donor organizations understood these implications and whether they communicated such dangers to the leadership is uncertain. Nonetheless, these donors impacted the reform of the legislation greatly, and bear at least part of the fault in the resulting negative consequences.

As a result of these discrepancies and early failures in these phase one reforms, the government decided to change the structure within which the previous legislation occurred. In the view of this author, the clear demarcating line between the phase one reforms and the phase two reforms in Mongolia was the passage in January of 1998 of the "Legal Reform Program of Mongolia" by the State Great Hural.[206] The purpose of the Legal Reform Program is to implement the objective of "developing a human, civil and democratic society," to define basic guidelines of work of state organization and officers at all levels, and to create a legal framework and favorable environment to ensure political, social and economic development and progress in compliance with the principles and concepts proclaimed in the Constitution.[207]

In an elemental sense, the Legal Reform Program articulated a framework for the government and civil society to implement the rule of law. In order to guide key stakeholders in the creation of this framework, the Act articulates six objectives: (i) development of the legal basis for ensuring the sovereignty of Mongolia; (ii) perfection of the legal basis of economic relations; (iii) ensurance of human rights freedoms and its legal guarantees; (iv) perfection of the legal basis of state structure; (v) creation of the environment for legal reform; (vi) perfection of the training of legal professionals; and (vii) broadening of participation of Mongolia in international legal regulations.[208]

The Legal Reform Program has been one of the fundamental pieces of legislation since Mongolia's democratization. It created the framework for further reforms and defined the policies and principles that the State Great Hural should follow in future legislation. Importantly, as well as improving legislation, it *deepened* the reform process. For example, the State Great Hural subsequently passed the "Guidelines for Improvement of Legislation of Mongolia for Period Up to 2004," which listed over 40 laws to be enacted in six main areas.[209] The government complied with these guidelines and also passed measures "to set up a system of studying enforcement and impact of legislation, carrying out monitoring and making assessment."[210]

One of the principal benefits of the Legal Reform Program has been to guide the substantial amount of donor activity in assisting further legislative reforms. Donor activity became particularly helpful after Mongolia passed the well-crafted

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breakthrough.

206. WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 40.

207. *Id.*

208. *Id.* at 41.

209. *See* Munkhorgil, *supra* note 195.

210. *Id.*

"Law on Non-Government Organizations" in 1997.[211] Donors such as the Asia Foundation began to influence the reform process by working with new interest groups and domestic NGOs, as well as members of government.[212] As well, NGOs have taken a more active and direct role in influencing the reformation process. After some tepid initial moves, Mongolian society began to interact with the government to influence the passage of *specific* laws (whereas previous agitation occurred to stimulate general ideals – like a democratic revolution). The benefit of the legal reform program in part has been for Mongolians to take more ownership over the path of the reform process.

For instance, NGOs with the support of donors played a formative role in the passage of the new Family Law in 1999.[213] Additionally, The Asia Foundation assisted in the revision of the 25-year old Family Law to reflect the changed social and economic conditions of Mongolia.[214] The Foundation provided support for a seminar to discuss subjects of amendments, such as domestic violence, joint property, and social benefits.[215]

Another example illustrates the confluence of donors with domestic actors. In 1999, The Asia Foundation supported the Political Education Academy of Mongolia to study the Constitution, its organic laws and its impact on government.[216] This exercise has contributed to the development of Mongolian democratic and constitutional studies, and it should lead to constitutional changes to increase efficiency, effectiveness, transparency and accountability of the government.[217] Partly because of these efforts, in December of 1999, the State Great Hural passed the first amendments to the Constitution.[218]

Although the Legal Reform Program created the atmosphere for positive rule of law reform, there was a risk that no subsequent enactments would guide or implement the rule of law. In this vein, the government recognized the need for more guidance and implementation and subsequently passed various government action plans, further signaling a divide between phase one and phase two reforms.[219]

Although they were probably not intended to do so, these action plans embody a procedurally-minimalist rule of law definition, and focus on the creation of norms and concepts, rather than ends-based goals. They closely follow the

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211. Tom Ginsburg, *Mongolia in 1997: Deepening Democracy*, 38 ASIAN SURV. 64, 65 (Jan. 1998).

212. THE ASIA FOUNDATION, *supra* note 162, at 3.

213. THE ASIA FOUNDATION, BUILDING LEGAL INSTITUTIONS IN MONGOLIA 2 (2000).

214. THE ASIA FOUNDATION, *supra* note 162, at 4.

215. *Id.*

216. *Id.*

217. *Id.*

218. Stewart Fenwick, *The Rule of Law in Mongolia -- Constitutional Court and Conspiratorial Parliament*, FED'N PRESS, http://digital.federationpress.com.au/pageview/3aj4a/9n061/17 (last visited Feb. 13, 2010).

219. *See generally* WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154.

suggestions of this article's rule of law formulation, with an appropriate overarching emphasis on norm creation, especially in the judiciary.

Suffice it to say, the reforms that occurred after these government action plans were superior to those that preceded them. The contrast between reform of legislation (many reforms occurred before the plans) and judicial reforms (most reforms occurred after the government plans) demonstrates the importance of these plans. To be clear, these action plans affected the legal and judicial reforms in two ways – (i) they implemented a more detailed framework to guide the passage of future legislation and reforms and (ii) they mandated and embodied the rule of law in the work of Mongolia's branches of government, and the donor organizations consulting them.

Donor coordination accelerated after the release of the Legal Needs Assessment, which was funded in part by the Danish International Development Agency (DANIDA) and administered by the World Bank's Mongolian Legal and Judicial Reform Project.[220] World Bank officials implemented the assessment process with the assumption that the country itself must design the course of action.[221] There was much institutional disagreement with this theory, as it was not usual World Bank practice to cede control of the agenda to the donor-recipient state.[222] However, World Bank staff members that were supportive of this idea were able to exert enough pressure on obstructions within the World Bank system to overcome these doubts.[223]

The assessment utilized the guidance of the Government's Legal Reform Program, and it was designed to further achieve the government's stated goals.[224] The assessment culminated in the identification for assistance of the following areas: (i) *legislative drafting*: development and coordination; (ii) *judicial and criminal justice reform*; (iii) *legal profession*: improvement of legal education and bar development; (iv) *legal scholarship*: development of materials and research databases; (v) *public awareness*: dissemination of legal information; and (vi) *coordination and harmonization of international treaties*.[225]

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220. WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 3.

221. This conclusion is based on the author's off the record discussions with an official of the World Bank while in Mongolia.

222. *Id.*

223. *Id.*

224. The Legal Needs Assessment assessed the major problems affecting the efficiency of the newly shaped legal system; identified programs that were needed to further legal reform activities; provided information to external donor community for designing of legal reform projects and for coordination of ongoing activities; and coordinated efforts of government, parliamentarians, judiciary, scholars and civil society to assess their needs of legal and judicial reform. *See* WORLD BANK, PROJECT APPRAISAL DOCUMENT ON A PROPOSED LEARNING AND INNOVATION CREDIT IN THE AMOUNT OF SDR 4.0 MILLION (US$5.0 MILLION EQUIVALENT) TO MONGOLIA FOR A LEGAL AND JUDICIAL REFORM PROJECT 4-5 (2001), *available at* http://www-wds.worldbank.org/external/default/WDS ContentServer/WDSP/IB/2002/01/07/000094946_01121708452144/Rendered/PDF/multi0page.pdf [hereinafter WORLD BANK, MONGOLIA PROJECT APPRAISAL DOCUMENT]; WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 15-16.

225. *Id.*

The Legal Needs Assessment was direct, comprehensive, and signaled to the state that the government direction imposed by the Legal Reform Program was acceptable to the donor community and the domestic constituencies.[226] A principal benefit of the assessment was that it resulted in a sincere societal buy-in of the assessment's conclusions by both government actors and citizens, since it was designed and administered by domestic actors. Many of these same domestic actors then designed and endorsed the resulting legal reform plans that arose from the legal reform program and assessment. Although the assessment was unusual and it likely would be difficult to repeat in many donor organizations – even its source, the World Bank – it should be held up as a prototype, as it has resulted in many tangible benefits.

Following in the wake of the Legal Needs Assessment, on May 4, 2000 the government of Mongolia passed its first government action plan, the "Strategic Plan for the Justice System of Mongolia."[227] This plan identified the direction of the development of the judiciary within the framework of the overall Legal Reform Plan and sets strategic goals to define the judicial reforms.[228] A working group that involved representatives of all judiciary bodies and experts of USAID prepared the Strategic Plan.[229]

The Strategic Plan identified six fundamental values: (i) *independence*: that the judiciary protects its political, economic, organizational and decision-making independence; (ii) *accountability*: ability to use public resources efficiently including personal accountability on the part of all individuals who work in the justice system; (iii) *responsiveness*: ability of the justice system to anticipate and timely respond to the changing needs of society; (iv) *fairness*: ability to treat all with respect and to apply only the law; (v) *accessibility*: ability of the justice system to be convenient, timely and affordable to everyone with a legitimate claim or concern; and (vi) *effectiveness*: ability to uphold and apply the law consistently throughout the country.[230]

This Strategic Plan is extraordinary because, rather than calling for ends (such as an online court database), it mandated the establishment of *values* that are the equivalent to norms of the rule of law. These values represent process-oriented reforms and closely relate to the procedurally-minimalist rule of law. An analysis of each of the values clearly corresponds to the rule of law formulation described above; in particular, this plan establishes the framework to implement the second

226. *See* WORLD BANK, IMPLEMENTATION COMPLETION AND RESULTS REPORT ON A LEARNING AND INNOVATION CREDIT OF XDR 4.0 MILLION (US$5.0 MILLION EQUIVALENT) TO MONGOLIA FOR A JUSTICE SECTOR REFORM PROJECT 6-7 (2001), *available at* http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2009/08/21/000333037_20090821003929/Rendered/PDF/ICR8770P074001 1C0disclosed081181091.pdf.

227. *See* USAID, THE JUDICIAL REFORM PROGRAM IN MONGOLIA: ACCOMPLISHMENTS, LESSONS LEARNED, AND RECOMMENDATIONS FOR THE FUTURE, *supra* note 175, at 5; WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 31.

228. WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 30-31.

229. WORLD BANK, MONGOLIA PROJECT APPRAISAL DOCUMENT, *supra* note 224, at 5.

230. WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 30-31.

essential value, the second primary quality and all of the secondary qualities of the rule of law. Most importantly, this Strategic Plan calls for an integrated approach to the rule of law (at least in the judiciary) where norms of universal value create an umbrella structure in which to generate specific ends that assist the procedurally-minimalist rule of law. The linchpin of this strategy is the USAID-funded Judicial Reform Program (JRP), which will be discussed below.[231]

Overall, the Government of Mongolia and donors have promulgated many new concepts in the justice system, and the adoption and implementation of these concepts in a coordinated fashion has been difficult. An emphasis on training new and established judges in these concepts somewhat has mitigated these difficulties. Apart from some conceptual confusion, judicial reforms mostly have been successful. The judicial sector has been modernized, and its court management and processes have been automated to increase efficiency, transparency, accountability and fairness.[232] The judiciary is becoming more professional, and is engaged in training to learn the new legal codes, and how to implement them. As well, there have been significant efforts to reduce corruption and increase judicial independence.[233] The challenge for Mongolia and its donors will be to move beyond the "introduction" of these new approaches and ensure that they are actually "embedded" and "institutionalized" within the legal profession.

Further, since the government reform plans, legislative reforms have been passed in a coordinated fashion. While some technical and drafting issues persist, donor coordination and guidance by the government of Mongolia has resulted in the passage of laws that are cleaner, clearer and appropriate for the circumstances of Mongolia.[234] The deepening of the reform process, leading in particular to judicial reforms, has helped to ensure that the implementation of these laws by judges and practitioners has become more accurate and appropriate.

While it is clear that in the case of a total societal implosion, there is an immediate need to begin to pass laws to structure a new society, the case of Mongolia demonstrates that as soon as it is possible, the government and the donor community should pass a government reform plan that will guide future reforms. These plans can identify specific needs, and, more fundamentally, contain important norms and notions that should guide the passage of laws and rules, and their subsequent implementation. For a variety of reasons, including clarity, buy-in, guidance, and comprehensiveness, these government reform plans offer the most bang for the buck.

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231. *See* National Center for State Courts International, *Mongolia – Mongolia Judicial Reform Project*, http://www.ncscinternational.org/x/Document_Viewer.aspx?DocumentID=683 (last visited Feb. 9, 2010); USAID, THE JUDICIAL REFORM PROGRAM IN MONGOLIA: ACCOMPLISHMENTS, LESSONS LEARNED, AND RECOMMENDATIONS FOR THE FUTURE, *supra* note 175, at 4.

232. *See* USAID, THE JUDICIAL REFORM PROGRAM IN MONGOLIA: ACCOMPLISHMENTS, LESSONS LEARNED, AND RECOMMENDATIONS FOR THE FUTURE, *supra* note 175, at 6-11.

233. *Id.* at 5, 10-11.

234. *See id.* at 7-8.

C. Lesson Three: Public Participation and Sentiment is a Proxy for the Institutionalization of the Norms and Culture of the Rule of Law

This article puts forth a definition of the rule of law that focuses in large part on the creation of the norms and culture of the rule of law. While the institutionalization of norms through legislation is a stepping stone, as would be the case where a law formally makes the judiciary independent, there are a variety of other factors that impede the true institutionalization of those norms. Indeed, some of those impediments are apparent facially, such as the particular legal history of Mongolia and the recent control of the judiciary by the Communist party. Others are more nuanced and thus difficult to identify. Because of the difficulty of direct identification of the creation and implementation of these norms, practitioners could utilize a proxy to aid in such an identification.

One proxy for whether the culture and norms of the rule of law are being adopted is public participation and public sentiment. In short, whether the public is participating in the passage of laws, in elevating disputes to the judiciary, and in other aspects of the rule of law actually indicates whether those norms and culture are being institutionalized.[235] This proxy will provide gross direction (that is, not nuanced) to the practitioner or researcher and would not permit a sophisticated understanding (or if somehow enumerated, a statistically significant conclusion) of whether a particular norm has been established. Nonetheless, it provides important guidance to aid in a determination of the efficacy of the donors' assistance to a donor-recipient and could provide an opportunity to change direction or refocus efforts and aid as needed.

The experience of Mongolia provides a useful example. In Mongolia's implementation of legal, judicial and societal reforms, the members of parliament and government leaders enacted the first four years of reforms without proper participation of the public. This was more or less expected since governmental decision-making during the communist era was private and opaque, so most initial reforms in the democratic era were nontransparent or minimally so. The fact that there were very few NGOs or interest groups operating in Mongolia also contributed to this lack of public participation.[236] Mongolians simply were too worried about their financial situation to invest energy in special interest reforms to create a particular ideal within, or type of, a market economy.[237] Anyways, very few knew about the workings of a market economy. While it is difficult to state with certainty which factor impeded public participation, the very fact that the public was not a part of the process indicates that there was no culture of the rule of law at the inception of the reforms.

As discussed above, only once there was a law on NGOs in place and sufficient donor activity in this field, did the public actually and actively

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236. *See, e.g.*, Ginsburg, *supra* note 211, at 65.

237. *See* USAID, THE JUDICIAL REFORM PROGRAM IN MONGOLIA: ACCOMPLISHMENTS, LESSONS LEARNED, AND RECOMMENDATIONS FOR THE FUTURE, *supra* note 175, at 20; *see* WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 6.

participate.[238] Prior to that point, public participation was limited to mass protests over faulty or hasty previous reforms. To its credit, Mongolia's leaders quickly have recognized errors in new legislation, and enacted subsequent legislation to remedy those problems.[239]

This awareness and willingness to rectify the earlier reforms is nowhere more apparent as in electoral reforms. The parliamentary election of 1992 resulted in the election of an overwhelming majority of representatives for the MPRP.[240] Because the opposition garnered 40% of the vote, but won only 5 out of 76 seats, the public revolted and engaged in a stinging protest against the new government.[241] An ensuing hunger strike by the Mongolia Democratic Union resulted in a negotiated agreement to revise the election law, to enact a law for the independence of the media from government control and interference,[242] and to address the new problem of corruption.[243] Previously, the MPRP had come to power under 76 single member districts, but after pressure from the opposition, who concentrated their support in urban areas, the election law changed to a mixed system of districts and proportional representation.[244]

The Asia Foundation sponsored exchange programs and forums to develop information for the revised election law, which was approved in 1992.[245] The revised election law paid dividends to the MPRP-opposition – the subsequent national election resulted in a coalition ousting the MPRP and winning 47 of 76 seats in Parliament.[246] The new election law also increased fairness and accountability, by requiring all candidates to open separate finance accounts which were subject to audits, by giving equal access to state-run media for campaign purposes, and by liberalizing nomination processes.[247]

The hunger strike also clearly identified corruption as a public issue and exposed the sense that many of the key norms of the rule of law were not being established or absorbed by the government actors.

Corruption in the judicial system is a root of corruption throughout society, as it reduces the ability of a judiciary to freely mete out justice. Corruption displaces the natural process of decision-making, and makes access to justice insignificant. In a 2005 Transparency International corruption survey, Mongolia scored a 3.0 out

238. *See* Ginsburg, *supra* note 211, at 65.

239. As well, Mongolia has been receptive to social considerations arising from their reforms, such as poverty, rural inequities, and the increased presence of street children. *Id.* For the most part, Mongolia's commitment to democracy has allowed interest groups and NGOs to agitate to bring these problems to the attention of the MPs, free from undue interference or violence by the government. *Id.*

240. Sheldon S. Severinghaus, *Mongolia in 1994: Strengthening Democracy*, 35 ASIAN SURV. 70, 70-71 (1995).

241. *Id.*

242. The State Great Hural finally passed the required Media Law on January 1, 1999, after hunger strikes in 1995 protesting the failure to do so. *See id.* at 71.

243. *Id.*

244. *See id.*

245. THE ASIA FOUNDATION, *supra* note 162, at 4.

246. Tom Ginsburg, *Mongolia in 1996: Fighting Fire and Ice*, 37 ASIAN SURV. 60, 61 (1997).

247. THE ASIA FOUNDATION, *supra* note 162, at 4.

of 10 on the corruption scale, indicating Rampant Corruption.[248] As well, Mongolian surveys and public opinion polls indicated that after Customs, participants ranked Judicial Institutions as the most corrupt institution.[249] Judicial corruption greatly impacts the rule of law in that it operates as a disincentive for the public to take complaints to judicial institutions for resolution. It impacts meaningful access to justice principles, and negatively affects the rule of law in that it prevents laws from being an actual guide, decreases the stability of the law and renders the law far from supreme.

The recent Law on the Courts changes the process of judicial discipline by including public participation.[250] However, as of 2005, the implementation of this aspect has yet to be realized.[251] Robert La Mont, the former and long-term director of the JRP, suggested a suite of solutions to address judicial corruption in Mongolia, as a first step to dealing with society-wide corruption.[252] These suggestions are typical suggestions to either face judicial corruption or increase professionalism in a judiciary.

In terms of corruption, the twin towers of transparency and disincentives are key tools. La Mont indicates that the inquisitorial procedures of the Mongolian judiciary create a system where judges frequently meet *ex parte* with witnesses and parties.[253] Thus, there is ample opportunity for the passing of bribes. The new Judicial Code of Ethics, however, did not contain a prohibition on *ex parte* conversations, because an overwhelming majority of the judges objected.[254] La Mont also specified that salary levels that allow judges to meet their needs would limit the possibility of bribe-taking.[255] However, he notes that donor activity may not have much effect, since the Mongolian government's finances dictates judicial salary.[256] He also indicates that the cost of corruption has been nearly non-existent in Mongolia, as there has been little prosecution of judicial corruption, save for cases of drunkenness on the job.[257] Thus, while dishonest judges and judicial

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248. Transparency International, Corruption Perceptions Index 2005, http://www.transparency.org /policy_ research/surveys_indices/cpi/2005 (last visited Feb. 16, 2010).

