

# NEW YORK INTERNATIONAL LAW REVIEW

Summer 2005

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## New Rules for a New War: The Applicability of the Geneva Conventions to Al-Qaeda and Taliban Detainees Captured in Afghanistan

Brett Shumate\*

In the wake of the U.S. Supreme Court's decisions in June 2004 regarding the status of the Guantánamo Bay detainees,<sup>1</sup> the legal status of those detainees under international law continues to remain at the forefront of political and legal debate. In deciding *Hamdi v. Rumsfeld*, the Supreme Court specifically declined to determine whether the detainees were entitled to the protections of the Geneva Conventions.<sup>2</sup> Even though the Administration has begun conducting trials of these terrorists through military commissions in attempted compliance with the Supreme Court's pronouncements,<sup>3</sup> a federal district court recently held that the captured terrorists are entitled to the protections of the Geneva Conventions,<sup>4</sup> again thrusting this issue to the forefront in policy-making and legal circles. The focus of the debate is whether the Geneva

1. See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2648 (2004) (holding that a detainee was entitled to notice based on his classification as an enemy combatant and a fair opportunity to be heard); see also *Padilla v. Rumsfeld*, 124 S. Ct. 2711, 2727 (2004) (concluding that habeas corpus jurisdiction was limited to the district in which the detainee was confined); *Rasul v. Bush*, 124 S. Ct. 2686, 2692 (2004) (explaining that 28 U.S.C.S. § 2241 confers jurisdiction on the district court to hear the habeas corpus challenges).
2. See *Hamdi*, 124 S. Ct. at 2659 ("Whether, or to what degree, the Government is in fact violating the Geneva Convention and is thus acting outside the customary usages of war are not matters I can resolve at this point."). See generally David D. Caron & Jenny S. Martinez, *Availability of U.S. Courts to Review Decisions to Hold U.S. Citizens as Enemy Combatants*, 98 AM. J. INT'L L. 782, 785 (2004) (noting that the Supreme Court chose not to discuss international law and treaties that are generally applied to these cases). See generally Bruce Zagaris, *U.S. Court of Appeals for the 9th Circuit Holds Guantánamo Detainees Have Rights*, 20 INT'L ENFORCEMENT L. REP. 2 (2004) (stressing the Court's decision not to resolve the specific international law issues).
3. See Neil A. Lewis, *Judge Halts War-Crime Trial at Guantánamo*, N.Y. TIMES, Nov. 9, 2004, at A1 (stating that President Bush improperly brushed aside the Geneva Conventions by establishing military commissions to try detainees in Guantánamo). See generally Caron & Martinez, *supra* note 2, at 788 n.67 (indicating that the November 2001 Military Order provided for trials before military commissions); Bradford A. Berenson, *Military Commissions for Terrorists on Solid Constitutional Grounds*, LEGAL BACKGROUNDER, Sept. 17, 2004, at 3 (noting that President Bush issued the Military Order that sets up military commissions to try suspected terrorists).
4. See *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 165 (2004) (concluding that Hamdan was entitled to the protections of the Geneva Convention until a "competent tribunal" concludes otherwise). See generally *In re Guantánamo Bay Cases*, No. 02-CV-0299, 2005 U.S. Dist. LEXIS 1236, at \*110-11 (U.S. D. Ct. Jan. 31, 2005) (declaring that Taliban fighters are entitled to the protections of the Geneva Conventions); Caron & Martinez, *supra* note 2, at 793 (discussing the decision in *Rasul*, which held that enemy combatants have rights under the Geneva Convention).

\* Candidate for J.D., Wake Forest University School of Law, 2006; B.A., Furman University, 2003. The author would like to thank his wife, Merritt, for her patience and understanding during the drafting of this article. Many thanks to Professor George K. Walker for his guidance and direction. I give my appreciation to the editors at the *New York International Law Review* for their fine efforts. Comments and suggestions are welcome at shumba3@law.wfu.edu.

Conventions apply to those terrorists detained in Afghanistan or, as the Bush administration asserts, whether new rules are required to fight the war against terrorism.<sup>5</sup>

The attacks on the United States on September 11, 2001, certainly signaled a new type of war.<sup>6</sup> The new enemy is one with widespread support in the Arab and Muslim world that uses terror to achieve its ends.<sup>7</sup> Its goals are unlike the traditional geopolitical goals with which military strategists are well versed.<sup>8</sup> Instead, the goal is the worldwide eradication of religious and political pluralism.<sup>9</sup> The enemy's tactics take no account of collateral damage and make no distinction between military and civilian targets.<sup>10</sup> In short, its hostility toward "us and our values" is

5. See The Committee on International Human Rights and The Committee on Military Affairs and Justice, *Human Rights Standards Applicable to the United States' Interrogation of Detainees*, 59 REC. 183, 215–16 (2004) (identifying the Administration's formal position as to the inapplicability of the Convention to Al-Qaeda detainees). See generally James P. Taylor, *The Constitution Approaches Guantánamo: A Legal Guide to the U.S. Detainees Cases*, 29 MONT. L. REV. 8, 8 (2004) (explaining that the Convention should not apply because the drafters of the Convention could not have envisioned a war such as the present one).
6. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 46 (1st ed. 2004) [hereinafter 9/11 COMMISSION REPORT]. "This is a new type of war" was a statement uttered by a military "assistant" in Rome, New York on the day of the attacks. However, President Bush was reported to have said to the National Security Council on September 12, 2001, that the "United States was at war with a new and different kind of enemy." *Id.* at 330. Moreover, in a video teleconference with his principal advisers, including National Security Advisor Condoleezza Rice and Director of Central Intelligence George Tenet, the President began the meeting on the day of the attacks by stating, "We're at war." *Id.* at 326; see also George K. Walker, *The Lawfulness of Operation Enduring Freedom's Self-Defense Responses*, 37 VAL. U. L. REV. 489 (2003) (discussing the events of 9/11 and the international reaction to the attacks).
7. See 9/11 COMMISSION REPORT, *supra* note 6, at xvi (asserting that the enemy gathers support in the Arab and Muslim countries by demanding a remedy to political grievances). See generally Kevin J. Fandl, *Terrorism, Development & Trade: Winning the War on Terror Without the War*, 19 AM. U. INT'L. REV. 587, 592 (2004) (identifying why the majority of recent terrorist attacks have their roots in the Middle East); Paul S. Dempsey, *Aviation Security: The Role of Law in the War Against Terrorism*, 41 COLUM. J. TRANSNAT'L. L. 649, 689 n.220 (2003) (noting that several Arab countries have provided protection to perpetrators of terrorist acts against civil aviation).
8. See Joseph P. Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. REV. 1, 38 (2004) (explaining that the ideology of Al-Qaeda is contrary to the principles of Islam). See generally Charles I. Lugosi, *Rule of Law or Rule by Law*, 30 AM. J. CRIM. L. 225, 225 (2003) (highlighting the difficulty of developing military strategy due to the nature of this war); Christopher M. Schumann, Note, *Bring it On: The Supreme Court Opens the Floodgates with Rasul v. Bush*, 55 A.F. L. REV. 349, 368–69 (2004) (emphasizing importance of obtaining information from captured "enemy" particularly because of extreme ideology).
9. See 9/11 COMMISSION REPORT, *supra* note 6, at xvi (reporting how terrorist groups have rallied support in the Arab world). See generally Bialke, *supra* note 8, at 38 (declaring that Al-Qaeda does not pursue legitimate interests and only seeks to cause chaos); Ravi Mahalingam, *Women's Rights and the "War on Terror": Why the United States Should View the Ratification of CEDAW as an Important Step in the Conflict with Militant Islamic Fundamentalism*, 34 CAL. W. INT'L. L.J. 171, 177 (2004) (identifying some principles of militant Islamic fundamentalist groups such as total rejection of Western social, economic and political values).
10. See 9/11 COMMISSION REPORT, *supra* note 6, at xvi (asserting that the enemy gathers support in the Arab and Muslim countries by demanding a remedy to political grievances). See generally Ruth Wedgwood, *Agona: Military Commissions; Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT'L L. 328, 330 (2002) (arguing that Al-Qaeda's campaign throughout the 1990s against American targets amounted to a war). For further discussion of Al-Qaeda's efforts against American targets in the early 1990s, see also 9/11 COMMISSION REPORT, *supra* note 6, at 69–70. See generally Shibley Telhami, *Conflicting Views of Terrorism*, 35 CORNELL INT'L. L.J. 581, 585 (2002) (discussing the alternatives available to the United States to increase protection from the deliberate targeting of civilians by terrorists).

limitless.<sup>11</sup> This new enemy, not contemplated by the drafters of the Geneva Conventions, would certainly seem to suggest the need for new rules.

Whether this new type of war justifies the actions of the United States in Afghanistan is the subject of robust debate.<sup>12</sup> The Bush administration argues that this new type of war and this new enemy require new rules.<sup>13</sup> Others seriously criticize this argument and assert that the policies of the Bush administration are dangerous and unnecessary.<sup>14</sup>

This article discusses the seemingly new rules embraced by the Bush administration to fight a new enemy and whether the actions of the United States comply with the Geneva Conventions. Specifically, Part I examines the Bush administration's response to 9/11 and its classification of Al-Qaeda and Taliban detainees in Afghanistan.

Part II discusses the Geneva Conventions, specifically the Geneva Convention Relative to the Treatment of Prisoners of War ("GPW" or "Third Convention")<sup>15</sup> and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War ("Civilians Convention" or "Fourth Convention").<sup>16</sup> Part II also includes a discussion of the criteria and rights afforded prisoners of war (POWs), "protected persons" and unlawful combatants.

Part III discusses the 1977 Additional Protocols to the Geneva Conventions and customary international law.

Part IV examines the varying interpretations of the Geneva Conventions and their applicability to the Taliban and Al-Qaeda detainees. This part begins with the analysis provided by

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11. See 9/11 COMMISSION REPORT, *supra* note 6, at 69–70 (noting that some terrorists consider Americans the enemies of Islam). The defeat of this new enemy will be accomplished once terrorism is eliminated as a threat to our way of life. *Id.* at 334; see also Nat'l Sec. Presidential Directive 9, Oct. 25, 2001.
  12. See Manoocher Mofidi & Amy E. Eckert, "Unlawful Combatants" or "Prisoners of War": The Law and Politics of Labels, 36 CORNELL INT'L L.J. 59, 74 (2003) (asserting that the United States was forced into exercising its right of self-defense). See generally R. Kenton Bird & Elizabeth B. Brandt, *Academic Freedom and 9/11: How the War on Terrorism Threatens Free Speech on Campus*, 7 COMM. L. & POL'Y 431, 434 (2002) (acknowledging that the debate as to the validity of U.S. foreign policy after 9/11 has not been welcomed in the nation's universities); Simon S.C. Tay, *Perspectives on Terrorism from Asia, the United States, and the Middle East: Asia and the United States After 9/11: Primacy and Partnership in the Pacific*, 28 FLETCHER F. WORLD AFF. J. 113, 114 (2004) (noting that the U.S. agenda after 9/11 has been very controversial).
  13. See Erin Daly, *Let the Sun Shine in: The First Amendment and the War on Terrorism*, 21 DEL. LAW. 14, 14 (2003) (pointing to disagreements that have arisen because many believe that not all the initiatives implemented by the Administration are justified). See generally Frederick N. Egler, Jr., *President's Message: To the Victors Belong: Justice?*, 5 LAW. J. 4, 4 (2003) (pointing to some of the new rules and definitions implemented by the Administration).
  14. See Barry Kolar, *Ready to Lead: As the ABA's First African American President, Dennis Archer Embodies Its Push for Diversity in the Legal Profession*, 39 TENN. B.J. 12, 14 (2003) (noting that the American Bar Association has been criticized for questioning Administration policies). See generally Matthew Purdy, *Civil Liberties: Bush's New Rules to Fight Terror Transform the Legal Landscape*, 27 MONT. L. REV. 8, 8 (2001) (explaining that despite the need for heightened security, the Administration's steps toward that objective have not been easily accepted).
  15. See Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Prisoners of War].
  16. See 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 Civilians Convention].

the Bush administration, continues with the arguments of critics of the Administration and concludes with the author's determination that the Administration has provided an aggressive, albeit legal, interpretation of the Geneva Conventions. Finally, this part suggests that most critics of the Administration attack the Administration's policy decision not to apply the Geneva Conventions, rather than its legal conclusions.

## I. The Bush Administration's Classification of Al-Qaeda and Taliban Detainees

In response to the attacks on the United States on September 11, 2001, Congress passed the "Authorization for the Use of Military Force" on September 18, 2001.<sup>17</sup> This resolution gave the President congressional approval to seek out those who had perpetrated the attacks against the United States on 9/11.<sup>18</sup> The joint resolution stated, "[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons."<sup>19</sup> Al-Qaeda and the Taliban regime of Afghanistan that harbored them were soon disclosed as the perpetrators.<sup>20</sup>

The President issued Military Order No. 1 on November 13, 2001, pursuant to the authority given to him by the Congress of the United States.<sup>21</sup> Finding that Al-Qaeda had created a state of armed conflict that required the use of the armed forces and that it intended to undertake further terrorist attacks, the Order permitted the detention and trial of Al-Qaeda members

17. See Joint Resolution to Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States, Sept. 18, 2001, Pub. L. No. 107-40, 115 Stat. 224, S.J. Res. 23, 107th Cong. (2001) [hereinafter Joint Resolution]. See generally Michael Greenberger, *A 'Third' Magna Carta*, 26 NAT'L L.J. S7, S7 (2004) (explaining the powers conferred on the President by the enactment of the joint resolution); Nancy Kassop, *The War Power and Its Limits*, 33 PRESIDENTIAL STUD. Q. 509 (2003) (discussing congressional resolutions that have given the President full discretion in particular areas).

18. See Thomas Geraghty, Comment, *The Criminal-Enemy Distinction: Prosecuting a Limited War Against Terrorism Following the September 11, 2001 Terrorist Attacks*, 33 MCGEORGE L. REV. 551, 559-60 (2002) (outlining the distinctions made between terrorists and terrorist enemies so as to give the President full military control to destroy a defined group). See generally Robert J. Araujo, *A Judicial Response to Terrorism: The Status of Military Commissions Under Domestic and International Law*, 11 TUL. J. INT'L. & COMP. L. 117, 122 (2003) (explaining the relationship between the resolution and establishment of military commissions); Keith S. Alexander, Note, *In the Wake of September 11th: The Use of Military Tribunals to Try Terrorists*, 78 NOTRE DAME L. REV. 885, 901 (2003) (citing the authoritative language in the resolution as meaning "the President is authorized to use all necessary and appropriate force").

19. See Joint Resolution, *supra* note 17, at 2(a).

20. See 9/11 COMMISSION REPORT, *supra* note 6, at 330-31 (discussing the repercussions to those countries that have assisted terrorists). See generally Ilias Bantekas, *The International Law of Terrorist Financing*, 97 AM. J. INT'L. L. 315, 316 (2003) (stating that by the time of the embassy bombings, it was clear that Osama bin Laden was residing in Afghanistan); Benjamin Langille, Note, *It's "Instant Custom": How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001*, 26 B.C. INT'L & COMP. L. REV. 145, 153-54 (2003) (noting that by September 12 the United Nations had identified the Taliban as a group harboring terrorists).

21. See Exec. Order No. 222, 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter Military Order] (granting authority to detain international terrorists and conduct their respective trials by means of military tribunals); see also Joint Resolution, *supra* note 17 (authorizing a military response to the attacks of September 11, 2001); Christopher Bryant & Carl Tobias, *Youngstown Revisited*, 29 HASTINGS CONST. L.Q. 373, 393 (2002) (asserting that in issuing the Military Order, President Bush relied on his authority as the President and Commander-in-Chief of the armed forces, as well as the power granted to him by the Constitution and federal statutes).

and other noncitizens by special military commissions.<sup>22</sup> In support of the President's military order, Vice President Cheney stated, "[S]omebody who comes into the United States of America illegally, who conducts a terrorist operation killing thousands of innocent Americans—men, women, and children—is not a lawful combatant. . . . They don't deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process."<sup>23</sup>

The President initiated military plans to attack Afghanistan in late September and early October 2001.<sup>24</sup> The international community overwhelmingly supported the U.S. operations in Afghanistan,<sup>25</sup> evidenced by the United Nations Security Council's passage of a resolution

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22. See Military Order, *supra* note 21, at § 1(a)–(c) (stating that the President proclaimed a national state of emergency following the attacks of September 11, 2001, carried out by Al-Qaeda); see also Daniel A. Reznick & Jonathan F. Potter, *Military Tribunals, the Constitution, and the UCMJ*, 2002 FED CTS. L. REV. 2, 3 (2002) (concluding that the Military Order raises significant constitutional and public policy issues); Amanda Schaffer, Comment, *Life, Liberty, and the Pursuit of Terrorists: An In-depth Analysis of the Government's Right to Classify United States Citizens Suspected of Terrorism as Enemy Combatants and Try Those Enemy Combatants by Military Commission*, 30 FORDHAM URB. L.J. 1465, 1465 (2003) (noting that the Military Order grants authority to try terrorists by military tribunal for violation of the laws of war).
23. See David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 959–60 (2002) (describing Vice President Dick Cheney's support of the use of military commissions in the trials of international terrorists); see also Roberto Iraola, *Military Tribunals, Terrorists, and the Constitution*, 33 N.M. L. REV. 95, 98 (2003) (announcing that prisoners captured during the war on terror should be treated differently than those captured in conventional warfare); Anton L. Janik, Jr., Comment, *Prosecuting Al Qaeda: America's Human Rights Policy Interests Are Best Served by Trying Terrorists Under International Tribunals*, 30 DENV. J. INT'L L. & POL'Y 498, 498 (2002) (raising the point that the use of military tribunals for the trials of international terrorists could undermine the view that U.S. justice can claim a moral high ground); Elisabeth Bumiller & Steven Lee Myers, *Senior Administration Officials Defend Military Tribunals for Terrorist Suspects*, N.Y. TIMES, Nov. 15, 2001, at B6 (asserting that the Military Order gave the government sweeping power to secretly prosecute alleged terrorists at home and abroad).
24. See Bumiller & Myers, *supra* note 23, at B61; Tawia Ansah, *War: Rhetoric & Norm-Creation in Response to Terror*, 43 VA. J. INT'L L. 797, 798–99 (2003) (stating that during the weeks after September 11, President Bush referred to the coming battle against terrorism and made threats against Osama bin Laden); see also Curtis F. Doebbler, *How Can We Really Protect National Security?*, 9 ILSA J. INT'L & COMP. L. 399, 402 (2003) (noting that the United States attacked Afghanistan less than a month after September 11, 2001); Broderick C. Grady, Note, *Article 5 of the North Atlantic Treaty: Past, Present, and Uncertain Future*, 31 GA. J. INT'L & COMP. L. 167, 195–96 (2002) (declaring that the link between the Taliban and Al-Qaeda gave the United States a mandate to attack Afghanistan); 9/11 COMMISSION REPORT, *supra* note 6, at 337 (explaining that on September 21, 2001, President Bush approved a four-phase military plan to attack Afghanistan, originally titled "Operation Infinite Justice").
25. See Derek Jinks, *State Responsibility for Sponsorship of Terrorists and Insurgent Groups: State Responsibility for the Acts of Private Armed Groups*, 4 CHI. J. INT'L L. 83, 89–90 (2003) (claiming that in the wake of September 11, 2001, there was broad international support for the United States holding Afghanistan responsible for harboring Al-Qaeda); see also Matthew Scott King, *The Legality of the United States War on Terror: Is Article 51 a Legitimate Vehicle for the War in Afghanistan or Just a Blanket to Cover Up International War Crimes?*, 9 ILSA J. INT'L & COMP. L. 457, 458 (2003) (stating that the United States received broad military support from nations around the world to deal with the threat of international terrorism).

endorsing the use of force.<sup>26</sup> The Security Council also unanimously declared that an armed attack had occurred on the United States and that, pursuant to Article 51, the United States had the right to use self-defense.<sup>27</sup>

Moreover, NATO declared for the first time in its history that the 9/11 attacks constituted “an armed attack against a member state” and “called upon members to render assistance.”<sup>28</sup> The mission, titled “Enduring Freedom,” involved American and local Afghan forces (known as the Northern Alliance) conducting military operations aimed at toppling the Taliban regime and eliminating Al-Qaeda’s sanctuary in Afghanistan.<sup>29</sup> By early December 2001, Afghanistan had been liberated from the Taliban.<sup>30</sup> But soon thereafter, the question facing the Administration was the legal status of the detainees captured in Afghanistan who intended to continue their attacks against the United States unless they were prevented from doing so.

In response to this problem, the United States began flying captured Taliban and Al-Qaeda detainees, designated as “enemy combatants,” to the U.S. Naval Station at Guantánamo Bay, Cuba on January 10, 2002.<sup>31</sup> The Administration initially intended to try detainees by military

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26. See U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001) (condemning the “horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania”); see also David Abramowitz, *The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43 HARV. INT’L L.J. 71, 72 (2002) (claiming that the United Nations Security Council declared that the acts of September 11 constituted a threat to international peace and security); King, *supra* note 25, at 464 (noting that following September 11, the United Nations Security Council passed two resolutions reaffirming the United States’ right to self-defense).
  27. See U.N. SCOR, *supra* note 26 (affirming the right of the United States to respond to the September 11 terrorist attacks with the use of military force); see also Michael J. Glennon, *Military Action Against Terrorists Under International Law: The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL’Y 539, 542–43 (2002) (stating that the United Nations officially recognized the United States’ right of self-defense); King, *supra* note 25, at 464.
  28. See Wedgwood, *supra* note 10, at 329 (noting that NATO’s belief that the events of 9/11 were a profound threat to international security led it to declare that the attacks amounted to an attack on a member state); see also Andrea Denise Botticelli, Note, *The Premier of the North Atlantic Treaty’s Article V: Is Article V Still a Deterrent?*, 26 SUFFOLK TRANSNAT’L L. REV. 51, 79–80 (2002) (asserting that NATO’s response to the September 11 attacks reaffirmed its alliance and strengthened the coalition against terrorist activity); Grady, *supra* note 24, at 169 (stating that NATO’s invocation of Article V following the September 11 attacks was the first time the Article was invoked in response to an attack on a member state).
  29. See Jinks, *supra* note 25, at 92 (explaining that the United States cooperated with Northern Alliance troops in Afghanistan during Operation Enduring Freedom); see also Mary Ellen O’Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889, 901 (2002) (arguing that because of the close links between the Taliban and Al-Qaeda, the effort of Operation Enduring Freedom to topple the Afghan government would lead to the defeat of Al-Qaeda); Wedgwood, *supra* note 10, at 329 (remarking that American special forces worked closely with the Northern and Eastern Alliance troops in launching a devastating air campaign in response to the Al-Qaeda attacks).
  30. See O’Connell, *supra* note 29, at 904 (proclaiming that the overwhelming use of force against the Taliban caused its defeat in December 2001); see also Wedgwood, *supra* note 10, at 329 (claiming that the war in Afghanistan resulted in the displacement of the Taliban regime); Evan Stephenson, Note, *Does United Nations War Prevention Encourage State-Sponsorship of International Terrorism? An Economic Analysis*, 44 VA. J. INT’L L. 1197, 1221 (2004) (commenting that the United States defeated the Taliban with unprecedented speed).
  31. See Daryl Mundis, *Agora: Military Commissions; The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts*, 96 AM. J. INT’L L. 320, 320 (2002) (finding that within one week after January 10, 2002, the population of “unlawful combatants” at Guantánamo grew to 110); see also Alfred De Zayas, *2003–04 Douglas Mck. Brown Lecture—Vancouver, 19 November 2003: The Status of Guantánamo Bay and the Status of the Detainees*, 37 U.B.C. L. REV. 277, 309 (2004) (stating that on January 10, 2002, the United States began transporting alleged members of the Taliban and Al-Qaeda to the U.S. Naval Base at Guantánamo Bay, Cuba).

commissions, within the framework of the President's military order.<sup>32</sup> Only after military officials found the evidence insufficient to prosecute the detainees did the Administration and the Department of Defense declare the detainees "enemy combatants" who could be detained indefinitely or until the termination of the conflict.<sup>33</sup> Shortly thereafter, the Bush administration signaled on February 7, 2002, that a new war had begun and that new rules were required.<sup>34</sup> Recognizing that global terrorists transcending national boundaries and targeting the innocent were not envisioned when the Geneva Conventions were signed in 1949, the Administration

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32. See Joshua S. Clover, Comment, *"Remember, We're The Good Guys": The Classification and Trial of the Guantánamo Bay Detainees*, 45 S. TEX. L. REV. 351, 353–54 (2004) (arguing that President Bush initially empowered the Secretary of Defense to try the Guantánamo Bay detainees by military commission, although he was reluctant to classify the detainees as POWs); see also Akash R. Desai, Note, *How We Should Think About the Constitutional Status of the Suspected Terrorist Detainees at Guantánamo Bay: Examining Theories that Interpret the Constitution's Scope*, 36 VAND. J. TRANSNAT'L L. 1579, 1582–83 (2003) (stating that the Secretary of Defense was given the authority to use "all means necessary" to ensure that individuals subject to the executive order would be tried by military tribunal); Tim Golden, *Administration Officials Split Over Stalled Military Tribunals*, N.Y. TIMES, Oct. 25, 2004, at A1 (explaining that the Bush administration had planned to have prisoners at Guantánamo Bay prosecuted before military tribunals).
33. See Rosa Ehrenreich Brooks, *War Everywhere, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 677 (2004) (noting that the U.S. government believes both citizen and noncitizen detainees at Guantánamo Bay can be held indefinitely without indictment); see also Jeffrey S. Becker, Comment, *A Legal War on Terrorism: Extending New York v. Quarles and the Departure from Enemy Combatant Designations*, 53 DEPAUL L. REV. 831, 849–50 (2003) (announcing that when a prisoner is labeled an "enemy combatant," the government can hold him in a military camp indefinitely); Golden, *supra* note 32, at A1. According to this article, CIA and military officials were more concerned with interrogation and gathering intelligence than prosecuting detainees in military commissions. The Administration uses the term *enemy combatant*; however, this term confuses the issue. All combatants are enemy combatants, including lawful and unlawful combatants. The proper designation is *unlawful combatant* to specify that the combatant is outside the protections of the Geneva Conventions.
34. See Erin Chlopak, Comment, *Dealing with the Detainees at Guantánamo Bay: Humanitarian and Human Rights Obligations Under the Geneva Conventions*, 9 HUM. RTS. BR. 6, 7 (2002) (announcing that the Geneva Conventions apply to Taliban detainees); see also Clover, *supra* note 32, at 359–60 (explaining the Bush administration policy of distinguishing between the Taliban and Al-Qaeda with regard to the Geneva Convention rights afforded each group); Ari Fleisher, White House Spokesman, Special White House Announcement re: Application of Geneva Conventions in Afghanistan (Feb. 7, 2002), available in LEXIS, Legis Library, Fednew File.



announced a new policy regarding Al-Qaeda and Taliban detainees to fit within the framework of the war on terrorism.<sup>35</sup>

The Administration made four declarations in announcing this policy.<sup>36</sup> First, the GPW, to which both Afghanistan and the United States were a party, applied to the armed conflict in Afghanistan between the Taliban and the United States.<sup>37</sup> Second, the GPW did not apply to the armed conflict in Afghanistan or elsewhere between Al-Qaeda and the United States.<sup>38</sup>

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35. See Sean D. Murphy, ed., *Contemporary Practice of the United States Relating to International Law: General International and U.S. Foreign Relations Law: Executive Branch Memoranda on Status and Permissible Treatment of Detainees*, 98 AM. J. INT'L L. 820, 820–21 (2004) (announcing how the Bush administration would apply the Geneva Conventions to Guantánamo Bay detainees). The International Committee of the Red Cross stated its opposition to this new policy in a press release:

The International Committee of the Red Cross (ICRC) welcomes the United States' reaffirmation of the applicability of the Third Geneva Convention to the international armed conflict in Afghanistan, and its recognition of the treaty's importance and value. International Humanitarian Law foresees that the members of armed forces as well as militias associated to them which are captured by the adversary in an international armed conflict are protected by the Third Geneva Convention. There are divergent views between the United States and the ICRC on the procedures which apply on how to determine that the persons detained are not entitled to prisoner of war status. The United States and the ICRC will pursue their dialogue on this issue. The ICRC remains firmly convinced that compliance with international humanitarian law in no manner constitutes an obstacle to the struggle against terror and crime. International humanitarian law grants the detaining power the right to legally prosecute prisoners of war suspected of having committed war crimes or any other criminal offence prior to or during the hostilities. The United States has demonstrated its respect and support for the ICRC's humanitarian mandate and activities in past and present conflict situations. ICRC delegates continue to be able to visit all persons detained by US forces both in Afghanistan and Guantánamo Bay, in accordance with the organization's mandate set forth in the Third Geneva Convention.

*Id.* at 821.

36. See George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891, 891–92 (2002) (outlining President Bush's views of how the Geneva Conventions should be applied to Taliban and Al-Qaeda detainees); see also Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649, 756–57 (2002) (noting the manner in which the Geneva Conventions were initially applied to prisoners captured in Afghanistan); see Katharine Q. Seelye, *A Nation Challenged: Captives; In Shift, Bush Says Geneva Rules Fit Taliban*, N.Y. TIMES, Feb. 8, 2002, at A1 (explaining President Bush's decision that the Geneva Convention would apply to the Taliban captives being held in Cuba but not to Al-Qaeda detainees).
37. See Bialke, *supra* note 8, at 16 (stating that the United States would treat Taliban detainees according to the Geneva Conventions because Afghanistan is a signatory to the Conventions); see also Desai, *supra* note 32, at 1587–88 (claiming that in response to international criticism, the United States changed its position and stated that captured members of the Taliban would receive protections contained in the Third Convention).
38. See Berta E. Hernandez-Truyol, *Seventh Annual Latcrit Conference, Latcrit VII, Coalition Theory and Praxis: Social Justice Movements and Latcrit Community—Part II Latcritical Perspectives: Individual Liberties, State Security, and the War on Terrorism: Globalizing Terror*, 81 OR. L. REV. 941, 952 (2002) (describing the United States' decision not to apply the Geneva Conventions to Al-Qaeda detainees); see also John Mintz & Mike Allen, *Bush Shifts Position on Detainees; Geneva Conventions to Cover Taliban, but Not Al Qaeda*, WASH. POST, Feb. 8, 2002, at A1 (citing President Bush's declaration that Al-Qaeda detainees would not be covered by the Geneva Conventions); Seelye, *supra* note 36, at A1 (stating that the United States would not apply the Geneva Conventions to Al-Qaeda detainees because Al-Qaeda is a terrorist group and not a Convention signatory).

Third, neither Al-Qaeda nor Taliban members were entitled to POW status.<sup>39</sup> Fourth, the Administration reaffirmed its commitment to the principles of the Geneva Conventions and announced that all detainees would be treated consistently with the Conventions regardless of their legal status.<sup>40</sup> The Administration's reasoning was that "the war on terrorism is a war not envisioned when the Geneva Convention was signed in 1949" and that "the [Third] Convention simply does not cover every situation in which people may be captured or detained, as we see in Afghanistan today."<sup>41</sup>

The reason for the distinction between Taliban and Al-Qaeda detainees, according to the Administration, was that Afghanistan was a party to the Convention; therefore, the Taliban regime, as the de facto government, was entitled to the protections of the Geneva Conventions.<sup>42</sup> Al-Qaeda members, on the other hand, did not deserve the protections of the Geneva Conventions and were not entitled to POW status because they were an international terrorist group and could not be considered a party to the Geneva Conventions.<sup>43</sup>

Even though the Administration regarded the Conventions as applicable to Afghanistan because it was a state party, it determined that Taliban detainees should not be treated as prisoners of war because the Taliban did not meet the four conditions required by Article 4 of the

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39. See Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT'L L.J. 367, 370 (2004) (analyzing the United States' position that Taliban and Al-Qaeda fighters are not entitled to POW status because they are "unlawful combatants"); see also K. Elizabeth Dahlstrom, Comment, *Between Empire and Community: The United States and Multilateralism 2001–2003: A Mid-Term Assessment: Humanitarian Law: The Executive Policy Toward Detention and Trial of Foreign Citizens at Guantánamo Bay*, 21 BERKELEY J. INT'L L. 662, 662 (2003) (explaining the initial Bush administration policy of not granting POW status to Taliban or Al-Qaeda detainees); Desai, *supra* note 32, at 1587–88 (concluding that in response to international criticism the United States changed its position and stated that captured members of the Taliban would receive protections contained in the Third Geneva Convention).
40. See Aldrich, *supra* note 36, at 891–92 (describing President Bush's announcement that Taliban and Al-Qaeda prisoners "are to be treated in a manner consistent with the general principles of the Geneva Convention"); see also Heather Anne Maddox, Comment, *After the Dust Settles: Military Tribunal Justice for Terrorists After September 11, 2001*, 28 N.C. J. INT'L L. & COM. REG. 421, 451 (2002) (asserting that the United States has maintained it is committed to the principles of the Geneva Convention).
41. See *Guantánamo Bay Cases*, 2005 U.S. Dist. LEXIS, at \*110–11 (citing to an instance not excluded from the coverage of the Third Geneva Convention); see also Melysa H. Sperber, Note, *John Walker Lindh and Yaser Esam Hamdi: Closing the Loophole in International Humanitarian Law for American Nationals Captured Abroad While Fighting with Enemy Forces*, 40 AM. CRIM. L. REV. 159, 164 (2003) (highlighting that a detainee, as a result of his or her nationality, may not be afforded the legal protections generally available under the Third Convention).
42. See *Guantánamo Bay*, 2005 U.S. Dist. LEXIS at \*105 (citing to an example which has not been found to be excluded from the coverage of the Third Geneva Convention); see also Bruce Zagaris, *President Bush Changes and Says Taliban Covered by Geneva Convention*, 2002 INT'L ENFORCEMENT L. REP. (revealing that the reason President Bush distinguished between the Taliban and Al-Qaeda under the Geneva Convention is because Afghanistan was a signatory to the Convention).
43. See *United States v. Arnaout*, 236 F. Supp. 2d 916, 921 (2003) (stating that a terrorist group like Al-Qaeda is ineligible to receive the protections of the Geneva Conventions); *U.S. Puts Taliban Detainees Under Geneva Convention*, ASIAN POL. NEWS, Feb. 11, 2002, at 1 (describing Al-Qaeda as an international terrorist society, as quoted by Ari Fleisher, White House spokesman); see also White House Fact Sheet: Status of Detainees at Guantánamo (Feb. 7, 2002), available at <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html> (last visited Feb. 15, 2005); Fleisher, *supra* note 34 (quoting the White House Fact Sheet concerning Al-Qaeda as a nonparty to the Geneva Conventions and its status as an international terrorist group).

GPW.<sup>44</sup> The Taliban violated these conditions, according to the Administration, because it did not effectively distinguish its members from the civilian population and, by providing “support to the unlawful terrorist objectives of the Al-Qaeda,” it did not conduct its operations in accordance with the laws of war.<sup>45</sup> Therefore, under the terms of the GPW, neither Al-Qaeda nor Taliban detainees were entitled to POW status despite the distinction between the groups.<sup>46</sup>

Despite its declaration that neither group would be protected under the GPW as POWs, the Administration reaffirmed its longstanding commitment to the Conventions and announced that the detainees would be afforded many of its privileges as a matter of policy.<sup>47</sup> Certain other privileges normally afforded to POWs would be withheld, such as “access to a canteen to purchase food, soap and tobacco, a monthly advance of pay, the ability to have and consult personal financial accounts, the ability to receive scientific equipment, musical instruments, or sports outfits.”<sup>48</sup> According to one Administration official, terrorists who have attempted to kill Americans should not “receive stipends from the American taxpayers.”<sup>49</sup>

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44. See *United States v. Lindh*, 212 F. Supp. 2d 541, 572 (2002) (holding that Taliban members were unlawful combatants and therefore could not be entitled to POW status); see also Fleisher, *supra* note 34 (explaining the four conditions of Article 4 that entitle belligerents to POW status: “[T]hey would have to be part of a military hierarchy, they would have to have worn uniforms or other distinctive signs visible at a distance, they would have to have carried arms openly, and they would have had to have conducted their military operations in accordance with the laws and customs of war.”). See generally Evan J. Wallach, *Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander?*, 2003 ARMY LAW. 18, 24 (outlining the four conditions the Taliban would have to meet, as required by Article 4 of the GPW, to qualify for POW treatment).

45. See Bialke, *supra* note 8, at 27 (remarking that the Taliban failed to meet the Geneva Conventions’ criteria by illegally choosing not to distinguish itself from the rest of the civilian population); see also Robert K. Goldman & Brian D. Tittmore, *Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law*, AM. SOC’Y INT’L L., at 27 (2002), at <http://www.asil.org/taskforce/goldman.pdf> (last visited Feb. 7, 2005); see Press Conference, Dep’t of Defense, Secretary Rumsfeld & General Myers, Feb. 8, 2002, at [www.defenselink.mil/news/Feb.2002/t02082002\\_t02085d.html](http://www.defenselink.mil/news/Feb.2002/t02082002_t02085d.html); White House Fact Sheet, *supra* note 43. Regarding the Taliban’s treatment under the Geneva Conventions, Secretary of Defense Donald Rumsfeld argued that the GPW requires soldiers to “wear uniforms that distinguish themselves from the civilian population,” but that the Taliban “did not wear distinctive signs, insignias, symbols, or uniforms. To the contrary, far from seeking to distinguish themselves from the civilian population of Afghanistan, they sought to blend in with the civilian non-combatants, hiding in mosques and populated areas.” The Taliban “were not organized in military units, as such, with identifiable chains of command; indeed, Al-Qaeda forces make up portions of their forces.” *Id.*

46. See Lugosi, *supra* note 8, at 239 n.103 (concluding that neither the Taliban nor Al-Qaeda are entitled to POW status); see also White House Fact Sheet, *supra* note 43 (stating the President’s view that neither Al-Qaeda nor the Taliban would have POW status because Al-Qaeda is not a party to the Geneva Convention and the Taliban detainees do not meet the qualifications).

47. See Steven R. Swanson, *Enemy Combatants and the Writ of Habeas Corpus*, 35 ARIZ. ST. L.J. 939, 945 (2003) (noting that although the Taliban did not qualify for POW status, it would still be afforded most of the privileges awarded to POWs); White House Fact Sheet, *supra* note 43 (following the provisions and commitments of the Geneva Conventions). See generally Dahlstrom, *supra* note 39, at 676 (noting the commitment to the principles of the Convention and that all prisoners would be treated humanely).

48. See Maddox, *supra* note 40, at 452 (listing specific privileges given to POWs under the Geneva Conventions which will not be afforded to detainees); White House Fact Sheet, *supra* note 43 (noting the specific provisions mentioned in the Convention). See generally Jinks, *supra* note 25, at 93 (asserting that under the Geneva Conventions, POWs are entitled to certain specific privileges).

49. See Walker, *supra* note 6, at 492–93 (stating that the US would be involved in hunting down people who are terrorist supporters); Matthew Engel & Duncan Campbell, *Amnesty Dismisses New US Line on Captives*, GUARDIAN, Feb. 8, 2002 (quoting Ari Fleisher, former White House spokesman, that terrorists should not receive the stipends from American taxpayers because under the Geneva Convention they are not considered to have POW status), available at <http://www.guardian.co.uk/afghanistan/story/0,1284,646942,00.html>; see also Fleisher, *supra* note 34 (finding the Administration’s classification of the detainees and the distinction made between Al-Qaeda and Taliban to be at odds with the President’s earlier statement that the United States “would make no distinction between the terrorists who committed the attacks and those who harbor them”).

## II. The Geneva Conventions

The Geneva Conventions establish the various levels of treatment that combatants should be afforded, depending upon their status.<sup>50</sup> The Geneva Conventions follow earlier efforts in 1899, 1907 and 1929, known as the Hague Conventions, to provide legal protection to combatants.<sup>51</sup> The Hague Convention of 1907 established the rules of conduct against the enemy,<sup>52</sup> while the Geneva Conventions set the rules for the treatment of the victims of war.<sup>53</sup> As treaties, the Geneva Conventions establish legal relationships only between nation states, rather than between nation states and private groups or organizations.<sup>54</sup> Article 2, common to all the Conventions, states that the Conventions apply “to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”<sup>55</sup>

The Geneva Conventions were drafted in 1949 and consist of four separate treaties:<sup>56</sup> (1) Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field (First Convention),<sup>57</sup> (2) Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (Second Con-

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50. See Geneva Convention Relative to Protection of War Victims, 6 U.S.T. 3316, 1949 U.S.T. 483 (setting out the treatment of combatants under this U.S. treaty in Articles 12 through 16) [hereinafter Protection of War Victims]; see also Nathan A. Canestaro, “Small Wars” and the Law: Options for Prosecuting the Insurgents in Iraq, 43 COLUM. J. TRANSNAT’L L. 73, 101 (2004) (describing the different treatment levels and types of status under the Geneva Convention); John Cerone, *Status of Detainees in International Armed Conflict, and Their Protection in the Course of Criminal Proceedings*, AM. SOC’Y INT’L L. INSIGHTS (Jan. 2002) (stating that the Geneva Convention provides different levels of protection), available at <http://www.asil.org/insights/insigh81.htm>.
  51. See Protection of War Victims, *supra* note 50 (stating in Article 135 that this treaty complements the provisions in the Hague Conventions concerning the legal protections afforded combatants); *Lindh*, 212 F. Supp. 2d at 557 (noting that the Geneva Convention followed the Hague Convention by setting out legal protections to combatants).
  52. See Convention Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, Annex art. 1, 36 Stat. 2277, T.S. No. 539 (Jan. 26, 1910) (codifying the laws of rules for enemy combatants).
  53. See Memorandum from John Yoo & Robert J. Delahunty, Office of Legal Counsel, Department of Justice, to William J. Haynes II, General Counsel, Department of Defense 5 (Jan. 9, 2002) [hereinafter Yoo/Delahunty Memo] (discussing whether the Geneva Conventions apply to the Taliban), at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf> (last visited Feb. 15, 2005); see also Jean Pictet, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, INTERNATIONAL COMMITTEE OF THE RED CROSS at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/AA9FC0E89F054EA6C1256C55004213D8> (last visited Feb. 15, 2005) [hereinafter ICRC] (discussing the treatment of the detainees in Guantánamo Bay and Afghanistan).
  54. See Vienna Convention on the Law of Treaties, May 23, 1969, 1966 U.S.T. Lexis 521 (stating that a “treaty means an international agreement concluded between States in written form and governed by international law. . . .”); see also *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 253 (1984) (holding that a “treaty is in the nature of a contract between nations”).
  55. See Prisoners of War, *supra* note 15, at 3318 (explaining that the treaty does not apply in all situations, but it does apply when a territory is occupied and in all cases of declared war).
  56. See Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 VA. J. INT’L L. 1025, 1026 (2004) (noting that the Geneva Conventions consist of four different treaties as well as two additional protocols added in 1977); see also Derek Jinks, *The Changing Laws of War: Do We Need a New Legal Regime After September 11?*, 79 NOTRE DAME L. REV. 1493, 1493 n.1 (2004) (outlining the body of rules for the “law of war” in the four distinct treaties of the Geneva Conventions).
  57. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

vention),<sup>58</sup> (3) Convention Relative to the Treatment of Prisoners of War (Third Convention or GPW)<sup>59</sup> and (4) Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Convention or Civilians Convention).<sup>60</sup> This article is concerned only with the GPW and the Civilians Convention.

All the Conventions contain common Article 3, which governs the conduct of states in a conflict that is not between “High Contracting Parties to the Conventions.”<sup>61</sup> Thus, common

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58. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 7 U.N.T.S. 85.

59. See Prisoners of War, *supra* note 15, at 3319 (setting forth the qualifications necessary to obtain the status of prisoner of war for the purposes of the Geneva Convention); Guantánamo Detainee Cases, 2005 U.S. Dist. LEXIS 1236, at \*106–07 (noting that the Geneva Convention is a self-executing document, thus binding the contracting parties without the need for additional enacting legislation to be passed by each participant country); see also Emanuel Gross, *Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy Have the Right to Hold Terrorists as Bargaining Chips?*, 18 ARIZ. J. INT’L & COMP. L. 721, 735 (2001) (stating that in order for a detainee to qualify as a POW, he must have acted in compliance with the laws and customs of war).

60. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, 3518, 75 U.N.T.S. 287, 289, 1949 U.S.T. LEXIS 483 (establishing who qualifies for protection as a civilian for the purposes of the Geneva Convention); see also Lucien J. Dhooze, *The Alien Tort Claims Act and the Modern Transnational Enterprise: Deconstructing the Mythology of Judicial Activism*, 35 GEO. J. INT’L L. 3, 20 (2003) (explaining the way in which the four separate documents of the Geneva Conventions interrelate); Gross, *supra* note 59, at 1193 (explaining that the Geneva Convention defines civilians negatively by setting forth who is not a civilian).

61. See Yoo/Delahunty Memo, *supra* note 53 (remarking that universal Article 3 of the Geneva Conventions is unique because it discusses conflict that is not between the high contracting parties); see also ICRC, *supra* note 53, at 28 (recognizing that the Geneva Conventions before 1949 were designed to assist the victims of wars between states and noting, “[T]he Red Cross has long been trying to aid the victims of civil wars and internal conflicts, the dangers of which are sometimes greater than those of international wars.” *Id.*). See generally Antonia Sherman, Note, *Sympathy for the Devil: Examining a Defendant’s Right to Confront Before the International War Crimes Tribunal*, 10 EMORY INT’L L. REV. 833 (1996) (opining that universal Article 3 of the Geneva Conventions should be applied to both high contracting parties and those groups not a party to the Conventions).

Article 3 may require high contracting parties to follow certain rules even if other parties to the conflict, such as an insurgent group, are not signatories to the Convention.<sup>62</sup>

In international armed conflicts, the only two categories of “protected persons” under the GPW are (1) combatants who adhere to certain criteria and (2) civilians.<sup>63</sup> Combatants who comply with the criteria become POWs with the attendant privileges and protections under the GPW.<sup>64</sup> Combatants who do not fulfill these conditions are deemed “unlawful combatants” and are entitled to different protections.<sup>65</sup> A discussion follows of the criteria for and the rights afforded to each category of protected persons.

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62. See Yoo/Delahunty Memo, *supra* note 53. Common Article 3 states:

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

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

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

See also John F. Murphy, *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. J. 1, 17–18 (1999) (expressing that although the requirements of Article 3 are only a minimum, the article itself leaves unclear what level of hostility is necessary to trigger these minimum levels); Sperber, *supra* note 41, at 174–75 (commenting that the requirements established by universal Article 3 are the minimum standards that must be met, and should be viewed as inviting a greater level of protection).

63. See Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 109 (2004) (stating that each of the four Geneva Conventions establishes detailed rules for protected persons); see also Marco Sassoli, *Use and Abuse of the Laws of War in the “War on Terrorism,”* 22 LAW & INEQ. 195, 203 (2004) (recognizing that if an individual does not qualify as either type of protected person, said individual need only be shown the fundamental guarantees of humane treatment); Christopher M. Supernor, *International Bounty Hunters for War Criminals: Privatizing the Enforcement of Justice*, 50 A.F. L. REV. 215, 218–19 (2001) (concluding that protected persons include the sick and wounded, prisoners of war and civilians who are under the control of an occupying force).

64. See Callen, *supra* note 56, at 1026 (explaining that the added protection afforded combatants who act in accord with the GPW are strong incentives to act lawfully); see also Jonathan G. Odom, *Beyond Arm Bands and Arms Banned: Chaplains, Armed Conflict, and the Law*, 49 NAVAL L. REV. 1, 19–20 (2002) (showing that “Geneva Law” encompasses the two additional 1977 protocols); Robert A. Ramey, *Armed Conflict on the Final Frontier: The Law of War in Space*, 48 A.F. L. REV. 1, 50–51 (2000) (illustrating that if a chaplain bears a weapon he would no longer be considered a civilian and would instead be considered an unlawful enemy combatant and therefore not protected by the GPW).

65. See Callen, *supra* note 56, at 1026–27 (emphasizing that unlawful combatants lose the protection afforded by the GPW); see also Ramey, *supra* note 64, at 48–49 (stressing that unlawful combatants do not lose all humanitarian protections; however, they are unable to claim POW status if captured); Martin S. Sheffer, *Does Absolute Power Corrupt Absolutely? Part I. A Theoretical Review of Presidential War Powers*, 24 OKLA. CITY U. L. REV. 233, 267 n.10 (1999) (establishing that unlawful combatants not only are unprotected by the GPW, but also can be subject to trial and punishment for the actions that have rendered them unlawful).

### A. Criteria for and Rights Afforded to Prisoners of War

Lawful combatants, or prisoners of war, enjoy the greatest protection under international law pursuant to the GPW.<sup>66</sup> They are defined as “members of the armed forces of a party to the international armed conflict”<sup>67</sup> and are authorized by a party to fight in the conflict.<sup>68</sup>

Article 4 of the GPW delineates the criteria for a combatant to qualify as a POW.<sup>69</sup> It classifies prisoners of war as belonging to one of several categories, only two of which are relevant to this discussion. The first category includes members of the armed forces of a party to the conflict.<sup>70</sup> Members of regular armed forces are presumed to be entitled to POW protection as long as they are captured while in uniform.<sup>71</sup> The second category includes members of other militias or volunteer corps, also known as members of irregular groups, as long as they

66. See *United States v. Lindh*, 212 F. Supp. 2d 541, 553 (2002) (stating that no prisoner of war may be tried for an act that is not forbidden by international law); see also Jinks, *supra* note 56, at 1502–03 (setting forth the list of rights enjoyed by prisoners of war, including humane treatment, due process, right of release at the end of hostile activities and the right to communicate with protective agencies); John C. Yoo & James C. Ho, *York University–University of Virginia Conference on Exploring the Limits of International Law: The Status of Terrorists*, 44 VA. J. INT’L L. 207, 222 (2003) (reiterating that unlawful combatants have no right to engage in hostilities).

67. See Christopher M. Evans, *Terrorism on Trial: The President’s Constitutional Authority to Order the Prosecution of Suspected Terrorists by Military Commission*, 51 DUKE L.J. 1831, 1851 (2002) (recognizing that the term *international armed conflict* is somewhat ambiguous and has been construed extremely broadly by the international community). *But see* Wallach, *supra* note 44, at 21–22 (suggesting that if current conflict in Afghanistan is deemed an international armed conflict, then the GPW would apply, as the Afghan rebels would be combatants).