249. *See* ROBERT LA MONT, SOME MEANS OF ADDRESSING JUDICIAL CORRUPTION IN MONGOLIA 2 (2002), *available at* http://www.forum.mn/en/index.php?sel=resource&f=resone&obj_id=11&menu_ id=3&resmenu_id=35 (summarizing Mongolian Chamber of Commerce and Industry 2000 survey, Annex 4, question 11).

250. *See id.* at 3 (stating that in the past, judicial discipline was initiated by chief justices and decided by fellow justices, thus resulting in a bias against punishing colleagues).

251. This is personal knowledge relating from the author's experiences working at the Supreme Court of Mongolia in the summer of 2005.

252. *See* LA MONT, *supra* note 249, at 6-8. These suggestions represent the views of the Mr. La Mont and they are not official USAID policy.

253. *Id.* at 3.

254. *Id.* at 3-4.

255. *Id.* at 4-5.

256. *Id.* at 4. The one impact donors can have, however, is where the executive does not raise salary levels in par with other governmental agencies, either as punishment for certain decisions, or to limit judicial independence. *Id.* There, donors can pressure the executive to continually raise judicial salaries where the budget allows. *Id.*

257. *Id.* at 3.

employees have some incentives to act corruptly, there are only few disincentives.[258]

La Mont suggests that there are a number of additional steps that can be taken to limit judicial corruption: require random assignment of cases;[259] require regular analysis of case reassignment; require public access terminals for all automated courts; require special rules of financial disclosure for judges, penalties in the Judicial Ethics Code, and random audits by the GCC Ethics Committee; prohibit *ex parte* conversations in the Judicial Ethics Code; train and provide equipment to the Judicial Disciplinary Committee; and train and provide equipment to the Prosecutor's corruption investigation unit.[260]

Not only does the public perception of corruption offer a proxy into the establishment of the norms of the rule of law, it can be a negative influence in and of itself. In particular, the public perception of corruption also influences actual corruption regardless of whether those perceptions are mistaken.[261] The more the public perceives corrupt legal institutions, the more likely that the public will be induced to make corrupt overtures, rather than settle for legal mechanisms to resolve disputes. To combat this ongoing danger, MFOS coordinates a public competition in conjunction with the Zorig Foundation.[262] Together, they seek to increase public awareness of corruption through the publication of anti-corruption essays and posters that are collected in a nationwide competition.[263]

The JRP released a report in August of 2005, which shows that public perception of the judiciary has improved significantly, and the JRP credits some of that increase to its work in the area.[264] Indeed, the JRP has instituted many of La Mont's suggestions, including equipping and training the new Judicial Disciplinary Committee, and equipping and training the new Special Investigative Unit of the Prosecutor General, empowered with investigating crimes in the judiciary.[265]

During the socialist era, corruption only existed at the highest echelons of government.[266] Small gifts and promises constituted the extent of influence peddling on every other level. But now, with a market economy, privatization and property rights, corruption has thrived.[267] It is commonly known that corruption is

258. *Id.* at 2.

259. *Id.* at 6. This reform has been undertaken, although there is indication that the automatic case management systems are not being used by all courts.

260. *Id.* at 6-8.

261. *Id.* at 2-3.

262. *See* ZORIG FOUNDATION, FINAL REPORT ON THE IMPLEMENTATION OF THE PROJECT SUPPORTED BY PTF 1 (2002), *available at* http://www.partnershipfortransparency.info/uploads/completed%20projects/Mongolia%20-%20Final%20report.pdf.

263. *Id.*

264. HEIKE GRAMCKOW, MONGOLIA JUDICIAL REFORM PROGRAM, ANNUAL REPORT 7 (2004) (stating the JRP's intention to strengthen the management and procedures of the Special Investigative Unit).

265. *Id.* at 3.

266. Verena Fritz, *Democratization and Corruption in Mongolia*, 27 PUB. ADMIN. & DEV. 191, 195 (2007).

267. *See, e.g.*, J. OYUNTUYA, NATIONAL INTEGRITY SYSTEMS COUNTRY REPORT: MONGOLIA,

widespread in Mongolia.[268] With free speech and a free media, stories of corruption circulate within the media widely.

Civil society was the sector that first exposed corruption and began to educate the public about the costs of corruption. Indeed, in the early part of this decade, civic dialogue centered around this increasing corruption and its effects on society, and what measures must be taken to prevent it.[269] The Zorig Foundation created public education campaigns and reported on this problem widely through surveys and summaries.[270] The Zorig Foundation's efforts were assisted by the UNDP.[271] In response to these efforts, in 2002 the State Great Hural passed the National Programme for Combating Corruption (NPCC) and the National Anti-Corruption Action Plan (NAAP).[272] The UNDP's Anti-Corruption Program aims to support the implementation of the NPCC and the NAAP.[273] These three actors – the Parliament, the Zorig Foundation and the UNDP – created a Mongolian Anti-Corruption website as an informative portal for Mongolians.[274]

The four major components of the UNDP project are: (i) participatory priority setting within the NPCC and the NAAP and the designation of the concrete immediate elements that can provide visible evidence of forward movement of the plan; (ii) broad public awareness on the complex issues of corruption and their negative impact on human security and sustainable human development; (iii) institutional capacity building to enforce, monitor, and evaluate the police, legal and regulatory framework to combat corruption; and (iv) strengthening the mechanisms necessary to improve the management, coordination, and monitoring of the implementation of the NPCC.[275]

Donors have stimulated a multitude of anti-corruption efforts, including creating a special anti-corruption prosecutor's office, automating and streamlining caseloads, and reforming election legislation to create campaign-funding

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DEMOCRATIC GOVERNING INSTITUTIONS CAPACITY BUILDING PROJECT (2001). *See also* NANCY TAYLOR, MONGOLIA CASE STUDY IN ANTI-CORRUPTION (2003); USAID, ASSESSMENT OF CORRUPTION IN MONGOLIA (2005), *available at* http://www.usaid.gov/mn/documents/MongoliaCorruptionAssessmentFinalReport.pdf; USAID, MONGOLIAN JUDICIAL REFORM PROGRAM, PUBLIC PERCEPTION OF THE JUDICIAL SYSTEM ADMINISTRATION (2005), *available at* http://pdf.usaid.gov/pdf_docs/PDACG136.pdf.

268. *See generally* OYUNTUYA, *supra* note 267; TAYLOR, *supra* note 267; USAID, ASSESSMENT OF CORRUPTION IN MONGOLIA, *supra* note 267; USAID, MONGOLIAN JUDICIAL REFORM PROGRAM, *supra* note 267.

269. *See generally id.*

270. *See* Zorig Foundation, http://www.zorigfoundation.org.mn (last visited Feb. 12, 2010). The Zorig Foundation is an NGO named after the slain founder of Mongolian democracy. *Id.*

271. *Id.*

272. United Nations Development Programme, *Completed Projects, Democratic Governance and Human Rights, Anti-Corruption (National Integrity System Enhancement) in Mongolia (Nov 2004 – Dec 2008)*, UNDP, http://www.undp.mn/dghr-ac.html (last visited Feb. 12, 2010).

273. *Id.*

274. *See* The Mongolian Anti-Corruption Website, http://www.anticorruption.mn/index.php (last visited Feb. 12, 2010).

275. United Nations Development Programme, *supra* note 272.

transparency.[276] These efforts are becoming more diverse, to meet the specific instances of corruption. However, there are still strong criticisms of Mongolia's efforts – primarily that its anti-corruption statute is flawed, that there is no sufficient enforcement, and that there are no sufficient anti-corruption mechanisms or bodies tasked with undertaking these efforts.[277] Needless to say, corruption remains Mongolia's largest impediment to advancing the rule of law and democracy.

It appears that one of the main aspects that influenced the perception of corruption in the judiciary is that the perception carried over from Mongolia's communist past – that the decisions of the executive branch and its actors are unassailable regardless of wrongfulness or illegality. Apparently in response to this challenging vestige of its history, Mongolia and its donors enacted a major initiative to establish an oversight mechanism for wrongful decisions made by the executive branch, through the creation of an administrative court system.[278]

The Administrative Cases Courts (ACC) was established by the State Great Hural in June of 2004.[279] It represents a significant success and progress in the improvement of the judicial system – in particular it creates accountability procedures for challenging government decisions which threaten the rule of law. The Law on Administrative Procedure governs the jurisdiction of these courts.[280] In short, "any disputes which arise from an administrative act and which may affect a person's rights may be challenged."[281] The implication is that the judiciary now settles disputes between public authorities and individuals arising from the exercise of public authority.

> This specialized court system is considered as an essential guarantee of the rule of law with emphasis on equity and fairness. The component would include the refurbishing of allocated space for the functioning of three pilot courts in Ulaanbaatar (Supreme Court and Capital City Court) and one at a selected aimag (Darkhan), training all administrative judges, public awareness campaign, introducing new techniques of case and court management within these administrative courts and, gathering and publication of data on court personnel and public opinion.[282]

Thus, the ACC uphold access to justice principles and accountability of government decisions by public decision-makers. There is an ongoing concern

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276. *See infra* Appendix B.

277. USAID, ASSESSMENT OF CORRUPTION IN MONGOLIA, *supra* note 267, at 2. *See* Brent T. White, *Rotten to the Core: Project Capture and the Failure of Judicial Reform in Mongolia*, 4 E. Asia L. Rev. 209, 209 (2009).

278. Interview with various officials that were involved in the formation and staffing of the administrative court system, Mongolia Supreme Court, in Ulaanbataar, Mongolia (2005). *See generally* Odgerel Tseveen & Battsetseg Ganbold, *The Mongolian Legal System and Laws: A Brief Overview*, GLOBALEX, (Jan. 2006), *available at* http://www.nyulawglobal.org/globalex/Mongolia.htm.

279. Tseveen & Ganbold, *supra* note 278.

280. *Id.*

281. *Id.*

282. WORLD BANK, LEGAL AND JUDICIAL REFORM PROJECT, *supra* note 176, at 9.

that the *aimag* (provincial) ACCs will not have a sufficient workload, and as a result, there have been delays in deciding on the exact structure of the courts and in filling available positions.[283] However, it seems likely that the advent of the administrative court will affect public perceptions of corruption in society, by giving it recourse to legal institutions when wronged by administrative actions. This goes far in creating a society-wide ethos of the rule of law.

At this point it seems that by and large, the legislature and the executive in Mongolia accept the prerogative of the administrative courts and intend to comply with decisions by these courts. However, at any time, if these high-level officials decide not to abide by these decisions, the rule of law will be compromised seriously. Judges from the Administrative Supreme Court seem to be waiting to see what reaction the other branches of government will have to the work of the administrative courts.[284]

As judged by the proxy of public sentiment and public participation in Mongolia, there have been improvements in the rule of law, including the establishment of a rule of law culture. Nonetheless, judging both by public participation and public perception, such improvements appear to be tenuous in Mongolia, and accordingly are at risk of backsliding. Nonetheless, the fact that the donor community and Mongolian governmental actors have responded to the failure of the public to participate or to its perceptions and demonstrations for change is significant and is a foundation to a promising rule of law culture.

D. Lesson Four: The Leverage of Donor Coordination Pays Dividends

One of the main benefits of the World Bank's Legal Needs Assessment was the coordination of donor activities, which resulted in a comprehensive plan among donors.[285] Indeed, the accompanying report to the assessment complained that "there is little effort made to coordinate project activities. In a nutshell, donors and international institutions foster legal reform activities piece by piece without a comprehensive approach."[286] Donors took up this call to arms, and engaged in a substantial amount of donor coordination of projects and funding, to reduce competitive or duplicative efforts, as well as to combine the power of the purse.[287]

The JRP has been the primary mechanism for donor coordination, after the passage of the Legal Reform Program of Mongolia. JRP is a mixture of work from the National Center for State Courts, the USAID, PACT, the Mongolian Open Society Forum, and the German Technical Corporation (GTZ).[288]

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283. Interviews with various officials, *supra* note 278.

284. Indeed, it seems that the other branches of government perhaps do not understand the full implications of these administrative courts. Thus, there is a danger that once the first big decision is adopted, there may be significant resistance to compliance, and backtracking away from an independent administrative court.

285. *See* USAID, THE JUDICIAL REFORM PROGRAM IN MONGOLIA: ACCOMPLISHMENTS, LESSONS LEARNED, AND RECOMMENDATIONS FOR THE FUTURE, *supra* note 175, at 13.

286. WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 39.

287. GRAMCKOW, MONGOLIA JUDICIAL REFORM PROGRAM, *supra* note 264, at 39.

288. *Id.*

The JRP works closely with the General Council of Courts (GCC)[289] to focus on six major tasks: (i) provide hands-on policy advice and training, including continuing legal education; (ii) build the capacity of legal institutions, to strengthen court management; (iii) introduce new approaches to legal education, including establishing legal professional qualifications; (iv) curb judicial corruption; (v) improve legal ethics; and (vi) increase public awareness and information about Mongolia's changing judicial landscape.[290] In short, the JRP works towards achieving the Justice System Plan, with particular focus on the Mongolian-identified objectives of "good governance" and "accountability."[291]

One significant criticism of the Judicial Reform Project is that their office is located at the Ministry of Justice & Home Affairs, an executive agency, thereby threatening judicial independence and compromising the integrity of the program. Those charges appear to be meritless, however, as the Judicial Reform Project seems to be impartial, well-executed and was headed by an extremely competent American lawyer, Mr. Robert La Mont.

JRP produces a "Rule of Law" newsletter to assist donor coordination and inform interested sectors of reform activities.[292] By 2004, JRP nearly had integrated its activities with the GTZ, particularly in public education and judicial training, and closely coordinated its work with the World Bank's Judicial and Legal Reform Project.[293]

However, the center that made the most impact in training has been the National Legal Center on Legal and Judicial Research, Training, Information and Publicity.[294] The JRP and other foreign donors, with the support of the World Bank, assisted in the creation of the National Legal Center (NLC) formed in late 2002.[295] The NLC moved to a new Mongolian-designed building in a central location in Ulaanbaatar on June 16, 2004.[296] The NLC is one of the linchpins of the Mongolian Legal and Judicial Reform Project, and gets most of its support from the JRP and the World Bank's Legal and Judicial Reform Project.[297] It is clear that the NLC usurped most if not all of the functions of its predecessors, and the JRP and GTZ have provided the bulk of training and CLE programs to judges, prosecutors and advocates.[298]

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289. The General Council of Courts is responsible for the administration of the courts.

290. THE UNITED STATES AGENCY FOR INTERNATIONAL AID, USAID/MONGOLIA, JUDICIAL REFORM PROJECT FACT SHEET, http://www.usaid.gov/mn/programs/pdf/JRP_061306.pdf.

291. USAID, THE JUDICIAL REFORM PROJECT IN MONGOLIA: ACCOMPLISHMENTS, LESSONS LEARNED, AND RECOMMENDATIONS FOR THE FUTURE, *supra* note 175, at 6, 11.

292. GRAMCKOW, MONGOLIA JUDICIAL REFORM PROGRAM, *supra* note 264, at 38.

293. *Id.* at 3.

294. *See* USAID, THE JUDICIAL REFORM PROJECT IN MONGOLIA: ACCOMPLISHMENTS, LESSONS LEARNED, AND RECOMMENDATIONS FOR THE FUTURE, *supra* note 175.

295. *Id.* at 8.

296. *See* Mongolia Legal Center, http://www.legalcenter.mn (last visited Feb. 22, 2010).

297. *See* USAID, THE JUDICIAL REFORM PROJECT IN MONGOLIA: ACCOMPLISHMENTS, LESSONS LEARNED, AND RECOMMENDATIONS FOR THE FUTURE, *supra* note 175.

298. *See id.*

The JRP continues working with the NLC to develop new courses and undertake trainings. USAID has funded the training of virtually every judge in Mongolia through a JRP-provided training program, mostly administered by the GTZ.[299] The NLC holds annual "Baby Judges" training course to introduce newly appointed judges to best practices and to assist in their receivership of their position.[300] The JRP also sponsored training in distant *aimags*, and inquired into their estimation of their training needs, for future provision of services.[301]

The donor coordination that Mongolia's donors engaged in after the government action plans and the legal needs assessment was remarkable and has been held up as a model for future donor activity. The GTZ in particular refers to this structure as a "best practice" in donor coordination.[302] After donor coordination began in earnest in 1999, the pace and depth of Mongolia's judicial and other reforms increased tremendously and have created a promising context for a deep and permanent rule of law culture and civil society.[303] Certainly, the engagement of donors with each other to create complementary activities and not overlap has been an important factor in the success of Mongolia's reforms this decade.

V. SOME CONCLUSIONS ON MONGOLIA'S LEGAL AND JUDICIAL REFORMS

> Mongolia has made the transition from communism to freedom, and in just 15 years, you've established a vibrant democracy and opened up your economy. You're an example of success for this region and for the world. I know the transition to liberty has not always been easy and Americans admire your patience and your determination. By your daily efforts, you're building a better life for your children and your grandchildren.[304]

Over the past two decades, Mongolia has moved towards a procedurally-minimalist definition of the rule of law. Overall, Mongolia's legal and judicial reforms resoundingly have been successful, although they have not been without problems. Donors have shown a great capacity to work together under unified leadership, and have effected serious and deep change. Mongolians have embraced their role and nongovernmental organizations have proliferated (especially those started by women) and have stimulated the reform process. And finally, Mongolia's leaders have shown a willingness to embrace honest and suitable changes to their legal system, for the benefit of all Mongolians.

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299. *See* Skip Waskin, *Judicial Reform Project Update, Q4 Updates 2005*, USAID, Dec. 13, 2005, http://www.usaid.gov/mn/programs/jrp/jrp-updates-Q4-05.html.

300. *Id.*

301. Skip Waskin, *Judicial Reform Project Update, Q3 Updates 2005*, USAID, Sept. 15, 2005, http://www.usaid.gov/mn/programs/jrp/jrp-updates-Q3-05.html.

302. GRAMCKOW, MONGOLIA JUDICIAL REFORM PROGRAM, *supra* note 264, at 40 (indicating that the JRP is "seen by other donors as the focal point for legal and justice sector information and more and more as the hub for rule of law coordination").

303. Heike Gramckow, *The Long Winding Road: Judicial Sector Reform in Mongolia*, 2 INT'L JUD. MONITOR 1, 1 (2007), http://www.judicialmonitor.org/archive_0207/sectorassessment.html.

304. Bush, *supra* note 12.

In the beginning of its democracy, Mongolia did not have much direction over the path of its reforms, as donor organizations and outside states influenced a large amount of the legislation. Obviously, these donor organizations were working with appropriate counterparts in Mongolia's government to enact the passage of laws, implementation of new procedures, and restructuring of institutions. But there was not a great deal of understanding by Mongolia's leaders of the exact effects of the reforms. Likewise, in the initial stages, Mongolia's institutions did not have any sectoral integration or cooperation amongst themselves, or even full command over much of the reforms, resulting in poor implementation.

During the first seven years of its democracy, Mongolia and its donors focused its reforms on legislation. Besides a slight restructuring of the courts, the government and its donors engaged in modest work in the judiciary. New legislation was imperfect as it was poorly drafted, difficult to implement, overlapping and inconsistent. As it were, the initial response to many issues in Mongolia was to draft a law or administrative procedure and as a result, the enactment of laws has not proven to be careful or targeted solutions for Mongolia's needs. Accompanying donor assistance in drafting laws has been transplantation problems, where the laws or regulations of foreign jurisdictions are ill-suited to the unique cultural context of Mongolia.

The tipping point, however, occurred when the government passed its reform plans. The reforms occurring before the passage of the government action plans were fundamentally flawed as they were not coherent or coordinated. Nonetheless, the government action plans at the least showed that there was a high level of acceptance for the pace and direction of the reform process that previously occurred, despite shortcomings of the process. More importantly, after the process of planning and memorializing an action plan, Mongolia's leaders gained a more intimate understanding of and control over their reform situation.

As well, the Legal Needs Assessment by the World Bank and domestic Mongolian actors was well-crafted and resulted in a societal buy-in, as it was designed in part and administered by domestic actors. This type of assessment is unusual and repeating it would be difficult in the present institutional bureaucratic environment in many donor organizations. Nonetheless, the Mongolian experience can be held up as a prototype, as it resulted in many tangible benefits, including the creation of an administrative court system, which should operate to protect the creation of a rule of law culture.