68. See Davis Brown, *Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses*, 11 CARDOZO J. INT’L & COMP. L. 1, 49–50 (2003) (stating that an entire population may be considered combatants and therefore authorized to fight in the conflict). See generally Lawrence Azubuike, *Status of Taliban and Al Qaeda Soldiers: Another Viewpoint*, 19 CONN. J. INT’L L. 127, 143 (2003) (discussing the Geneva Conventions’ definition of who is a “party to the conflict”).

69. See *Prisoners of War*, *supra* note 15, at 3319 (setting forth the qualifications necessary to obtain the status of prisoner of war for the purposes of the Geneva Convention); see also William H. Ferrell, III, *No Shirt, No Shoes, No Status: Uniforms, Distinction, and Special Operations in International Armed Conflict*, 178 MIL. L. REV. 94, 102 (2003) (enumerating the four criteria that must be satisfied under Article 4 of the Third Convention for a combatant to be a POW). See generally Bialke, *supra* note 8, at 2 (opining that in certain circumstances a presumption of unlawful combatantry is allowable).

70. See Cerone, *supra* note 50 (discussing whether diversity of nationality is a requirement for a combatant to be granted POW status); see also ICRC, *supra* note 53, at 52.

The Commentary to Article 4 states that: the drafters of the 1949 Convention, like those of the Hague Convention, considered that it was unnecessary to specify the sign which members of armed forces should have for purposes of recognition. It is the duty of each State to take steps so that members of its armed forces can be immediately recognized as such and to see to it that they are easily distinguishable from members of the enemy armed forces or from civilians. The Convention does not provide for any reciprocal notification of uniforms or insignia, but merely assumes that such items will be well known and that there can be no room for doubt.

See generally Derek Jinks, *International Human Rights Law and the War on Terrorism*, 31 DENV. J. INT’L L. & POL’Y 58, 64 (2002) (revealing that the rules concerning POWs can be suspended in very limited instances).

71. See Goldman & Tittmore, *supra* note 45 (quoting White House Fact Sheet); see also Michel Bourbonniere & Louis Haack, *Military Aircraft and International Law: Chicago Opus 3*, 66 J. AIR L. & COM. 885, 904–05 (2001) (suggesting that “military uniforms” for the purpose of protection under the Geneva Convention can consist simply of a special identification card); Maddox, *supra* note 40, at 446–47 (stating that the wearing of a uniform is one of the primary requirements for the combatant to be classified as a POW).

fulfill several conditions.<sup>72</sup> Members of this second group are not presumed to be entitled to POW status by law or custom<sup>73</sup> unless they meet the criteria set forth in Article 4A(2):

1. they must belong to an organized group;
2. the group must belong to a party to the conflict;
3. the group must be commanded by a person responsible for his subordinates;
4. the group must ensure that its members have a fixed, distinctive sign recognizable from a distance;
5. the group must ensure that its members carry their arms openly; and
6. the group must ensure that its members conduct their operations in accordance with the laws and customs of war.<sup>74</sup>

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72. See Cerone, *supra* note 50 (discussing whether diversity of nationality is a requirement for a combatant to be granted POW status); see also ICRC, *supra* note 53, at 57. Article 4 does not establish nationality as a criteria for determining status. *Id.* The ICRC commentary states, "Resistance movements must be fighting on behalf of a 'Party to the conflict' in the sense of Article 2, otherwise the provisions of Article 3 relating to non-international conflicts are applicable, since such militias and volunteer corps are not entitled to style themselves a 'Party to the conflict.'" *Id.* See generally Tracy Fisher, Note, *At Risk in No-Man's Land: United States Peacekeepers, Prisoners of "War," and the Convention on the Safety of United Nations and Associated Personnel*, 85 MINN. L. REV. 663, 672 n.51 (2000) (remarking that although the Geneva Convention does give POW status to volunteer corps, it does so only for militias forming part of such combatants).

73. See Goldman & Tittmore, *supra* note 45 (quoting White House Fact Sheet); see also James A.R. Nafziger, *The Grave New World of Terrorism: A Lawyer's View*, 31 DENV. J. INT'L L. & POL'Y 1, 13 (2003) (suggesting that although the Geneva Convention of 1949 applies to the Taliban, they are presumed to be unlawful combatants and therefore outside the protections of the laws of war); Desai, *supra* note 32, at 1586 n.46 (setting forth the requirements in Article 4 of the Geneva Convention necessary to achieve POW status).

74. See Prisoners of War, *supra* note 15, at 3319. The text of Article 4A(2) states:

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

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

See also Goldman & Tittmore, *supra* note 45 (quoting White House Fact Sheet); Omar Akbar, Note, *Losing Geneva in Guantánamo Bay*, 89 IOWA L. REV. 195, 201 (2003) (noting that Article 4A(1) provides POW status for certain individuals, the requirements of which are laid out in Article 4A(2)).



The first requirement, that irregulars belong to an organized group, recognizes the intent of the drafters that irregulars have the characteristics found in armed forces with regard to “discipline, hierarchy, responsibility, and honor.”<sup>75</sup> This requirement is closely related to the third requirement that the irregulars be commanded by a person responsible for his subordinates.<sup>76</sup>

The second requirement, that irregulars belong to a party to the conflict, mandates that the group fight for a “State Party that is engaged in an international armed conflict within the meaning of common Article 2 of the 1949 Conventions.”<sup>77</sup> The key part of this requirement is the relationship between the irregular and the party to the conflict.<sup>78</sup> This requirement prohibits individuals or groups from engaging in “private warfare” against a state party involved in armed conflict.<sup>79</sup> Indeed, “[r]esistance movements must be fighting on behalf of a ‘Party to the conflict’ in the sense of Article 2, otherwise the provisions of Article 3 relating to non-international conflicts are applicable, since such militias and volunteer corps are not entitled to style themselves a ‘Party to the conflict.’”<sup>80</sup>

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75. See Goldman & Tittmore, *supra* note 45 (quoting White House Fact Sheet); see also Ferrell, *supra* note 69, at 101 (opining that the drafters created the four criteria of Article 4A(2) because they believed these criteria were inherent in the recognized armed forces of a state. See generally Christopher C. Burris, Comment, *Re-examining the Prisoner of War Status of PLO Fedayeen*, 22 N.C. J. INT'L L. & COM. REG. 943 (1997) (discussing an instance in which POW status was withheld on the basis of a lack of uniform, without regard to the possible exception of Article 4A(2)).
  76. See Goldman & Tittmore, *supra* note 45 (quoting White House Fact Sheet); see also George H. Aldrich, *New Life for the Laws of War*, 75 AM. J. INT'L L. 764, 770–71 (1981) (advancing that irregulars may still pass the first prong of the Article 4A(2) test even though the adverse party does not recognize the person(s) in command of the militia); Burris, *supra* note 75, at 971 (demonstrating the difficulty in drawing a line between a group commanded by someone responsible for his subordinates and a group left to its own volition).
  77. See Prisoners of War, *supra* note 15, at 3316 (asserting that in order for irregular armed forces to be protected as prisoners of war they must first belong to a party to the conflict); see also Aldrich, *supra* note 76, at 768 (referring to the Convention Relative to the Treatment of Prisoners of War); Goldman & Tittmore, *supra* note 45, at 11–12.
  78. See Azubuike, *supra* note 68, at 154 (explaining that international law requires that “irregulars” have some relationship to a party to the conflict); see also Goldman & Tittmore, *supra* note 45, at 12 (commenting that resistance groups must have a de facto relationship with a party to the conflict); Suzannah Linton, *Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor*, 25 MELB. U. L. REV. 122, 160–61 (2001).
  79. See Bialke, *supra* note 8, at 35–37 (emphasizing that “private warfare” is prohibited by international law); see also Yoram Dinstein, *Humanitarian Law on the Conflict in Afghanistan*, 96 AM. SOC'Y INT'L L. PROC. 23 (2003) (stating that private warfare has been banned since the mid-nineteenth century); Goldman & Tittmore, *supra* note 45, at 12 (suggesting that the requirement that “irregulars” be affiliated with a party to the conflict is intended to prevent “private warfare”).
  80. See ICRC, *supra* note 53, at 57 (commenting on the applicability of Article III of the Convention Relative to the Treatment of Prisoners of War). See generally Anthony Cullen, *The Parameters of Internal Armed Conflict in International Humanitarian Law*, 12 U. MIAMI INT'L & COMP. L. REV. 189, 193–94 (2004) (stating that Article 3 of the Convention Relative to the Treatment of Prisoners of War applies to nonstate actors in an armed conflict); Robert Kogod Goldman, *International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts*, 9 AM. U. J. INT'L L. & POL'Y 49, 57 (1993) (discussing the proper application of Article 3 of the Convention Relative to the Treatment of Prisoners of War).

The third requirement, that irregulars be commanded by a person responsible for his subordinates,<sup>81</sup> is, as noted, closely related to the first. Article 4 does not specify the leader's qualifications or how he obtains his authority—he could be an officer or a civilian.<sup>82</sup> The essential aspect is that the commander is responsible for the actions taken under his orders and that he is considered similar to a military commander with respect to control and discipline of members of the irregular group.<sup>83</sup> In other words, “[h]is competence must be considered in the same way as that of a military commander.”<sup>84</sup>

The fourth requirement, that irregulars have a fixed distinctive sign, may be satisfied by something less than the wearing of a uniform, such as a distinctive sign that is recognizable at a distance and clearly distinguishes the irregulars from civilians.<sup>85</sup> “[F]or partisans a distinctive sign replaces a uniform; it is therefore an essential factor of loyalty in the struggle and must be worn constantly, in all circumstances.”<sup>86</sup> However, there is no international agreement as to what

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81. See Prisoners of War, *supra* note 15, at 3316 (stating that “irregular” forces must have a commander who is responsible for the actions in order to be protected by the Convention as a prisoner of war); see also Burris, *supra* note 75, at 976–78 (1997) (referring to a military court case in which members of the Palestinian Front for the Liberation of Palestine were denied POW status because they failed to show that they were commanded by a person responsible for their actions); 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, 373 (2003) (arguing that some of the 9/11 hijackers may have been able to fulfill this requirement if they were subject to some form of a military hierarchy within Al-Qaeda).
  82. See Goldman & Tittmore, *supra* note 45, at 12 (highlighting the absence of a definitive rule regarding who may be considered a commander of “irregulars”); see also Murphy, *supra* note 35, at 480 (arguing that Taliban detainees are not prisoners of war because they are not commanded by a military hierarchy). See generally Canestaro, *supra* note 50, at 100–01 (stating that this requirement was first codified in the Brussels Declaration of 1874).
  83. See Goldman & Tittmore, *supra* note 45, at 12 (noting that the leader of the irregulars should be similar to a military commander); see also U.S. DEPT OF THE ARMY, FIELD MANUAL 27-10: THE LAW OF LAND WARFARE ch. 3, § 1, para. 64(a) (1976) [hereinafter ARMY FIELD MANUAL] (stating that the commander of the “irregular” forces should be a commissioned officer or some other person of position or authority), available at <http://faculty.ed.umuc.edu/~nstanton/FM27-10.htm> (last visited Feb. 7, 2005); Bialke, *supra* note 8, at 23 (detailing factors to consider in determining whether “irregulars” are operating within a military hierarchical structure).
  84. See Prisoners of War, *supra* note 15, at 3316 (commenting on the Geneva Conventions); see also Michael C. Dorf, *What is an “Unlawful Combatant,” and Why It Matters: The Status of Detained Al Qaeda and Taliban Fighters*, at <http://writ.news.findlaw.com/dorf/20020123.html> (Jan. 23, 2002) (suggesting that the Taliban may satisfy the requirement because it had a structure more similar to the military than to Al-Qaeda) (last visited Feb. 7, 2005). See generally CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW 159 (Roy Gutman & David Reiff eds., 1999) (indicating that the requirement of having a commander is intended to ensure that “irregulars” will follow the laws of war), available at <http://www.crimesofwar.org/thebook/guerrillas.html> (last visited Feb. 7, 2005).
  85. See Prisoners of War, *supra* note 15, at 3316 (stating that “irregulars” must wear a visible distinctive sign in order to be granted POW status); see also Goldman & Tittmore, *supra* note 45, at 13 (explaining that something less than an actual uniform can constitute compliance with the rule); ARMY FIELD MANUAL, *supra* note 83, at ch. 3, § 1, para. 64(b) (specifying that a helmet or headdress that clearly designates “irregulars” from civilians will suffice).
  86. See Prisoners of War, *supra* note 15, at 3316 (commenting on the “distinctive sign” requirement of the Geneva Convention Relative to the Treatment of Prisoners of War); see also Ferrell, *supra* note 69, at 106 (stating that the distinctive sign must be continuously worn). But see Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT’L L. 1, 48 (2004) (referring to Geneva Convention Additional Protocol I, which provides for an exception to the rule of wearing a distinctive sign continuously).

constitutes a “distinctive sign.”<sup>87</sup> Although customary international law does not require irregulars to distinguish themselves from civilians by wearing a traditional military uniform,<sup>88</sup> the critical aspect of this fourth requirement is that the sign or mode of dress be visible to the naked eye.<sup>89</sup>

The fifth requirement, that of carrying arms openly, prevents irregulars from gaining unfair advantage and surprise against regular forces by concealing their weapons from an approaching enemy.<sup>90</sup> “[T]he enemy must be able to recognize partisans as combatants in the same way as members of armed forces, whatever their weapons.”<sup>91</sup>

The sixth requirement, that irregulars must conduct their operations in accordance with the laws of war, declares that irregulars must engage only in lawful attacks against the enemy.<sup>92</sup> Irregulars are still bound by the laws and customs of war and must observe treaties prohibiting certain activities.<sup>93</sup>

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87. See Goldman & Tittlemore, *supra* note 45, at 13 (noting that there is no international consensus as to what constitutes a distinctive sign); see also Bialke, *supra* note 8, at 23–25 (stating that a military uniform is preferable but at a minimum a sign that is visible from a distance will suffice). See generally Jordan J. Paust, Symposium, *Current Pressures on International Humanitarian Law: War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT’L L. 325, 334 (2003) (questioning how this requirement applies to U.S. soldiers in Afghanistan who wear traditional Afghan clothing to blend in).

88. See Goldman & Tittlemore, *supra* note 45, at 13 (noting that something less than a uniform may constitute a distinctive sign). See generally Mofidi & Eckert, *supra* note 12, at 68; Thomas J. Lepri, Note, *Safeguarding the Enemy Within: The Need for Procedural Protections for U.S. Citizens Detained as Enemy Combatants Under Ex Parte Quirin*, 71 FORDHAM L. REV. 2565, 2572 (2003) (stating that a distinctive sign is required in order to gain POW status).

89. See Goldman & Tittlemore, *supra* note 45, at 11–12 (stressing that the important thing about the distinctive sign is that it be visible); see also Paul Butler, *By Any Means Necessary: Using Violence and Subversion to Change Unjust Law*, 50 UCLA L. REV. 721, 760 (2003) (stating that the distinctive sign must be visible); Aldrich, *supra* note 36, at 895 (noting that because Taliban members failed to wear a distinctive sign visible from a distance, they therefore do not qualify for POW status).

90. See Prisoners of War, *supra* note 15, at 3316 (asserting that irregulars must carry their arms openly); see also Goldman & Tittlemore, *supra* note 45, at 13 (stating that this requirement is intended to create a level playing field in armed conflicts); Emanuel Gross, *The Laws of War Waged Between Democratic States and Terrorist Organizations: Real or Illusive*, 15 FLA J. INT’L L. 389, 420–21 (2003) (suggesting that the carrying of arms openly is intended to alert the parties to the conflict as to whom they are fighting).

91. See ICRC, *supra* note 53, at 61 (commenting on the requirement that irregulars carry their weapons openly); see also Goldman & Tittlemore, *supra* note 45, at 13 (referring to the ICRC Commentary, which says that irregulars must be recognizable); Gross, *supra* note 90, at 420–21 (suggesting that the carrying of arms openly is intended to alert the parties to the conflict as to whom they are fighting).

92. See Prisoners of War, *supra* note 15, at 3316 (asserting that irregulars must follow the rules of war); see also Christopher L. Blakesley, *Ruminations on Terrorism & Anti-Terrorism Law & Literature*, 57 U. MIAMI L. REV. 1041, 1117 (2003) (referring to a statement from the White House indicating that Taliban fighters are not prisoners of war because they failed to follow the rules of war); Mofidi & Eckert, *supra* note 12, at 74 (arguing that terrorists are not protected by the Convention because they target civilians in violation of the laws of war).

93. See Evans, *supra* note 67, at 1846–47 (arguing that terrorists should not receive POW status because their acts are so egregious as to rise to the level of war crimes). See generally Arturo Carrillo-Suarez, *Hors de Logique: Contemporary Issues in International Humanitarian Law as Applied to Internal Armed Conflict*, 15 AM. U. INT’L L. REV. 1, 64–65 (1999) (questioning how international law applies to paramilitary fighters in Columbia who target civilians).

In all their operations, they must be guided by the moral criteria which, in the absence of written provisions, must direct the conscience of man. . . . They may not attack civilians or disarmed persons and must, in all their operations, respect the principles of honour and loyalty as they expect their enemies to do.<sup>94</sup>

In addition to the above criteria for establishing POW status, Article 5 of the GPW provides that detainees should be classified as prisoners of war should there be any doubt about their status.

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.<sup>95</sup>

After satisfying the preconditions for POW status, prisoners of war may actively participate in the hostilities and may not be punished for doing so.<sup>96</sup> The purpose of detaining POWs is not to punish them, but to prevent them from returning to the fight.<sup>97</sup> They are entitled to “combat immunity,”<sup>98</sup> which means they may “kill or wound enemy combatants, destroy other

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94. See ICRC, *supra* note 53, at 61; see also Mofidi & Eckert, *supra* note 12, at 74 (stating that terrorists should not receive POW status because they conceal their intent to use force, hide amongst civilians and target civilians in violation of the laws of war). See generally Jan Crawford Greenburg, *U.S. Aims to Prosecute Leaders: Effort Is Seen as Crucial Deterrent Against War Crimes*, CHI. TRIB., Apr. 14, 2003, at 2 (detailing practices of the Iraqi armed forces that violate the customary rules of war).

95. See Sassoli, *supra* note 63, at 205 (explaining that while a combatant's status is being determined, he must be treated as a POW); see also Sperber, *supra* note 41, at 201 (indicating that official commentary on Article 5 ensures POW protections to persons whose status is in doubt until a competent tribunal decides otherwise).

96. See Karen L. Douglas, *Contractors Accompanying the Force: Empowering Commanders with Emergency Change Authority*, 55 A.F. L. REV. 127, 134 (2004) (asserting that combatants have the right to participate directly in hostilities and are afforded POW status); Sassoli, *supra* note 63, at 204 (noting that combatants have a right to participate actively in hostilities and may not be punished for it); Lisa L. Turner & Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1, 32 (2001) (recognizing that participation in hostilities would be lawful for a combatant).

97. See Mofidi & Eckert, *supra* note 12, at 90 (remarking that the Third Geneva Convention prescribes measures to keep captured prisoners securely captive); Sassoli, *supra* note 63, at 205 (noting that prisoners of war may be interned to keep them from rejoining the fighting); Johan D. van der Vyver, *Torture as a Crime Under International Law*, 67 ALB. L. REV. 427, 459 (2003) (addressing the President's power to proclaim someone an “enemy combatant,” thereby condemning that person to indefinite detention).

98. See Jinks, *supra* note 56, at 1502 (stating that POWs may not be prosecuted for their participation in hostilities); Murphy, *supra* note 35, at 982 (citing a Virginia court which recognized that lawful combatant immunity forbids prosecution of soldiers for their lawful belligerent acts committed during the course of armed conflicts); Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1, 15 (2004) (opining that combatants who receive immunity from prosecution for killing carried out in accordance with the law is a unique feature of international humanitarian law).

enemy military objectives and cause incidental civilian casualties<sup>99</sup> without being prosecuted for their participation in the hostilities. They may be prosecuted only for violations of the laws of war or crimes unrelated to the hostilities.<sup>100</sup> Any prosecution of POWs must be in accordance with Articles 82 through 108 of the GPW, which require, among other things, that POWs be tried by the same courts and using the same procedures as apply to members of the armed forces of the detaining power.<sup>101</sup>

Prisoners of war also have the right to humane treatment (including limits on interrogation tactics), to due process, to release and repatriation upon the conclusion of hostilities and to communicate with certain agencies.<sup>102</sup> The GPW prohibits reprisals against POWs insofar as states must prohibit mistreatment of POWs by punishing individuals who violate the Conventions.<sup>103</sup>

## B. Criteria for and Rights Afforded to Protected Persons Under the Civilians Convention

The Civilians Convention, also known as the Fourth Convention, safeguards combatants labeled as “protected persons.”<sup>104</sup> *Protected persons* are those “who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a

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99. See generally Goldman & Tittmore, *supra* note 45 (commenting on the White House’s position with respect to application of the Third Geneva Convention and the hostilities in Afghanistan); see Richard D. Glick, *Lip Service to the Laws of War: Humanitarian Law and United Nations Armed Forces*, 17 MICH. J. INT’L L. 53, 81 n.100 (1995) (explaining that each soldier encompassed within the definition of *combatant* is entitled to kill or wound enemy combatants without committing a crime); David Kaye & Steven A. Solomon, *The Second Review Conference of the 1980 Convention on Certain Conventional Weapons*, 96 AM. J. INT’L L. 922, 926 n.27 (2002) (arguing that combatant immunity is in effect a limited license to take life and cause destruction).
  100. See Kenneth Anderson, *The Military Tribunal Order: What to Do with Bin Laden and Al Qaeda Terrorists? A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantánamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL’Y 591, 615–16 (2002) (asserting that POWs are liable to prosecution for violations of the laws and customs of war); Cerone, *supra* note 50 (stating that combatants may be prosecuted only for violations of the law of armed conflict or for crimes that are unrelated to the hostilities).
  101. See Anderson, *supra* note 100, at 616 (recognizing that the Third Geneva Convention provides for basic due process rights, including the same rights that a member of the armed forces of the party trying him or her would receive under similar circumstances); see also Cerone, *supra* note 50, at ¶ 22 (reporting that POWs are guaranteed the protections outlined in Articles 82 through 108 of the Third Geneva Convention, including limitations on penalties and rights of defense).
  102. See Prisoners of War, *supra* note 15, at 3316 (stating that prisoners of war must at all times be humanely treated); see also Joan Fitzpatrick, *Agora: Military Commissions: Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT’L L. 345, 353 (2002) (acknowledging that POWs are entitled to a wide range of treaty protections, including humane treatment, limits on interrogation and trial rights); Jinks, *supra* note 56, at 1502 (recognizing that POWs enjoy substantial international legal protection such as the right to humane treatment, the right to release and repatriation and the right to communicate with protective agencies).
  103. See Prisoners of War, *supra* note 15, at 3316 (providing that measures of reprisal against POWs are prohibited); see also Jinks, *supra* note 56, at 1502 (recognizing that the Third Geneva Convention prohibits reprisals against POWs); Diana Jean Schemo, *A Nation at War: International Law; Iraq Violates Rules of War, U.S. Complains*, N.Y. TIMES, Mar. 24, 2003, at B6 (reporting that the Geneva Convention to which Iraq is a party bars reprisals against prisoners of war).
  104. See Civilians Convention, *supra* note 16, at 290; see also Cerone, *supra* note 50, at ¶ 10 (recognizing that the bulk of the Fourth Geneva Convention’s protections apply only to “protected persons” as defined in Article 4 of that Convention); Douglas Jehl, *U.S. Sees No Basis to Prosecute Iranian Opposition ‘Terror’ Group Being Held in Iraq*, N.Y. TIMES, July 27, 2004, at A1 (reporting that under the Fourth Geneva Convention, protected persons are those who fall under the control of an occupying power or a country involved in the conflict).

Party to the conflict or Occupying Power of which they are not nationals.”<sup>105</sup> Most often, combatants who do not qualify for POW status will be classified as protected persons as long as they meet certain nationality requirements.<sup>106</sup>

With regard to the nationality requirement, *protected persons* do not include nationals of a co-belligerent state or nationals of neutral states in the home territory of a party to the conflict, as long as such states have “normal diplomatic representation in the State in whose hands [the nationals] are.”<sup>107</sup> Enemy nationals and third-party nationals other than nationals of an ally of the occupier in an occupied territory are always protected.<sup>108</sup> Neutral third-party nationals are protected on a party’s own territory only if they do not benefit from normal diplomatic protection.<sup>109</sup>

After qualifying for protected status, protected persons may not participate in the hostilities and are protected from attacks.<sup>110</sup> They may be detained for only two reasons: (1) punishment of criminal offenses under domestic legislation and (2) urgent security reasons.<sup>111</sup> Protected persons are entitled to the protections of Articles 71 through 76 of the Fourth Convention,

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105. See Civilians Convention *supra* note 16, at 290; Akbar, *supra* note 74, at 215–16 (concluding, with respect to the Al-Qaeda detainees, that any person who falls into U.S. hands in the course of a conflict is protected as a civilian and not assumed to be a criminal under Article 4 of the Fourth Convention); Erin Chopak, *Dealing with the Detainees at Guantánamo Bay: Humanitarian and Human Rights Obligations Under the Geneva Conventions*, 9 HUM. RTS. BRIEF 6, 7 (2002) (stating that Article 4 of the Fourth Convention professes a broad protection to protected persons as long as the prisoners are nationals of a state bound by the Convention).

106. See Jinks, *supra* note 39, at 382 (interpreting the Civilians Convention to cover unlawful combatants who satisfy its nationality and territoriality requirements); see also Cerone, *supra* note 50, at ¶ 12 (remarking that, generally, individuals who do not qualify for POW status will qualify as protected persons as long as they meet the nationality requirement); Douglas Jehl, *U.S. Action Bars Rights of Some Captured in Iraq*, N.Y. TIMES, Oct. 26, 2004, at A1 (reporting that the Bush administration would consider nationality a factor in determining the status of prisoners held in Iraq under the Geneva Conventions).

107. See Civilians Convention, *supra* note 16, at 290.

108. See *id.* (stating that nationals of a state not bound by the Convention or nationals of a neutral or co-belligerent state which has normal diplomatic representation are not protected); see also Jinks, *supra* note 39, at 381 (asserting that the text and drafting history of the Civilians Convention make clear that it does protect unlawful combatants provided they are enemy nationals); Sassoli, *supra* note 63, at 206 (noting that enemy nationals and third-party nationals other than nationals of an ally of the occupier in an occupied territory are always protected).

109. See Civilians Convention, *supra* note 16, at 290; see also Jinks, *supra* note 39, at 383 (explaining that several categories of persons are not protected by the Convention, including nationals of neutral states whose own state maintains diplomatic relations); Sassoli, *supra* note 63, at 206 (emphasizing that neutral third-party nationals are protected by the Convention only if they do not benefit from normal diplomatic protection).

110. See Civilians Convention, *supra* note 16, at 290 (indicating that protection is not available for persons engaged in hostilities); see also Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT’L L.J. 65, 91 (2003) (maintaining that the Convention affirms the right of civilian persons to be protected against, inter alia, willful killing, torture or inhuman treatment); Sassoli, *supra* note 63, at 206 (reiterating that civilians may not participate in hostilities and are protected against attacks).

111. See Civilians Convention, *supra* note 16, at 290 (noting that internment may be ordered for security reasons); see also Orna Ben-Naftali & Sean S. Gleichevitch, *Missing in Legal Action: Lebanese Hostages in Israel*, 41 HARV. INT’L L.J. 185, 236 (2000) (citing Article 78 of the Fourth Geneva Convention, which permits the administrative detention of protected persons, but only as a preventive means); Sassoli, *supra* note 63, at 206 (stating that civilians may be interned for imperative security reasons).

including the right to a regular trial, to counsel who may visit the accused freely, to call witnesses, to an interpreter and to appeal.<sup>112</sup>

### C. Criteria for and Rights Afforded to Unlawful Combatants

Unlawful combatants are individuals who participate in hostilities but do not satisfy the requirements for POW status; thus, they are excluded from combat immunity.<sup>113</sup> Unlawful combatants include “civilians, certain civilians accompanying the armed forces, as well as non-combatant members of the armed forces who, in violation of their protected status, actively engage in hostilities.”<sup>114</sup> This term may also include “irregular or part-time combatants, such as guerillas, partisans, and members of resistance movements, who either fail to distinguish themselves from the civilian population at all times while on active duty or otherwise do not fulfill the requirements for privileged combatant status.”<sup>115</sup> For example, an enemy combatant would include a privileged combatant who is caught spying while violating the GPW requirement that combatants wear regular uniforms.<sup>116</sup>

By actively engaging in hostilities, unlawful combatants forfeit their combat immunity.<sup>117</sup> Upon capture, they can then be tried under municipal law for their unlawful belligerency even

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112. See Civilians Convention, *supra* note 16, at 290 (outlining Articles 71 through 76 of the Fourth Geneva Convention, describing a detainee’s legal rights); see also Callen, *supra* note 56, at 1037 (remarking that the Civilians Convention requires that protected persons be permitted free choice of counsel, the right to present evidence and call witnesses and rights of appeal); Cerone, *supra* note 50, at ¶ 23 (stating that protected persons are entitled to rights, including rights to an interpreter, to be visited by the delegates of the protecting power and the ICRC and to be detained and serve sentences in the occupied territory).
  113. See Jinks, *supra* note 56, at 1506 (showing that unlawful combatants, although having some rights, do not have all the rights POWs receive); see also Jinks, *supra* note 39, at 368 (arguing that “the denial of POW status carries few protective or policy consequences, and that the gap in protection for those classified as POWs and those not so classified (e.g., those designated ‘unlawful combatants’) is closing”).
  114. See Callen, *supra* note 56, at 1028 (defining the two categories of unlawful combatants as those who operate behind enemy lines and those who fight directly on the battlefield).
  115. See Goldman & Tittlemore, *supra* note 45, at 4. See generally Ingrid Brunk Wuerth, *The President’s Power to Detain “Enemy Combatants”: Modern Lessons from Mr. Madison’s Forgotten War*, 98 NW. U. L. REV. 1567, 1587 (2004) (stating that spies and guerillas are examples of unlawful combatants).
  116. See *Ex parte Quirin*, 317 U.S. 1, 31 (1942) (reasoning that even an otherwise lawful combatant caught spying will lose his status and become an unlawful combatant and, thus, forfeit certain rights); see also Clover, *supra* note 32, at 378 (emphasizing that the Supreme Court has traditionally viewed spies who enter enemy territory without uniforms as unlawful combatants); Goldman & Tittlemore, *supra* note 45, at 4 (explaining that lawful combatants who violate the code of dress become unlawful combatants).
  117. See Brooks, *supra* note 33, at 694 (explaining that people who do not act in accordance with the basic principles of war become unlawful enemy combatants and lose their combat immunity); see also Watkin, *supra* note 98, at 15–16 (emphasizing that civilians and lawful combatants receive combat immunity, but civilians actively participating in hostilities will lose that protection); Sassoli, *supra* note 63, at 203 (showing that there are two groups of protected persons: lawful combatants and civilians protected by the Fourth Convention; others benefit only from fundamental guarantees of humane treatment).

though their acts complied with the laws of war.<sup>118</sup> However, the fact that an unlawful combatant engages in hostilities is not by itself a violation of the laws of armed conflict.<sup>119</sup>

### III. Protocol I and Customary International Law

Although the United States rejected Protocol I in 1987,<sup>120</sup> making it nonapplicable in conflicts involving the United States and another state, Protocol I may still provide the basis for binding customary international law.<sup>121</sup> Additional Protocols I and II derived from the 1974–1977 Diplomatic Conference on International Humanitarian Law Applicable in Armed Conflict.<sup>122</sup> The goal of the conference was to create new rules for irregular forces and to relax the Hague and Geneva standards.<sup>123</sup> This relaxation of the strictures of those treaties provides guerrillas with privileged combatant status while attempting to protect enemy forces from the danger of guerrillas using civilian disguises to initiate surprise attacks.<sup>124</sup>

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118. See Bialke, *supra* note 8, at 68 (emphasizing that although unlawful combatants *can* be tried in the criminal courts of their country or the country where hostilities took place or before military tribunals, they do not necessarily have a *right* to be tried in those venues); see also Goldman & Tittmore, *supra* note 45, at 4 (noting that unlawful combatants will be “punished under municipal law for their unprivileged belligerency, even if their hostile acts complied with the laws of war”). See generally Brooks, *supra* note 33, at 694 (asserting that unlawful combatants can be tried at any time during or after an armed conflict and do not have the same privileges lawful combatants receive).
  119. See Goldman & Tittmore, *supra* note 45, at 4; see also Bialke, *supra* note 8, at 68 (showing two ways a person may become an unlawful combatant: (1) by engaging in armed conflict without legal authorization and (2) by engaging in armed conflict in a manner that violates laws of armed conflict); Pierre-Richard Prosper, *Ambassador-at-Large for War Crimes Issues, U.S. Department of State, Opening Statement Before the Senate Judiciary Committee* (Dec. 4, 2001), at <http://www.hrcr.org/hottopics/tribunal.html> (last visited Feb. 4, 2005) (explaining that persons become enemy combatants by engaging in an armed conflict without a legal right to wage warfare; however, they violate laws of war when they start targeting civilians).
  120. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter *Protections of Victims in International Armed Conflicts*] (outlining international humanitarian law in armed conflicts).
  121. See Goldman & Tittmore, *supra* note 45, at 23 (explaining that although the United States is not a party to the treaty, it continues to apply it in cases of international armed conflicts); see also Watkin, *supra* note 98, at 15–16 (emphasizing that “[a]lthough thirty countries have not ratified Additional Protocol I, the targeting provisions are largely seen as reflective of customary international law”); INT’L & OPERATIONAL LAW DEPT., JUDGE ADVOCATE GENERAL’S SCH., U.S. ARMY, LAW OF WAR WORKSHOP DESKBOOK, ch. 3 (Brian J. Bill ed., 2000) (outlining factors responsible for the growing relevance of Protocol I in the United States), available at <http://www.an.af.mil/an/awc/awcgate/law/low-workbook.pdf>.
  122. See Goldman & Tittmore, *supra* note 45, at 16 (acknowledging that one of the outcomes of the 1974–1977 Diplomatic Conference was the birth of the two Additional Protocols of 1977).
  123. See Goldman & Tittmore, *supra* note 45, at 16; ICRC, *supra* note 53; see also Louis Rene Beres, *On International Law and Nuclear Terrorism*, 24 GA. J. INT’L & COMP. L. 1, 9 (1994) (emphasizing that the outcome of the Diplomatic Conference of 1977 was incorporation of “irregular forces within the full scope of the law of armed conflicts”).
  124. See Goldman & Tittmore, *supra* note 45, at 16–17 (stating that although Protocol I affords privileged status to guerrillas, such status is limited to those who do not use civilian disguise to surprise the opposition); see also George H. Aldrich, *Civilian Immunity and the Principle of Distinction: Guerilla Combatants and Prisoner of War Status*, 31 AM. U. L. REV. 871, 879 (1982) (showing that the 1974–1977 Diplomatic Conference provided guerrillas who distinguish themselves from civilian populations with privileged combatant status).



Article 43 of Protocol I furthered this goal by eliminating the distinction between regular armed forces and irregular voluntary militias.<sup>125</sup> Article 44 states that all those defined by Article 43 shall be treated as POWs.<sup>126</sup> Article 43(1) defines armed forces thusly:

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 [emphasis added].<sup>127</sup>

Article 43(2) further provides: "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."<sup>128</sup> Protocol I therefore puts all a party's armed forces on an equal legal footing and requires that all combatants, not just irregulars, be "under a command responsible" for their actions.<sup>129</sup> This provision breaks from the Geneva Conventions by defining members of the armed forces as those under a "command link."<sup>130</sup>

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125. See ICRC, *supra* note 53, at 520 (stressing that Article 44 increases the protection of irregular forces and thereby encourages them to follow rules of armed conflict).

126. See Protections of Victims in International Armed Conflicts, *supra* note 120 (outlining the legal status of captured persons); see also George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT'L L. 1, 8 (1991) (explaining that violations by captured combatants do not strip them of their POW status).

127. See Protections of Victims in International Armed Conflicts, *supra* note 120, at 24 (outlining the legal status of captured persons and providing additional guidelines); see also MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 234 (1982).

128. See Protections of Victims in International Armed Conflicts, *supra* note 120, at 24; see also Ferrell, *supra* note 69, at 104 (stating that Article 43(2) allows combatants to participate in hostilities and, therefore, indirectly provides them with "combat immunity").

129. See Goldman & Tittmore, *supra* note 45, at 17 (explaining that under Article 43(1) all armed forces are responsible for the conduct of their subordinates); see also Aldrich, *supra* note 126, at 8 (emphasizing that under Article 43 all armed forces, including irregulars, are responsible for the conduct of their subordinates and are equally subject to internal disciplinary procedures).

130. See FRITS KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 75 (1987) (assessing the changes through a comparative analysis of Protocol I and the traditional requirements of the Hague Regulations); see also Aldrich, *supra* note 126, at 8 (anticipating that the departure may justify refusal to treat certain captured personnel as combatants or POWs); Goldman & Tittmore, *supra* note 45, at 17 (noting that the application of the "command link" requirements to all combatants is a break from both the Hague Regulations and the Third Geneva Convention).

Protocol I also more broadly defines when a combatant may be entitled to protection as a prisoner of war.<sup>131</sup> Article 45 presumes that one who participates in hostilities is a prisoner of war under the GPW if he claims POW status or appears entitled to such status.<sup>132</sup> Article 44(2) states that a combatant does not lose his status as a prisoner of war by failing to comply with the laws of war.<sup>133</sup>

In addition, Protocol I provides a more expansive definition of *distinction*, thus making it more difficult for combatants to lose their POW status.<sup>134</sup> Article 44(3) mandates that “combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack.”<sup>135</sup> Like the Geneva Conventions, Protocol I does not stipulate how a combatant must distinguish himself from the civilian population, but authoritative commentary states that the combatant must at least carry his arms openly.<sup>136</sup> Unlike the Geneva Conventions, which punished combatants who failed to distinguish themselves by stripping them of POW status, Protocol I provides that combatants who fail to distinguish themselves are to be punished for breaches of the laws of war, but they do not surrender their protections as POWs.<sup>137</sup>

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131. See Protections of Victims in International Armed Conflicts, *supra* note 120, at 24 (outlining the legal status of captured persons); see also Knut Ipsen, *Combatants and Non-Combatants*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 65, 68 (Dieter Fleck ed., 1995) (explaining that irregular fighters are at least accorded bedrock guarantees under international law); Goldman & Tittmore, *supra* note 45, at 22 (expressing concern that the relaxed standards for granting POW status may result in loss of that status).
132. See Protections of Victims in International Armed Conflicts, *supra* note 120, at 24; see also BOTHE, *supra* note 127, at 261 (noting that failure to claim POW status cannot itself justify denial of such status); Goldman & Tittmore, *supra* note 45, at 18 (articulating the presumption of Article 45).
133. See Protections of Victims in International Armed Conflicts, *supra* note 120, at 23; see also Goldman & Tittmore, *supra* note 45, at 18 (asserting that Article 44(2) mandates that combatants do not forfeit combatant or POW status for noncompliance with rules).
134. See Protections of Victims in International Armed Conflicts, *supra* note 120, at 23 (enumerating requirements for according combatant status to those persons who fail to distinguish themselves from the civilian population); see also JUDITH GAIL GARDAM, NON-COMBATANT IMMUNITY AS A NORM OF INTERNATIONAL HUMANITARIAN LAW 103–04 (1993) (examining the underlying concerns that the definition was aimed to address); HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW: THE REGULATION OF ARMED CONFLICTS 82–84 (1990) (discussing the controversial third provision of Article 44 and noting that the distinction problem is one of the most challenging aspects of the changes in Protocol I; explaining the drafters’ intent to strike a balance between traditional and contemporary views of combatants).
135. See Protections of Victims in International Armed Conflicts, *supra* note 120, at 23.
136. See Aldrich, *supra* note 76, at 774 (concluding that a combatant will probably lose POW status unless he carries his arms openly or otherwise distinguishes himself at all times during military operations); see also George H. Aldrich, *Why the United States of America Should Ratify Additional Protocol I*, in HUMANITARIAN LAW OF ARMED CONFLICT CHALLENGES AHEAD: ESSAYS IN HONOUR OF FRITZ KALSHOVEN 127, 140–41 (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991) (commenting that the ambiguities of distinguishing mean that the Protocol’s protection of irregulars may be attenuated and opining that the efficacy of Protocol I’s protections will be determined by future armed conflicts).
137. See Protections of Victims in International Armed Conflicts, *supra* note 120, at 23; see also Goldman & Tittmore, *supra* note 45, at 19–20 (indicating that under preexisting law, a failure to distinguish would disqualify the combatant of privileged status, whereas Protocol I does not have this effect).

The only situation that will result in the forfeiture of POW status<sup>138</sup> is set forth in Article 44(3), which states:

Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

- (a) during each military engagement, and
- (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.<sup>139</sup>

With this definition, Protocol I recognizes the difficulties in certain circumstances for combatants to distinguish themselves from the civilian population.<sup>140</sup> Even in those circumstances, the combatant must distinguish himself by carrying arms openly during each military engagement and when visible to the adversary before an attack.<sup>141</sup> By failing to comply with these cri-

138. See Protections of Victims in International Armed Conflicts, *supra* note 120, at 23 (stating that a combatant will retain combatant status if “he carries his arms openly”).

139. See Protections of Victims in International Armed Conflicts, *supra* note 120, at 23. Article 44(2) states:

While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

The commentary to Article 44(3) states:

[T]his distinction should be clearly recognizable, as in Article 4A(2)(b) of the Third Convention, and throughout military operations . . . . The minimum conclusion which can be drawn from these indications is that any armed combatant should, in the context of this provision, clearly distinguish himself from the civilian population by means of a characteristic piece of clothing which is visible, as long as he is armed, and whatever the nature of his arms. On the other hand, it seems doubtful, in the light of the wording of the second sentence of this paragraph, which deals only with “armed” combatants, that the obligation also extends to members of a guerrilla movement who are not armed and whose participation in military operations may or may not be limited, but remains indirect.

140. See Protections of Victims in International Armed Conflicts, *supra* note 120, at 23; Aldrich, *supra* note 124, at 877–78 (explaining that the rationale for the line drawn by Article 44(3) reflects realistic assumptions about guerrilla warfare); see also Goldman & Tittmore, *supra* note 45, at 20–22 (opining that the new rule of distinction was designed to respond to difficulties in distinguishing civilians from combatants).

141. See Protections of Victims in International Armed Conflicts, *supra* note 120, at 23; BOTHE, *supra* note 127, at 253 (remarking that the minimum requirement for distinguishing a combatant is carrying of the arms openly); see also John C. Yoo, *The Status of Soldiers and Terrorists Under the Geneva Conventions*, 3 CHINESE J. INT’L L. 135, 148 (2004) (acknowledging that the combatant must distinguish himself by carrying arms openly during attacks; concluding that “[t]his is no advance for humanitarian law”) (quoting Abraham D. Sofaer, *The Rationale for the United States Decision*, 82 AM. J. INT’L L. 784, 786 (1988)); Goldman & Tittmore, *supra* note 45, at 21.

teria, a combatant will forfeit his status as a prisoner of war and can be tried for all hostile acts, even those that comply with the laws of war.<sup>142</sup>

Whether the Additional Protocols constitute binding customary law on the United States is a matter of controversy in academic literature.<sup>143</sup> The source of the controversy derives from the fact that the United States is not a party to the Additional Protocols and has rejected certain provisions, “including the definition of combatants under Article 43 and the relaxation under Article 44 of the Third Geneva Convention’s requirements concerning prisoner of war status for irregular combatants.”<sup>144</sup> The United States is most likely classified as a “persistent objector” because its objection to the treaty has been consistently maintained.<sup>145</sup> The status of persistent objectors is well established in international law:

[A] state may contract out of a custom in the process of formation. Evidence of objection must be clear and there is probably a presumption of acceptance which is to be rebutted. Whatever the theoretical underpinnings of this

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142. See Protections of Victims in International Armed Conflicts, *supra* note 120, at 23; see also ICRC, *supra* note 53, at 529 (asserting that “[t]he exception leading to loss of status relates to ‘the guerrilla fighter who relies on his civilian attire and lack of distinction to take advantage of his adversary in preparing and launching an attack’” (footnote omitted)); Goldman & Tittmore, *supra* note 45, at 22 (noting that the combatant entitlement is lost upon failure to comply, resulting in forfeiture of POW status).
143. See Jennifer Elsea, *Treatment of “Battlefield Detainees” in the War on Terrorism* 29 at <http://fpc.state.gov/documents/organization/9655.pdf> (Apr. 11, 2002) (documenting the controversy surrounding the issue) (last visited Feb. 7, 2005); see also Joan Fitzpatrick, *Speaking Law to Power: The War Against Terrorism and Human Rights*, 14 EUR. J. INT’L L. 241, 249–50 (2003) (underscoring that the United States has claimed that the war on terrorism is not cognizable under the Protocols); Sean D. Murphy, ed., *Decision Not to Regard Persons Detained in Afghanistan as POWs*, 96 AM. J. INT’L L. 475, 476–80 (2002) (summarizing the debates and concluding that the disagreement between the United States and the ICRC on the issue does not constitute a stalemate).
144. See Goldman & Tittmore, *supra* note 45, at 36–37. But see Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. INT’L L. & POL’Y 419, 425–28 (1987) (maintaining that the United States has intended to support the Article 43 provisions even though they are regarded as undesirable). See generally Jinks & Sloss, *supra* note 63, at 114–20 (arguing that the United States is bound by the Geneva Conventions, notwithstanding current interpretations of the Protocols).
145. See Jinks, *supra* note 39, at 411 (indicating that the United States is not a party to the Protocols “and specifically objects to the lawful combat regime elaborated therein”); see also Theodor Meron, Editorial Comment, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AM. J. INT’L L. 678, 679–81 (1994) (finding that President Reagan staunchly opposed Protocol I and encouraged other nations not to ratify). But see Howard S. Levie, *Prohibitions and Restrictions on the Use of Conventional Weapons*, 68 ST. JOHN’S L. REV. 643, 649 (1994) (maintaining a voluntarist view such that any state or authority has the right to refuse to be bound to controversial provisions).

principle, it is well recognized by international tribunals, and in the practice of states.<sup>146</sup>

#### IV. Interpretations of Whether the Protections of the Geneva Convention Apply to Unlawful Combatants

Whether the Geneva Conventions offer protection to Al-Qaeda and Taliban detainees has been the subject of much controversy since the Bush administration's declaration that the unlawful combatants captured in Afghanistan are not entitled to the protections of the Geneva Conventions.<sup>147</sup> Following a discussion of the Bush administration's interpretation, as well as critical interpretations, the author's analysis will conclude Part IV.

##### A. The Bush Administration's Interpretation of the Geneva Conventions and Customary International Law<sup>148</sup>

In announcing its new policy, the Bush administration determined that members of Al-Qaeda were not entitled to the protections of the laws of war because Al-Qaeda is a terrorist

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146. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 11 (6th ed. 2003); see also LORI FISLER DAMROSCH ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 101 (4th ed. 2001):

[A] customary rule may arise notwithstanding the opposition of one State, or even perhaps a few States, provided that otherwise the necessary degree of generality is reached. But they may also seem to lay down that the rule so created will not bind the objectors; in other words, that in international law there is no majority rule even with respect to the formation of customary law.

*Id.* For further discussion of customary international human rights and humanitarian law, specifically the International Convention on Civil and Political Rights, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the International Convention on the Elimination of All Forms of Racial Discrimination, see Goldman & Tittmore, *supra* note 45, at 33–34 (proposing that the core provisions of Article 75 constitute customary law as they are related to the International Convention on Civil and Political Rights and are therefore binding on the United States).

147. See Callen, *supra* note 56, at 1025–29 (positing that although “Geneva Law” encompasses the two 1977 Additional Protocols, “battlefield unlawful combatants” found in territories controlled by neither side of a conflict are not entitled to POW status); see also Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1, 10 n.24 (2002) (discussing whether Al-Qaeda and Taliban prisoners are entitled to POW status under the canons of international law).

148. The Bush administration's interpretation is provided in an opinion by the Office of Legal Counsel in the Department of Justice (OLC). The January 9, 2002 memo was authored by OLC lawyers John Yoo and Robert J. Delahunty. See Michael Isikoff, *Double Standards?*, NEWSWEEK, May 25, 2004, available at <http://msnbc.msn.com/id/5032094/site/newsweek> (last visited Feb. 7, 2005). This memo was the primary basis for White House Counsel Alberto Gonzales's later memo on January 25, 2002, which advised the President that the Geneva Conventions did not apply to the Taliban or Al-Qaeda. *Id.* The OLC is the principal advisory department to the President and other agencies. Accordingly, OLC acts as the legal adviser to the President and all the executive branch agencies. The OLC drafts legal opinions of the Attorney General and also provides its own written opinions and oral advice in response to requests from the counsel to the President, the various agencies of the executive branch and offices within the Department of Justice. In addition to serving as, in effect, outside counsel for the other agencies of the executive branch, the OLC functions as general counsel for the Department itself. *Id.*

organization.<sup>149</sup> The OLC analysis and legal framework that was adopted by the White House<sup>150</sup> was not unanimously supported within the Administration.<sup>151</sup> The State Department, for example, argued that the Geneva Conventions applied both legally and from a policy standpoint.<sup>152</sup> Despite the State Department's objections, the OLC interpretation prevailed.<sup>153</sup>

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149. See Yoo/Delahunty Memo, *supra* note 53 (explaining the OLC's position that Al-Qaeda does not receive the protections of the laws of war); Tim Golden, *After Terror, a Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004, at A1 (discussing the Bush administration's internal deliberations regarding the creation of military commissions to try detainees and the major role that Assistant Attorney General John Yoo played); see also Golden, *supra* note 32, at A1 (explaining the internal division of the Bush administration regarding stalled military tribunals).
150. See Memorandum from Alberto R. Gonzales, White House Counsel, to President George W. Bush, Decision re: Application of the Geneva Convention on Prisoners of War to the Conflict with Al-Qaeda and the Taliban (Jan. 25, 2002) (stating that the President adopted the opinion of OLC that the GPW does not apply and that Al-Qaeda and Taliban detainees are not prisoners of war under the GPW), available at <http://msnbc.msn.com/id/4999148/site/newsweek> (last visited Feb. 7, 2005); *President Nominates Gonzales as Next Attorney General; Powell Announces Resignation*, 81 INTERPRETER RELEASES 1613, 1613-14 (2004) (discussing President Bush's decision that the Geneva Conventions do not apply over the objection of Secretary of State Colin Powell); see also Barry C. Scheck, *The 'New Paradigm' and Our Civil Liberties*, 28 CHAMPION 4, 21 (2004) (indicating that the President sided with his counsel, Alberto Gonzales, in determining that the Geneva Conventions do not apply).
151. See Murphy, *supra* note 35, at 822 (stating the State Department's position that not applying the Geneva Conventions at all would "reverse over a century of U.S. policy and practice" and may "undermine the protections of the law of war for our troops"); see also Final Report of the Independent Panel to Review DOD Detention Operations 6-7 (Aug. 2004) (discussing the Department of State's opinion that the Geneva Convention provided a sufficiently robust legal construct under which the global war on terror could effectively be waged), available at <http://www.dod.gov/news/aug2004/d20040824finalreport.pdf> (last visited Feb. 7, 2005); Press Briefing by White House Counsel Judge Alberto Gonzales, Department of Defense General Counsel William Haynes, Department of Defense Deputy General Counsel Daniel Dell'Orto and Army Deputy Chief of Staff for Intelligence General Keith Alexander (June 22, 2004) (describing the set of government documents exploring the limits as to what the executive branch can do within the law and the consideration of the President which ultimately led to the adoption of more tailored policies), available at <http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html> (last visited Feb. 7, 2005).
152. See Memorandum from William H. Taft IV, Legal Advisor, Department of State, to the Counsel to the President (Feb. 2, 2002) (arguing that the Geneva Conventions apply both legally and from a policy standpoint), available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/index.htm> (last visited Feb. 7, 2005); see also Memorandum from Colin L. Powell, Secretary of State, to the Counsel to the President and Assistant to the President for National Security Affairs (Jan. 26, 2002) (stating that the Yoo/Delahunty Memo does not "present to the President the options that are available to him; nor does it identify the significant pros and cons of each option"), available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/index.htm> (last visited Feb. 7, 2005); R. Jeffrey Smith, *U.S. Liability Key Concern in '02 Debate on Detainees*, WASH. POST, June 23, 2004, at A13 (explaining the State Department's arguments that the Geneva Conventions should apply).
153. See Yoo/Delahunty Memo, *supra* note 53 (describing the OLC's interpretation of the Geneva Conventions as applied to Al-Qaeda and Taliban detainees); see also Neil A. Lewis & Eric Schmitt, *The Reach of War: Legal Opinions; Lawyers Decided Bans on Torture Didn't Bind Bush*, N.Y. TIMES, June 8, 2004, at A1 (stating that the Bush administration's top lawyers, except for those at the State Department, approved the Justice Department's position that the Geneva Conventions do not apply); R. Jeffrey Smith, *Lawyer for State Department Disputed Detainee Memo; Military Legal Advisers Also Questioned Tactics*, WASH. POST, June 24, 2004, at A7 (describing how President Bush embraced the Justice Department's viewpoints despite the State Department's objections).