In addition to signaling high-level acceptance of the prior reforms, the government action plans led to other tangible benefits as well. International donors followed the government's prerogatives, and created their donor plans to fit within the framework of the government's plans. The existence of these plans also assisted the work of civil society to stimulate deeper reforms. Civil organizers and leaders needed only to point to the appropriate section of the government plan, how their work assists that goal, and then pressure for acceptance or assistance, as the case may be.

The government action plans stimulated the donors to accept the JRP as a donor clearinghouse and coordination center. As mentioned above, the GTZ uses

Mongolian donor coordination as a best practice in the field of rule of law donor assistance.[305] Once the JRP began its donor coordination, donors were able to minimize or discontinue duplicative or contradictory reforms.

The impact of these action plans cannot be understated. They created concepts or norms as goals of rule of law reforms, rather than ends-based institution-building. They affected the psychology of the Mongolian society, and in particular, its leaders. Taking control over the reform process creates the belief in the parliamentarians and civil society that they are the catalysts – and this will make them more conducive to establishing a rule of law culture and accepting the rule of law. Now, Mongolian justice can become a Mongolian product, since many actors of society are taking part in the planning and decision-making in a fixed and controlled framework.

Overall, judicial reforms largely have been successful. As with legislative reforms, however, certain problems in the judiciary remain unresolved. Fixing the procedural standards of the judiciary does not increase the rule of law ethos. Increasing case-processing times, court administration and public access to information creates needed transparency, but these technical fixes do not create human change. Judges continue to be unwilling to embrace a more stringent ethics standard and many of the "old guard" judges question the efficacy of most of the reform programs. The plethora of new laws and procedures and the manifestation of extraordinary disputes based on market circumstances have left many judges confused, uncomfortable and ill-equipped to make good professional decisions. During the first phase of democracy, judges in rural courts obstinately refused to apply new laws, and used many of the outdated communist-era laws. It is unclear to what extent this practice continues.

Training has increased the capacity of the individual judge, and procedural and legal manuals have aided in the decision-making capability and uniformity of the judiciary. Legal education is undergoing beneficent change, and experts agree that it is improving and becoming standardized. Accreditation standards and bar associations also are beginning to raise the professionalism of the judiciary.

Lastly, donors adeptly utilized public perception surveys to gauge the public's knowledge, understanding and support for government institutions and the reform process. After having discovered a low level of confidence in the judiciary and other institutions, Mongolia and its donors responded effectively and engaged in reforms that raised public confidence. Without a public buy-in, the creation of the norms of the rule of law, as embodied in the action plans, would not be sustainable, as the public would not feel that the rules passed by the legislature or executive are supreme or guiding and would not have confidence in the judiciary to resolve its disputes. Future rule of law programs would benefit from utilizing public perception surveys and responding accordingly.

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305. GRAMCKOW, MONGOLIA JUDICIAL REFORM PROGRAM, *supra* note 264, at 40 (indicating that the Judicial Reform Program is "seen by other donors as the focal point for legal and justice sector information and more and more as the hub for rule of law coordination").

But in the context of all of these tangible successes, the human problem remains in Mongolia. The norms of the rule of law have been introduced, but have not fully taken root. Judges must embrace the independence of the judiciary, and lose the culture of complacency of the past – that of following executive directives. Mongolia's judges are young, competent, and embracing of the ideals of the rule of law. As the old guard steps into retirement and the young tireless leaders continue to adopt and accept the notion of the rule of law, Mongolia's judiciary will be what the Constitution promises, an independent, impartial and equal branch of government. Although the public is beginning to understand and accept the rule of law reforms and attribute a heightened status to essential government institutions, like the judiciary, there remains space for much improvement.

While the government plans effectively have guided the last phase of legal reforms, there have been difficulties in their implementation. Resultantly, the next phase of legal reforms intends to concentrate on assistance in implementation of the recently created laws, institutions, norms and culture. The Judicial Reform Project's 2004-2008 program focuses on implementation of specific measures of the Program of the Government of Mongolia, which the Parliament adopted in November of 2004.[306] As well, the USAID states that "[o]ver the next five years, the challenge for USAID will be to move beyond the "introduction" of these new approaches and ensure that they are actually "embedded" and "institutionalized" within the legal profession."[307]

Overall, the Mongolization of the legal system has not fully occurred yet, as it is still adjusting to a new legal system and language applicable to a market economy.[308]

The seeds of the rule of law culture are planted, and Mongolia and its donors continue to look forward to tilling the grounds, to embed these concepts and watch their offspring grow and stimulate a deep and successful democracy and market economy.

But this optimism belies Mongolia's serious concern – corruption. The problem of corruption has far-reaching implications and seriously has affected Mongolian democracy, its market economy, foreign investment, judicial independence, public perceptions, and the rule of law. Corruption has caused renewed and invigorated protests recently. Pro-democracy parties have threatened to boycott, unless the corrupt leaders step down.[309] Mongolia's society presently is colliding over its rampant corruption. Can effective legal and judicial institutions fully combat corruption? No, but these institutions are a prerequisite to doing so.

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306. USAID, THE JUDICIAL REFORM PROJECT IN MONGOLIA: ACCOMPLISHMENTS, LESSONS LEARNED, AND RECOMMENDATIONS FOR THE FUTURE, *supra* note 175.

307. USAID, MONGOLIA STRATEGIC PLAN 2004-2008 40 (2003) *available at* http://pdf.dec.org/pdf_docs/PDABY661.pdf [hereinafter MONGOLIA STRATEGIC PLAN 2004-2008].

308. *See* WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 37-38 (discussing problems with Mongolia's legal reforms, as of 2000).

309. Oyungerel Tsedevdamba, *Pro-Democracy Activists in Mongolia Worry about Potential Roll Back of Reforms*, EURASIANET, Nov. 22, 2002, http://www.eurasianet.org/departments/rights/articles/eav112202.shtml.

Bending the leaders to accept the rule of law is fundamentally a political exercise, and they must be constrained through domestic bottom-up pressures and international top-down pressures. This is true for judges as well as parliamentarians as well as employees of the executive. It is the psychological willingness of the judges to rule honestly and professionally, and of high-level officials to accept living subject to the law. Otherwise, the whole premise is undermined.

The focus is *not only* on the leaders. Public perception of corruption has been very high in all sectors, although in recent years, the public seems to think more highly of the judicial branch. But the prevalence of corruption has a basic effect on the mentality of the citizenry, which can undermine a rule of law culture.

The administrative court is a significant catalyst to reducing corruption in government and constraining leaders through law, but questions abound. Will the government allow the court full discretion to hear cases and controversies – will it allow it to be independent? Will the government accept its decisions? Will it hold itself responsible for its actions? Will the Mongolian citizenry embrace the concept of the rule of law? Or will they live subject to corruption and engage in corruptive exchanges, because it is "the only way"? While the passage of time answers these questions, the Mongolian dream of democracy hangs in the balance.

APPENDIX A
MONGOLIA'S SOCIALIST TRADITIONS:
INSTITUTIONAL AND LEGAL BACKGROUND

After the U.S.S.R, Mongolia became the second nation to embrace communism, establishing a one-party system and eventually a command economy administered by five-year plans.[310] The U.S.S.R.'s military and diplomatic assistance in Mongolia's independence from China initiated an extremely close bilateral relationship between the two states.[311] Although formally independent, Mongolia became the *de facto* sixteenth republic of the Soviet Union.[312] Indeed, of all former soviet bloc states, Mongolia was the most dependent of Soviet aid and technical assistance. In the 1980s, Soviet direct aid reached as high as 30% of Mongolia's GDP, and approximately 40,000 Soviet advisors gave technical assistance to Mongolia's industrial development, particularly in the mining and manufacturing sectors.[313] This aid helped Mongolia close its wide trade gap and increase social services, thus benefiting Mongolian rural society and increasing the legitimacy of the rule by the communist Mongolian People's Revolutionary Party (MPRP).[314]

The beginning of the disintegration of the Soviet Union and the Council on Mutual Economic Assistance (CMEA) in the 1980s was the principal agitation for change in Mongolia.[315] Mongolian students, like their Eastern European counterparts, began peaceful demonstrations calling for democracy, and organized sit-ins and hunger strikes in Sukhbaatar Square, the main square in Ulaanbaatar where the Parliament is located.[316] Math and Physics professors from the Mongolian National University formed the Social Democratic Party, and professors from the Economics Department formed the National Progress Party.[317] Mongolia's versions of *glasnost* and *perestroika* unexpectedly promoted the democratic reformists' agenda, although the government originally initiated them

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310. *See* Fedor S. Mansvetov, *Russia and China in Outer Mongolia*, 24 FOREIGN AFF. 143, 147-49 (1945-46).

311. *Id.* at 146-47 (explaining that in return for the 1912 treaty whereby Russia agreed to assist Mongolian autonomy from the "presence of Chinese troops on her territory [and] the colonization of her land by the Chinese," Russia gained unfettered rights to railroad construction).

312. CEVDET DENIZER & ALAN GELB, MONGOLIA: PRIVATIZATION AND SYSTEM TRANSFORMATION IN AN ISOLATED ECONOMY 3 (2005). *See also* Bradsher, *supra* note 2, at 548.

313. Bilskie & Arnold, *supra* note 5, at 208; Cheung, *supra* note 10, at 70-71 (detailing the withdrawal of Soviet assistance and Mongolia's initial painful reforms).

314. *See* Bradsher, *supra* note 2, at 545-46. In fact, aid disproportionately influenced Mongolian welfare, in that herdsmen's standard of living was greatly higher than it would have been without it. In 1970, Mongolian aid far outpaced other developing countries. *Id.* at 546. Bradsher cites $220 in aid per capita for Mongolians, in comparison to $4.20 in 80 non-communist countries and $36 in US aid for the South Vietnamese. *Id.*

315. *See* Ginsburg, *supra* note 2, at 461.

316. *Id.* at 462-63 (examining the transition period and the elasticity of the MPRP in responding to the popular demonstrations, after briefly debating whether to respond with force, like the Chinese in Tiananmen Square).

317. *Id.* at 463.

to strengthen the socialist economy, not render it obsolete.[318] Under these plans, moderates in the MPRP were increasingly placed in leadership positions while Mongolia sought to increase government transparency and performance, by allowing more autonomy to state enterprises and government ministries.[319] In the end, these moderates were the key factor in the MPRP's decision to allow a transition to democracy. During *glasnost* and *perestroika*, Mongolia began to establish international relationships with deft speed.[320]

Economic Background: Initially, Soviet control was largely over Mongolia's economic system – all of Mongolia's trade was with the Soviet Union from 1921 until 1952.[321] During that time, the Soviet Union left Mongolia relatively undeveloped, as the U.S.S.R. tended to its own nation-building. Mongolia's economy remained dominated by livestock-raising and nomadism. Once appropriately strengthened, however, the U.S.S.R. eventually asserted control over Mongolia's political and social spheres in addition to its economy.[322] In 1948, the Soviets introduced economic planning in Mongolia with the first of the five-year plans, which collectivized herds, built winter animal shelters and wells, and sought to industrialize Mongolia.[323] The plans aimed to stimulate a change from an agricultural-industrial economy to an industrial-agricultural economy.

The Soviet Union invested substantial sums in developing Mongolia's mining industry, primarily its copper trade, and in developing light industries within Ulaanbaatar (translation: red city), such as carpet, wool and shoe factories.[324] After the establishment of the CMEA, the Soviet trade bloc, Mongolia's industrialization reflected the "international Socialist division of labor and the steady growth of international cooperation between Socialist countries."[325] Within that framework, Mongolia provided meat, hides and other livestock products, minerals and coal to the Soviet bloc, and imported the balance of other daily necessities.[326] The government administrated and coordinated all banking, production, distribution, and social services functions during Mongolia's socialist era.[327]

Political and Social Background: The MPRP controlled Mongolia from 1921, when that party's young revolutionary founder, Sukhbaatar, led the state to independence from China, with the help of the U.S.S.R.[328] Soviet assistance came

318. *Id.* at 461.

319. Bilskie & Arnold, *supra* note 5, at 208-11 (discussing the "renewal" program modeled after Mikhail Gorbachev's efforts in the Soviet Union).

320. *Id.*

321. Bradsher, *supra* note 2, at 548.

322. *Id.* at 206.

323. *Id.* at 207; Bradsher, *supra* note 2, at 549-50.

324. K.L. Abeywickrama, *The Marketization of Mongolia*, 10 MONTHLY REV. 25, 27 (1996).

325. Bradsher, *supra* note 2, at 550 (quoting former Premier Tsedenbal in 1970).

326. Omar Sattaur, *Thoroughly Modern Mongolia*, NEW SCIENTIST, Sept. 1, 1990, at 23. *See also* Ginsburg, *supra* note 2, at 461 (detailing that in the 1980s, Mongolia traded 95% with the Soviet Union, and the balance with CMEA).

327. *See* Abeywickrama, *supra* note 325, at 26-27.

328. Ginsburg, *supra* note 2, at 462.

hand in hand with Soviet influence, which soon changed into Soviet command, mainly by directing the MPRP, the governing Mongolian communist party.[329] The MPRP increased its stranglehold on society until it controlled all aspects of its citizens' behavior. The MPRP regulated prices.[330] It collectivized and controlled herds. The government managed domestic production and all traffic and supply of goods.[331] The MPRP controlled foreign trade, and consistently ran trade deficits, which Russian direct aid closed.[332] In terms of human development, the socialist regime in Mongolia stymied human freedoms.[333] The MPRP controlled the media, and there was no freedom of speech or association.[334] There was no opportunity for private initiative. In short, the Mongolian people were governed, not governing.

In addition to the communist party, the *negdels*, the state herding and agricultural cooperatives, governed Mongolia.[335] They provided veterinary care, abundant wells, and decreased risk of loss from natural disasters.[336] The *negdels*' marketing function supplied necessary services – they purchased raw materials at fixed prices set by the Ministry and transported the products to the state run processing facilities at set schedules.[337] The *negdels* also established customary land use rights, controlling concentration of the herds and their grazing within each *negdel* as well as among themselves.[338]

Under the rule of various dictatorships, the Mongolian people suffered through a period of brutal atrocity.[339] The state eventually provided its people with a strong sense of security. Indeed, Mongolia's development advanced considerably under communist rule. Economically, society benefited from fixed prices at home,[340] above market prices for meat, leather, cashmere and copper abroad,[341] and cheap luxury goods from Eastern Europe. Socially, educational

329. *See id.* at 460.

330. Bilskie & Arnold, *supra* note 5, at 207.

331. Abeywickrama, *supra* note 325, at 26.

332. Ginsburg, *supra* note 2, at 462.

333. Bilskie & Arnold, *supra* note 5, at 206-07.

334. *See id.*

335. *See* U.N. DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT MONGOLIA 2003 25 (2003), *available at* http://hdr.undp.org.

336. *See id.* at 39.

337. *Id.*

338. *Id.*

339. *See* Bilskie & Arnold, *supra* note 5, at 207 (describing the destruction of the lamaseries and the transformation of the command economy). Mongolia's two dictators are known as the Mongolian equals of the Soviet versions. *Id.* Horolyn Choibalsan was "Mongolia's Stalin" for transforming Mongolia's society with murder and violent purges to rid it of any challenges, killing over 100,000 persons, including Monks, intellectuals and the traditional elite, and causing the near-total destruction of Buddhist lamaseries. *Id.* Yumjaagiin Tsedenbal was "Mongolia's Brezhnev" for suffocating Mongolia's economy through the introduction of command and control characteristics. *Id.*

340. *Id.* Fixed prices allowed rural society to purchase goods for the same prices as in Ulaanbaatar, although the distances to supply rural aimag (provincial) centers was vast. *Id.* Ultimately, the demise of fixed prices undermined rural society's well-being and civic participation. *Id.*

341. *See* Abeywickrama, *supra* note 325, at 27. These goods were sold to the U.S.S.R. at prices fixed at a percentage over world prices. *Id.*

improvements were impressive, health services were free, and there was practically no unemployment.[342] Importantly, the government solidified (superficial) gender equality, social protection, and human security.[343]

Legal Background: Mongolia has gone through various and interrupted legal systems during its existence as a state. Mongolia's rich legal history originated from the *yassa*, Chinggis Khan's legal codification.[344] Subsequently, during Manchu rule over Mongolia, administrative authority encompassed judicial authority.[345] Once Mongolia gained independence from China as a result of the 1921 People's Revolution, the government instituted a mixed Asian and European legal system.[346] Mongolia's legal system during the communist era was based on the Soviet adaptation of the Roman law system; however, there were no professional lawyers or judges.[347] In 1933, Mongolia reorganized its court system and vested much judicial power in the executive.[348] When the judicial system was reestablished during communist rule, it was structured primarily as a criminal legal system.[349] After heavy amounts of Russian funding, a tangible legal profession emerged.[350]

Thousands of directives from the MPRP, ordinances of the People's Representatives *Hurals* (parliaments) and decisions of the Ministerial Counsel comprised the rest of Mongolia's legal system.[351] Overall, the appropriate government ministries resolved what problems arose, and there was no need for a formal civil law system. *Negdels* and other cooperatives also played a significant role in the rule of law. Along with *aimag* (provincial) governors, *negdels* were the primary regulators of the rural population, and they settled disputes amongst themselves, or went to the *aimag* governor for assistance.[352]

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342. *Id.*

343. U.N. DEVELOPMENT PROGRAMME, *supra* note 336, at 6.

344. M. BYAMBA & MONGOLIAN WOMEN LAYERS ASSOCIATION, HISTORICAL AND CURRENT OVERVIEW OF THE MONGOLIAN JUDICIAL SYSTEM 1 (2005); GEORGE LANE, GENGHIS KHAN AND MONGOL RULE 37 (2004).

345. Tseveen & Ganbold, *supra* note 278; Dorothea Heuschert, *Legal Pluralism in the Qing Empire: Manchu Legislation for the Mongols*, 20 INT'L HIST. REV. 310, 321 (1998).

346. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 161 (2003).

347. *Id.*; BYAMBA, *supra* note 345, at 4.

348. WILLIAM ELLIOTT BUTLER, THE MONGOLIAN LEGAL SYSTEM: CONTEMPORARY LEGISLATION AND DOCUMENTATION 92-93 (1982). *See also* The Supreme Court of Mongolia, Judicial System of Mongolia, http://www.supremecourt.mn/english/index.php?what=system (last visited Feb. 28, 2010) (giving a broad overview of the history of Mongolia's judicial system).

349. GINSBURG, *supra* note 347, at 161.

350. *Id.*

351. WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 4-5.

352. U.N. DEVELOPMENT PROGRAMME, *supra* note 336, at 39-40.

APPENDIX B

MONGOLIA'S REALIZATION OF THE PROCEDURALLY-MINIMALIST RULE OF LAW:

STEPS TAKEN BY MONGOLIA AND ITS DONOR ORGANIZATIONS

I. REFORM OF LEGISLATION

The first phase of legal reform was the reformation of the Constitution. The Asia Foundation contributed the most, but there also were independent analyses of the draft constitution by scholars and professors from the U.S. and Germany.[353] The next aspect of stage-one reforms was the rewriting of the legal code to create appropriate rules that govern newly-created market-based relationships.[354] To be consistent with the rule of law formulation described above, any decisions with the effect of law and any lawmaking should be transparent and should allow for meaningful public participation. As such, the reforms of the legal code should result in the passage of fair, equal and nondiscriminatory laws and decisions with the effect of law.

Construction of a market-oriented economy was the first priority of Mongolia's newly elected government, which based this transformation on (i) privatization as the centerpiece, (ii) financial, fiscal and external sector reforms and (iii) removal of controls on prices, tariffs and wages.[355]

Moderate price reforms occurred first, to soften the way for privatization. In January of 1991, the government freed prices on most non-essential commodities and increased prices on state subsidized essential items and public utilities.[356] An increase in salaries, a reduction in spending and the budget, and a decrease in subsidies to most state enterprises rounded out these price reforms.[357]

The government then privatized state assets under the Privatization Law of May 1991, which entitled all citizens to 10,000 *tugrug* (Tg) of vouchers.[358] These citizens could redeem small-value assets under the green vouchers, and shares in public limited or joint stock companies from large state enterprises under the blue vouchers.[359] Public utilities and key transport, telecommunications and mining enterprises however, remained under state control.[360] Livestock was privatized to herdsmen and accommodations were privatized to its inhabitants.[361]

The Banking Law of May 1991 reformed the financial sector and created a new state central bank (its previous version was the sole banking center of

353. *See* Bilskie & Arnold, *supra* note 5, at 210 (stating that Mongolia lobbied the U.S. for help in formulating their constitution); THE ASIA FOUNDATION, *supra* note 213, at 1.

354. *See* Bliskie & Arnold, *supra* note 5, at 211-12. *See also infra* note 101 and accompanying text.

355. *See* Goyal, *supra* note 10, at 635 (discussing the development of the transition period).

356. Cheung, *supra* note 10, at 70.

357. *Id.*

358. Goyal, *supra* note 10, at 635.

359. *Id.* at 635-36.

360. *Id.* at 636.

361. *Id.*

Mongolia) as well as constructed the basic legal framework for commercial banks to operate in Mongolia.[362] An unlikely early reform that complemented Mongolia's financial reforms was the establishment of a stock exchange in 1992, under the direction of Zoljargal, one of Mongolia's many "brash young reformers."[363] The Foreign Investment Law of May 1994 created the necessary conditions for Mongolia's entry into the globalized system of investments and trade, by stipulating the conditions for foreigners to own property and investments.[364]

II. REFORM OF THE JUDICIARY

A. The Present State of the Mongolian Judiciary

Legal Profession: The legal profession is composed of the same four main groups of professional lawyers as during the socialist period: (i) judges; (ii) prosecutors representing the state; (iii) advocates who are admitted to practice law, provide legal advice and represent parties in court; and (iv) notaries, who witness or authenticate documents.[365]

Advocates: Previously, the state operated the economy, the social network and the administration and its officers resolved any arising disputes. Resultantly, citizens had little need for lawyers and the legal system, unless they were involved in a criminal case. Now, with increasing citizen rights (property rights, civil rights, etc.) and the rise of a civil law system, the number of lawyers is growing. The number of advocates in the Association of Mongolian Advocates (AMA) has increased from 200 in 1994 to over 500 in 2001.[366] In 1995, Mongolia passed the Law on Advocacy, which delineates the functions of the profession – advocates may present legal advice, prepare legal documents, participate in investigations, and may represent clients in court and other administrative organs.[367] Advocates must be members of the AMA, and to qualify for membership, an individual must have a law degree, an absence of a criminal record and pass an examination administered by the AMA and the Ministry of Justice and Home Affairs (MOJHA).[368]

Judges: During the communist era, judges historically occupied one of the lowest governmental levels, and garnered little respect.[369] In those times, the MPRP directly appointed judges and retained and exercised a substantial amount of oversight. For instance, oftentimes the party recalled judges to explain a decision to a local party committee where it disagreed.[370] Prosecutors traditionally had more power than judges, and effectively decided cases based on party lines,

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362. *Id.* at 637.

363. Cheung, *supra* note 10, at 71.

364. Tsedendambyn Batbayar, *Mongolia in 1993: A Fragile Democracy*, 34 ASIAN SURVEY 41, 44 (1994).

365. Tseveen & Ganbold, *supra* note 278. This article does not treat notaries in depth.

366. WORLD BANK, MONGOLIA PROJECT APPRAISAL DOCUMENT, *supra* note 224, at 8.

367. *Id.*

368. *Id.*

369. *See* Tseveen & Ganbold, *supra* note 278.

370. *Id.*

resulting in about a 98% conviction rate before 1991.[371] Today however, judges are gaining more prestige in society, and the Constitution and national legislation protect their independence. Presently there are approximately 360 judges in Mongolia, who are appointed by the President upon the recommendation of the General Council of Courts, and who have life tenures.[372] Most Mongolian judges are very young, between 30 and 35 years old. This result is due to the low age and experience requirements to be a judge: for the lower courts, judges must be at least 25 years old and have three years legal experience; for the Supreme Court, judges must be at least 35 years old and have ten years of legal experience.[373] At present, two-thirds of the judiciary's cases are civil, in contrast to the communist period where nearly all cases were criminal.[374] However, judges in Mongolia are overloaded with cases.[375] On average they settle 350 cases a year– far in excess of the international average – which "often causes a superficial approach in settling cases and disputes."[376]

Legal Education: As of 2005, there were 31 law schools operating in Mongolia.[377] In 2001, approximately 6,000 students attended law school, with half of those students enrolled in one of the four main universities.[378] The Ministry of Justice and Home Affairs has been planning to audit all law schools to determine their curricula and the level of expertise and qualifications of the law professors. It is unclear whether this exercise has been completed. In general, law schools in Mongolia need a unified curricula standard applicable to all accredited law schools and elevated standards of entry into the legal profession on the basis of merit, equality and fundamental fairness.

Judiciary System: *Soum*, *intersoum* and district courts are courts of first instance that handle less serious crimes and civil disputes under ten million *tugrug*.[379] *Aimag* (province) and city courts are found in the capitals of the *aimags* and there is one specialized court in Ulaanbaatar called the Capital City Court (this is the equivalent of an *aimag* court).[380] These are also courts of first instance but they have different jurisdiction than the other courts of first instance.[381] *Aimag* courts have jurisdiction over more serious crimes, civil disputes over ten million *tugrug*, and appeals from lower courts.[382] The Supreme Court has jurisdiction over all

371. *Id.*

372. *Id.*

373. *Id.*

374. ZORIG FOUNDATION, REPORT ON THE NATIONAL INTEGRITY SYSTEM 10 (2001).

375. *Id.* at 8.

376. *Id.*

377. WORLD BANK, MONGOLIA-LEGAL AND JUDICIAL REFORM PROJECT, REPORT NO. PID10443 5 (2005). *See also* Worldwide Legal Directories, Schools of Law in Mongolia Directory, http://www.hg.org/law-schools-mongolia.asp (last visited Feb. 20, 2010).

378. WORLD BANK, MONGOLIALEGAL AND JUDICIAL REFORM PROJECT, *supra* note 378, at 5. The report identifies that MOJHA provided this information to the World Bank. *Id.*

379. Tseveen & Ganbold, *supra* note 278.

380. *Id.*

381. *Id.*

382. *Id.*

appeals from decisions of *aimag* and the Capital City courts as well as jurisdiction over some matters of first instance.[383] In 2004, the government of Mongolia with the assistance of the World Bank initiated a specialized system of administrative courts.[384] Lastly, there is a Constitutional Court which only has jurisdiction over questions concerning the constitution.

B. Donor Activity And Structuring The Judicial Reforms

Law on Courts: Reforms of the judiciary began modestly with the 1993 Law on Courts.[385] During the passage of the Law on Courts, The Asia Foundation provided two legal consultants to work with the Chief Justice of the Supreme Court, the Ministry of Justice, and the Parliament.[386] These consultants were two Americans – Clifford Wallace, Chief Senior Judge of the Ninth Circuit, and a specialist from the U.S. Congressional Research Service.[387] Between 1994 and 1998 USAID entered its second phase of assistance for Mongolia, and it reported that this era was marred with energy crises and economic stabilization issues. As a result, although it paid attention to and engaged in reform programs concerning democratization and improving legal institutions, short-term emergency considerations disproportionately diverted its aid away from rule of law programs.[388]

C. The Progression of Mongolia's Judicial Reforms

Although the reform process occurred across various fields simultaneously, this appendix describes Mongolia's judicial reforms by subject matter, for ease of understanding. This approach paints a cogent picture of the overall path of Mongolia's judicial reforms, but not necessarily a temporally accurate one.

Judicial Independence: Increasing the political, economic, organizational and decision-making independence of the judiciary is the first fundamental value of the parliament's Strategic Plan for the Justice System of Mongolia.[389] Judicial independence is of course a necessary aspect of a procedurally-minimalist rule of law.

In advance of the legal reform program, The Asia Foundation supported the Mongolia Group for Independence of Judges and Lawyers (MGIJL) seminar on judicial independence and ethics.[390] As well, the JRP brought a consultant to Mongolia – Marie Milks, a retired Hawaii State Court Judge who has had prior

383. *Id.*

384. *See* interview with various officials, *supra* note 278, and accompanying text; THE WORLD BANK, MAJOR WORLD BANK JUDICIAL REFORM PROJECTS APPROVED AUGUST 2004 1 (2004).

385. THE ASIA FOUNDATION, *supra* note 162, at 2.

386. *Id.*

387. *Id.*

388. USAID, MONGOLIA STRATEGIC PLAN 2004-2008, *supra* note 308, at 10-11 (summarizing its prior programs and strategies).

389. *Id.* at 11 ¶2; WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 30.

390. *See* THE ASIA FOUNDATION, *supra* note 213, at 1.

experience in Mongolia –in September of 2005 to work on improving judicial independence.[391]

Capacity Building of Legal Institutions: Mongolia and its donors have spent a great amount of money and resources on increasing the capacity of the judiciary and other legal institutions. One necessary and specific focus has been on reforming the Judicial Council.

The Judicial Reform Project has focused its assistance on Mongolian legal capacity building, with particular attention to the General Council of Courts (GCC), Mongolia's judicial council. The initial priority of the JRP was assistance in court management and administration, with the goal of increasing transparency, accountability and judicial efficiency. Throughout its assistance, the JRP did not impose any of its own ideals on the GCC.[392] Rather, it presented the GCC with comparative background material from other countries with different administrative and management systems, and aided in the GCC's informed decisions.[393] The JRP supports the GCC in creating a national case information database and improving its budget expertise. Further, it has assisted the GCC in making adjustments in its decision-making processes and introducing the use of sub-committees for better information and broader participation in the GCC's decisions.[394] In addition, Robert La Mont, then-Chief of Party for the JRP, personally participated in the GCC's meetings, as a monitoring activity and to directly impact the GCC's policy making and administrative decisions.[395]

Outside of the GCC, over the last fifteen years, Mongolia has built a substantial amount of capacity in its judiciary. Mongolia has automated all 61 of its courts under the JRP's assistance, which includes automated case management procedures and records, and automated random assignment of cases.[396] More than three-quarters of the caseloads in Mongolian courts are automated, and almost all courts have computers, and many with Internet access.[397] Mongolia soon hopes to create a central database for case information on the Internet. After a slight learning curve, USAID issued and installed generators to back up the computers when the power goes out, as frequently occurs in the *aimags*.[398]

As well, the JRP has assisted each court in creating public information areas and improving the efficiency of records management processes. The goal has been

391. *See* Skip Waskin, *Judicial Reform Project Update*, USAID, Oct. 21, 2005, http://www.usaid.gov/mn/programs/jrp/jrp-updates-Q4-05.html.

392. See GRAMCKOW, MONGOLIA JUDICIAL REFORM PROGRAM, *supra* note 264, at 4.

393. *Id.*; *See* USAID, THE JUDICIAL REFORM PROGRAM IN MONGOLIA: ACCOMPLISHMENTS, LESSONS LEARNED, AND RECOMMENDATIONS FOR THE FUTURE, *supra* note 175, at 6.

394. *Id.*

395. *See* GRAMCKOW, MONGOLIA JUDICIAL REFORM PROGRAM, *supra* note 264, at 8.

396. USAID, *Judicial Reform Project Update*, USAID, Aug 5, 2005, http://www.usaid.gov/mn/programs/jrp/index.html (explaining improvements in judicial independence).

397. *See* USAID, *Case Study, Helping Mongolia to Reform Judicial Sector*, USAID, Oct. 6, 2009, http://www.usaid.gov/stories/mongolia/cs_mongolia_law.html.

398. *See* Skip Waskin, *Mongolia, Judicial Reform Project Update*, USAID, July18, 2005, http://www.usaid.gov/mn/programs/jrp/jrp-updates-Q3-05.html (explaining court automation).

to improve transparency, efficiency and reduce opportunities for system manipulation. The JRP organized court management training to increase the performance of case flow management of individual courts, to raise the efficiency and productivity of the bench.[399]

Further, the World Bank has funded a Unified Information System (UIS), to link all national level justice sector institutions in Ulaanbaatar to share data and make court information available to the public, and make available all laws and regulations, with the intention of giving courts complete knowledge to allow judges to rule consistently.[400]

These reforms have increased judicial efficiency, which in turn assures fairness, a fundamental principle of the rule of law. As well, these reforms increase accountability and transparency, to reduce possibilities of corruption and assure access to the courts for meaningful, fair, impartial and equal redress and justice.

Training and Continuing Legal Education: Training professionalizes the judicial system, and has been an extremely important part of Mongolia's rule of law reforms. In January 2000, the Association of Mongolian Judges, the Association of Mongolian Lawyers, and the Association of Mongolian Advocates founded the Judicial Training Center.[401] The Mongolian Foundation for Open Society (MFOS), which jointly runs the JRP with USAID and PACT, supported the establishment of the Judicial Training Center through financial and technical support.[402] The Judicial Training Center resides at the Supreme Court. As well, The Asian Development Bank opened a Legal Retraining Center for Lawyers in February of 2000.[403]

III. LEGISLATIVE AND EXECUTIVE REFORM THROUGH GOOD GOVERNANCE PROGRAMS

With judicial reforms in place, the Government of Mongolia and its donors have begun fine-tuning the application of these reforms. While this process occurs, their joint attention has shifted to good governance reforms, through increasing transparency and accountability. Mongolia has undertaken many good governance reforms that donors primarily advance and fund.

Capacity Development of the Office of the President: The UNDP supports the Office of the President of Mongolia in developing its institutional capacity for public consensus building and to provide long-term solutions to political and socio-economic challenges.[404] The four core objectives of the project are: (1) to

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399. *See id.* at ¶ 4 (Court Management Training).

400. *See* GRAMCKOW, MONGOLIA JUDICIAL REFORM PROGRAM, *supra* note 264, at 16 (stating that the Judicial Reform Project is assisting the World Bank in networking the courts into the UIS).

401. *See* Retraining Centre of Judges, Introduction to Judges Retraining Centre of Mongolia, ¶ 1, http://www.owc.org.mn/jrc/English/introduction_eng.html (last visited Feb. 21, 2010).

402. *Id.* at ¶ 2.

403. WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 6 n. 6.

404. *See* United Nations Development Programme, *Completed Projects, Institutional Capacity Development of the Office of the President of Mongolia (Jan.2005-Dec. 2007)*, UNDP, http://www.

enhance constitutional and legal status of the President of Mongolia, including the President's inclusive public policy-making powers, (2) improve organizational development of the Office of the President, including its policy analysis capacity and human resources management, (3) improve staff performance management system of the Office of the President, including results based assessment for public service delivery, and (4) increase responsiveness and transparency / accountability of the Office of the President, including better connecting the President with the people and application of tools.[405]

Capacity Development of the State Great Hural: The Asia Foundation has a program on Strengthening the Legislative Research and Analysis Capacity of the State Great Hural.

Mongolia's State Great Hural (SGH), or parliament, is at the center of the country's democracy, but possesses little independent capacity to conduct policy research and analysis. This hinders its ability to play an active role in policymaking and oversight of the government.[406]

The Asia Foundation has focused on creating an independent analytic capacity for the parliament. It endeavors to go past donor-driven demands to create local demand. In order to achieve this, The Asia Foundation has worked to increase transparency in governmental and legislative processes, so that nongovernmental organizations and civil society have a role in influencing the legislature.[407] The Asia Foundation supports improving the quality of policy research capacity, and advances the notion that civil society may be able to increase that capacity.[408] This "may be a linchpin reform that will lead to more demand for information, more transparency, and better quality information. But the current situation of low transparency provides a core structural constraint to the development of more analytic capacity."[409]

Finally, the Asian Development Bank has been assisting Mongolian governance reforms on a more macro level. ADB has undertaken a country governance assessment which highlights the importance of public sector reform and strengthening the government's institutional capacity.[410]

Legal Professional Qualifications: In addition to training of existing judges, prosecutors and advocates, Mongolia has been revamping its legal professional qualifications. The reformation of legal education meets two fundamental goals: creating predetermined standards that all graduates must meet; and coordinating

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undp.mn/dghr-icd.html.

405. *Id.*

406. THOMAS B. GINSBURG, STRENGTHENING LEGISLATIVE RESEARCH AND ANALYSIS CAPACITY OF MONGOLIA'S STATE GREAT HURAL 3 (2005).

407. *Id.* at 5, 17.

408. *Id.* at 8.

409. *Id.* at 3.

410. ASIAN DEVELOPMENT BANK, MONGOLIA COUNTRY STRATEGY AND PROGRAM UPDATE 2004-2006 4 (2003) (showing the relatively large size of Mongolia's public sector and the high public sector wages in proportion to GDP).

legal education to ensure that all law schools teach substantially the same subject matter.

The Mongolia Legal Needs Assessment Report indicated that legal education needs drastic improvement. The quality of the courses and testing is inadequate, as the "faculty is basically confined to teaching the relevant chapters of the Civil Code and limited to recitation of the provisions of the passed laws."[411] The report calls for a new methodology, which concentrates on developing critical and analytical thinking, to understand and debate the rationale behind the law, and not just to memorize and know the provisions of the law.[412] The Soros Foundation has supported curriculum development and the development of textbooks, and donated funds to the Ulaanbaatar Metropolitan Central Library to establish a specialized public law library.[413] While Mongolia and its donors have begun curriculum and systemic reforms in the Mongolian legal education, they leave much to be desired.

As a third prong of legal educational reform, the creation of a required bar examination will ensure that established minimum standards are met by all legal graduates. The JRP assisted in the creation and administration of the first qualification exam for legal professionals (bar exam) given by the Ministry of Justice and Home Affairs.[414] As of 2005, there have been two exams.[415] There were some major problems in the first qualification exam; however, the report on the second Lawyer Qualification Exam, offered in 1995, showed that the exam was conducted fairly and openly and that grading mistakes were corrected and being investigated.[416]

Bar Associations: Mongolia does not have a functioning bar association. The Mongolian Advocate's Association regulates advocates, but not government legal advisors, prosecutors or judges.[417] It functions to represent the interests of only its advocate members. Accordingly, to cure this deficiency, the JRP is assisting the Mongolian Advocates Association's efforts to become a full Bar Association, with two main functions: monitoring of member ethics; and training of member skills.

Ethics in the Legal Profession: Because of Mongolia's socialist legal traditions, judges have not understood the concept of conflict of interests, and a majority of judges has met with significant resistance the work that donors have done in this field. Judges maintain significant personal relationships with the participants of cases, parties and witnesses, and (in part because of this) judges are prone to

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411. WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 32.

412. *Id.* at 7.

413. See *id.* at 33 (lamenting also the lack of adequate study and research textbooks and teaching materials).

414. See GRAMCKOW, MONGOLIA JUDICIAL REFORM PROGRAM, *supra* note 264, at 2 (demonstrating JRP's seminal role in contributing to the drafting of the legislation that created this exam, and its assistance in drafting the exam questions and ensuring secrecy).

415. Skip Waskin, *Mongolia, Judicial Reform Project Update*, USAID, Aug. 18, 2005, http://www.usaid.gov/mn/programs/jrp/jrp-updates-Q3-05.html.