The Bush administration made several arguments in support of its conclusion that the Conventions do not apply to the detainees.<sup>154</sup> First, it argued that Al-Qaeda members are not entitled to the protections of the Conventions.<sup>155</sup> Second, Taliban members, likewise, are not entitled to the protections of the Conventions.<sup>156</sup> Third, the President is not bound by customary international law.<sup>157</sup> Fourth, no Article 5 hearing is required because there is no doubt regarding the status of the detainees.<sup>158</sup>

### 1. Members of Al-Qaeda Are Not Entitled to Protection Under the Geneva Conventions

According to the OLC, three reasons justified the determination that the Geneva Conventions did not apply to Al-Qaeda.<sup>159</sup> First, Al-Qaeda was a nonstate actor and ineligible for the

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154. See White House Fact Sheet, *supra* note 43 (stating the government position that the Geneva Conventions do not apply to Al-Qaeda detainees but asserting that “[t]he United States is treating and will continue to treat all of the individuals detained at Guantánamo humanely” and “in a manner consistent with the principles” of the Geneva Conventions); see also Jim Garamone, *Rumsfeld Explains Detainee Status*, AM. FORCES PRESS SERV., Feb. 8, 2002 (discussing Secretary Rumsfeld’s statement on the applicability of the Geneva Conventions to the Taliban and Al-Qaeda), available at [http://www.defenselink.mil/news/feb2002/n02082002\\_200202086.htm](http://www.defenselink.mil/news/feb2002/n02082002_200202086.htm) (last visited Feb. 7, 2005); Goldman & Tittmore, *supra* note 45, at 24–25 (explaining why Taliban and Al-Qaeda detainees are not entitled to POW status under the Conventions).

155. See Aldrich, *supra* note 36, at 891–92 (stating that Al-Qaeda is not a party to the treaty and therefore undeserving of inclusion); see also Seelye, *supra* note 36, at A1 (indicating that the Conventions will apply to the Taliban but not to Al-Qaeda); Press Release, White House Office of the Press Secretary, Statement by the Press Secretary on the Geneva Convention (May 7, 2003) (describing Al-Qaeda as an international terrorist group that is not covered by the Geneva Convention), available at <http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html> (last visited Feb. 7, 2005).

156. See Jinks & Sloss, *supra* note 63, at 101 (stating that the Bush administration maintains that neither the Taliban nor Al-Qaeda detainees qualify as prisoners of war under the Geneva Conventions); see also Daryl A. Mundis, *The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts*, 96 AM. J. INT’L L. 320, 325 (2002) (explaining that although the Geneva Conventions apply to the Taliban forces, the Taliban detainees are not entitled to POW status and are therefore not afforded the protections of the treaty); Seelye, *supra* note 36, at A12 (indicating the President’s change from his original decision and stating that the Conventions do apply to the Taliban detainees; but neither the Taliban nor Al-Qaeda would be granted POW status).

157. See Yoo/Delahanty Memo, *supra* note 53 (explaining the OLC’s position that customary international law cannot bind the executive branch under the Constitution because it is not federal law). See generally *United States v. Alvarez-Machain*, 504 U.S. at 655, 655–56 (1992) (stating that although the defendant may be correct that his abduction was “shocking” and in violation of general international law principles, the decision whether he should be returned to Mexico, being beyond the scope of the extradition treaty between the United States and Mexico, is a matter for the executive branch); *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 935–36 (D.C. Cir. 1988) (concluding that when two political branches, acting together, contravene a treaty or a rule of customary international law, the courts do not have any authority to remedy the violation); Memorandum from the Office of Legal Counsel, U.S. Department of Justice, to Attorney General Richard L. Thornburgh, Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities (June 21, 1989) (indicating that the President has the constitutional authority to take actions even if those actions contravene customary international law).

158. See John Mintz, *U.S. Told to Rule on Detainees’ Status*, WASH. POST, Mar. 14, 2002, at A12 (stating that the Bush administration has decided that the 300 captives at Guantánamo Bay do not deserve POW status and that there is no doubt on the matter, so no tribunal is necessary); LAWYERS COMM. FOR HUMAN RIGHTS, ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES 54–55 (2003) (providing the Bush administration’s arguments to explain the basis for the Guantánamo detainees), available at [www.humanrightsfirst.org/pubs/descriptions/Assessing/AssessingtheNewNormal.pdf](http://www.humanrightsfirst.org/pubs/descriptions/Assessing/AssessingtheNewNormal.pdf) (last visited Feb. 7, 2005). See generally Akbar, *supra* note 74, at 217–19 (stating the Bush administration’s position regarding Taliban detainee status).

159. See Yoo/Delahanty Memo, *supra* note 53.

protections of the Geneva Conventions.<sup>160</sup> Second, the nature of the conflict makes the Geneva Conventions inapplicable.<sup>161</sup> Third, members of Al-Qaeda did not meet the eligibility requirements for treatment as POWs.<sup>162</sup>

First, as noted, Al-Qaeda, as a nonstate actor, is ineligible for protection under the Geneva Conventions.<sup>163</sup> The Administration classifies Al-Qaeda as a “non-governmental terrorist organization composed of members from many nations, with ongoing operations in dozens of nations.”<sup>164</sup> As such, Al-Qaeda is not a state and is not eligible to sign the Geneva Conventions because nongovernmental organizations cannot sign international agreements governing the laws of war. Even if Al-Qaeda were eligible to sign the Conventions, it has not done so and never would. Moreover, common Article 2, which triggers the procedures for the regulation of POWs, is limited only to cases of armed conflict between “High Contracting Parties.” Because Al-Qaeda is not such a party, its treatment is not governed by the Geneva Conventions.<sup>165</sup>

Second, the Geneva Conventions are inapplicable because of the nature of the conflict.<sup>166</sup> When Article 3 is read in conjunction with common Article 2, they show that the Geneva Conventions were intended to cover only traditional wars between nation states (Article 2) or non-international civil wars (Article 3). The current conflict with Al-Qaeda does not fit within either category because it is not an international war between nation states, but a conflict between a nation state (United States) and a nongovernmental organization (Al-Qaeda). Moreover, this conflict is not a civil war under Article 3 because it is a conflict of international char-

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160. *Id.* (stating the three reasons that support the conclusion that the Geneva Conventions do not apply to Al-Qaeda).

161. *Id.* (concluding that the nature of the conflict precludes application of common Article 3 of the Geneva Conventions to Al-Qaeda).

162. *Id.* (stating that Al-Qaeda members fail to satisfy the eligibility requirements for treatment as POWs under the Third Geneva Convention); *see also* Mofidi & Eckert, *supra* note 12, at 86–87 (listing the four-part test and explaining how Al-Qaeda would fail each part); Kenneth Roth, *Human Rights as a Response to Terrorism*, 6 OR. REV. INT’L L. 37, 40 (2004) (stating that Al-Qaeda will probably fail all parts of the four-part test for determining POW status); Leah E. Kraft, Comment, *The Judiciary’s Opportunity to Protect International Human Rights Applying the U.S. Constitution Extraterritorially*, 52 U. KAN. L. REV. 1073, 1076–77 (2004).

163. *See* Yoo/Delahanty Memo, *supra* note 53 (stating that Al-Qaeda as a nonstate actor renders itself ineligible to claim the protections of the treaties specified by the Geneva Conventions); *see also* Sassoli, *supra* note 63, at 199 (stating that Al-Qaeda members are nonstate actors and therefore the Geneva Conventions do not apply to them); Chlopak, *supra* note 34, at 7 (explaining that Al-Qaeda, as a nonstate actor, could not have signed onto the treaties and, therefore, the Geneva Conventions cannot apply to it).

164. *See* Yoo/Delahanty Memo, *supra* note 53 (asserting that Al-Qaeda is not a state but a nongovernmental terrorist organization composed of members from many nations). *See generally* David Johnston et al., *Qaeda’s New Links Increase Threats from Far-Flung Sites*, N.Y. TIMES, June 16, 2002, at A11 (indicating that Al-Qaeda could have cells in as many as sixty countries).

165. *See* Yoo/Delahanty Memo, *supra* note 53 (reasoning that because Al-Qaeda is not a high contracting party, its treatment is not governed by the Geneva Conventions, particularly those regarding POWs); *see also* Joan Fitzpatrick, *Sovereignty, Territoriality, and the Rule of Law*, 25 HASTINGS INT’L & COMP. L. REV. 303, 317 (2002) (noting that Al-Qaeda and other terrorist networks are not capable of being high contracting parties to the Geneva Conventions); Murphy, *supra* note 35, at 823 (citing President Bush as concluding that, because Al-Qaeda is not a high contracting party to the Geneva Conventions, none of the Third Geneva Convention’s provisions apply to it).

166. *See* Yoo/Delahanty Memo, *supra* note 53.



acter and not an internal armed conflict between parties fighting for control of territory.<sup>167</sup> Therefore, the treatment of Al-Qaeda is not governed by the Geneva Conventions.<sup>168</sup>

Third, members of Al-Qaeda do not meet the eligibility requirements for treatment as POWs under the GPW.<sup>169</sup> Article 4A(2) of the GPW defines prisoners of war as including not only captured members of the armed forces of a high contracting party, but also irregular forces such as “members of other militias and members of other volunteer corps, including those of organized resistance movements.”<sup>170</sup> Article 4A(3) also includes among this definition of POWs “members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.”<sup>171</sup> These definitions, however, do not encompass members of Al-Qaeda because the conflict in Afghanistan does not fall within either Article 2 or 3. Therefore, Article 4 does not apply because there is not a conflict subject to Article 2 or 3 of the Geneva Conventions.<sup>172</sup>

Even if Article 4 were considered to apply to members of Al-Qaeda, they still would not receive the protections afforded POWs.<sup>173</sup> Article 4A(2) requires that militia or volunteers fulfill the conditions required for treatment as POWs first established in the Hague Convention

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167. See Murphy, *supra* note 143, at 477 (stating that Al-Qaeda could not benefit from Article 3 because it applies only to internal conflict); see also Chris Downes, “Targeted Killings” in an Age of Terror: *The Legality of the Yemen Strike*, 9 J. CONFLICT & SEC. L. 277, 283 (2004) (reasoning that Article 2 will not apply to an international armed conflict in which Al-Qaeda is a nonstate actor). But see David L. Sloss, *International Decision: Rasul v. Bush*, 98 AM. J. INT’L L. 788, 797–98 (2004) (arguing that Article 3 includes conflicts between a state and a nonstate entity and thus applies to Al-Qaeda fighting with the Taliban against the United States).

168. See Yoo/Delahunt Memo, *supra* note 53 (concluding that treatment of Al-Qaeda is not governed by the Geneva Convention, in view of the reasons stated above); Aldrich, *supra* note 36, at 898 (reaching similar conclusion that Al-Qaeda members are not entitled to be treated as combatants under international law because the Geneva Convention does not apply to the group’s armed conflict); see also Ruth Wedgwood & R. James Woolsey, *Law and Torture*, WALL ST. J. EUR., June 28, 2004, at A8 (concurring to the extent that there is substantial rationale to hold that Al-Qaeda is not entitled to the entire range of the Geneva Conventions).

169. See Yoo/Delahunt Memo, *supra* note 53 (stating that Al-Qaeda members fail to satisfy the GPW requirements for treatment as POWs); Jinks & Sloss, *supra* note 63, at 101 (insisting that, inapplicability of the GPW notwithstanding, the Civilians Convention should still apply to both Al-Qaeda and the Taliban); Prisoners of War, *supra* note 15, at 3316 (providing certain modes of eligibility, including Article 4A(2) and 4A(3), particularly analyzed here).

170. See Yoo/Delahunt Memo, *supra* note 53 (stipulating the provisions of Article 4A(2)); see also William H. Taft IV, Symposium, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT’L L. 319, 320–21 (2003) (stating that terrorists act outside Article 4 of the GPW because they are not members of regular armed forces and refuse to distinguish themselves from civilians, as required).

171. See Prisoners of War, *supra* note 15, at 3316 (defining the scope of POWs to extend the GPW’s application to “organized resistance movements”).

172. See Yoo/Delahunt Memo, *supra* note 53 (holding that unless there is a conflict subject to Article 2 or 3—which does not exist in Afghanistan—Article 4 does not apply); see also Murphy, *supra* note 35, at 824 (reasoning that Al-Qaeda detainees are not considered “prisoners of war” because their conflict does not meet the Geneva Convention’s requirement); Desai, *supra* note 32, at 1587–88 (referring to this argument as the Government’s rationale).

173. See Yoo/Delahunt Memo, *supra* note 53 (observing that even if Article 4 could be both substantive and jurisdictional, Al-Qaeda members could not be protected as POWs).

of 1907.<sup>174</sup> These conditions require that combatants be commanded by a person responsible for his subordinates, have a fixed distinctive sign, carry arms openly and conduct operations according to the laws and customs of war.<sup>175</sup>

The Administration argues that members of Al-Qaeda have demonstrated they will not follow the requirements of lawful warfare because they have attacked civilian targets with no military value, refused to wear uniform or insignia or carry arms openly and hijacked civilian airliners, taken hostages and killed them.<sup>176</sup> They also do not obey the laws of war covering the protection of the lives of civilians or the means of legitimate combat.<sup>177</sup> Therefore, members of Al-Qaeda do not qualify under Article 4A(2) as POWs because they are not “regular armed forces” and do not qualify for protection as lawful combatants under the laws of war.<sup>178</sup>

## 2. Members of the Taliban Are Not Entitled to Protection Under the Geneva Conventions

The Bush administration rightfully acknowledged that the status of Taliban detainees under the Geneva Conventions was a much more difficult question.<sup>179</sup> According to the Administra-

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174. See Prisoners of War, *supra* note 15, at 3316 (providing that relations between the powers which are bound both by the Hague Convention of 1907 and the GPW, the GPW shall be complementary to the Hague Convention); see also Ferrell, *supra* note 69, at 101 (noting the assumption that the Geneva Convention incorporates the 1907 Hague Convention in its analysis of “general armed forces” under Article 4A(2)). But see Paust, *supra* note 87, at 329 (claiming that Article 1 of the Geneva Convention has expanded the 1907 Hague Convention’s requirement of “militia”).

175. See Prisoners of War, *supra* note 15, at 3316 (listing conditions necessary for combatants to be considered POWs).

176. See Yoo/Delahunty Memo, *supra* note 53 (making similar observations about Al-Qaeda, which in turn demonstrates that its members will not follow the laws of war); see also Brooks, *supra* note 33, at 732 (stating that Al-Qaeda combatants neither wear uniforms nor carry arms openly, thus not complying with the law of armed conflicts); Ted Lapkin, *When Rules Go Out the Window*, SYDNEY MORNING HERALD, Dec. 7, 2004, at 13 (explaining that Al-Qaeda combatants have violated the laws of civilized war by hijacking airliners and indiscriminately killing civilians).

177. See Elena Katselli & Sangeeta Shah, *September 11 and the UK Response*, 52 INT’L & COMP. L.Q. 245, 250 (2003) (acknowledging that only recognized armed forces under responsible command, unlike Al-Qaeda, could qualify under the GPW); see also Printer, *supra* note 81, at 374 (insisting that Al-Qaeda combatants, as terrorists, have no right to be deemed “lawful combatants” under the laws of war); Peter Margulies, *Making “Regime” Change Multilateral: The War on Terror and Transitions to Democracy*, 32 DENV. J. INT’L L. & POL’Y 389, 415 (2004) (making similar observations regarding the Taliban).

178. See Yoo/Delahunty Memo, *supra* note 53 (stating that neither Al-Qaeda nor its members qualify for protection as legal combatants because they are not “regular armed forces”); see also Nafziger, *supra* note 73, at 13–14 (noting that the Geneva Conventions do not apply to, and thus do not protect, Al-Qaeda because of the irregular nature of the militia vis-à-vis the protection normally given to regular armed forces); Wedgwood, *supra* note 10, at 335 (concluding that the GPW will not apply to Al-Qaeda, which is an international terrorist group not fighting for a sovereign state and thus not comprised of legal combatants).

179. See Yoo/Delahunty Memo, *supra* note 53 (admitting that the Taliban detainees’ status under the Convention poses a more difficult legal question); see also Chlopak, *supra* note 34, at 6 (noting the United States’ ambiguous approach toward Taliban detainees’ treatment under the Geneva Conventions); Desai, *supra* note 32, at 1587–88 (observing that the United States modified its rule with regard to treatment of Taliban detainees, as opposed to treatment of Al-Qaeda).

tion, although Afghanistan is a party to all four of the Geneva Conventions, the Taliban was not the de facto government.<sup>180</sup> Afghanistan was also a failed state because it lacked the attributes of statehood necessary to continue as a party to the Geneva Conventions.<sup>181</sup> Moreover, the Taliban militia and Al-Qaeda were complicit such that the Taliban was dominated by Al-Qaeda and could not be distinguished from it.<sup>182</sup> Therefore, like Al-Qaeda, the Taliban does not qualify for protection under the Geneva Conventions.

First, the Bush administration argued that the President, as Commander-in-Chief, has the plenary authority to determine that Afghanistan ceased to operate as a state and that the Taliban was not protected by the Geneva Conventions.<sup>183</sup> The Administration noted that the U.S. Supreme Court has found that the President has plenary control over the conduct of foreign relations by endorsing “the generally accepted view that foreign policy [is] the province and responsibility of the Executive.”<sup>184</sup> With the President’s authority over foreign relations comes the power to interpret treaties and international law.<sup>185</sup> Therefore, the Administration has the power to determine “whether a territory has the necessary political structure to qualify as a Nation State for purposes of treaty implementation.”<sup>186</sup>

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180. *But see* Davis Cohen, *Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses*, 11 CARDOZO J. INT’L & COMP. L. 1, 6 (2003) (insisting that the Taliban served as Afghanistan’s de facto government from 1995 to late 2001, regardless of the international community’s view of that government’s legitimacy).

181. *See* Yoo/Delahunt Memo, *supra* note 53 (stating that Afghanistan’s territory was largely overrun and held by factional violence rather than an actual government); *see also* Yoo & Ho, *supra* note 66, at 218 (arguing that although Afghanistan is a party to the Geneva Conventions, the Taliban displaced the legitimate government, thereby making Afghanistan a failed state); Luisa Vierucci, Note & Comment, *Is the Geneva Convention on Prisoners of War Obsolete?*, 2 J. INT’L CRIM. JUST. 866, 868 (2004) (citing counsel to the President as suggesting that the Geneva Conventions could not apply to the Taliban, a terrorist organization controlling a failed state).

182. *See* Yoo/Delahunt Memo, *supra* note 53 (stating that the Taliban leadership could not be distinguished from Al-Qaeda); *see also* Jeffrey F. Addicott, *Legal and Policy Implications for a New Era: The War on Terror*, 4 SCHOLAR 209, 218–19 (2002) (discussing state sponsorship of Al-Qaeda by the Taliban); Jinks, *supra* note 25, at 86 (noting United Nations’ condemnation of the Taliban for allowing Al-Qaeda to use Afghanistan as a base).

183. *See* Yoo/Delahunt Memo, *supra* note 53 (stating that the Taliban was not entitled to the protections of the Geneva Convention); *see also* Vierucci, *supra* note 181, at 867 (summarizing the argument of the Yoo/Delahunt Memo); Murphy, *supra* note 35, at 821 (listing Bush administration arguments against application of the Geneva Convention).

184. *See* Yoo/Delahunt Memo, *supra* note 53 (quoting *Department of the Navy v. Egan*, 484 U.S. 518, 529 (1988)).

185. *Id.* (stating that the President has the power to interpret treaties and international law); *see* U.S. CONST. art. II, § 2, cl. 1–2 (enumerating the President’s powers to make and interpret treaties); *see also* Cindy G. Buys & William Isasi, *An “Authoritative” Statement of Administrative Action: A Useful Political Invention or a Violation of the Separation of Powers Doctrine?* 7 N.Y.U. J. LEGIS. & PUB. POL’Y 73, 76 (2003) (noting the President’s power under the Constitution to make and interpret treaties).

186. *See* Yoo/Delahunt Memo, *supra* note 53 (stating that the Administration has the power to determine whether Afghanistan was a nation state); *see also* *Clark v. Allen*, 331 U.S. 503, 514 (1947) (holding that the President could determine if Germany continued to exist after its defeat in World War II because the question is a political one).

Having established the President's authority to determine if a state fails to exist, the Administration argued that the President may declare Afghanistan a failed state.<sup>187</sup> Therefore, the Taliban is not entitled to protection under the Geneva Conventions. Several criteria characterize a "failed state."<sup>188</sup> A failed state is generally characterized by the collapse or near-collapse of state authority, which includes "the inability of central authorities to maintain government institutions, ensure law and order or engage in normal dealings with other governments, and by the prevalence of violence that destabilizes civil society and the economy."<sup>189</sup> The President could find that when Afghanistan was under the control of the Taliban, there was no functioning central government capable of providing services to the population, suppressing violence or maintaining normal relations with other governments.<sup>190</sup> The Taliban therefore only had the status of a violent faction fighting with other factions for control of the country.<sup>191</sup>

The Administration also uses traditional legal analysis to conclude that Afghanistan was a failed state. The State Department has identified four tests for "statehood":

1. Does the entity have effective control over a clearly defined territory and population?
2. Is there an organized governmental administration of the territory?
3. Does the entity have the capacity to act effectively to conduct foreign relations and to fulfill international obligations?

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187. See Yoo/Delahunt Memo, *supra* note 53 (arguing in favor of the President declaring Afghanistan a failed state); see also Murphy, *supra* note 35, at 821 (reiterating the argument for labeling Afghanistan under Taliban rule a "failed state"); Neil A. Lewis, *Justice Memos Explained How to Skip Prisoner Rights*, N.Y. TIMES, May 21, 2004, at A10 (summarizing the arguments against the applicability of the Geneva Convention).

188. See Robert I. Rotberg, *Failed States in a World of Terror*, FOREIGN AFFAIRS, Aug. 2002, at 127 (listing various characteristics of failed states); see also William A. Lovett, *Bargaining Challenges and Conflicting Interests: Implementing the DOHA Round*, 17 AM. U. INT'L L. REV. 951, 995-96 (2002) (noting the "violence, barbarism and thuggery" characteristic of failed states); Daily Trust, *Nigeria: Security Concerns: Evidence of a Failed State?* AFRICA NEWS, Apr. 30, 2004 (describing escalating violence, lawlessness, assassinations and the inability of Nigerian authorities to address these problems).

189. See Yoo/Delahunt Memo, *supra* note 53; see also J. Alexander Thier, Comment, *Afghanistan: Minority Rights and Autonomy in a Multi-Ethnic Failed State*, 35 STAN. J. INT'L L. 351, 352-53 (1999) (labeling Afghanistan a failed state because of violence and lawlessness). See generally Sonia Boutillon, *The Interpretation of Article I of the 1951 Convention Relating to the Status of Refugees by the European Union: Toward Harmonization*, 18 GEO. IMMIGR. L. J. 111, 124-25 (2003) (stating that human rights violations are typical of failed state settings).