416. See Waskin, *supra* note 302, at ¶ 2.

417. *See* ASIAN DEVELOPMENT BANK, LAW AND POLICY REFORM: DEVELOPING MONGOLIA'S LEGAL FRAMEWORKS: A NEEDS ANALYSIS 39, ¶ 3 (1995).

financial and personal influence.[418] The JRP also has recognized that the communication culture of judges is very low.[419] The JRP provided advice on the Judicial Ethics Code and the draft Law on Courts.[420] Jack Marshall has taught ethics courses in an interactive and enthusiastic environment, and the participants have indicated that they actually changed their behavior as a result of these workshops.[421] Professor Marshall continues to work with the Judicial Disciplinary Committee to fine tune the recommended changes to the Judicial Ethics Code and helps improve procedures for investigating and prosecuting violations.[422]

Public Education and Awareness: Public opinion surveys have shown that confidence in Mongolia's legal institutions has been low.[423] The JRP developed a variety of public outreach and information programs, including a television program that presents changes in the criminal code.[424]

PACT administers the public education campaign for the JRP. PACT conducted focus groups to gauge their awareness levels and then developed themes and content for the public education campaign.[425] The result was its production in collaboration with the German Technical Corporation of a TV drama series, Huuliin Tsag, which informed people of the new Criminal and Criminal Procedure codes.[426] More importantly, it provided practical knowledge on how to exercise rights by showing how the courts work and demonstrating the independent rule of law.[427] At the time, this series was the most watched program on Mongolian television.[428] After success with the television program, the JRP created a radio drama with the same subject matter and purpose, to reach Mongolia's rural population.[429]

To manage public information about the judiciary, JRP has created a Public Access website which will put all case information on the web. This is occurring despite the reservations of some judges.[430]

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418. GRAMCKOW, MONGOLIA JUDICIAL REFORM PROGRAM, *supra* note 264, at 24 (stating also that judges are careless in court sessions and are too bureaucratic).

419. *Id.* at 24.

420. *See id.* at 17, 22.

421. *Id.* (emphasizing that future lawyer qualifications examinations must include the subject of legal ethics).

422. *Id.*

423. *See* USAID, THE JUDICIAL REFORM PROGRAM IN MONGOLIA: ACCOMPLISHMENTS, LESSONS LEARNED, AND RECOMMENDATIONS FOR THE FUTURE, *supra* note 175, at 9-10.

424. *Id.*

425. *See* PACT, Judicial Reform Program, http://www.pactworld.org/cs/judicial_reform (last visited Feb. 11, 2010).

426. USAID, THE JUDICIAL REFORM PROGRAM IN MONGOLIA: ACCOMPLISHMENTS, LESSONS LEARNED, AND RECOMMENDATIONS FOR THE FUTURE, *supra* note 175, at 38.

427. *Id.*

428. *Id.*

429. *Id.*

430. *See* Judicial Reform Project Update, National Center for State Courts, http://www.usaid.gov/mn/programs/jrp/jrp-updates-Q3-05.html (last visited Feb. 12, 2010). (Although not stated, publicizing the case docket prevents the shifting of cases between judges, and this may be one reason for their reservations, since they are known to reassign cases frequently. Reassignment of cases to "interested"

Public Media Education: Mongolia has not had a long tradition of independent media, and journalists during the socialist-period mostly reiterated and reported the government line.[431] They have not had a tradition of impartiality and critical thinking.[432] In addition to its public outreach, PACT maintains the JRP website, and conducts training for public affairs and public information officers and journalists, to improve the depth and quality of the media, which plays a vital role in monitoring and public awareness.[433]

IV. INCREASING LEGAL REPRESENTATION AND ACCESSIBILITY THROUGH LEGAL AID PROGRAMS AND NGOS

Legal Representation and Accessibility: With the advent of a market economy, Mongolia has had to increase its citizens' accessibility to the courts. Many of the access to justice problems focus on access to information. However, in many cases, there is not sufficient personal access to legal representation.

For instance, due to inefficiencies in the system, free legal assistance has not been fully used by citizens charged with crimes. A key underlying cause of this is likely to be a shortage of well-trained lawyers. Until October 2002, for instance, there were only 390 certified advocates in the country, of whom only 21.0 percent were located outside Ulaanbaatar. There were fewer than five advocates in most aimags. Bayan-Olgii and Govi-Altai aimags had just one advocate each. While the number of lawyers has increased with the holding of qualification examinations for lawyers in 2002, the concentration of lawyers in Ulaanbaatar has also continued to increase.[434]

Under their Rule of Law Program, MFOS undertook a legal education program that supported the Law School of Mongolian State University's efforts to start a legal clinic to provide free legal aid to indigent clients, under the supervision of law professors and attorneys.[435] MFOS had previously assisted the Shikhikhutug private law school's establishment of a legal clinic.[436] MFOS supports a project that provides free legal aid and psychological consultancy to prisoners of juvenile and women's prisons.[437]

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judges has resulted in charges of corruption and bribe-taking and the JRP and civil society has clamored for rules controlling and monitoring reassignment of cases).

431. GRAMCKOW, MONGOLIA JUDICIAL REFORM PROGRAM, *supra* note 264, at 5 (assessing the past traditions of the media in Mongolia, and stating that impartial public awareness and public monitoring of the justice system is "not always mastered even in advanced democracies").

432. *Id.*

433. *See* Amartya Sen, Speech at the World Bank Legal Conference: What is the Role of Legal and Judicial Reform in the Development Process? (June 5, 2000), *available at* http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/legalandjudicial.pdf (discussing how an active and free media can do much to advance the rule of law).

434. U.N. DEVELOPMENT PROGRAMME, *supra* note 336, at 17.

435. M. ICHINNOROV, ET AL. & SOROS FOUNDATION, ACCESS TO JUSTICE: ACCESS TO A FREE LEGAL AID (NEEDS ASSESSMENT REPORT, MONGOLIA) (2002), *available at* http://www.soros.org.mn/en/index.php?sel=resource&f=resone&obj_id=263&menu_id=3&resmenu_id=2.

436. *Id.*

437. *Id.*

MFOS also has a new initiative, an Access to Justice Project, which promotes right-based justice reform.[438] MFOS intends to create a new justice system with the cooperation of state and non-state actors.[439] This entails linking legal clinics, human rights NGOs and private law firms to provide effective legal assistance to all of society, with a focus on vulnerable groups. This MFOS program focuses on the creation of an adequate fee structure and a budget for a mandatory legal defense system and legal assistance to the indigent.[440]

Lastly, MFOS' Freedom of Information Project aims to increase access to government information and raise public awareness and active participation. In 1998, MFOS assisted the creation of the Legal Resource Center with the Ulaanbaatar Metropolitan Library to increase access to legal information and research materials by creating a centralized law library for law students, lawyers and other professionals and the general public.[441]

Alternative Dispute Mechanisms: Improving access to justice through the creation of alternative dispute resolution mechanisms or formalization of traditional dispute resolution mechanisms increases the ability to achieve meaningful redress.

The Asia Foundation has supported legal mediation and research on traditional dispute resolution to deal with social developments – such as the herding communities' disputes over traditional pastureland use. The Asia Foundation is documenting traditional conflict resolution practices on a comparative basis to identify the changes in the pastureland use and the effects of economic and political transitions, to increase and improve the resolution of these disputes.

Likewise, the JRP has worked with the Foreign Trade Arbitration Court of the Mongolian Chamber of Commerce and Industry and the Mongolian Advocates Association to organize training on arbitration principles, case resolution at the arbitration court, and mediation and involvement of state courts in the court procedures.[442]

Strengthening the Role of NGOs as Civil Society: Nongovernmental organizations assist in the advancement of the rule of law by advocating on behalf of individuals, interest groups or causes, to influence governments to take action, usually through the promulgation of legislation or legal reforms. International nongovernmental organizations play a complementary function by drawing attention to governmental violations of the rule of law. These organizations, like the UNDP or the World Bank, widely disseminate detailed reports, which actually influence governmental action.

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438. *Id.*
439. *Id.*
440. *Id.*
441. *Id.*
442. GRAMCKOW, MONGOLIA JUDICIAL REFORM PROGRAM, *supra* note 264, at 23 (discussing a lack of donor coordination in the arbitration field, and stating that the JRP will focus on creating a combined donor strategy as it has in the legal education field).

As well, domestic nongovernmental organizations can advance the rule of law by exerting bottom-up pressures. Foreign donors in Mongolia have done a formidable job at stimulating the role of domestic NGOs and increasing their influence in communications with the Mongolian government.

The Asia Foundation's program on nongovernmental organizations aims to expand and strengthen citizen decision-making and relationships between rural NGOs, government and business to improve governance.[443] In that regard The Asia Foundation assisted in the passage of the NGO law, which has given nongovernmental organizations a robust freedom to operate in Mongolian society.[444] As well, The Asia Foundation has supported the work of numerous NGOs (primarily women's rights and family rights organizations) and citizen civic outreach programs.[445]

Specifically, The Foundation built the Center for Citizen Education, which has a rural outreach program.[446] It also has supported the Mongolian Women's Lawyer's Association with technical assistance, in their efforts to develop a judicial advocacy program to advance women's rights, by filing test cases in key areas of discriminatory practices.[447] Resultantly the Mongolian Women Lawyers Association has raised public awareness of laws and regulations, published handbooks on legal topics and undertaken legal training programs.[448]

V. POLICE, PROSECUTOR, AND PRISON REFORMS

The police system, the state prosecution system, and the prison system all can impact the rule of law. They principally affect meaningful access to justice and procedural standards. These three systems should be reformed to prevent interference with the establishment of a procedurally-minimalist rule of law. Mongolia has not ignored these structures. Rather, Mongolia actively has been reforming the police, the prosecutor's office and the prison system.

Prosecutor Reforms: The JRP assists the Office of the Prosecutor General. The JRP formed a special prosecutor's office focusing on judicial corruption – the General's Special Investigation Unit – which investigates crimes by justice sector officials.[449] The JRP provided specialized training from a U.S. prosecutor with experience in corruption, and provided equipment to the Prosecutor General.[450] The JRP has been developing a joint procedural manual for prosecutors and investigators, which will ensure compliance with international standards for human rights and provide uniform implementation procedures and enhanced coordination

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443. *See* THE ASIA FOUNDATION, STRENGTHENING MONGOLIA'S NONGOVERNMENTAL ORGANIZATIONS (2000). *See also* THE ASIA FOUNDATION, WOMEN'S POLITICAL PARTICIPATION IN MONGOLIA (2000).

444. THE ASIA FOUNDATION, *supra* note 162, at 1.

445. *Id.*

446. *Id.*

447. *Id.*

448. WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 38.

449. Judicial Reform Program, Ethics in the Legal Profession, http://www.usaid.gov/mn/programs/jrp/index.html (last visited Feb. 12, 2010).

450. *Id.*

among justice sector institutions. As well, the JRP has begun to automate the prosecutor's office to link the work of the prosecutors with the administration of the judiciary.

Penitentiary Reforms: MFOS has worked in the criminal justice system, in support of penitentiary training. MFOS is assisting the Penitentiary Department to establish a long-term, sustainable training structure for corrections officers. In addition, MFOS lends support to a pre-trial detention centers monitoring project implemented by the Center for Human Rights and Development.[451] This project investigates human rights abuses in detention centers and publicizes them to the general public. MFOS has supported the establishment of community service sentencing, which is a provision of the new Penal Code.[452]

Arrest and Detention Reforms: Many organizations, domestic and international, work in the reformation of arrest and detention. The JRP assisted in developing arrest and detention joint regulations, and then used these regulations to make recommendations on the Criminal Procedure Code.[453] UNDP also engaged in arrest and detention reforms. As well, the National Human Rights Commission made significant headway in securing the constitutional rights of those who are in arrest and detention situations.[454]

451. *Id.*

452. *Id.*

453. GRAMCKOW, MONGOLIA JUDICIAL REFORM PROGRAM, *supra* note 264, at 2.

454. The National Human Rights Commission is beyond the scope of this work, but does affect the rule of law in that it has helped to create fair procedural standards and meaningful access to justice. For more information on this, see the National Human Rights Commission website, available at http://www.nhrc-mn.org; the National Human Rights Status Report 2003, available at http://www.nhrc-mn.org/docs/Annual2003StatusReport.pdf (last visited Feb. 20, 2010); and United Nations Development Programme, UNDP Current Projects, Democratic Governance, Capacity Development of the National Human Rights Commission of Mongolia, http://www.undp.mn/dghr.html (last visited Feb. 20, 2010). The UNDP Capacity Development of the NHRC is also supported by NZAID. NZAID, New Zealand's International Aid and Development Agency, http://www.nzaid.govt.nz/programmes/c-timor-leste.html (last visited Feb. 20, 2010). This project provides technical assistance to the National Human Rights Commission of Mongolia to enhance Mongolia's capacity to promote and protect human rights. New Zealand Ministry of Foreign Affairs & Trade, Mongolia, http://www.mfat.govt.nz/Countries/Asia-North/Mongolia.php (last visited Feb. 20, 2010).

THIN ICE, SHIFTING GEOPOLITICS: THE LEGAL IMPLICATIONS OF ARCTIC ICE MELT

Tessa Mendez[*]

INTRODUCTION

Navigators searched for a commercial sea route via the Arctic Sea for centuries. In North America, this route was historically known as the Northwest Passage, and generations of merchants and seamen sought the route because the existence of such a passage would dramatically cut travel time and costs.[1] Heavy ice in the Arctic Ocean once prevented utilization of both the Northwest Passage over the American continent and the Northern Sea Route over the Eurasian continent. Today, this may be changing. Arctic ice naturally recedes every summer when the region is exposed to long hours of sunlight, and the melting in recent years has been considerably greater than historical averages. Due to rising global temperatures, scientists project that the Arctic sea routes will open up to seasonal shipping within the century.[2]

The melting ice will also facilitate access to the Arctic's lucrative natural resources. Not only does the Arctic seabed have rich mineral deposits, but geologists also believe large quantities of oil and natural gas lie beneath the Arctic seabed.[3] As one expert has aptly noted, "[i]ronically, the great melt is likely to yield more of the very commodities that precipitated it: fossil fuels."[4] The growing pressure to discover diminishing supplies of oil and natural gas will likely entice oil and gas companies to extract the resources that are predicted lie under the Arctic sea.

Due to the hostility of the region, the Arctic expanse has been largely ignored or forgotten throughout modern history. Because Arctic sovereignty has never been completely determined or agreed upon, rights to the opening Arctic passageways as well as the natural resources located under the water are sure to be

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1. Clifford Krauss, Steven L. Myers, Andrew C. Revkin & Simon Romero, *As Polar Ice Turns to Water, Dreams of Treasure Abound*, N.Y. TIMES, Oct. 10, 2005, at A1.

2. Mark Jarashow, Michael B. Runnels, & Tait Svenson, Note, *UNCLOS and the Arctic: the Path of Least Resistance*, 30 FORDHAM INT'L L.J. 1587, 1587 (2007).

3. *Scramble for the Seabed*, THE ECONOMIST, Jan. 3, 2009.

4. Scott G. Borgerson, *Arctic Meltdown: The Economic and Security Implications of Global Warming*, 87 FOREIGN AFFAIRS 63 (2008).

contested in years to come.[5] As a consequence, questions regarding the delineation of territorial sovereignty that are largely settled in other areas of the world remain contested in the Arctic. As states realize the value of the Arctic, they start to assert and enforce their privileged claims of dominion. Within the last few years, the international struggle for control of the Arctic's natural resources, navigational capacity, and military opportunities have dramatically increased.[6]

International law has a vital role to play in resolving the unfolding dispute. The provisions and definitions within the United Nations Convention on the Law of Sea[7] ("UNCLOS" or "the Convention") provide critical guidance for Arctic nations as they attempt to assert sovereignty claims. UNCLOS also establishes dispute resolution mechanisms that could be used to determine ownership of Arctic territory if countries cannot negotiate acceptable decisions. Moreover, although not yet ratified by the United States, this Convention is largely seen as a codification of customary international law. Therefore, UNCLOS should be regarded as a primary resource for resolution of Arctic disagreements.

Sovereignty disputes reflect the geopolitical realities of the region. Geopolitics is defined as the study of the influence of geography, history, and social science with reference to spatial politics and patterns at various scales.[8] The geopolitical balance of power in the Arctic is radically changing as the geography of the region undergoes massive transformation. Arctic geography has increasing economic and strategic significance because the resources in the area are becoming commercially available. Geopolitics, because it is preoccupied with borders, resources, flows, territories, and identities, can provide a pathway for critical analysis of future disputes.[9] Moreover, the interrelationship between power and geography can be used as a tool to understand and anticipated trends in the international law of the region. The changes in the Arctic have created a unique situation, and the analysis that follows will provide an in-depth review of the various legal claims.

This paper is divided into six parts. Part I gives background information about how fast the ice is melting. The pace of the melt is important because visible signs of warming pressures countries to assert claims on resources and navigable regions. Part II highlights the importance of northern sea routes and is followed by Part III outlining the mineral wealth in the region. Because mining and travel in the Arctic will be both expensive and hazardous even after significant portions of sea ice have melted, states seek to understand the dangers of the region to better appreciate the costs and benefits of development. Part IV analyzes the law of continental shelves and how countries are already utilizing this law to claim the sea floor. Part V examines the laws that could affect the Northwest Passage and the

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5. *See* Stephanie Holmes, Comment, *Breaking the Ice: Emerging Legal Issues in Arctic Sovereignty*, 9 CHI. J. INT'L L. 323, 324 (2008).

6. *Scramble for the Seabed*, *supra* note 3.

7. UN Convention on the Law of the Sea, opened for signature Dec. 10, 1982, U.N. Doc. A/CONF. 62/122 (1982), 21 I.L.M. 1261 (1982) [hereinafter UNCLOS].

8. GEARÓID Ó TAUTHAIL, CRITICAL GEOPOLITICS 10 (1996).

9. *Id.*

international use of the Arctic ocean over North America. Part VI concludes by outlining potential resolutions to the Arctic dispute and projections about the future.

I. HOW QUICKLY IS ARCTIC ICE MELTING?

Global warming is most dramatic in the Arctic.[10] In Alaska and western Canada, average winter temperatures have increased by as much as seven degrees Fahrenheit in the past 60 years.[11] Scientists agree that atmospheric warming will continue for years to come, and that this warming will significantly affect ice coverage in the Arctic. Many experts believe the particularly sharp increase in warming and melting throughout the last few decades can be attributed to both human and natural causes.[12] Because ice and snow are white, they have what is known as a "high albedo" and reflect most solar energy.[13] Albedo is a measure of how strongly an object reflects light from sources such as the sun. Water is darker and thus has a "low albedo" that absorbs most solar radiation. This creates a condition known as a "positive feedback loop" and, as a consequence, the Arctic region essentially amplifies any sort of warming trend.[14] The ocean exposed by melting ice soaks up more heat, which melts more ice and exposes more sea.[15] In the most extreme scenario, the positive feedback loop could cause extreme deterioration of Arctic sea ice, leaving the Arctic Ocean more like the Baltic Sea, covered by only a thin layer of seasonal ice in the winter.[16] At the current pace of retreat, trans-Arctic voyages could be possible within the next five to ten years, but it remains extremely difficult to make an accurate prediction.[17]

Arctic ice is melting at a much faster rate than scientists originally projected. According to satellite images from the European Space Agency, the year 2007 showed the lowest Arctic sea ice levels on record.[18] The ice was so sparse that, for the first time in recorded history, the Northwest Passage was fully clear of ice.[19] While the Northern Sea Route, a similar sea passage over the Siberian coast, remained blocked by a large mass of ice, the Northern Sea Route is predicted to open at approximately the same time as the Northwest Passage.[20] Experts at the National Snow and Ice Data Center (NSIDC) in Boulder, Colorado, noted that this significant transformation in Arctic geography occurred 30 years ahead of what

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10. Borgerson, *supra* note 4.
11. *Id.*
12. Andrew Revkin, *No Escape: Thaw Gains Momentum*, N.Y. TIMES, Oct. 25, 2005, at F1.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. Borgerson, *supra* note 4.
18. John Roach, *Arctic Melt Opens up Northwest Passage*, NATIONAL GEOGRAPHIC NEWS, Sept. 17, 2007, *available at* http://news.nationalgeographic.com/news/2007/09/070917-northwest-passage.html.
19. *Id.*
20. Press Release, National Snow and Ice Data Center, Arctic Sea Ice Shatters All Previous Record Lows (Oct. 1 2007) *available at* http://www.nsidc.org/news/press/2007_seaiceminimum/20071001_pressrelease.html.

had been predicted.[21] Scientists are exploring several theories that may explain the mismatch between observations and climate models. The models may have assumed sea ice levels to be thicker than they actually are, they may lack a key dynamic in ocean circulation patterns, or they may underestimate the effects of the feedback loop.[22]

Anthropogenic climate change will continue to affect the geography of the Arctic. Because geography shapes political power, the human struggle over borders, space, and authority in the Arctic will only increase in years to come.[23] As the physical landscape of the Arctic shifts, the landscape of human control shifts too. Not surprisingly, Arctic countries are scrambling to exert control over this potentially critical region.

II. WHY DO NORTHERN SEA ROUTES MATTER?

Northern sea routes provide economic, strategic, and political advantages. This section will analyze how an ice free Arctic tempts international shippers and traders with the promise of large cost reductions. It will also examine some of the concerns associated with shipping in this delicate and dangerous region. The Northern Sea Route and the Northwest Passage could assist international trade by cutting existing transit times by days, and would save shipping companies thousands of miles in travel.[24] The current route from Rotterdam and Yokohama through the Suez Canal stretches 11,200 nautical miles.[25] The Northern Sea Route could reduce the sailing distance to only 6,500 nautical miles, saving more than 40 percent.[26] Likewise, the Northwest Passage could cut a voyage from Seattle to Rotterdam by 2,000 nautical miles, making it nearly 25 percent shorter than the current route, through the Panama Canal.[27]

International business would also be profoundly affected by Arctic ice melt. Taking into account canal fees, fuel costs, and other variables that determine freight rates, the shortcuts over the top of the world could cut the cost of a single voyage of a large container ship by as much as 20 percent, from approximately $17.5 million to $14 million.[28] The savings would be even greater for the megaships that cannot fit through the Panama and Suez Canals and must currently sail around the Cape of Good Hope and Cape Horn.[29] Moreover, these Arctic routes would also allow commercial and military vessels to avoid sailing through politically unstable Middle Eastern waters and the pirate plagued waters off the coast of Somalia and in the South China Sea.[30]

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21. Roach, *supra* note 18.
22. *Id.*
23. Ó TAUTHAIL, *supra* note 8, at 10.
24. Borgerson, *supra* note 4.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*

These advantages have led many leaders and intellectuals to reconsider the value of the Arctic; an inherently geopolitical process. Geopoliticians argue that the world is actively 'spacialized,' divided up, labeled, and sorted out into a hierarchy of places of greater and lesser importance.[31] States then express their sovereignty by enforcing property rights over the areas of importance. As Arctic countries increasingly understand the significance of the northern reaches, they become anxious to possess them.

Arctic interest is somewhat tempered, however, by the significant drawbacks of Northern Sea routes. Not only will the Arctic remain covered in ice throughout the winter, but thick, multi-year ice will remain prevalent for some time to come.[32] As opposed to first-year ice that is usually 3 feet thick and formed over a single winter, multi-year ice can be over 16 feet thick and sharp enough to cut through the hull of a ship.[33] Models have shown that the melting of first-year ice will annually open the Northwest Passage, but the melt may also clear the way for large pieces of multi-year ice to drift down from the North Canadian Archipelago.[34] This multi-year ice can be exceptionally dangerous. One study showed that multi-year ice accounted for 74 percent of the damage suffered by ships traveling in the Canadian Arctic between 1976 and 2007.[35] Therefore, if shippers ever attempt to take advantage of the passages, they will have to employ significant precautions.

In order to navigate these dangerous, opening sea-lanes, many of the world's shipyards are building ships with fortified hulls.[36] The lure of the Northern Sea Route and Northwest Passage are driving the development and construction of new types of ships, such as a double-ended tanker that can cruise bow first through open water and then turn around and proceed stern first to break through ice.[37] Russia has already acquired fourteen ice-breakers for its fleet, and many American naval specialists now say the two ice-breakers currently owned by the United States are grossly inadequate.[38] The very act of purchasing ice-breakers reveals interest in the region, and demonstrates future intentions.

III. WHAT ARE THE PROJECTED NATURAL RESOURCES IN THE ARCTIC?

Open and accessible sea lanes are not the only valuable commodity that an ice-free Arctic Ocean offers. This part of the paper will analyze the natural resources of the Arctic. Importantly, the technology and infrastructure needed to utilize these resources has not yet been developed. Nevertheless, these resources

31. JOHN AGNEW, GEOPOLITICS: RE-VISIONING WORLD POLITICS 2-3 (2d ed. 2003) (1998).

32. *See* Peter Tyson, *Future of the Passage*, NOVA, Feb. 2006, http://www.pbs.org/wgbh/nova/arctic/passage.html.

33. Anne Casselman, *Will the Opening of the Northwest Passage Transform Global Shipping Anytime Soon?*, SCIENTIFIC AMERICAN, Nov. 10, 2008, *available at* http://www.sciam.com/article.cfm?id=opening-of-northwest-passage.

34. *Id.*

35. *Id.*

36. Krauss et al., *supra* note 1.

37. *Id.*

38. Andrew Revkin, *Experts Urge U.S. to Increase Icebreaker Fleet in Arctic Waters*, N.Y. TIMES Aug. 17, 2008 at A0.

have generated the most excitement about the Arctic, and may generate future conflict. The Arctic may be the next, and probably the last, great energy frontier.[39] Scientists estimate the resources in the Arctic account for about 22 percent of the undiscovered, technically recoverable hydrocarbon resources in the world.[40] Typically, "undiscovered" resources are those which have not been measured or even fully identified, but are marked by some degree of geological assurance.[41] "Technically recoverable resources" are those resources producible using currently available technology and industry practices.[42] Scientists in the American government believe that 90 billion barrels of oil and vast amounts of natural gas may lie beneath the Arctic Ocean.[43] This quantity of oil would sufficiently the meet current world demand for approximately three years.[44] With such huge potential profits at stake, the race has begun among Arctic nations for control of the resources in areas once considered too harsh to explore. As fuel prices become extremely volatile, the possibility of oil and natural gas reserves in the Arctic takes on added geopolitical significance. Because politically unstable Middle Easter countries currently possessed the majority of fuel resources, Arctic nations may fight to possess oil and natural gas in the region and achieve energy independence.

While scientists begin to gain a better understanding of the resources in the Arctic, the exact locations of those resources remain relatively unknown. About 84 percent of the estimated resources are expected to be offshore.[45] A third of the undiscovered oil, or about 30 billion barrels, is believed to be off the coast of Alaska while nearly two-thirds of the undiscovered natural gas resources are in two Russian provinces, the West Siberian Basin and the East Barents Basin.[46] Many countries – including the United States – have scrambled to launch geological survey missions to better understand and assert their claims.[47] The imprecise boundaries in the Arctic have made the ownership of off-shore Arctic resources ambiguous. If the majority of the Arctic oil and natural gas can be found in territorial waters, long-term conflict is less likely to occur. At this point, however, the lack of certainty and the huge economic potential of the oil and gas reserves add to tensions between Arctic nations.

Oil and natural gas are not the only resources likely to be found in the Arctic – valuable minerals may also exist on the seabed. Scientists have long known about unconventional mineral ore deposits known as manganese nodules. These nodules are spherical accretions of manganese, cobalt, copper and nickel which

39. Krauss et al., *supra* note 1.

40. Press Release, U.S. Geological Survey, 90 Billion Barrels of Oil and 1,670 Trillion Cubic Feet of Natural Gas Assessed in the Arctic (Jul. 23, 2008), *available at* http://www.usgs.gov/newsroom/article.asp?ID=1980&from=rss_home.

41. *See id.*

42. *Id.*

43. *Scramble for the Seabed*, *supra* note 3.

44. Jad Mouawad, *Oil Survey Says Arctic has Riches,* N.Y. TIMES, Jul. 24, 2008, at C0.

45. U.S. Geological Survey, *supra* note 40.

46. Mouawad, *supra* note 44.

47. U.S. Geological Survey, *supra* note 40.

precipitate out of sea water at depth.[48] They form when warm solutions of dissolved metals from the earth's crust leach into cold ocean waters, and they are found on roughly a quarter of the ocean floor.[49] Recovering the nodules can be technically difficult. The nodules are usually found under at least 2 miles of water and dredging them stirs large quantities of sediment which seriously disrupts marine habitat.[50] Thus, excitement surrounding the minerals has calmed significantly since the 1970's.[51] Not only must the technology become cheaper and more widely available, but industrial commodity prices must also remain high to make manganese nodules profitable.[52]

Because the Arctic can be relatively unstable and much remains unknown about specific conditions, environmental issues surround all forms of resource extraction in the region. Concerns about onshore resources, such as the oil in Alaska's Arctic National Wildlife Refuge, have dominated debates about Arctic development in the United States up to this point.[53] However, in the future most resources will likely be discovered offshore. Arctic development will surely create environmental consequences. The United States Coast Guard has already begun to prepare for the time when tanker and other ship traffic increases in the area, taking precautionary steps to deal with an inevitable oil spill.[54] Russia, on the other hand, has taken very few steps to prevent and manage oil spills. For the entire Barents region, Russia has only two bases with the equipment necessary to fight an oil spill while Norway has at least 50 bases of this kind.[55] Any oil spill occurring in the Arctic will take longer to dissipate because the waves are not as strong in the region and natural decomposition occurs slowly in colder temperatures.[56] Therefore, even as countries look to the Arctic to supplement declining oil reserves, environmental security may become an issue that divides countries as well.

Geopolitics is inherently tied to resource use and control. The Arctic, as relatively virgin territory, lacks the geopolitical stability that has been established in most other areas of the world. The fact that the geography itself is in flux adds to the instability of the region. Countries will jockey for position until an effective legal regime is established in the area.

IV. WHAT IS THE LAW OF CONTINENTAL SHELVES?

As global pressures on resources inevitably increase, contested Arctic sovereignty claims beg resolution. International law of the sea will be an essential tool in resolving debates. This section begins with a brief history of maritime law,

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48. *Scramble for the Seabed*, *supra* note 3.

49. *Id.*

50. *Id.*

51. *Id.*

52. *See id.*

53. Borgerson, *supra* note 4.

54. Andrew Revkin *A Little Oil Goes a Long Way,* Dot Earth Blog, N.Y. TIMES, Jul. 25, 2008, http://dotearth.blogs.nytimes.com/2008/07/25/a-little-oil-goes-a-long-way/?apage=9.

55. *Id.*

56. *Id.*

followed by an examination of the United Nations Convention on the Law of the Sea, and how the Commission of Continental Shelves may be the body used to determine resource rights. These analyses reveal the importance of the Commission of Continental Shelves and UNCLOS, and suggest that it is imperative for the United States to ratify this treaty to protect its national interests.

A. Historic Maritime Law

In 1608, Hugo Grotius published a short treatise arguing that the world's oceans constitute a common resource belonging to all states.[57] This proposition became known as the Freedom of the Seas Doctrine and still forms the basis of modern maritime law.[58] Grotius supported his argument with the premise that the ocean was so large and inexhaustible that rival countries could simultaneously carry out the major activities of fishing and navigation without incident.[59] Unfortunately, Grotius' premise did not hold true post-industrialization, and the world's oceans have become vulnerable to overuse.[60] The high seas have become subject to the tragedy of the commons.[61] In this context, the tragedy of the commons is represented by multiple states acting independently and ultimately spoiling large portions of the ocean through over-fishing, resource exploitation, and pollution.[62] The Arctic region, with its fragile environment, seems particularly susceptible to the tragedy of the commons, especially if sovereignty rights remain unresolved.

International law of the sea evolved dramatically throughout the twentieth century as technology developed and the problems associated with overuse expanded. Historically, nations could only exert rights over the ocean for three nautical miles (nm) beyond their geographic territory, but this standard began to shift in the beginning of the twentieth century as countries sought to extend their territories to include mineral deposits and fishing rights. In 1945, President Truman extended the United States' control to all resources on the continental shelf using the customary international law principle of resource protection.[63] Also in the latter part of the 1940's, several countries extended their control to 200 nm beyond their land territory to cover productive fishing grounds.[64] Both the 200 nautical mile boundary and continental shelf sovereignty have become part of modern law.[65]

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57. Hugo Grotius, *Mare Liberum* (Ralph Van Deman, trans., Oxford 2001) (1916).

58. Rebecca Bratspies, *Finessing King Neptune: Fisheries Management and the Limits of International Law*, 25 HARV. ENVTL. L. REV. 213, 219 (2001).

59. *Id.*

60. *Id.* at 216-17.

61. *See* Garrett Hardin, *Tragedy of the Commons*, 162 SCIENCE 1243, 1243 (1968).

62. *Id.*

63. *Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf*, Proclamation No. 2667 (Sept 28, 1945), *reprinted in* 1945 Pub. Papers 150, 150 (nullified by the Outer Continental Shelf Land Acts, 43 USC § 1331 et. seq. (2000)).

64. Bratspies, *supra* note 58, at 222.

65. *See* UNCLOS, *supra* note 7, art. 57, 76.

Toward the latter half of the twentieth century, resources heavily contested, and thus nautical disagreements, became more frequent. There was a general call for the codification of international maritime law, so negotiations began on the United Nations Convention on the Law of the Sea in 1973. The Convention was designed to resolve international nautical disputes[66] and to set aside the resources of the high seas as the common heritage of mankind.[67] UNCLOS is sometimes considered the "constitution of the oceans," due to its expansive nature.[68] UNCLOS governs nearly every aspect of maritime law, including sovereignty limits, navigation, seabed mining, and environmental protection.[69] Moreover it provides a legal framework for resolving ocean-related disputes, which may make it an appropriate organization to deal with the Arctic conflict. While the United States has not yet ratified UNCLOS, it has become generally accepted worldwide and recognized as a codification of customary international law. To understand how UNCLOS may apply to the Arctic, the following provides a brief description of the terminology and access rights associated with coastal zones described in UNCLOS.

B. UNCLOS and Continental Shelves

Despite the United States' non-ratification, the expansive nature of UNCLOS and its general acceptance make this treaty a prime candidate for adjudicating sovereign claims and natural resource disputes in the Arctic. UNCLOS creates a general structure of maritime control for coastal states all over the world. UNCLOS codified customary international law by granting states the most control over the waters closest to its shore or "baseline."[70] A state can exercise less control over areas found further from its land territory. In general, a state can exercise its sovereignty 200 nm from its baseline.[71] This area is known as the exclusive economic zone (EEZ), and the coastal nation has sole exploitation rights over all natural resources within that boundary – including oil and natural gas reserves.[72] UNCLOS allows states to extend their exclusive economic zone beyond 200 nm only if they can demonstrate that the continental shelf beyond their coastline extends further.[73]

UNCLOS defines the continental shelf as the natural prolongation of the land territory to the continental margin's outer edge.[74] So long as the shelf extends at least 100nm from the point at which the sea reaches a depth of 2.5km – known as the 2500 meter isobath – a country may be granted rights over the natural resources

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66. *Id.* at Preamble.

67. *Id.* art. 150.

68. UNCLOS is often commonly referred to as the "constitution of the oceans." *See e.g.*, John T. Swing, *What Future for the Oceans?*, FOREIGN AFFAIRS Sept. 2003 at 139.

69. *See* UNCLOS, *supra* note 7.

70. *See* discussion of internal waters and the Northwest Passage, *infra*.

71. UNCLOS, *supra* note 7, arts. 56, 57.

72. *Id.*

73. *Id.* arts. 76, 77.

74. *Id.* art. 76.

on and under the seabed up to 350 nautical miles from land.[75] This provision allows coastal states to extract oil and natural gas on the continental shelves, to the exclusion of others.

Because it can be difficult to decipher the geologic structures of the continental shelf, UNCLOS created a specific body to examine claims. This body, known as the United Nations Commission on the Limits of the Continental Shelf, meets every two years.[76] While this Commission may provide specific proposals to the countries that submit claims, UNCLOS describes the role of the Commission of the Continental Shelf as 'recommendatory' only.[77] Coastal states have the liberty to establish their boundaries on the basis of the Commission's suggestions.[78] Countries have ten years to submit claims to the body after ratification of UNCLOS.[79] Five countries have territory within the Arctic Circle: the United States (via Alaska), Russia, Canada, Denmark (via Greenland), and Norway. The U.S. has not ratified UNCLOS, and so has not yet established a ten year deadline. Russia ratified the Convention in 1997, making 2009 the last session during which it could bring claims.[80] Canada ratified UNCLOS in 2003 and Denmark in 2004, so both of these countries have some years before they must submit their final claims.[81] Norway ratified the Convention in 1996, and submitted a claim to the Commission on Continental Shelves in 2006.[82]

The Commission on Continental Shelves has already reviewed Norway's submission and in 2009, the Commission approved Norway's 146,000 square mile claim.[83] One small section, known as the Loophole, overlaps with a previous Russian claim.[84] When the Commission approved Norway's claim, it stated that it was up to Norway to resolve any disputed areas through negotiation.[85] Because the United States has not ratified the UNCLOS, it cannot bring claims before the commission and no representatives sit on the advisory board.

Russia has aggressively asserted its sovereignty in the region since its ratification of UNCLOS in 1997. In 2001, Russia was the first Arctic nation to bring a submission before the UN Commission on the Limits of the Continental Shelf.[86] In this claim, Russia sought ownership of approximately 460,000 square miles of the continental shelf; an area roughly the size of the states of California,

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75. *Id.*

76. *Id.* Annex II.

77. *Id.*

78. *See* David A. Colson, *The Delimitation of the Outer Continental Shelf Between Neighboring States*, 97 A.J.I.L. 91, 93 (2003).

79. UNCLOS, *supra* note 7, at Annex art. 4.

80. Holmes, *supra* note 5, at 331.

81. *Id.*

82. *UN Backs Norway claim to Arctic Seabed Extension*, CALGARY HERALD, Apr. 15, 2009, *available at* http://www.calgaryherald.com/technology/backs+Norway+claim+Arctic+seabed+extension/1499675/story.html.

83. *Id.*

84. *Id.*

85. *Id.*

86. Borgerson, *supra* note 4.

Indiana, and Texas combined.[87] This 2001 claim included the North Pole.[88] The UN Commission neither rejected nor accepted the Russian proposal, but recommended the country undertake additional research.[89]

In the summer of 2007, Russia sent a team of scientists in one of its nuclear powered ice-breakers to survey the Arctic region and plant the Russian flag on the seabed beneath the North Pole.[90] While the submersible was planting the flag, it also took samples from the sea floor.[91] From these geologic samples, Russia argued the Lomonosov Ridge, an underwater mountain ridge that runs underneath the North Pole, and the Mendeleev Ridge, were natural extensions of the Eurasian continent.[92] Russia submitted these findings to the UN Commission on Continental Shelves in May of 2009.[93]

What did Russia argue in its submission to the Commission? Under the Convention, a state must demonstrate that an underwater structure is a geologic extension of the land territory. Thus, Russia would have to establish that the Lomonosov and Mendeleev Ridges were not "oceanic ridges," defined in the Convention as free-standing geologic structures separated from the continental shelf.[94] Therefore, Russia would have to demonstrate that the Lomonosov and Mendeleev Ridges were "submarine elevations that are natural components of the continental margin."[95] If Russia is successful in its claims, then the 200 nm EEZ outer limit would be removed, allowing Russia to extend its EEZ to 350 nm or the end of the continental shelf.[96]

While Canada and Denmark have not yet submitted a claim to the Commission on Continental Shelves, Canadian and Danish scientists claim to have proof that the Lomonosov Ridge is actually a natural extension of the North American continent.[97] The culminating research – the product of millions of dollars of contributions from both governments – was presented at the 2008 International Geological Congress.[98] These two countries hope that the geologic

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87. *Id.*

88. Press Release, UN Commission on Continental Shelves, Commission on Continental Shelves Receives its First Submission: Russian Federation First to Move to Establish Outer Limits on its Extended Continental Shelf (12/21/2001) *available at* http://www.un.org/ News/Press/docs/2001 /sea1729.doc.htm. Mark Benitah, *Russia's Claim in the Arctic, and the Vexing Issue of Ridges in UNCLOS*, 11 A.S.I.L. 27 (2007).

89. *Id.*

90. Yuri Zarakhovich, *Russia Claims the North Pole*, TIMES, Jul. 12, 2007.

91. *Id.*

92. Benitah, *supra* note 88.

93. *Id.*

94. *Id. See also* UNCLOS *supra* note 7, art. 76. ("The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.").