190. See Yoo/Delahunt Memo, *supra* note 53 (citing a State Department finding that there was no functioning central government in Afghanistan under the Taliban). Secretary of Defense Donald Rumsfeld stated on November 2, 2001, that the "Taliban is not a government. The government of Afghanistan does not exist today." *Id.* The State Department also concluded that "there is no functioning central government in Afghanistan." *Id.* The Administration further notes the conclusions of prominent authorities on Afghan affairs, including Lakhdar Brahimi, United States mediator in Afghanistan, who have concluded Afghanistan meets the definition of a failed state. *Id.*; see also Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto Gonzales, Counsel to the President, and William J. Haynes II, General Counsel, Department of Defense (Jan. 22, 2002) (noting the opinion of experts that Afghanistan under Taliban rule was without a functioning central government), available at <http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf> (last visited Feb. 7, 2005); Kenneth Katzman, *Afghanistan: Current Issues and U.S. Policy*, POL'Y PAPERS, Jan. 5, 2004 (explaining the deterioration of relations between the United States and Afghanistan under the Taliban).

191. See Yoo/Delahunt Memo, *supra* note 53 (according the Taliban militia the status of merely one fighting faction); see also Major Michael Lacey, *Self Defense or Self Denial? The Proliferation of Weapons of Mass Destruction*, 10 IND. INT'L & COMP. L. REV. 293, 307 (2000) (pointing out that the Taliban was fighting with several other factions for control of Afghanistan); Gregg Zoroya, *Afghanistan's Children Traumatized by Violence*, USA TODAY, Oct. 31, 2001, at A1 (noting the extreme violence of the Taliban).

4. Has the international community recognized the entity?<sup>192</sup>

Using these criteria the Administration concluded that Afghanistan was a failed state and not a high contracting party to the Geneva Conventions.<sup>193</sup> First, the Taliban militia did not have effective control over a clearly defined territory and population because at least 10 percent of the country was governed by the Northern Alliance.<sup>194</sup> Moreover, large portions of the population, an estimated 3.5 million, were refugees in nearby Pakistan and Iran.<sup>195</sup> Additionally, Afghanistan was divided between tribal and ethnic factions, and the Taliban represented only the Pashtun movement that did not command the allegiance of the other major ethnic groups in Afghanistan.<sup>196</sup>

Second, an organized governmental administration did not exist in Afghanistan because it exhibited the characteristics of a criminal gang and not an organized government.<sup>197</sup> The Administration noted several prominent authorities who have argued that Afghanistan “had ceased to exist as a viable state. . . . [and that there was] no semblance of an infrastructure that can sustain society.”<sup>198</sup> “With the Taliban, there are few meaningful governmental structures and little that actually functions.”<sup>199</sup>

Third, the Taliban was unable to conduct foreign relations and to perform its international obligations.<sup>200</sup> The Taliban refused to comply with United Nations Security Council

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192. See Yoo/Delahanty Memo, *supra* note 53 (citing opinions of U.S. agencies and foreign governments that Afghanistan was a failed state).

193. *Id.* (concluding that Afghanistan under the Taliban was not a high contracting party to the Geneva Conventions).

194. *Id.*; see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987) (defining a state as having a “defined territory” controlled by its own government, which maintains “formal relations” with other governments); William T. Vollman, *Across the Divide: What Do the Afghan People Think of the Taliban?*, NEW YORKER, May 15, 2000, at 58 (stating that 10 percent of Afghanistan was controlled at the time by the Northern Alliance).

195. See Yoo/Delahanty Memo, *supra* note 53 (estimating Afghan refugee populations in Pakistan and Iran); see also Stephen H. Legomsky, *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection*, 15 INT’L J. REFUGEE L. 567, 590 (2003) (noting the presence of millions of Afghan refugees in Pakistan and Iran). *But see* Claudia Kelly Dixon, *Human Rights and the Environment: Nowhere to Run, Nowhere to Hide: How the Events of September 11, 2001 Have Impacted the Refugee Humanitarian Crisis in Afghanistan*, 2001 COLO. J. INT’L ENV’T L. & POL’Y 111, 113 (2001) (numbering the refugees at 3.5 million in Pakistan alone, with another 1.5 million in Iran).

196. See Yoo/Delahanty Memo, *supra* note 53.

197. *Id.*; see SCOR Res. 1333 U.N. SCOR 4251st mtg. at U.N. Doc. S/2000/1202 (2000), reprinted in [2000] 54 Y.B. OF THE U.N., 237 (noting that the Taliban benefited directly from the illegal opium trade); see also Alfred W. McCoy, *From Free Trade to Prohibition: A Critical History of the Modern Asian Opium Trade*, 28 FORDHAM URB. L.J. 307, 342–43 (2000) (detailing Taliban involvement in the opium trade).

198. See Yoo/Delahanty Memo, *supra* note 53; see also Svante E. Cornell, *The War Against Terrorism and the Conflict in Chechnya: A Case for Distinction*, 27 FLETCHER F. WORLD AFF. 167, 180 (2003) (noting the destruction of Afghanistan’s infrastructure even before the Taliban came to power); James Morrison, *Embassy Row: Test for Civilization*, WASH. TIMES, Sept. 19, 2002 at A16 (tracking world pledge of \$1.8 billion to repair Afghanistan’s infrastructure).

199. See Yoo/Delahanty Memo, *supra* note 53 (stating the State Department’s conclusions with respect to Afghanistan’s political and physical infrastructure).

200. *Id.* (suggesting that part of the reason for noncompliance was the influence of Al-Qaeda on the Taliban); see also Bialke, *supra* note 8, at 16 (declaring that, as a signatory to the Geneva Convention, part of the Taliban’s international obligations was to apply the laws of armed conflict to its conduct, which it failed to do); Murphy, *supra* note 35, at 821 (stating that the United States could set aside its obligations under the Geneva Convention toward Afghanistan based on the latter’s failure to fulfill its international obligations).

Resolutions which called on it to surrender Osama bin Laden, and it continued to shelter and support those responsible for the attacks of September 11, 2001.<sup>201</sup> These actions placed it in breach of international law, which prohibits the use of a nation's territory for attacks against another nation.<sup>202</sup>

Fourth, the Taliban was not recognized as the legitimate government of Afghanistan by the United States or the international community.<sup>203</sup> Although Pakistan, Saudi Arabia and the United Arab Emirates (UAE) maintained diplomatic relations with the Taliban, the nearly universal refusal to recognize the Taliban as a government supports the United States' position that the Taliban was not the government of Afghanistan and that Afghanistan had ceased to operate as a nation state.<sup>204</sup>

Accordingly, Afghanistan failed the ordinary tests for statehood.<sup>205</sup> This failure precluded the Taliban from consideration as a high contracting party to the Geneva Conventions.<sup>206</sup> Moreover, the Taliban's close association with Al-Qaeda lends additional support to the conclusion that the two entities were intertwined and that the Taliban did not deserve different treatment under the Geneva Conventions.<sup>207</sup>

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201. See Barry A. Feinstein, *A Paradigm for the Analysis of the Legality of the Use of Armed Force Against Terrorists and States that Aid and Abet Them*, 17 *TRANSNAT'L LAW* 51, 64 (2004) (summarizing the major points of United Nations Security Council Resolution 1333); see also Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 *MICH. J. INT'L L.* 513, 542 n.87 (2003) (laying out the provisions of Security Council Resolution 1333, as well as the demands the United States continued to make following the attacks of September 11, 2001). See generally James Morrison, *Envoy Irks Pakistan*, *WASH. TIMES*, Mar. 23, 2004, at A14 (reporting that the Taliban had been harboring Osama bin Laden and his followers since the September 11, 2001 attacks).
202. See Yoo/Delahunty Memo, *supra* note 53 (basing this conclusion on the fact that the Taliban has continued to give refuge to those responsible for the September 11, 2001 attacks). See generally *Daily Alert—U.S. Urges Taliban Crackdown*, *EMERGING MKT. DAILY NEWS*, July 16, 2004, available at 2004 WL 64480287 (describing how the Taliban have infiltrated Pakistan to use it as a launchpad for attacks).
203. See Yoo/Delahunty Memo, *supra* note 53 (excepting Pakistan as the one nation that did recognize the Taliban); see also Francesco Francioni & Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14 *EUR. J. INT'L L.* 619, 622 (2003) (stating that virtually the entire world does not recognize the legitimacy of the Taliban regime in Afghanistan despite its control over the majority of Afghan territory). But see Scott Higham et al., *A Holding Cell in War on Terror; Prison Represents a Problem That's Tough to Get Out of*, *WASH. POST*, May 2, 2004, at A1 (pointing out that some nations, excluding the United States, do recognize the Taliban as the legitimate government of Afghanistan).
204. See Yoo/Delahunty Memo, *supra* note 53 (noting, however, that even Pakistan withdrew its recognition of the Taliban's legitimacy once conflict arose); see also Ann Elizabeth Mayer, *A "Benign" Apartheid: How Gender Apartheid Has Been Rationalized*, 5 *UCLA J. INT'L L. & FOREIGN AFF.* 237, 275 (2000) (asserting that the Taliban has, by and large, failed to gain international recognition as the legitimate government of Afghanistan because only Pakistan, Saudi Arabia and the UAE still recognized it); Paul Bergen, *Brother in Arms*, *N.Y. TIMES*, Jan. 8, 2005, at A15 (noting that Saudi Arabia, Pakistan and the UAE were the only three countries to acknowledge the Taliban regime).
205. See Yoo/Delahunty Memo, *supra* note 53 (arriving at this conclusion based on evidence that the Taliban did not satisfy the tests for statehood); see also Yoo & Ho, *supra* note 66, at 218 (highlighting some of the reasons Afghanistan was classified as a failed state). But see Michael Byers, *Terrorism, The Use of Force and International Law After 11 September*, 51 *INT'L & COMP. L.Q.* 401, 403 (2002) (questioning the meaning of "failed statehood").
206. See Yoo/Delahunty Memo, *supra* note 53 (asserting this as one of the results of Afghanistan's failure to be classified as a state); see also *U.S. Reveals Memos on Interrogation*, *IRISH TIMES*, June 24, 2004, at 11 (reporting that the United States did not consider the Geneva Conventions' articles to apply to the Taliban because the Taliban was not a high contracting party).
207. See Yoo/Delahunty Memo, *supra* note 53 (pointing out that the Taliban's spiritual leader, Mullah Mohammed Omar, was influenced by Al-Qaeda's radical Islamic beliefs).

The Administration's determination that Afghanistan was a failed state supports the conclusion that the Geneva Conventions would not apply to the Taliban.<sup>208</sup> The protections of the Geneva Conventions are not available to the Taliban because common Article 2 applies only to international wars between two state parties to the Conventions.<sup>209</sup> The standards in Article 3 also would not apply because the current conflict is not a non-international conflict and because Article 3 concerns only non-international conflicts that occur "in the territory of one of the High Contracting Parties."<sup>210</sup> Because Afghanistan was not a high contracting party, a non-international conflict within its territory is not covered by Article 3.<sup>211</sup>

Even assuming that Afghanistan was a party to the Convention, the Taliban militia would not meet the criteria in the two categories of Article 4 of the GPW, which would entitle it to POW status.<sup>212</sup> First, Article 4A(1) would not apply because the United Nations and most nations refused to recognize the Taliban as the government of Afghanistan;<sup>213</sup> therefore, Taliban members were neither "[m]embers of the armed forces of a Party to the conflict" nor "members of militias or volunteer corps forming part of such armed forces."<sup>214</sup>

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208. *Id.* (outlining the reasons leading to the U.S. government's conclusion that Afghanistan was a failed state and not a party to the Geneva Conventions).

209. *Id.* (establishing that the Taliban militia, lacking status as a state party, cannot enjoy the protections of common Article 2 of the Geneva Conventions); see also Lapkin, *supra* note 176, at 13, available at 2004 WL 100176100 (stressing that the Taliban should be denied privileges under Article 2 of the Geneva Conventions because of its systematic violations of the basic tenets of the law of armed conflict). See generally Frank Davies, *Gonzales' Counsel to Bush to Be Topic at Hearings*, MONTEREY COUNTY HERALD, Jan. 5, 2005, available at 2005 WL 56906726 (summarizing a memorandum to the President, which reaffirmed the exclusion of Geneva Conventions protections to Taliban and Al-Qaeda captured terrorists, whose warfare tactics violate Geneva standards).

210. See Yoo/Delahunty Memo, *supra* note 53; see also Press Release, State Department, White House Releases Documents on Torture in War on Terror—Bush Banned Torture, Regardless of Applicability of Geneva Conventions (June 23, 2004) [hereinafter *Bush Banned Torture*] (showing President Bush's acceptance of the Justice Department's conclusion that common Article 3 did not apply to the Taliban), available at 2004 WL 59153270 (last visited Feb. 7, 2005); *U.S. Releases Documents to Refute Torture Allegations*, HINDUSTAN TIMES, June 26, 2004, available at 2004 WL 83757001 (stating that President Bush recognized that the Taliban is engaged in a conflict of international scope, to which common Article 3 of the Geneva Conventions does not apply).

211. See Yoo/Delahunty Memo, *supra* note 53; see also *Bush Banned Torture*, *supra* note 210 (explaining that President Bush considered Taliban fighters to be engaged in armed conflict of international scope, which excluded them from common Article 3 protection); *U.S. Releases Documents to Refute Torture Allegations*, *supra* note 210 (noting that common Article 3 of the Geneva Conventions applies only to non-international armed conflicts).

212. See Yoo/Delahunty Memo, *supra* note 53; see also Jonathon Kay, *Redefining the Terrorist*, NAT'L INT., Apr. 1, 2004, at 87 (noting that, because Taliban terrorists do not qualify for Article 4 POW status, they may be subject to any manner of detention and interrogation by the United States). But see Robert J. Inlow, *Geneva Convention Cuts Both Ways*, WASH. TIMES, Jan. 10, 2005, at A16 (arguing that there is a double standard of giving U.S. Special Forces individuals Article 4 POW status when, based on a literal reading of the provision, they would not meet the criteria for protection as POWs).

213. See Yoo & Ho, *supra* note 66, at 218 (citing nonrecognition of the Taliban as Afghanistan's legitimate government as a reason for Afghanistan's classification as a failed state); see also Higham, *supra* note 203, at A1 (reasoning that some countries, excluding the United States, recognize the Taliban as the legitimate government of Afghanistan). See generally Edward Mortimer, *International Administration of War-Torn Societies*, GLOBAL GOVERNANCE, at 7 (2004), available at 2004 WL 73248449 (noting the instability of the Afghan government, which was not recognized by virtually the entire international community).

214. See Yoo/Delahunty Memo, *supra* note 53 (concluding that members of the Taliban militia do not meet any of the conditions required under Article 4 to attain POW status).

Second, assuming the Taliban could be considered a “government or authority” under Article 4A(3), it would have to demonstrate that it was bound by the GPW in order to claim the benefits of the treaty.<sup>215</sup> The Taliban did not act consistently with the most fundamental obligations of the laws of war;<sup>216</sup> therefore, it cannot claim the benefits of the GPW and does not fall within the meaning of “members of regular armed forces” in Article 4A(3).<sup>217</sup>

Finally, Taliban, like Al-Qaeda, members are not entitled to POW status because of the failure to meet certain conditions under Article 4A(2).<sup>218</sup> The Taliban was not commanded by a person responsible for his subordinates, the distinctive uniform requirement was not met and the requirement that it conduct operations in accordance with the laws of war was not met.<sup>219</sup> Therefore, Taliban detainees are not entitled to the protections of the Geneva Conventions.<sup>220</sup>

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215. See Yoo/Delahunty Memo, *supra* note 53 (noting that the Taliban failed to fulfill its obligations to the Geneva Conventions and committed acts in violation of the basic standards of armed conflict); see also Ferrell, *supra* note 69, at 103 (explaining that because the Taliban conducts operations in a way that runs contrary to the fundamental obligations of the laws of war, it is denied the protections of Article 4(A)(3)); Yoo & Ho, *supra* note 66, at 219 (remarking that Article 4(A)(3) applies only to members of the “armed forces” of a party to the Geneva Convention).
216. See Margulies, *supra* note 177, at 415 (stating that, in targeting civilians, members of the Taliban violated the laws of war); see also Press Release, The White House Office of Communications (Feb. 7, 2002), available at 2002 WL 191074 (emphasizing that the Taliban have not conducted their operations pursuant to the customs and laws of war); Eric Lichtblau, *Bush Nominee Plans to Stand Firm on War-Captive Memo*, N.Y. TIMES, Jan. 6, 2005, at A25 (referring to the Taliban as an enemy that does not fight in accordance with the laws of war).
217. See Yoo/Delahunty Memo, *supra* note 53 (maintaining that Taliban captives do not fall within the purview of Article 4(A)(3) of the Third Geneva Convention); see also Murphy, *supra* note 35, at 823 (noting that members of the Taliban are characterized as militia instead of as members of the regular armed forces of Afghanistan). See generally Ted Lapkin, *Does Human Rights Law Apply To Terrorists?*, MIDDLE E. Q., Fall 2004, at 3–13 (indicating that the privileges conferred under Article 4 of the Geneva Convention do not extend to members of the Taliban because they are not a regular force).
218. See Katherine S. Mangan, *Torture's Paper Trail*, CHRON. OF HIGHER EDUC., Jan. 21, 2005, at 12 (reporting that members of the Taliban militia do not have the right to obtain POW status); see also Yoo/Delahunty Memo, *supra* note 53 (outlining the conditions necessary to be considered a POW under Article 4A(2), including “that of being commanded by a person responsible for his subordinates,” “that of a distinctive uniform,” “that of conducting operations in accordance with the laws . . . of war” and that of being a member of “regular armed forces” or a combatant “of other kinds covered by the Convention”); Michael Duffy et al., *The Torture Files*, TIME, Jan. 17, 2005, at 42 (quoting President Bush who remarked that neither Al-Qaeda fighters nor Taliban captives deserved POW status because they did not meet the conditions of Article 4).
219. See Yoo/Delahunty Memo, *supra* note 53 (asserting that the Taliban did not meet the specific conditions under the Geneva Convention that would accord them POW status); see also Wallach, *supra* note 44, at 18 (positing that Taliban detainees are not accorded POW status under Article 4 of the Geneva Convention because of their inability to satisfy the requisite conditions and their commitment to terrorist activities). See generally Brooks, *supra* note 33, at 732–33 (discussing the Bush administration's refusal to grant members of the Taliban militia POW status).
220. See Eric Lichtblau, *Bush Aide to Defend POW Memo*, INT'L HERALD TRIB., Jan. 7, 2005, at 5 (clarifying the Bush administration's decision to deny the Taliban full coverage and protection under the Geneva Conventions); see also Murphy, *supra* note 35, at 822 (highlighting the role that the Justice Department played in President Bush's refusal to include members of Al-Qaeda and the Taliban under the scope of the Third Geneva Convention); Yoo/Delahunty Memo, *supra* note 53. The Yoo/Delahunty Memo argues that the President was authorized to suspend the Geneva Conventions as to Afghanistan because Afghanistan lacked the capacity to fulfill its treaty obligations or because it was in material breach of its obligations. The memo also asserts that international law does not prohibit the President from suspending the United States' treaty obligations to Afghanistan because the general rule in international law is that the breach of a multilateral treaty by a state party justifies the suspension of that treaty with regard to that state. *Id.*



### 3. Nonbinding Effect of Customary Rules of International Law in the Detention of Al-Qaeda and Taliban Members

The Bush administration asserts that the customary international law of armed conflict does not bind the President or U.S. armed forces concerning the detention or trial of Al-Qaeda and Taliban members.<sup>221</sup> Although the Administration recognizes the view of many international law experts, it concludes that customary international law is not federal law and thus cannot bind the Chief Executive.<sup>222</sup> The Administration argues that international law is not mentioned anywhere in the Constitution as a source of federal law or constraint on the Executive.<sup>223</sup>

Moreover, customary international law has not been subjected to the exacting requirements set forth in the Constitution for law to become binding.<sup>224</sup>

The Administration further argues that the President has the constitutional authority to override international law.<sup>225</sup> Citing several Supreme Court decisions, the Administration posits that although disregarding international law may be a poor idea in the court of public opinion,

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221. See Yoo/Delahanty Memo, *supra* note 53 (noting that customary international law, which is not federal law, does not have a binding effect on the President); see also Jinks & Sloss, *supra* note 63, at 102 (illustrating that the Geneva Conventions, which are international laws, do not bind the President because he has the constitutional authority to circumvent them in the interest of national security); Wuerth, *supra* note 115, at 1601 n.209 (asserting that customary international law is not binding upon the President because it is not preemptive under the Supremacy Clause of the Constitution and is not federal common law).
  222. See Yoo/Delahanty Memo, *supra* note 53 (reasoning that neither the text of the Constitution nor its historical underpinnings support the contentions made by various academics in the field of international law). But see Ralph G. Steinhardt, *International Humanitarian Law in the Courts of the United States*: Yamashita, Filartiga, and 9/11, 36 GEO. WASH. INT'L L. REV. 1, 4–5 (2004) (arguing that the Supreme Court has held that customary international law should be treated as federal law). See generally Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 836 (1997) (noting that the Restatement (Third) does not categorize customary international law as federal law).
  223. See Yoo/Delahanty Memo, *supra* note 53 (asserting that the Supremacy Clause refers only to the Constitution, laws and treaties of the United States as sources of federal law); see also T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT'L L. 91, 96 (2004) (opining that international law is neither state law nor federal law); Bradley & Goldsmith, *supra* note 222, at 819 (admitting that the Constitution is generally silent regarding the legal status and treatment of customary international law).
  224. See Yoo/Delahanty Memo, *supra* note 53 (concluding that the Constitution's structure would be distorted if customary international law were given legal effect because the international law has never been evaluated by the houses of Congress or by the President). See generally Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 321 (emphasizing that the text of the Constitution does not include any references to international law); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393, 396 (1997) (arguing that formal agreements and unwritten, accepted customs under international law are not addressed by the Supremacy Clause of the Constitution).
  225. See Yoo/Delahanty Memo, *supra* note 53 (declaring that the branches of government may act "within their respective spheres of authority" and supersede customary international laws); see also Antonio Cassese, Comment, *Are International Human Rights Treaties and Customary Rules on Torture Binding Upon U.S. Troops in Iraq?*, 2 J. INT'L CRIM. JUST. 872, 873 (2004) (asserting that presidential decisions regarding armed conflicts may override any conflicting rules of customary international law because such rules are not federal law and thus are not binding). See generally Murphy, *supra* note 35, at 821 (noting that the President's authority includes the discretionary and unilateral right to suspend America's obligations under international laws such as the Third Geneva Convention).

the government nevertheless has the power to do so.<sup>226</sup> The Administration distinguished *Paquete Habana*, which acknowledged that “international law is part of our law.”<sup>227</sup> Even though the *Paquete Habana* Court applied customary international law as federal common law, it recognized that the executive and judiciary branches could override international law.<sup>228</sup>

Additionally, the Administration views customary international law as inapplicable because it would weaken the President’s authority over foreign relations and his authority as Commander-in-Chief.<sup>229</sup> The Constitution has given the President plenary authority over foreign relations and the use of the military, and any restriction would inhibit this authority.<sup>230</sup> More-

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226. See *Brown v. United States*, 12 U.S. 110, 128 (1814) (noting that customary international law is only a guide, and the sovereign is able to abandon it at will); see also *Schooner Exch. v. McFaddon*, 11 U.S. 116, 145–46 (1812) (holding that although the Court applied international law to resolve the dispute at hand, “the sovereign of the place” could have “destroy[ed] this implication” if he had chosen a different rule); Yoo/Delahanty Memo, *supra* note 53 (recognizing the judiciary’s authority to override customary international law). See generally *New York Life Ins. Co. v. Hendren*, 92 U.S. 286 (1875) (revealing that the Supreme Court has no jurisdiction as to the laws of war because such laws do not appear in “the constitution, laws, treaties, or executive proclamations, of the United States”), available at [http://pegc.no-ip.info/archive/DOJ/20020109\\_yoomemo.pdf](http://pegc.no-ip.info/archive/DOJ/20020109_yoomemo.pdf) (last visited Feb. 6, 2005).

227. See *Paquete Habana*, 175 U.S. 677, 700 (1900) (conceding that American courts must adopt rules of international law unless they can apply a certain treaty, judicial decision or executive or legislative enactment). The Supreme Court recently addressed similar issues in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2764 (2004) (maintaining that “[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations”).

228. See *Paquete Habana*, 175 U.S. at 700 (reasoning that executive acts and judicial decisions trump the application of international laws); see also *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453 (11th Cir. 1986) (stating that international law controls only in the absence of decisions or enactments in American law which could be applied to resolve the dispute at issue); *Filartiga v. Pena-Irala*, 630 F.2d 876, 880–81 (2d Cir. 1980) (affirming that the laws and customs of other nations are not binding upon the political branches of the United States).

229. See Yoo/Delahanty Memo, *supra* note 53 (suggesting that adherence to international law infringes on the President’s ability to represent the United States in its involvements overseas and undermines his discretion in controlling the military). See generally *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 432–33 (1964) (articulating that in matters of foreign affairs, the President assumes the role of interpreter and advocate of the rules that are most desirable for the national interest); *Rappenecker v. United States*, 509 F. Supp. 1024, 1029 (N.D. Cal. 1980) (stressing the Chief Executive’s plenary power over the manner in which he conducts America’s foreign policy initiatives).

230. See Yoo/Delahanty Memo, *supra* note 53 (discussing the vast and significant authority accorded the President by the Constitution to accomplish national foreign policy objectives); see also John C. Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1198–99 (2004) (characterizing the President’s power as being complete when he plays the role of Commander-in-Chief as well as when he commands the military). See generally Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1016 (2004) (stating that the power of conducting foreign affairs rests exclusively in the hands of the President).

over, incorporating customary international law into federal law would require the judiciary to intervene in matters of military concern.<sup>231</sup> Such action is not within the purview of the judiciary but of the Chief Executive.<sup>232</sup>

#### 4. There Is No Doubt Regarding the Detainees' Status as Unlawful Combatants

The Bush administration argues that detainees have been treated consistently with Article 5 of the GPW because there is no doubt about their status as unlawful combatants.<sup>233</sup> Responding to the argument that Article 5 of the GPW requires the United States to treat detainees as POWs until a competent tribunal has determined they do not qualify for POW status, the Administration contends that in the case of Al-Qaeda and Taliban detainees, there is no such doubt.<sup>234</sup> Not every captured combatant receives a military tribunal decision, as such decisions are reserved for those individuals whose legal status under the GPW is in doubt.<sup>235</sup> As the "highest competent" authority on the subject, the President has conclusively determined that Al-Qaeda and Taliban detainees do not qualify for POW status under the GPW<sup>236</sup> and, as such, are not entitled to treatment as POWs.

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231. See Yoo/Delahunty Memo, *supra* note 53 (warning that the judiciary may be forced to decide political questions in violation of the Constitution if international law is incorporated into federal law).

232. *Id.* (reinforcing the idea that the President is granted the authority to make determinations under international law). The Administration argues that even though customary international law is not binding on the President, he has the constitutional authority to impose the laws of war on members of Al-Qaeda and the Taliban. *Id.* Moreover, the Administration argues that even though the Army's Manual on the Law of Land Warfare is the Army's interpretation of the customary law of international law, it may be "expanded, altered, or overridden at any time by the presidential act, as the Manual itself recognizes." *Id.* See also ARMY FIELD MANUAL, *supra* note 83, at ch. 1, para. 7(c).

233. See Brief for Respondents at 23–24, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696) (asserting there is no doubt concerning the status of Al-Qaeda and Taliban detainees as the President has conclusively determined that they do not qualify under the GPW for POW privileges); see also Jordan J. Paust, *Judicial Power To Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503, 503–04 (2003) (maintaining that President Bush has claimed the right to detain Al-Qaeda and Taliban members after a determination that they are "enemy" or "unlawful" combatants); Alfred de Zayas, *The Status of Guantánamo Bay and the Status of the Detainees*, 37 U.B.C. L. REV. 277, 283 (2004) (expressing the White House's view that the detainees are being treated in accordance with international law, but because they are enemy combatants, they do not have POW status).

234. See Brief for Respondents, *supra* note 233, at 23–24.

235. *Id.*; see also Bialke, *supra* note 8, at 49–50 (explaining that a competent tribunal is convened only when necessary to resolve doubt as to the legal status of a captured combatant); Wallach, *supra* note 44, at 27 (indicating that if any doubt arises under Article 5 regarding an individual's protection as a prisoner of war, that individual shall enjoy the protection until a tribunal determines his status).

236. See Brief for Respondents, *supra* note 233, at 24; see also Michael Beattie & Lisa Yonka Stevens, Comment, *An Open Debate on United States Citizens Designated as Enemy Combatants: Where Do We Go from Here?*, 62 MD. L. REV. 975, 976 (2003) (showing that the Supreme Court established the principle that the President, in his role as Commander-in-Chief, should be given deference in his determination of enemy status). See generally Aldrich, *supra* note 36, at 891–92 (revealing that it was the President who determined the United States' position on the application of the GPW to Al-Qaeda and Taliban detainees).

## B. Critical Responses to the Bush Administration's Classification of Al-Qaeda and Taliban Detainees

Critics of the Administration make several arguments to justify their conclusion that the Administration erred in failing to afford the Al-Qaeda and Taliban detainees the protections of the Geneva Conventions.<sup>237</sup> First, critics argue that the United States must treat the detainees as POWs under Article 5 of the GPW.<sup>238</sup> Second, the Administration's conclusion is a radical departure from U.S. military practice.<sup>239</sup> Third, the Geneva Conventions are the supreme law of the United States.<sup>240</sup> Fourth, Al-Qaeda members are entitled to the protections of the Conventions because they engaged in an international armed conflict on the side of a party to the Conventions.<sup>241</sup> Fifth, both Al-Qaeda and Taliban detainees satisfy the four conditions to enti-

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237. See Jinks & Sloss, *supra* note 63, at 113 (claiming that some individuals would argue that the United States has incorrectly denied POW status to the detainees); see also Michael J.D. Sweeney, *Detention at Guantánamo Bay—A Linguistic Challenge to Law*, 30 HUM. RTS. 15, 16 (2003) (commenting that despite the evidence in support of the detainees' POW status, the Bush administration continues to refuse to convene a tribunal for resolution of the issue); Akbar, *supra* note 74, at 204–05 (alleging that the U.S. government continues to declare the detainees as unlawful combatants, despite many objections from both domestic and international organizations).

238. See Berman, *supra* note 86, at 37 (discussing the ample debate over the POW status of Al-Qaeda and Taliban detainees, with human rights groups arguing against the U.S. government's rejection of such status for these detainees); see also Brooks, *supra* note 33, at 733 (discussing how many human rights groups, scholars, foreign diplomats and military lawyers challenge the Bush administration's decision that Al-Qaeda and Taliban detainees are unlawful combatants); Callen, *supra* note 56, at 1027–28 (explaining that although the Bush administration claims unlawful combatants are not covered by any Geneva Conventions, others would argue that they are entitled to protection under Article 5).

239. See Janik, *supra* note 23, at 512–13 (suggesting that the United States, in declaring Al-Qaeda and Taliban detainees unlawful combatants, has risked extreme divergence from the usual protections given to prisoners of war facing military tribunals); see also Maddox, *supra* note 40, at 425–26 (reasoning that since Justice Black said that military trials of civilians charged with crimes that are not subject to judicial review are a radical departure from U.S. beliefs, Justice Black would disagree with the Bush administration's rules making military tribunal decisions reviewable only by the President); Anthony Lewis, *The Roots of Abu Ghraib: A President Beyond the Law*, N.Y. TIMES, May 7, 2004, at A31, available at 2004 WLNR 5369431 (concluding that the most radical departure from law is President Bush's claim that he can determine any U.S. citizen is an enemy combatant and treat him or her accordingly).

240. See Howard S. Levie, *Enforcing the Third Geneva Convention on the Humanitarian Treatment of Prisoners of War*, 7 USAFA J. LEG. STUD. 37, 42 (1996–97) (affirming that the United States' treaties, of which the Geneva Convention is one, are part of the supreme law of the land); see also Michael A. McKenzie, *Treaty Enforcement in U.S. Courts—United States v. Noriega*, 34 HARV. INT'L L.J. 596, 600–01 (1993) (recognizing that since 1955, when the Third Geneva Convention was ratified by the U.S. Senate, it has been incorporated into U.S. law as the supreme law of the land); Julianne Peck, Note, *The U.N. and the Laws of War: How Can the World's Peacekeepers Be Held Accountable?*, 21 SYRACUSE J. INT'L L. & COM. 283, 303 (1995) (informing that when the Geneva Conventions of 1949 came into force, they became the supreme law of the land for the United States).

241. See David D. Caron & David L. Sloss, *International Decision, Availability of U.S. Courts to Detainees at Guantánamo Bay Naval Base—Reach of Habeas Corpus—Executive Power in War on Terror*, 98 AM. J. INT'L L. 788, 795 (2004) (discussing the flaws in the Administration's analysis that the Geneva Conventions do not apply to Al-Qaeda because it is not a state party to the Conventions); see also David B. Rivkin Jr. & Lee A. Casey, *Geneva Conventions and POWs: Al Qaeda Combatants Do Not Qualify*, WASH. TIMES (D.C.), Nov. 16, 2004, at A19 (reporting that the U.S. Supreme Court determined that the Geneva Prisoner of War Convention applies to everyone fighting in Afghanistan, thus extending its protection to Al-Qaeda detainees). But see Yoo & Ho, *supra* note 66, at 216 (arguing that although the conflict in Afghanistan is governed by the laws of war, Al-Qaeda is not a state party to the Geneva Convention and thus should not receive its protection).

tle them to POW status.<sup>242</sup> Sixth, both groups must be considered POWs because no combatant can fall outside the protections of the Conventions.<sup>243</sup>

### 1. The United States Must Treat Detainees as POWs Until a Competent Tribunal Has Determined They Do Not Qualify for POW Status

Critics of the Administration argue that the Administration erred in declaring detainees unlawful combatants because Article 5 of the GPW requires a competent tribunal to determine the status of any detainee.<sup>244</sup> Article 5 creates a presumption in favor of treating a combatant as a prisoner of war unless a competent tribunal determines otherwise on an individualized basis.<sup>245</sup> Article 5 requires that a detainee's status be determined only by a competent tribunal should any doubt arise as to whether the detainee deserves status as a POW.<sup>246</sup>

242. See Steven W. Becker, "Mirror, Mirror on the Wall . . .": *Assessing the Aftermath of September 11th*, 37 VAL. U. L. REV. 563, 574-76 (2003) (noting the four conditions from the 1949 Geneva Conventions that must be met to qualify for POW status and showing that Taliban combatants and the Al-Qaeda fighters found with them are entitled to POW status); see also Wallach, *supra* note 44, at 18 (allowing that Taliban and Al-Qaeda members qualify as prisoners of war under the GPW). But see Press Release, White House Press Secretary Ari Fleischer, Statement by the Press Secretary on the Geneva Convention (May 7, 2003) (asserting that neither Taliban nor Al-Qaeda fighters are entitled to POW status under the GPW because neither group meets the four GPW conditions), available at <http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html> (last visited Feb. 6, 2005).

243. See Blakesley, *supra* note 92, at 1114 (emphasizing how the Third Geneva Convention should apply to all combatants captured during armed conflict); see also Chlopak, *supra* note 34, at 7 (noting that according to Human Rights Watch, no one under enemy control can fall outside the law, so detainees must either be protected by the Third Convention as prisoners of war or by the Fourth Convention as civilians); Luisa Vierucci, *Prisoners of War or Protected Persons Qua Unlawful Combatants? The Judicial Safeguards to Which Guantánamo Bay Detainees Are Entitled*, 1 J. INT'L CRIM. JUST. 284, 295 (2003) (stressing that lawful combatants are subject to treatment as prisoners of war when captured by opposing military forces).

244. See Brief of Amici Curiae Experts on the Law of War in Support of Petitioners at 6, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696) [hereinafter Brief of Amici Curiae Experts] (detailing how, if any doubt arises as to whether a detained person deserves POW status, such detainee shall enjoy POW protection until his status is determined by a competent tribunal). Some critics argue that the President lacks the constitutional authority to declare combatants as unlawful; see also Wuerth, *supra* note 115, at 1569 ("[T]he President lacks the constitutional power to detain U.S. citizens as enemy combatants.").

245. See Prisoners of War, *supra* note 15, at 3316 (providing that if there is any doubt regarding a person in the hands of his enemy, that person will enjoy the protection of the Convention until a competent tribunal makes a determination); see also Goldman & Tittmore, *supra* note 45, at 23 (opining that while the United States is committed to upholding the Geneva Conventions, the Conventions do not take into account every situation where a person might be detained, thus not including the situation in Afghanistan); White House Fact Sheet, *supra* note 43 (indicating that while neither Taliban nor Al-Qaeda fighters are afforded prisoner of war status, they will still be given many of the same protections as a matter of policy).

246. See Prisoners of War, *supra* note 15, at 3316; see also Brief of Amici Curiae Experts, *supra* note 244 (enumerating the policy under the Convention that only a competent tribunal can make a determination when there is doubt surrounding an individual's POW status).

This requirement has been adopted and incorporated into U.S. Army regulations, and today every branch of the U.S. military follows the requirements of Article 5.<sup>247</sup> The Army regulations, for example, state that if there is any doubt regarding a person's status, the detainee must be provided the protection of the GPW "until such time as their status has been determined by a competent tribunal."<sup>248</sup> Moreover, Army regulations state that Article 5 applies to any person "who asserts that he is entitled to treatment as a prisoner of war,"<sup>249</sup> which would suggest that doubt arises when a combatant asserts his right as a POW. In that case, a tribunal must be held to determine his status because the unilateral determination of the President is insufficient.<sup>250</sup>

## 2. The Administration's Determination Is a Radical Departure from the Practice of the U.S. Military

Critics of the Administration further argue that the Administration has failed to act in accordance with military practice adhered to since World War II.<sup>251</sup> In the Korean War, for

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247. See Brief of Amici Curiae Experts, *supra* note 244, at 6–7 (outlining how the U.S. military implemented regulations recognizing the requirement for competent tribunals from Article 5 as soon as the Convention was ratified in 1955); see also ARMY FIELD MANUAL, *supra* note 83, at ch. 1, para 7(c) (illustrating how the United States will strictly adhere to the law of war until directed otherwise by a competent authority); Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees § 1-5(a)(2) (1997) [hereinafter Army Regulation 190-8] (holding that "[a]ll persons taken into custody by U.S. forces will be provided with the protections of the GPW" until a competent authority determines some other legal status), available at <http://usmilitary.about.com/library/milinfo/arreg2/blar190-8.htm> (last visited Feb. 6, 2005).

248. See Army Regulation 190-8, *supra* note 247; see also Brief of Amici Curiae Experts, *supra* note 244, at 8 (quoting Article 5 of the GPW: "[I]f any doubt arises as to whether a person . . . belongs to any of the categories enumerated in Article 4, GPW," that person will enjoy POW protection until a competent tribunal determines his or her status); Vaughn A. Ary, *Accounting for Prisoners of War: A Legal Review of the United States Armed Forces Identification and Reporting Procedures*, 1994 ARMY LAW. 16, 17 n.7 (1994) (clarifying that under the GPW, an individual will enjoy the protections of being a POW if doubt arises, until a competent tribunal has ruled).

249. See ARMY FIELD MANUAL, *supra* note 83, at ch. 3, § 1, para. 71; see also Brief of Amici Curiae Experts, *supra* note 244, at 13 (remarking that Article 5 applies to any individual who has been involved in hostile activities to help a military party and who asserts that he is entitled to treatment as a prisoner of war); Aldrich, *supra* note 36, at 898 (rationalizing that a tribunal is required whenever doubt arises and a detainee asserts the right to be treated as a prisoner of war).

250. See Aldrich, *supra* note 36, at 897–98 (citing the language of Article 5 of the Geneva Convention that requires a "competent tribunal" and states that the President alone cannot constitute one); see also Mundis, *supra* note 31, at 325 (maintaining that when Article 4 of the Geneva Convention is in doubt, the President acting unilaterally cannot substitute for a "competent tribunal"); White House Fact Sheet, *supra* note 43 (stating that President Bush concluded that the Geneva Convention applies only to detained members of the Taliban and not those of Al-Qaeda).

251. See ARMY FIELD MANUAL, *supra* note 83, at ch. 3, § 1, para. 71(b), (c) (describing American policy of providing a competent tribunal before denying POW status); see also Brief of Amici Curiae Experts, *supra* note 244, at 13 (labeling the failure to convene a competent tribunal as a radical departure from American policy dating back to World War II); Elsea, *supra* note 143 (maintaining that the United States had previously interpreted the Geneva Convention to require an individual review before POW status can be denied).

example, the U.S. military treated Chinese captives as POWs under the GPW even though the international community did not recognize the communist government.<sup>252</sup> During the Vietnam conflict, the U.S. military directed that all combatants be entitled to the protections of the GPW regardless of their unit.<sup>253</sup> The U.S. military also faithfully followed the GPW during the 1991 Persian Gulf War by convening 1,196 tribunals to resolve the status of enemy combatants<sup>254</sup> (which refutes any assertion by the Administration that convening tribunals will interfere with military operations<sup>255</sup>).

### 3. The Geneva Conventions Are the Supreme Law of the United States

According to critics of the Administration, the Geneva Conventions are the “supreme Law of the Land” and must be applied by U.S. courts because the United States ratified them.<sup>256</sup> The Supremacy Clause of the U.S. Constitution states: “The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made . . . shall be the supreme Law of the Land.”<sup>257</sup> Moreover, “[t]he Supremacy Clause of the United States Constitution gives legal force to foreign treaties, and our status as a free nation demands faithful com-

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252. See Brief of Amici Curiae Experts, *supra* note 244, at 9-10 (describing how the United States military gave POW considerations to captured Chinese soldiers, despite not recognizing Communist China); see also Human Rights Watch, *Background Paper on Geneva Conventions and Persons Held by U.S. Forces* (Jan. 29, 2002) (detailing how Chinese prisoners were considered as POWs under the Geneva Convention even though neither the United States nor the United Nations acknowledged their government at the time), available at <http://www.hrw.org/backgrounder/usa/pow-bck.htm> (last visited Feb. 7, 2005). See generally Howard S. Levie, *How It All Started – And How It Ended: A Legal Study of the Korean War*, 35 AKRON L. REV. 205, 223 n.71 (2002) (revealing that many of the Chinese POWs captured during the Korean War resisted repatriation to Communist China).

253. See Brief of Amici Curiae Experts, *supra* note 244, at 10; see also U.S. Military Assistance Command for Vietnam, Directive No. 381-46, Annex A (Dec. 27, 1967), reprinted in *Contemporary Practice of the United States Relating to International Law*, 62 AM. J. INT’L L. 754, 766-67 (1968) (directing American soldiers to grant POW status to members of the Viet Cong, North Vietnamese Army and to a group referred to as *irregulars*, which included Viet Cong guerrilla units); Hans-Peter Gasser, *The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims: An Appeal for Ratification by the United States*, 81 AM. J. INT’L L. 912, 921-22 (1987) (asserting that Viet Cong guerrilla units were never granted formal POW status but treated as such under the condition that they were engaging in combat and not in acts of terrorism).

254. See Dep’t of Defense, *Conduct of the Persian Gulf War: Final Report to Congress* 578 (1992), available at <http://www.ndu.edu/library/epubs/cpgw.pdf> (last visited Feb. 7, 2005); see also Brief of Amici Curiae Experts, *supra* note 244, at 10 (noting that the U.S. military continued its history of complying with the Geneva Convention in the Persian Gulf War of 1991); Meron, *supra* note 145, at 678 (highlighting the impact of the Geneva Protocol on the United States in the Persian Gulf War, despite not officially ratifying this agreement).

255. See *Hamdi v. Rumsfeld*, 316 F.3d 450, 469-71 (4th Cir. 2003) (explaining the court’s concern with placing a strain on the military during wartime and putting the focus on record keeping rather than winning the war); see also Brief of Amici Curiae Experts, *supra* note 244, at 11 (arguing that the Fourth Circuit’s fears that tribunals interfere with the war efforts are unfounded, as history has demonstrated the American military’s capability to effectively carry out both activities).

256. See Judiciary and Judicial Procedure, 28 U.S.C.S. § 2241(c)(3) (2005) (extending the writ of habeas corpus to a prisoner held in custody in violation of a treaty of the United States); see also *Wildenhus’s Case*, 120 U.S. 1, 17 (1887) (holding that a treaty is considered to be supreme law of the United States and that a plaintiff may seek a writ of habeas corpus under one); Brief of Amici Curiae Experts, *supra* note 244, at 17 (arguing that a U.S. court can apply the Geneva Convention to the case of those detained in Afghanistan).

257. U.S. CONST. art. VI, cl. 2.

pliance with the law of free nations.”<sup>258</sup> Therefore, the denial of POW status to detainees under the GPW violates the Convention and U.S. law because the GPW is the supreme law of the United States.<sup>259</sup>

#### 4. Al-Qaeda Members Are Entitled to POW Status Because They Engaged in an International Armed Conflict on Behalf of a Party to the Geneva Conventions

Some critics concede that the Administration correctly labeled Al-Qaeda as an international terrorist organization that is unable to ratify the Geneva Conventions insofar as it participated in the 9/11 attacks and perpetrated private hostilities against the United States in violation of the laws of war.<sup>260</sup> But those critics also distinguish between Al-Qaeda as a whole and those detained in Afghanistan,<sup>261</sup> noting that the members of Al-Qaeda detained in Afghanistan were engaged in an international armed conflict in Afghanistan—a party to the Geneva Conventions—against the United States.<sup>262</sup> In fact, some Al-Qaeda members were integrated into the Taliban fighting units.<sup>263</sup>

Proponents of this view argue that under GPW Article 4A(1) and (3), “[m]embers of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming

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258. See Brief of Amici Curiae Experts, *supra* note 244, at 19 (quoting Sandra Day O’Connor, *Federalism of Free Nations*, in *INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS* 13, 18 (Thomas M. Franck & Gregory H. Fox eds., 1996): “[D]omestic courts should faithfully recognize the obligations imposed by international law. The Supremacy Clause of the United States Constitution gives legal force to foreign treaties, and our status as a free nation demands faithful compliance with the law of free nations.”); see also *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 201 (maintaining that a treaty or one of its provisions supersedes any inconsistent domestic law).

259. See *Hamdi*, 316 F.3d at 450 (explaining that the Geneva Convention did not apply to the plaintiff’s case because the Geneva Convention is not a self-executing treaty and does not create a private right to action in American courts); see also Brief of Amici Curiae Experts, *supra* note 244, at 20 (asserting that denial of POW status to Mr. Hamdi constitutes a violation of the Geneva Convention and, subsequently as a valid treaty of the United States, the Supremacy Clause); Akbar, *supra* note 74, at 195 (criticizing the Fourth Circuit’s use of precedent not on point as its basis for determining in *Hamdi* that the Geneva Convention is not a self-executing treaty).

260. See Bialke, *supra* note 8, at 34–35 (describing Al-Qaeda members as the prototypical nonstate actors and unlawful combatants with no rights under the Geneva Convention); see also Goldman & Tittmore, *supra* note 45, at 29 (echoing the Bush administration’s position that Al-Qaeda is a global terrorist group that engaged in private hostilities with the United States and cannot legally be considered a party to the Geneva Convention).

261. See Azubuike, *supra* note 68, at 152 (separating the acts committed by Al-Qaeda prior to the war in Afghanistan and its involvement with said conflict); see also Blakesley, *supra* note 92, at 1119 (detailing the American proposition to do away with any distinction and make it illegal simply to be a member of Al-Qaeda); Goldman & Tittmore, *supra* note 45, at 29 (differentiating between members of Al-Qaeda caught engaging in private hostilities against the United States and those detained while fighting in an international conflict alongside the Taliban).

262. See Murphy, *supra* note 35, at 477 (indicating the United States reversed its original contention that the Geneva Convention did not apply to a party—the Taliban—that it did not recognize as the government of Afghanistan); see also Goldman & Tittmore, *supra* note 45, at 29 (highlighting that some of the Al-Qaeda members captured in Afghanistan were fighting alongside the Taliban in the state of a party to the Geneva Convention). See generally *Human Rights Standards Applicable to the United States’ Interrogation of Detainees*, *supra* note 5, at 15–16 (asserting that the conflict in Afghanistan was no longer an international one once the Karzai government took effect, thus making the Geneva Convention inapplicable to anyone detained after this point).

263. See Azubuike, *supra* note 68, at 127 (noting that Al-Qaeda and Taliban forces were so intertwined that it was difficult at times to distinguish between the two); see also Goldman & Tittmore, *supra* note 45, at 29 (pointing out that elements of Al-Qaeda existed within the Taliban forces, as well as alongside in an independent group).



part of such armed forces” are entitled to POW status.<sup>264</sup> They also note that the GPW does not distinguish combatants on the basis of nationality;<sup>265</sup> therefore, the Al-Qaeda members who were integrated with the Taliban as part of their regular forces cannot be denied POW status on that basis. However, critics concede that members of Al-Qaeda who fought alongside the Taliban but were not integrated into their regular forces probably do not qualify for POW status under the requirements of Article 4A(2) of the GPW.<sup>266</sup>

#### 5. Al-Qaeda and Taliban Detainees Satisfy the Four Conditions to Entitle Them to POW Status

Even if Al-Qaeda and Taliban detainees did not otherwise qualify as POWs, they would be entitled to POW status if they satisfied the requirements of Article 4A(2) of the GPW, which delineates four criteria for “[m]embers of the armed forces of a Party to the conflict as well as members of militias or volunteer corps” to qualify as prisoners of war.<sup>267</sup> These include command by a person responsible for his subordinates, having a fixed distinctive sign recognizable from a distance, carrying arms openly and conducting their operations in accordance with the laws and customs of war.<sup>268</sup> Critics argue that the detainees meet each of these criteria and thus should be accorded POW status.<sup>269</sup>

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264. See Prisoners of War, *supra* note 15, at 3316; see also Goldman & Tittmore, *supra* note 45, at 29 (indicating that Article 4A(1) and (3) of the Geneva Convention apply to members of a state's regular army). But see Ferrell, *supra* note 69, at 99–100 (claiming that in order to attain POW status, a person must satisfy not just Article 4A(1) of the Geneva Convention, but Article 4A(2) as well).

265. See Prisoners of War, *supra* note 15, at 3316 (providing that “all prisoners of war shall be treated alike by the Detaining Power, without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria” (emphasis added)); see also Sperber, *supra* note 41, at 197 n.172 (asserting that nationality was included in Article 16 to ensure that captured alien combatants are treated the same as captured nationals (citing LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT*, 199 (2d ed. 2000))); Goldman & Tittmore, *supra* note 45, at 29 (noting that nationality is irrelevant to POW status under the Geneva Convention).