95. Benitah, *supra* note 88.

96. *Id.*

97. Randy Boswell, *Canada to Make Groundbreaking Arctic Claim*, NATIONAL POST, Aug. 6, 2008, *available at* http://www.nationalpost.com/news/canada/story.html?id=705136.

98. *Id.*

research will give them grounds to support territorial claims to the Commission on Continental Shelves. These two nations must submit their final submissions by 2013 and 2014 respectively.

Canada has been strengthening its claims of sovereignty over the continental shelf in other ways as well. In 2002, Canada began patrolling the most remote reaches of the Arctic with army rangers.[99] In response to Russia's symbolic flagging of the Arctic sea floor, Canada added eight new ice-breakers to its fleet, built a new deep-water port, reopened a closed air force base, and started a "cold weather" army training facility.[100] The Canadian military recently launched a satellite system that will allow surveillance of the Arctic as far as 1,000 miles offshore.[101] Bill Graham, the Canadian defense minister, exemplified the aggressive Canadian posture when he said: "I don't see the Northwest Passage as something for another 20 years, but at the rate of present global warming, we know that it will be within 20 years and we have to get ahead now.''[102] Canada aims to not only tighten control of its territory, but also establish a strong posture for future disputes over the ownership of the continental shelf and the Northwest Passage.

These widely varied country positions make it clear that more geologic evidence must be acquired before this issue can be settled decisively. While the Commission on Continental Shelf is in the best position to delimit boundaries, the Commission has received dozens of pending claims from countries claiming continental shelves all over the world. Some argue the Commission on Continental Shelves has become overburdened with work in the past couple of years.[103] The Commission may not be able to resolve the nature and ownership of the Lomonososov Ridge and the area around the North Pole for some time to come. Therefore, even though it is my belief that the Commission on Continental Shelves would provide the best resolution to the problems of the region, Arctic countries have incentives to scrutinize alternative methods of settling disputes.

V. WHAT IS THE LAW REGARDING STRAITS AND PASSAGES?

As mentioned previously, under the UNCLOS regime, states can exert the most control over the waters closest to shore. This section will analyze the various legal standards and levels of control associated with the maritime zones immediately surrounding coastal states. This section focuses on the classification of the maritime zone containing the Northwest Passage, because its categorization may affect the ability of international shippers and merchants to traverse the waters above Canada. It is important to note that the analysis to follow would not apply to the waters above Russia. The Northern Sea Route is completely within Russian

99. Krauss et al., *supra* note 1.

100. *Arctic Patrol Ship Purchase Met with Skepticism*, CBC NEWS, Jul. 10, 2007, *available at* http://www.cbc.ca/canada/north/story/2007/07/10/north-shipreax.html.

101. Borgerson, *supra* note 4.

102. Krauss et al., *supra* note 1.

103. Nathanial Gronewold, *A Peek Inside the U.N.'s Continental Shelf Commission*, N.Y. TIMES, Sept. 14, 2009.

control, which is significant because many models demonstrate the Northern Sea Route opening before the Northwest Passage does.

Each coastal zone is measured from a carefully defined baseline most often located at the shore or low-water line. UNCLOS recognizes "internal waters" as all waterways on the landward side of baseline.[104] These waterways basically function as a continuation of a country's land territory. The coastal state may set laws, regulate use, exploit resources, and maintain absolute control over internal waters.[105] UNCLOS defines "territorial waters" as the coastal area up to 12 miles from baseline.[106] The state retains the right to set laws, regulate use, and draw on any resource. Foreign vessels, however, have a the right of "innocent passage" through these waters, which this means a foreign vessel can safely traverse territorial waters but cannot fish, pollute, fire weapons, or spy.[107] "Archipelagic waters" under the UNCLOS, are considered a hybrid of internal and territorial waters. An archipelagic baseline can be drawn between the outermost points of the outermost islands, so long as the points are sufficiently close to one another.[108] Archipelagic waters are like internal waters in that the state can exercise full sovereignty, but foreign vessels have right of innocent passage – similar to territorial waters.[109]

Canada has claimed sovereignty over many of the islands in the Arctic sea, and argues that these islands create archipelagic waters under UNCLOS.[110] If these claims are upheld, then experts believe that Canada may be able to assert sovereignty over the Northwest Passage and thus regulate its use – which could include the imposition of usage fees.[111] The United States disputes Canada's claim to exclusive sovereignty over the Northwest Passage.[112] The United States holds the position that the northern islands of Canada may constitute archipelagic waters, but contends that the Northwest Passage is actually an international strait under UNCLOS, and thus cannot be subjected to Canada's restrictive control.

If the Northwest Passage is classified as an international strait, then ships could freely to travel the route without Canadian control. International straits are defined as internationally trafficked waterways that connect oceans and economic zones through several viable routes.[113] While the Northwest Passage connects oceans through numerous viable routes, Canada argues the route should fall under its exclusive sovereignty because it has never been "internationally trafficked."[114]

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104. UNCLOS, *supra* note 7, arts. 5, 8.

105. *Id.* art. 2.

106. *Id.* art. 3.

107. *Id.* arts. 17-19.

108. *Id.* art. 47.

109. *Id.* arts. 47-53.

110. Donald R. Rothwell, *The Canadian-U.S. Northwest Passage Dispute: A Reassessment*, 26 CORNELL INT'L L.J. 331, 332 (1993).

111. *See* Jarashow, Runnels, & Svenson, *supra* note 2, at 1600-01.

112. Rothwell, *supra* note 110, at 332.

113. Jarashow, Runnels, & Svenson, *supra* note 2, at 1605. *See also* UNCLOS, *supra* note 7, art. 37.

114. Jarashow, Runnels, & Svenson, *supra* note 2, at 1605-1607.

Since 1903, when the first transit of the Northwest Passage was made, less than fifty transits have been completed.[115] Non-Canadian vessels made only sixteen of these transits and few were for commercial use.[116] Even though the number of completed transits may rise exponentially in the future, at this point Canada claims primary usage. The United States has not accepted Canada's efforts to conclusively establish exclusive sovereignty over the Northwest Passage. Instead, the United States argues the Northwest Passage should not be subject to the exclusive sovereignty of one state.[117] However, the United States has not ratified the Convention, thus hampering the utility of any of the potential dispute resolution mechanisms discussed below.

VI. HOW WILL ARCTIC NATIONS RESOLVE DISPUTES OVER CONTINENTAL SHELVES AND THE NORTHWEST PASSAGE?

International dispute resolution is controversial and tenuous. There are few enforcement mechanisms and states are often unwilling to bind themselves to unsavory decisions. Nevertheless, this section will analyze various legal frameworks within the international sphere that could be used to resolve the Arctic disputes. UNCLOS will be addressed first, followed by the International Court of Justice ("ICJ") and the continental shelf cases that have already been decided by this body. The Arctic Council and the rights of indigenous peoples will be examined next and the benefits of an Arctic Treaty will be treated last. While this aspect of the paper will focus on the more binding forms of dispute resolution, it is worth remembering that non-binding decisions are the norm in the international sphere. Thus, "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means"[118] may be a more realistic, efficient, and effective means of resolving Arctic disputes.

A. International Tribunal for the Law of the Sea

Article 83 of the UNCLOS instructs countries with opposite or adjacent coasts that have submitted overlapping claims to the UN Commission on Continental Shelves to agree upon a boundary.[119] If the countries cannot reach an agreement within a "reasonable period of time," then Article 83 directs them to resort to the remedial provisions of UNCLOS.[120] UNCLOS recognizes that dispute resolution within the international sphere can be complex, and so the Convention offers a variety of resolution options. UNCLOS indicates a strong preference for peaceful resolution of disputes, and provides that countries should first try to settle disputes informally.[121] If the two parties are unable to settle a dispute on their own, UNCLOS suggests a range of forums. UNCLOS directly

115. *Id.* at 1610.
116. *Id.*
117. Rothwell, *supra* note 110, at 332.
118. U.N. Charter art. 33, para. 1.
119. UNCLOS, *supra* note 7, art. 83.
120. *Id.*
121. *Id.* art. 279.

sponsors the International Tribunal for the Law of the Sea, but also allows parties to access the International Court of Justice or an arbitral tribunal.[122]

The International Tribunal for the Law of the Sea has 21 member judges.[123] Thus far, it has decided 16 cases.[124] The Tribunal has jurisdiction over all disputes submitted to it in accordance with the Convention.[125] It also extends to all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal. Notably, Article 298 allows nations to opt out of the binding dispute resolution provisions for disputes that arise under Article 83.[126] All Arctic nations except Norway have exercised this option.[127] This is not surprising given the general distaste for binding dispute resolution in international law, and this fact should not be read to undermine the effectiveness of the Tribunal. The Tribunal could still act as an arbitral body or issue an advisory opinion, presenting a valuable opportunity for compromise among Arctic nations.[128]

B. International Court of Justice

The International Court of Justice has decided three major overlapping continental shelf disputes since its inception in 1946, and could act as to resolve the current Arctic disputes over sovereignty of the Arctic sea floor and the resources that may lie below.[129] The ICJ applied UNCLOS customary international law provisions on continental shelves in *Tunisia v. Libya*[130] and *Libya v Malta.*[131] The well known *North Sea Continental Shelf Case*[132] was decided in 1969, before UNCLOS was drafted, but this case also dealt with similar issues.[133] However, as the ICJ noted in *Libya v. Malta*, even as the UNCLOS esteems a goal of equitable solutions, it offers little guidance in achieving those solutions.[134] Because the language of the Convention is unclear, the ICJ may draw on other international law principles—such as the equidistant principle, natural prolongation principle, historical practice, and sector theory—to give UNCLOS provisions context in an Arctic dispute decisions.

The equidistant principle has a strong history in customary law. Before UNCLOS, the 1958 Geneva Convention on the Continental Shelf provided that continental shelf disputes for countries with opposite or adjacent coasts should be decided by drawing a median line between the two coasts, unless the countries

122. *Id.* art. 287.

123. *Id.* Annex VI art. 2.

124. International Tribunal for the Law of the Sea, http://www.itlos.org/start2_en.html (last visited Jan. 17, 2010).

125. *Id.*

126. UNCLOS, *supra* note 7, art. 298.

127. Holmes, *supra* note 5, at 325.

128. UNCLOS, *supra* note 7, art. 191

129. *See, e.g.*, Holmes, *supra* note 5, at 340-41.

130. Continental Shelf (Tunis. v. Libya) 1982 I.C.J. 63 at 25-26 [hereinafter Tunis. v. Libya].

131. Continental Shelf (Libya v. Malta), 1985 I.C.J. 3 (June 3) [hereinafter Libya v. Malta].

132. North Sea Continental Shelf (F.R.G. Den. v. F.R.G. Neth.) 1969 I.C.J. 2 (Feb. 20) [hereinafter North Sea].

133. *See id.*

134. Libya v. Malta at 37-39.

came to another agreement or special circumstances required a different arrangement.[135] This method of demarcation was used in the *North Sea Continental Shelf Cases* but rejected in *Tunisia v. Libya.*[136] Originally, the method often came under strong attack for being arbitrary because "special circumstances" could preempt its use.[137] However, the principle has grown more widely accepted over time. An analysis based on the equidistant principle would likely favor Canada's interests in the Arctic – at the expense of the United States. Canada argues the Alaskan border should be demarcated as a straight continuation from the land border on the coast. This method would allow Canada to claim a portion of the Beaufort Sea that is predicted to be rich in natural resources.[138]

The United States argues that the Alaskan maritime border should follow the landform in a continuous northeasterly line.[139] This argument seems to be a variation on the natural prolongation principle – or the principle that a nation's maritime boundaries should reflect the 'natural prolongation' of the land territory where reaches the coast. The meaning and application of the natural prolongation principle has evolved over time as well. When the doctrine was first used, its relationship to the 1958 Geneva Convention was far from clear.[140] The Court began to expand and clarify both the equidistant principle and the natural prolongation doctrine in *Libya v. Malta.*[141] Libya argued that the natural prolongation of the land territory into and under the sea was fundamental to the juridical concept of the continental shelf.[142] The Court, however, disagreed. This was the first case decided after the adoption of UNCLOS, and the Court completely set aside the relevance of natural prolongations.[143] Instead, the Court noted the significance of the 200nm exclusive economic zone described in the access rights of the UNCLOS, and disregarded the geological or geomorphological characteristics of the sea floor.[144] Since the time of *Libya v. Malta,* however, the law and practice of maritime delimitation has matured and natural prolongations are often considered today when determining continental shelf access rights.

Countries coming before the ICJ may also try to bolster their claims with evidence of historical use.[145] While Tunisia successfully made this argument in *Tunisia v Libya*, Tunisia had an eighty year historical practice of fishing in the contested area.[146] In that case, the Court noted that historical rights and the

135. Holmes, *supra* note 5, at 344.

136. North Sea at 5. *See also* Tunis. v. Libya at 25-26.

137. Colson, *supra* note 78, at 99-100.

138. WALTER B. PARKER & JOHN H. BYRNE, SEA CHANGES: PERSPECTIVES ON ALASKA'S FUTURE UNDER PENDING UNITED NATIONS CONVENTION OF THE LAW OF THE SEA AND THE FINDINGS OF THE UNITED STATES OCEANS COMMISSION REPORT 3 (2004).

139. *Id.*

140. Colson, *supra* note 78, at 100.

141. Libya v. Malta at 23-24, 45-46.

142. *Id.* at 40.

143. Colson, *supra* note 78, at 91.

144. *Id.* at 100.

145. Holmes, *supra* note 5, at 342.

146. Tunis. v. Libya at 134-35.

continental shelf are governed by distinct legal regimes.[147] As noted previously, the Arctic has generated very little interest historically; the region has largely been left to indigenous people who call the region home.

Various Arctic countries may also try to assert coastline proportionality, a method of delimitation used in *Libya v. Malta*.[148] In the Arctic, coastline proportionality could be advanced by calling on "sector theory," a historic method of claiming territory around the poles. Under sector theory, a country may assert sovereignty over a pie-shaped wedge formed by extending lines of longitude from its coast to the pole.[149] Russia and Canada have both been strong proponents of sector theory, arguing that the ocean within each nation's sector becomes internal waters subject to their exclusive control.[150] The United States has historically opposed sector theory, as Alaska represents a narrow shoreline and sector theory tends to favor those countries with the longest coastlines.[151] This method of demarcation does not require geologic evidence gathering from deep-sea ridges, and will provide each Arctic country an expansion in territory.

While the ICJ has some experience dealing with continental shelf issues, non-binding dispute resolution is the norm in the international sphere. However, even if the parties choose to act outside the International Tribunal for the Law of the Sea or the International Court of Justice, UNCLOS would still probably apply. UNCLOS has gained almost universal ratification, and those countries that remain as hold-outs recognize the Convention as a codification of customary international law. Thus, an international arbitral tribunal or mediator would almost certainly use UNCLOS if the Arctic nations chose a non-binding resolution process.

C. Arctic Council

The Arctic Council is another forum that could offer resolution to Arctic territorial disputes. The Ottawa Declaration formally established the Arctic Council in 1996 as an international body designed to deal with problems in the region, but currently it only addresses issues of sustainable development and environmental protection.[152] Part of the reason for its silence on the most pressing concerns is a 1996 prohibition made by the United States that prevents the group from addressing security concerns, a prohibition that has thus far prevented the Arctic Council from addressing territorial demarcation of the region.[153] If the charter were reconstructed, however, the Arctic Council might prove a powerful tool in the creation of a new standard for the Arctic region. One of the major advantages of utilizing this international group is the consideration the Arctic Council already gives to the indigenous people of the region – including the Aleuts, Inuits, and Saami.[154] The Arctic has a population of over four million

147. *Id.*
148. Holmes, *supra* note 5, at 345.
149. *Id.*
150. Colson, *supra* note 78, at 97.
151. *Id.*
152. About Arctic Council, http://arctic-council.org/article/about (last visited Feb. 26, 2010).
153. Borgerson, *supra* note 4.
154. About Arctic Council, *supra* note 152.

people, including more than thirty different indigenous groups.[155] The people who currently live in the Arctic and have roots going back centuries deserve to have their opinions incorporated into future decisions. If indigenous people have a voice in the decision-making process, then they will be more likely to support policies and aid scientists with their ability to detect early or unnoticed impacts of climate change.[156] Thus, the concerns of indigenous people should be considered in any attempted resolution, whether through the Arctic Council or otherwise.

D. Arctic Treaty

The conflicts surrounding arctic resources and sea routes could also be resolved through treaty. A treaty could adjudicate sovereignty, postpone territorial disputes, and foster cooperation amongst signatories. One option is a limited treaty involving the North American countries. The other option is an expansive treaty involving all Arctic nations. In the wake of the aggressive Russian maneuvering that took place in 2007, some called for the United States, Canada, and Denmark/Greenland to enter into a limited trilateral treaty that would exercise joint jurisdiction over any potential North American Arctic shipping.[157] This treaty could be designed to counteract Russian control over the region, and would allow the free passage of vessels from the United States through the Northwest Passage. A treaty such as this could enact a policy that would allow countries to share responsibility for policing the Arctic waters as well as protecting the fragile Arctic environment.[158] Specific provisions within the treaty could be used to administrate the division of resources such as oil and natural gas. Moreover, a treaty of this kind would offset or even stop Russian expansionism and afford Canada and Greenland protection under the United States' military. However, a limited treaty such as this would contain drawbacks. Excluding Russia would leave measure of oversight for Russian use of the Arctic. Therefore, most experts advocate a multilateral treaty among all Arctic nations rather than the more limited trilateral treaty.

Multilateral treaties have already proved to be an effective way of resolving territorial disputes similar to the Arctic controversy. For 50 years, the 1959 Antarctic Treaty has regulated the sovereignty disagreements that previously plagued the southern polar region and has preserved the region as a global commons area.[159] The success of the Antarctic Treaty is often attributed to its expansive membership. The Antarctic Treaty quickly became a legitimate document because twelve major powers ratified it immediately after its creation.[160]

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155. *Id.*

156. Erika M. Zimmerman, Comment, *Valuing Traditional Ecological Knowledge: Incorporating the Experiences of Indigenous People into Global Climate Change Policies*, 13 N.Y.U. ENVTL. L. J. 803, 827 (2005).

157. Dianne DeMille, *Steerage and Stewardship: US, Canada, & Denmark/Greenland Should Join Forces to Guard the North American Side of the Arctic*, CAN. AM. STRATEGIC REV. (2008) *available at* http://www.casr.ca/ft-arctic-trilateral-treaty-1.htm.

158. *Id*

159. The Antarctic Treaty Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71.

160. British Antarctic Survey, The Antarctic Treaty: Background Information, http://www.

Since its inception, more than 40 states have ratified the Antarctic treaty, thus cementing its goal of promoting peace and science.

The Arctic and the Antarctic nations share four common goals: continued scientific investigation, preservation of territorial sovereignty, national security, and environmental protection.[161] In Antarctica, these goals have been achieved through the unique provisions of Article IV of the Antarctic Treaty.[162] Article IV suspended all territorial rights to the Antarctic, but also stated that signing the Treaty did not represent "a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica."[163] Part 2 of Article IV also states no country may make new claims of territorial sovereignty while the treaty is in force.[164] The treaty has been successful because no party has been allowed to advance their claims, but at the same time no party has been forced to renounce their claims.

Article IV has undoubtedly been essential to the Antarctic Treaty, and if an Arctic Treaty were created, the decision to include a similar clause would be a major and controversial choice. While the suspension of territorial rights in the Arctic may protect the environment, the countries in the region may hesitate to give up their claims on hydrocarbon fuels. Some critics argue the differences between the Arctic and Antarctic outnumber the similarities, and thus the Antarctic Treaty is an imperfect guide. Not only does the Antarctic lack the promise of readily accessible hydrocarbon resources, but the southern polar reaches are also removed from valuable trade routes and are far from any other continent.[165] Furthermore, the Arctic is an ocean while the Antarctic is a continent. The solutions that allowed the peaceful division of land may not be as successful in oceanic disputes over valuable waters.

While there are undeniable differences between the Arctic and the Antarctic, they are similar in that they are both fragile ecosystems needing protection. Moreover, the fact that the Arctic is closer to trade routes and continents means that it is even more subject to dispute and clearly designated ownership is all the more essential. Undoubtedly, Arctic nations will have a difficult time compromising, and it is possible that 'soft law' provisions may be the best way to reach a compromise. Any decision made must not only balance the competing sovereignty claims, but also assess long term environmental concerns as well.

CONCLUSION

The United States' persistent refusal to ratify UNCLOS is somewhat surprising because the Convention's negotiations concluded in 1982 and every

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antarctica.ac.uk//about_antarctica/geopolitical/treaty/ (last visited Jan. 23, 2010).

161. Melissa A. Verhaag, Note, *It Is Not Too Late: The Need for a Comprehensive International Treaty to Protect the Arctic Environment*, 15 GEO. INT'L ENVTL. L. REV. 555, 558-59 (2003).

162. *See*, Rothwell, *supra* note 110, at 364-65. Antarctic Treaty *supra* note 159, art. IV.

163. Antarctic Treaty *supra* note 159, art. IV.

164. *Id.*

165. Borgerson, *supra* note 4.

other major industrialized country has ratified it.[166] Presumably, the United States' position is rooted in the negotiation of the Convention that took place in the 1970's. At that time, the UN proposed arrangements for the sharing of technical mining information with a new International Seabed Authority.[167] The United States – a leader in the development of the technologies necessary for deep sea mining – was unwilling to divulge its practices, and thus refused to sign the Convention.[168] Even though the provision was dropped in 1994, the United States has yet to endorse UNCLOS despite numerous calls for the ratification from within the country and abroad.[169] It appears that a few U.S. Senators remain the last holdouts of resistance to the Convention – blocking its ratification.

Can UNCLOS be considered a powerful international agreement if the United States has not ratified it? Legitimacy relies on the internalization of external standards to substantiate the belief by an actor that a rule or institution ought to be obeyed. In the international sphere, very few laws or organizations have obtained recognition and approval of all countries. Because so few bodies govern the relations between states, any breach to the legitimacy of those bodies is clearly significant. Despite the destabilizing effect of the United States' non-ratification of the UNCLOS, 157 countries and the European Community have joined in the Convention.[170] Moreover, in many areas, UNCLOS codifies preexisting customary international law of the sea that the United States already recognizes.[171] Therefore, while non-ratification may weaken the UNCLOS, at the moment, it appears the rest of the world accepts the Convention as legitimate. UNCLOS will play an essential role in resolving disagreements in the Arctic, and it is critical for the United States ratify UNCLOS in the very near future.

This paper began with an explanation of climate change and Arctic ice melt because predictions about future developments in the region rely on a basic understanding of these forces. As the ice melts, the Northwest Passage and the Northern Sea Route will become viable routes for summer shipping – opening the region to a new reality. Merchants as well as politicians are calculating the dangers as well as the potential cost reductions associated with northern shipping routes. As the technology and infrastructure develop in the Arctic, it may become

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166. "Status of the United Nations Convention on the Law of the Sea, etc.," Division for Ocean Affairs and the Law of the Sea, http://www.un.org/Depts/los/convention_agreements/convention_agreements.htm, accessed Jan. 17, 2010.

167. JAMES MORELL, THE LAW OF THE SEA: AN HISTORICAL ANALYSIS OF THE 1982 TREATY AND ITS REJECTION BY THE UNITED STATES, 96 (1992).

168. *Id.*

169. Former President Bush urged Congress to ratify the Convention in 2007. *See*, Press Release, Office of the Press Secretary, President's Statement on Advancing U.S. Interests in the World's Oceans (May 15, 2007) *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2007/05/20070515-2.html. Secretary of State Clinton noted that the ratification of the Law of the Sea treaty was long overdue in her Senate Confirmation hearing. *Transcript of Hillary Clinton's Confirmation Hearing*, (Jan. 13, 2009), *available at* http://www.cfr.org/publication/18225/transcript_of_hillary_clintons_confirmation_hearing.html.

170. "Status of the United Nations Convention on the Law of the Sea, etc.," *supra* note 166.

171. GERARD J. MAGONE, LAW FOR THE WORLD OCEAN 40 (1981).

possible to utilize the region's rich natural resources. It is this prospect that has generated the most excitement among Arctic nations and precipitates the need for an effective legal regime in the area. It is my belief that UNCLOS and the Commission on Continental Shelves can provide the legal mechanisms necessary to delineate sovereignty over the continental shelves and ownership of the resources that may be discovered there. UNCLOS will inform the debates about the Northwest Passage; implicating the future of international trade. Finally, any dispute resolution in the Arctic would likely either involve a UNCLOS body, such as the International Tribunal for the Law of the Sea, or an application of UNCLOS principles. The United States' non-ratification of the Convention acts as a major roadblock to advancing its national interests and settling the controversies in the region.

While it is probably already too late to prevent the Arctic ice melt, it is not too late to effectively resolve the sovereignty issues the melt will create. Thus far, the United States has not taken a significant role in the conflict or its resolution, but this type of ambivalence cannot continue as disputes escalate. Many suggest the United States join and support multilateral efforts that have already been established. Dispute resolution will be certainly be complicated and controversial; therefore, the full participation and engagement of all Arctic nations will be necessary. A geographical transformation of this magnitude has never occurred in the course of modern human history, and never has a physical change in landscape freed so many natural resources or created such new potential for trade. Therefore, it is essential that an adequate framework be developed to deal with these radical changes, and it is obvious that the framework needs not only the cooperation, but also the leadership of the United States.

THE EVOLUTION OF THE LAWS OF WAR IN THE WAR ON TERROR

*Reviewed by Lara L. Griffith**

MICHAEL LEWIS, ERIC JENSEN, GEOFFREY CORN, VICTOR HANSEN, RICHARD JACKSON AND JAMES SCHOETTLER,THE WAR ON TERROR AND THE LAWS OF WAR (OXFORD UNIVERSITY PRESS 2009).

I. INTRODUCTION

The War on Terror and the Laws of War was written by a group of legal scholars and professors who are equally as comfortable with the laws of war as they are with the military field. Geoffrey Corn, author of the introduction as well as chapters on the application of the law to the war on terror, is currently an Associate Professor of Law at South Texas College of Law. Corn graduated from Hartwick College and the U.S. Army Command and General Staff College, earned his J.D. with highest honors at George Washington University, and served in the U.S. Army for twenty-one years, finishing his career as a Lieutenant Colonel in the Judge Advocate General's Corps.[1] Michael Lewis, author of perhaps the most analytic chapter in the book, *Battlefield Perspectives on the Laws of War*, graduated cum laude from Harvard Law School and continued on to have a 7-year career flying F-14 fighter airplanes with the United States Navy.[2] Lewis and his other co-authors Victor M. Hansen, Dick Jackson, Eric Jensen and James Schoettler, have extensive experience authoring literature on the laws of war.[3] Such sweeping military and academic experience is likely the reason for the authors' comprehensive and meticulous analysis of the laws of war.

This is a book geared towards practicing lawyers; namely, as it became evident through the progression of the book, to international lawyers and practitioners dealing with the laws of war. An incredibly specific niche to which the authors are directing their literature, the book's audience is expected to have a baseline understanding of both the American legal system as well the interaction between the military and the law during times of international conflict.

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1. Oxford University Press, The War on Terror and the Laws of War: A Military Perspective, http://www.us.oup.com/us/catalog/general/subject/Law/PublicInternationalLaw/GeneralPublicInternationalLaw/?view=usa&ci=9780195389210 (last visited Mar. 1, 2010).

2. *Id.*

3. *Id.*

II. THE LAWS OF WAR AND THEIR APPLICATION

The authors start blending the military and legal genres military and legal immediately from the beginning of the book. The Introduction cites NATO General James L. Jones's remark from 2003, stating that going to war was once a task focused on leading combat forces, but now, "you have to have a lawyer or a dozen. It's become very legalistic and very complex."[4] Thus, while the role of the lawyer is established right from the beginning, the Introduction warns lawyers to be weary of what they are dealing with. Professor Corn cautions his readership that they, as lawyers, know the law rather than the technological intricacies of modern warplanes. While he assumes his readers are knowledgeable, he notes that the laws of war and the arena wherein they evolve are extraordinarily convoluted and variable. The Forward of the book, then, sends a caution to lawyers: do not step into unfamiliar waters and assume to understand how to navigate through them. The authors of the book provide such a warning presumably to illustrate the necessity of their book as a guide through this arena.

Professor Corn follows the Introduction by authoring the first chapter entitled *What Law Applies to the War on Terror?* He quickly sets the legal framework of the entire book by distinguishing between a pre- and a post-9/11 legal and militaristic structure. He explains how the September 11th attacks both created and obliterated the categories of the laws of war. Up until that point, the only framework that existed was either inter-state or intra-state war.[5] Professor Corn explains that the paradigm shift began with the determination and categorization of the "unlawful enemy combatant" and its effect on the pre-9/11 legal configuration.[6] This term and its significance will be discussed later in this note. Professor Corn derives much of his framework from Common Articles 2 and 3 of the Geneva Convention.[7] It is clear, then, where his steep dichotomy comes from; Article 2 conflicts are international armed conflicts which arise between two or more of the High Contracting Parties, and Article 3 conflicts are conflicts *not* of an international character.[8] Chapter 1 is devoted to establishing the difference between these two types of conflicts, and emphasizing the enormous importance of what rhetoric can do within the Laws of Armed Conflict (LOAC).

Much of the chapter is derived from Professor Corn and co-author Eric Talbot Jensen's previous article: *Untying the Gordian Knott: A Proposal for Determining Applicability of the Laws of War to the War on Terror*.[9] That article focuses on the concept of "rules of engagement" and how those rules are broken into either status-based rules or conduct-based rules. While that article brings its readers to a narrow and esoteric view of the rules of engagement, the present book broadens and even

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4. GEOFFREY S. CORN, ET AL., THE WAR ON TERROR AND THE LAWS OF WAR vii (2009).
5. *Id.* at 3.
6. *Id.*
7. *Id.*
8. *Id.* at 5.
9. Geoffrey S. Corn and Eric Talbot Jensen, *Untying the Gordian Knott: A Proposal for Determining Applicability of the Laws of War to the War on Terror*, 5-6 (S. Tex. C. L. Working Paper K33), Jan 14, 2008, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1083849.

simplifies the scope of the argument. This is particularly evident when Professor Corn concludes Chapter 1 by deriving his perspective from that of "the warrior." The warrior's understanding, Corn writes, is "based on the pragmatic and simple reality that authorization to engage an opponent based solely on a status determination means the line has been crossed."[10] Essentially, Professor Corn anchors the idea of the very wartime framework he is promoting to the most militaristic of all men in history, the warrior. With the weightiness and simplicity of the warrior supporting the book's basic legal paradigm, the book is able to move forward into more specified areas of the field.

Chapter Two focuses on the targeting of persons and property in war. It is written by Eric Jensen, a Lieutenant Colonel of the US Army JAG Corps. The chapter begins by laying out the history of the codification of the laws of war. The chapter provides a concise background of where the rules came from for targeting persons and property, explaining that regulations on specific weapons systems and tactics grew in the post-World War II era.[11] The authority for this chapter is found in the Protocol Additional to the Geneva Convention and Relating to the Protection of Victims of International Armed Conflicts (GPI).[12] Jensen uses the GPI to methodically lay out three categories of individuals on the battlefield: combatants, non-combatants, and civilians.[13] He explains, however, how the category of civilians can lose their immunity as civilians if they engage in conflict and turn themselves into pseudo combatants. The analytical break down of the players on the battlefield is a helpful academic tool for those unfamiliar with the layout of war.

One of the most revealing portions of the book in terms of military operations was the section in Chapter Two about the Air Force. The author explains how the Air Force must calculate collateral damage before they can go ahead with a targeted mission against combatants or civilian objects.[14] The chapter delves into soldiers' discretion, and segues into how targeting of transnational terrorists is an entirely different playing field. Much of the rest of the book turns on the revelation found in this chapter concerning how transnational armed terrorists do not fit the definitions of any of the three categories of battlefield players listed above. Thus, the now infamous label synonymous with the War on Terror and with the then-reigning Bush Administration was born: "unlawful enemy combatants." The authors made a noteworthy mention of an International Committee of the Red Cross (ICRC) study currently being conducted regarding whether civilians' memberships in the armed wing of terrorist organizations will not only increase the State's ability to respond to the threat, but will also reinforce fundamental principles of the LOAC that are designed to protect those very civilians from the

10. CORN, *supra* note 4, at 34.
11. *Id.* at 43.
12. *Id.* at 45.
13. *Id.*
14. *Id.* at 47.

effects of the hostility.[15] Why the study is not included in the references is unclear and unfortunate, as the brief mention serves to pique the reader's interest.

Further, for all the discussion surrounding former President Bush's policy on the detention of combatants in the war on terror, Chapter Three, entitled *Detention of Combatants and the Global War on Terror*, is noticeably silent as to the controversy. It is a refreshing change to read this chapter as it is entirely void of judgment on the subject, and instead is wholly focused on the definitional status of these individuals. While concurrent articles such as Stephanie Cooper Blum's *The Why and the How of Preventive Detention in the War on Terror*[16] aptly focus on whether the Bush Administration's approach was unsound and unlawful, Jensen's chapter solely focuses on dissecting the definition of combatants for purposes of detention.

A useful and interesting section of Chapter Three, particularly to the lawyer or law student is the Executive Branch Response and the following section of Schoettler's Observations. It is a necessary part of the book where the author is able to scrutinize the lessons learned from the litigation which ensued following the president's detention of combatants in the war on terror. Schoettler emphasizes the recurring concern from the Supreme Court that the Executive branch did not exercise unchecked power when it came to indefinite detention of enemy combatants.[17] A testament to Schoettler's partisan authorship, however, is that his conclusion aligns itself only with keeping to the laws of armed conflict instead of playing to a particular political angle.

III. TREATMENT AND TRIAL OF DETAINEES IN MILITARY COURTS

Chapters Four and Five focus on treatment and trial of detainees. This part of the book appeals to the sensationalists because it describes interrogation techniques and goes into detail about how such techniques violate virtually every human rights treaty of which the United States is a party, the 8th Amendment, and the uniform code of military justice.[18] After a frustratingly circular, albeit entirely accurate, analysis of how the amorphous standards became alarmingly susceptible to abuse, resulting in investigations of misconduct and ultimately re-regulation with the 2006 Department of Defense detainee program, the author leaves us with the standards the military began with: minimum humane treatment of Article 3 of the Geneva Convention.[19]

Chapter Five brings the reader back to the warrior ideal, but instead of using it for the legal and militaristic framework, this chapter describes how military courts trying war crimes makes sense because it is akin to warriors judging warriors. Again, the author goes through a somewhat circular history of how military courts have ebbed and flowed throughout different conflicts. The author points out and

15. *Id.* at 59.

16. Stephanie Cooper Blum, *The Why and How of Preventive Detention in the War on Terror*, 26 T.M. COOLEY L. REV. 51, 56 (2009).

17. CORN, *supra* note 4, at 122.

18. *See id.* at 148.

19. *Id.*

argues the most notable events in the progression of military courts: First, President Bush's decision in November of 2006 to order a military commission for terrorist operatives was justified by stating that the fight against al Qaeda was sufficient to trigger LOAC application.[20] After its establishment, the Supreme Court eventually ruled that the structure violated domestic and international law.[21] More recently, changes have been made since President Obama's original plan to fully shut down the detention facility at Guantanamo Bay.[22] Since the book's publication, a task force, led by Attorney General Eric H. Holder Jr., has recommended that thirty-five detainees face prosecution or military commission.[23] While 110 detainees have been approved for transfer, the goal that President Obama set when he took office in 2009 is far from being realized on the date originally set for the facility's closure.[24] The administration has decided that approximately forty other detainees should be prosecuted for terrorism and related war crimes even though it is still unclear whether these detainees should face a civil trial or a military commission.[25]

Both of these chapters explain that while procedural limitations for detention and prosecution of transnational terrorists is somewhat clear, substantive jurisdiction for trials and interrogation is lacking in clarity. Such a lack of substantive clarity is evidenced by one of the most recent decisions by Mr. Holder, announcing that five detainees would face military commission and five others would be prosecuted in federal court.[26] The authors' conclusion at the end of Chapter Five is both fitting and timely, in that it looks to the future and demands "continuing observation and analysis," of these military courts and the decisions that allow for prisoners to be held under their jurisdiction.[27]

IV. COMMAND RESPONSIBILITY AND THE BATTLEFIELD PERSPECTIVE

The final two chapters of the book, the first of which is devoted entirely to the doctrine of command responsibility, and the second, a thorough analysis of the battlefield perspective of the laws of war, provide for strong final chapters. One commentator disparaged the book for not having a conclusion and proffered the suggestion that a lack of conclusion means the war on terror "is something that will keep the military busy for a while."[28] While a conclusion to the entire book may have been a helpful additive, each chapter's author provided insightful observations in their own mini-conclusions. Such disparate topics do not provide

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20. *Id.* at 164.

21. *Id.*

22. *Id.*

23. CBC News, *Prosecute 35 Guantanamo Detainees: Task Force*, CBC News, Jan 22, 2010, http://www.cbc.ca/world/story/2010/01/22/us-guantanamo-bay-task-force.html.

24. *Id.*

25. Charlie Savage, *Detainees Will Still Be Held, but Not Tried, Official Says*, N.Y. TIMES, Jan 22, 2010, at A14, *available at* http://www.nytimes.com/2010/01/22/us/22gitmo.html?partner=rss&emc=rss.

26. *Id.*

27. CORN, *supra* note 4, at 186.

28. Gentian Zyberi, *Book Review – The War on Terror and the Laws of War: A Military Perspective*, INT'L L. OBSERVER, Dec. 18, 2009, http://internationallawobserver.eu/2009/12/18/book-review-the-war-on- terror-and-the-laws-of-war-a-military-perspective/.

perfect fodder for an ultimate conclusion, and reviewer Gentian Zyberi may be correct in that a conclusion is preemptive because the war on terrorism is quite evidently not near a conclusion.

The doctrine of command responsibility is analyzed in Chapter Six as having a foundation in substantive criminal law principles. The author explains that command responsibility does *not* refer to instances of direct liability; rather, it based on "the principle of derivative imputed liability."[29] Explaining further, he states that the commander's liability derives from his relationship with his soldiers and the link between his act and the crimes committed by his subordinates.[30] While this doctrine first seems esoteric and too particularized for this survey book, the author ties in its codification with principles used against members of the Taliban and other non-state actors. This chapter results being one of the most edifying of the entire book, as the author describes how preoccupied commanders are to be held within the doctrine. Rightfully so, as they are more likely to prevent and suppress LOAC violations if they could be held liable in a criminal court for their subordinates' violations. The true analysis, however, comes when the author compares commanders in the United States Army to leaders of terrorist organizations and how the latter find the doctrine entirely useless.[31]

V. CONCLUSION

As noted, while Chapter Seven, the final chapter, does not fully substitute for a conclusion, it gives a thoughtful final nod to the complexities between military operations and the laws of war. In summarizing what the reader should take from this narrative, the author returns to the warrior ideal to produce two overall principles. The first principle boils down to a simple epithet: warriors need rules.[32] Such a catch phrase is perhaps what the authors, collectively, would use if asked to summarize their book in three words. The second take-away is that the laws of war need to be clear and simple, and both given and received with confidence.[33] Although Chapter Seven delves into more specifics of aviation and technology, the chapter's worth is found in its brief explanation of the authors' intention in writing the book. The ability to see the laws of war through a militaristic eye is an invaluable perspective for lawyers and lawmakers alike. The authors of the book present an incredibly thorough study of exceedingly pertinent information. Such a task, in light of the ever-changing laws is daunting, but these authors have created this book as an important tool as the war on terror presses forward.

29. CORN, *supra* note 4, at 191.
30. *Id.*
31. *Id* at 205.
32. *Id.* at 211.
33. *Id.*