266. See Prisoners of War, *supra* note 15, at 3316 (granting POW status to those who fulfill four criteria: “(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; (d) that of conducting their operations in accordance with the laws and customs of war”); see also Diane F. Orentlicher & Robert Kogod Goldman, *The Military Tribunal Order: When Justice Goes to War: Prosecuting Terrorists Before Military Commissions*, 25 HARV. J.L. & PUB. POL’Y 653, 658 (2002) (arguing that Al-Qaeda could be considered a paramilitary organization that fails to meet the requirements of lawful combat provided by Article 4A(2)); Goldman & Tittmore, *supra* note 45, at 30.

267. See Prisoners of War, *supra* note 15, at 3316.

268. *Id.*

269. See Bialke, *supra* note 8, at 1 (suggesting that Al-Qaeda and Taliban detainees are qualified to receive POW status); see also Thomas M. Franck, *Criminals, Combatants, or What? An Examination of the Role of Law in Responding to the Threat of Terror*, 98 AM. J. INT’L L. 686, 688 (2004) (indicating it may be inappropriate to ignore such detainees’ status as POWs). But see *It’s Not Torture, and They Aren’t Lawful Combatants*, WASH. POST, Jan. 11, 2003, at A19 (proposing that neither Al-Qaeda nor Taliban detainees warrant POW status).

First, both Al-Qaeda and Taliban detainees were commanded by a responsible person.<sup>270</sup> Even though the Taliban appears not to have a conventional military command structure, it could not have actively fought against the American forces in Afghanistan without one.<sup>271</sup> Indeed, the Taliban resistance was certainly more cohesive than a disorganized mob and showed some form of military command structure, which enabled them to mount hardened resistance.<sup>272</sup> Al-Qaeda maintains an even more unconventional command structure by Western standards.<sup>273</sup> Nevertheless, the existence of such a structure is evidenced by the cell network responsible for planning and executing the 9/11 attacks, which required some central command with authority over operations.<sup>274</sup>

Critics also challenge the Administration's conclusion that the Taliban forces were not organized into military units with a readily identifiable chain of command.<sup>275</sup> They argue that it is the prerogative of the adversary, and not the United States, to determine how to effectively organize its command structure. Because command facilities are the most valuable of military targets, the adversary will make every effort to conceal and confuse the enemy regarding its command structure to protect against attack. More practically, it is hard to believe the Taliban could have defeated the Northern Alliance and gained control over the majority of Afghanistan without a command structure.<sup>276</sup>

Second, Al-Qaeda and Taliban detainees satisfy the requirements of wearing a distinctive sign and carrying arms openly.<sup>277</sup> Even though on the surface it appears that neither would satisfy these requirements because they dress like local Afghan civilians, Protocol I and historical precedent provide the solution. Article 44 of Protocol I remedies the problems in the GPW

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270. See Clover, *supra* note 32, at 360–61; see also Stephen Biddle, *Afghanistan and the Future of Warfare*, FOREIGN AFF. (noting sophisticated authoritative command by terrorist leaders). But see Diane K. Hook, *Detainees or Prisoners of War?: The Applicability of the Geneva Convention to the War on Terrorism*, 58 J. MO. B. 346, 348 (2002) (finding the Taliban army too disjointed for “responsible command”).

271. See Clover, *supra* note 32, at 361 (considering the complexity and success of the September 11 attacks as evidence of coordinated command structures); see also Hook, *supra* note 270, at 348 (noting the unconventional military structure). See generally *By the Laws of War, They Aren't POWs*, WASH. POST, Mar. 3, 2002, at B3 (outlining the evolution of the Taliban's military structure).

272. See Anderson, *supra* note 100, at 628 (detailing the Taliban command structure); see also Clover, *supra* note 32, at 361 (describing the resistance against the U.S. army). But see *United States v. Lindh*, 212 F. Supp. 2d 541, 541 (2002) (holding that Lindh failed to show a clear military structure or hierarchy in the Taliban army).

273. See Bialke, *supra* note 8, at 15 (commenting on Al-Qaeda's unconventional structure and the difficulties it poses); see also Clover, *supra* note 32, at 361 (noting the unfamiliar nature of Al-Qaeda terror cells). See generally Geraghty, *supra* note 18, at 577 (discussing Al-Qaeda's structure).

274. See Clover, *supra* note 32, at 361; see also Michael J. Garcia, Note, *A Necessary Response: The Lack of Domestic and International Constraints upon a U.S. Nuclear Response to a Terrorist Attack*, 1 GEO. J.L. & PUB. POL'Y 515, 529 (2003) (identifying the role of structure in the September 11 attacks).

275. See Clover, *supra* note 32, at 361; see also Turley, *supra* note 36, at 756–57 (criticizing the Bush administration's classification of Taliban units). See generally Azubuike, *supra* note 68, at 148 (supporting the notion of structure and an identifiable chain of command).

276. See Joshua S. Clover, *supra* note 32, at 360–61.

277. See Azubuike, *supra* note 68, at 148 (finding general agreement that the Taliban openly carried arms); see also Clover, *supra* note 32, at 363 (noting the distinctive signs and compliance with openly carrying arms). See generally Brooks, *supra* note 33, at 734 (stating that the Taliban both had distinctive regalia and carried arms openly).

that failed to encompass guerrilla forces in an effective manner<sup>278</sup>—it provides that guerrilla fighters do not lose their status as prisoners of war if they carry their arms openly during each military engagement and when they are visible to the enemy while preparing for a military deployment.<sup>279</sup> The fact that the detainees satisfy the requirement of carrying their arms openly would satisfy the requirement that they wear a distinctive sign.<sup>280</sup> Additionally, the U.S. military seemingly could distinguish the Taliban fighters from civilians because the United States did not complain about its inability to attack the Taliban's command and control facilities.<sup>281</sup>

Moreover, Al-Qaeda and Taliban detainees are similar to the Viet Cong who were granted POW status during the Vietnam War, even though they posed a similar challenge under the GPW. The Viet Cong, like Al-Qaeda and Taliban fighters, had a military command structure,<sup>282</sup> but they did not wear a distinctive insignia that was recognizable at a distance and intended to blend in with the civilian population.<sup>283</sup> Nevertheless, they were granted POW status under the GPW.<sup>284</sup>

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278. See Patricia Zengel, *Assassination and the Law of Armed Conflict*, 134 MIL. L. REV. 123, 149 (1991) (discussing Protocol I's purpose); see also Clover, *supra* note 32, at 363 (identifying the effect of Article 44). See generally Yoo & Ho, *supra* note 66, at 226 (listing components and goals of Article 44 and Protocol I).

279. See Abraham D. Sofaer, *The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims: The Rationale for the United States' Decision*, 82 AM. J. INT'L L. 784, 786 (1988) (observing the existence of an exemption with respect to carrying arms openly); see also Clover, *supra* note 32, at 360–61 n.128 (discussing the Article 44 provision on carrying arms openly).

280. See Bialke, *supra* note 8, at 26–27 (nullifying the requirement of distinctive signs in certain circumstances when carrying arms openly); see also Clover, *supra* note 32, at 363 (revealing that the detainees had carried arms openly, satisfying the requirement). See generally Michael Ashkouri, *Has United States Foreign Policy Towards Libya, Iraq & Serbia Violated Executive Order 12333: Prohibition on Assassination?*, 7 NEW ENG. INT'L & COMP. L. ANN. 155, 162 (2001) (stating that carrying arms openly is sufficient to comply with the international conventions).

281. Marco Sassoli, *The Status of Persons Held in Guantánamo Under International Humanitarian Law*, 2 J. INT'L CRIM. JUST. 96, 102 (2004) (stating that the United States was able to attack the Taliban's command and control stations); see also Aldrich, *supra* note 36, at 891 (charging the United States with the ability to distinguish soldiers and civilians). See generally Steven R. Ratner, Comment, *Jus ad Bellum and Jus in Bello After September 11*, 96 AM. J. INT'L L. 905 (2002) (implying the United States was able to differentiate between soldiers and civilians).

282. See John Alan Cohan, *Legal War: When Does It Exist, and When Does It End?*, 27 HASTINGS INT'L & COMP. L. REV. 221, 282 (2004) (describing the structure of the Viet Cong); see also Clover, *supra* note 32, at 363–64 (comparing the command military structure of Al-Qaeda to that of the Viet Cong). See generally Jeffrey F. Addicott & William A. Hudson, Jr., *The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons*, 139 MIL. L. REV. 153, 175 (1993) (stating that a component of the Viet Cong's action was based in command-directed structure).

283. See Addicott & Hudson, *supra* note 282, at 166 (pointing out the difficulties in distinguishing civilians and aggressive guerilla fighters); see also Matthew Lippman, *Genocide: The Crime of the Century. The Jurisprudence of Death at the Dawn of the New Millennium*, 23 HOUS. J. INT'L L. 467, 496 (2001) (discussing the problems that result from the inability to distinguish civilians from soldiers). See generally Clover, *supra* note 32, at 364 (noting the intent of the Viet Cong to blend in with Vietnamese civilians).

284. See Akbar, *supra* note 74, at 213 (remarking that captured Viet Cong and North Vietnamese soldiers were given POW status during the Vietnam War); see also Clover, *supra* note 32, at 364 (stating that during the Vietnam War, captured Viet Cong soldiers were afforded POW status); Frank Davies, *Former POWs Warn of Consequences in Enemy Combatant Cases*, MIAMI HERALD, Apr. 29, 2004, at 10A (mentioning that Viet Cong guerillas were categorized as prisoners of war and given protections under the Geneva Convention).

Critics of the Administration attack Secretary of Defense Rumsfeld's statement that members of the Taliban did not effectively distinguish themselves from the civilian population.<sup>285</sup> They note that irregulars are not required by the Geneva Conventions to wear traditional uniforms to entitle them to POW status.<sup>286</sup> Irregulars may dress in civilian clothing as long as they wear a distinctive sign to distinguish them from the civilian population.<sup>287</sup> Critics speculate that members of the Taliban and the Northern Alliance were able to recognize each other because the Taliban wore dark turbans and the Northern Alliance wore scarves.<sup>288</sup> This, they argue, would suffice to distinguish them from the civilian population.<sup>289</sup> If the Northern Alliance was able to distinguish the enemy, so too did the United States military when actively engaged in hostilities in Afghanistan.<sup>290</sup>

Third, critics acknowledge that whether Al-Qaeda and Taliban detainees conducted their operations in accordance with the laws of war is a more difficult assessment.<sup>291</sup> They refute the argument that both did not follow the laws of war because of their support for terrorism and contempt for human rights by noting the absence of evidence that they were engaged in either

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285. See Pamela Hess, *Unlikely Bin Laden Killed by CIA Missile*, UNITED PRESS INT'L, Feb. 8, 2002 (reiterating Secretary of Defense Rumsfeld's statement that Taliban fighters did not distinguish themselves from the civilian population of Afghanistan); see also Bernard Weil, *Red Cross Insists Captives Are POWs*, TORONTO STAR, Feb. 9, 2002, at A17 (reporting that the Red Cross disagreed with the Bush administration's assessment of Taliban fighters as unlawful combatants).

286. See Azubuike, *supra* note 68, at 143–44 (listing the factors used to determine if an irregular combatant may be classified as a prisoner of war under the Geneva Convention); see also Berman, *supra* note 86, at 41 (explaining the requirements that must be met for members of organized resistance movements to be treated as prisoners of war); Chlopak, *supra* note 34, at 8 (relating that the Geneva Convention will confer POW status on irregular combatants who wear a distinctive symbol rather than a uniform).

287. See Protection of War Victims, *supra* note 50, at 4 (requiring that members of irregular forces wear a "fixed, distinctive sign" in order to merit POW status); see also Ferrell, *supra* note 69, at 106 (stating that under the Geneva Convention, irregular forces can wear a distinctive sign instead of a traditional uniform to gain POW status); Mofidi & Eckert, *supra* note 12, at 68.

288. See Aldrich, *supra* note 36, at 895 (commenting on the theory that the Taliban can be distinguished from civilians by their dark turbans); see also Brooks, *supra* note 33, at 734 (confirming that the Taliban wore distinctive black turbans); Elsea, *supra* note 143 (affirming the Defense Department's statement that the Taliban wore distinctive dark turbans).

289. See John W. Broomes, *Maintaining Honor in Troubled Times: Defining the Rights of Terrorism Suspects Detained in Cuba*, 42 WASHBURN L. J. 107, 127 (2002) (positing that Taliban members could be distinguished by their dark turbans); see also Neil P. McNulty, *Guantanamo Detainees Don't Qualify for POW Status*, VIRGINIAN-PILOT, Feb. 1, 2002, at B11 (suggesting that the Taliban's dark turbans served as a variety of uniform, which distinguished its members from civilians). But see Bialke, *supra* note 8, at 30–31 (observing that Taliban fighters purposely disguised themselves as civilians and wore civilian clothes rather than adopting a distinctive sign or uniform).

290. See Goldman & Tittlemore, *supra* note 45, at 28; see also Jaime Jackson, *Trial of the Accused Taliban and Al Qaeda Operatives Captured in Afghanistan and Detained on a U.S. Military Base in Cuba*, 34 CUMB. L. REV. 195, 221–22 (2003/2004) (asserting that the Northern Alliance could distinguish the Taliban fighters by their dark turbans); Elsea, *supra* note 143 (asserting that the success and speed of U.S. forces in defeating Taliban enemies make it clear that the Taliban could be distinguished).

291. See Azubuike, *supra* note 68, at 149 (noting that the assessment of whether Taliban and Al-Qaeda soldiers followed the laws of war is complicated); see also Jim Davis, *A Cautionary Tale: Examining the Use of Military Tribunals by the United States in the Aftermath of the September 11 Attacks in Light of Peru's History of Human Rights Abuses Resulting from Similar Measures*, 31 GA. J. INT'L & COMP. L. 423, 450–51 (2003) (illustrating this proposition by showing that in most instances terrorists do not conduct operations according to the laws of war, but certain Al-Qaeda members integrated into the Taliban's forces did conduct operations according to the laws of war); Goldman & Tittlemore, *supra* note 45, at 25.

of these when captured in Afghanistan.<sup>292</sup> Moreover, Taliban members should not lose their POW status on the basis that they provided sanctuary to Al-Qaeda and sympathized with its objectives, because such actions are not equivalent to failing to conduct their operations in compliance with the laws of war.<sup>293</sup>

Assuming Taliban detainees do not meet the criteria set forth in Article 4A(2), critics argue that such detainees qualify for protection as POWs under Article 4A(1).<sup>294</sup> Article 4A(1) provides POW status to “[m]embers of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.”<sup>295</sup> Taliban detainees meet this definition, irrespective of the four conditions in Article 4A(2), because the Taliban governed Afghanistan at the time of its capture.<sup>296</sup> This protection should also extend to Al-Qaeda because of their close relationship and the nearly indistinguishable nature of the two groups.<sup>297</sup>

#### **6. Both Al-Qaeda and Taliban Detainees Must Be Considered Prisoners of War Because No Combatant Can Fall Outside the Third and Fourth Conventions**

Critics challenge the Administration’s determination that unlawful combatants fall outside the protections of the Geneva Conventions by arguing that no person can fall outside the

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292. See Goldman & Tittmore, *supra* note 45, at 27; see also Ratner, *supra* note 281, at 908 (remarking that most of the government’s evidence linking the Taliban and Al-Qaeda’s terrorist activity has not been made public). *But see* Jinks, *supra* note 25, at 87 (maintaining that Al-Qaeda and the Taliban collaborated to carry out terrorist attacks).

293. See Aldrich, *supra* note 36, at 891–92 (maintaining that Taliban soldiers should not lose POW status simply because the Taliban provided sanctuary to Al-Qaeda); see also David Scheffer, *Options for Prosecuting International Terrorists*, POLY PAPERS, Nov. 14, 2001, available at LEXIS, News Library, Plycpa File (arguing that Taliban leaders who sympathized with Al-Qaeda would most likely be treated as prisoners of war). *But see* Wedgwood, *supra* note 10, at 335 (emphasizing that Taliban fighters should not be accorded POW status because they abetted Al-Qaeda members in violating the laws of war).

294. See Aldrich, *supra* note 36, at 891–92 (concluding that Taliban detainees should be considered either members of the armed forces or members of a militia group, both of which are protected under the Geneva Convention); see also Clover, *supra* note 32, at 365 (describing that under the requirements of the Geneva Convention, Article 4(A)(1), Taliban detainees should be classified as prisoners of war); Stuart Taylor, Jr., *We Don’t Need to Be Scofflaws to Attack Terror*, LEGAL AFF., Feb. 2, 2002, (positing that Taliban detainees should be classified as prisoners of war under Article 4(A)(1) of the Geneva Convention).

295. See Protection of War Victims, *supra* note 50, at 4 (stating requirements that must be met for treatment as a POW).

296. See Wallach, *supra* note 44, at 22 (expressing that the Taliban was clearly the de facto government of Afghanistan). *But see* Lapkin, *supra* note 217 (commenting that the Taliban detainees are not eligible for POW status because the Taliban was never the official governing body of Afghanistan). See generally Michael Byers, *Ignore the Geneva Convention and Put Our Own Citizens at Risk*, HUMANIST, Mar. 1, 2002, at 33 (reasoning that under the Geneva Convention, Taliban detainees should be considered prisoners of war even if the Taliban was not the official government of Afghanistan).

297. See Azubuike, *supra* note 68, at 136 (expressing that the link between Al-Qaeda and the Taliban was so close that policies applicable to one may be applicable to the other); see also Caron & Sloss, *supra* note 241, at 795 (declaring that because Al-Qaeda soldiers supported the Taliban against the United States, those soldiers should be entitled to the same treatment as Taliban soldiers); Clover, *supra* note 32, at 366 (observing that Al-Qaeda, as well as Taliban detainees, should be accorded POW status because the two groups are so closely related).

Third (GPW) and Fourth (Civilians) Conventions.<sup>298</sup> Critics point to the text of Article 4 to support their argument. Article 4 of the Fourth Convention states, "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."<sup>299</sup> Article 4 continues that persons protected by the Third Convention "shall not be considered as protected persons within the meaning of the present Convention."<sup>300</sup> Critics argue that this text indicates that one who is not protected under the GPW is a "protected person" under the Fourth Convention.<sup>301</sup> Proponents of this view also find support in the ICRC Commentary:

Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law.<sup>302</sup>

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298. See Knut Dormann, *The Legal Situation of Unlawful/Unprivileged Combatants*, 85 INT'L REV. RED CROSS 45, 49 (2003), at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5LPHBV/\\$File/irrc\\_849\\_Dorman.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5LPHBV/$File/irrc_849_Dorman.pdf) (last visited Feb. 7, 2005):

A textual interpretation of the Conventions can only lead to the conclusion that all persons who are not protected by the GCI-III, thus also persons who do not respect the conditions which would entitle them to POW status/treatment, are covered by the GC IV provided that they are not: Nationals of a State which is not a party to the Convention; nationals of the Party/Power in which hands they are; or nationals of a neutral State.

*Id.* See generally Sassoli, *supra* note 63, at 223 (stressing that under international law, every person in enemy hands must be protected under the First, Third or Fourth Convention); Serge Schmemmann, *Prisoners, Surely. But P.O.W.s?*, N.Y. TIMES, Jan. 27, 2002, at 14 (proposing that unlawful combatants may be protected under the Geneva Convention requirement that captives be treated as POWs until a tribunal determines their status).

299. See Civilians Convention, *supra* note 16 (describing situations in which a person is protected by the Convention).

300. See Civilians Convention, *supra* note 16 (indicating that certain enumerated parties who would be classified as protected persons under the Third Convention would not be so classified under the Fourth Convention).

301. See Sassoli, *supra* note 63, at 207 (arguing that in the text, context and aim of the Geneva Conventions, no person can fall in between the protections afforded by the Third and Fourth Conventions); see also Sassoli, *supra* note 281, at 101 (arguing that no person can fail to be protected by either the Third or Fourth Geneva Convention); Marco Sassoli, "Unlawful Combatants": *The Law and Whether It Needs to Be Revised*, 97 AM. SOC'Y INT'L L. PROC. 196, 197 (2003) (arguing that it is not possible for a person to fall in between the protections of the Third and Fourth Geneva Conventions and thus be protected by neither).

302. See ICRC, *supra* note 53, at 51; see also Anthea Roberts, *Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 11*, 15 EUR. J. INT'L L. 721, 742 (2004) (restating the ICRC Commentary); Sassoli, *supra* note 63, at 207–08 (quoting the ICRC Commentary).

### C. Analysis of Competing Interpretations

The Bush administration and its critics each provide reasoned and well-balanced arguments regarding the applicability of the Geneva Conventions to the Taliban and Al-Qaeda detainees.<sup>303</sup> Both analyses are written with an eye toward the underlying policies each side wants to further. The Administration's arguments are an aggressive interpretation of the Geneva Conventions, intended to provide the President with maximum flexibility in the war on terrorism.<sup>304</sup> Critics of the Administration provide plausible legal arguments for their interpretation and attack the Administration's policy decision not to afford detainees the protections of the Geneva Conventions.<sup>305</sup> This criticism is certainly welcome; however, a distinction should be made between criticism of the Administration's policies and its legal analysis. Although critics of the Administration provide several legal arguments as to why the Conventions apply to the Taliban and Al-Qaeda detainees,<sup>306</sup> the Administration's approach is also legitimate and founded in

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303. See Jinks & Sloss, *supra* note 63, at 101 (arguing that even if the Taliban or Al-Qaeda detainees do not qualify as POWs under the Geneva Convention Relative to the Treatment of Prisoners of War, they still qualify for protection under the Geneva Convention Relative to Civilian Persons in Time of War); see also Sassoli, *supra* note 63, at 196 (explaining President Bush's argument that because Taliban and Al-Qaeda detainees at Guantánamo Bay are "terrorists," they are considered unlawful combatants and thus are ineligible for the protections of the Geneva Conventions); Sloss, *supra* note 167, at 797–98 (arguing that President Bush's position on the detainees at Guantánamo Bay—that the laws of war allow the United States to hold the detainees without providing them the protections of the Geneva Conventions—is untenable because he relies on judicial precedent that antedates and has been overruled by the Geneva Conventions).

304. See Melissa A. Jamison, *Detention of Juvenile Enemy Combatants at Guantánamo Bay: The Special Concerns of the Children*, 9 U.C. DAVIS J. JUV. L. & POL'Y 127, 131 (2005) (demonstrating the government's argument that the detainees held at Guantánamo Bay are not covered by the Geneva Conventions because the Conventions did not contemplate the war on terror); see also Scheck, *supra* note 150, at 4 (explaining that President Bush sided with Alberto Gonzales, who argued that the war on terror places a large premium on getting information from captured terrorists quickly and that "[t]his new paradigm" makes the Geneva Convention for POWs "obsolete"). But see Jordan J. Paust, *Tolerance in the Age of Increased Interdependence*, 56 FLA. L. REV. 987 (2004) (arguing that President Bush's refusal to follow human rights law and the Geneva Conventions, his interrogation of detainees and his prosecution of foreigners accused in ad hoc military commissions do not serve efforts to defeat terrorism).

305. See Becker, *supra* note 242, at 565 (pointing out that the Bush administration has faced sharp criticism from countries in Europe); see also Jules Lobel, *Preventive Detention: Prisoners, Suspected Terrorists and Permanent Emergency*, 25 T. JEFFERSON L. REV. 389, 396 (2003) (stating that numerous international organizations, including the Red Cross and the Inter-Human American Rights Commission, have criticized the Bush administration for its refusal to afford the detainees at Guantánamo Bay rights under the Geneva Conventions); W. Michael Reisman, *Aftershocks: Reflections on the Implications of September 11*, 6 YALE HUM. RTS. & DEV. L.J. 81, 97 (2003) (noting that President Bush faced a chorus of criticism when he announced that the detainees captured in Afghanistan would not be treated as POWs under the Geneva Conventions).

306. See Callen, *supra* note 56, at 1072 (reasoning that most of the detainees held in Iraq are either protected by the Prisoner of War Convention or, if classified as unlawful combatants, by the Civilian Convention); see also Paust, *supra* note 304, at 1002 (arguing that the Bush administration's refusal to follow human rights law and the Geneva Conventions, its interrogation of detainees and its prosecution of foreigners accused in ad hoc military commissions do not help to defeat transnational terrorism); Sloss, *supra* note 167, at 797–98 (arguing that President Bush's position on the detainees at Guantánamo Bay—that the laws of war allow the United States to hold the detainees without providing them the protection of the Geneva Conventions—is untenable).

international law and the text of the Geneva Conventions,<sup>307</sup> although it is not without criticism.<sup>308</sup> This part examines the competing arguments and arrives at six conclusions. First, the Administration is correct that the Geneva Conventions do not apply to Al-Qaeda members captured in Afghanistan.<sup>309</sup> Second, the Administration's conclusion that the Conventions do not apply to the Taliban detainees is a more difficult argument given that Afghanistan is a party to the Conventions;<sup>310</sup> however, this conclusion is justified given the Taliban's failure to comply with Article 4A(2).<sup>311</sup> Third, in order to further the underlying policies of the Geneva Conventions, neither group should be afforded protection thereunder.<sup>312</sup> Fourth, an Article 5

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307. See Anderson, *supra* note 100, at 627 (noting that a principled argument in favor of the Bush administration policy can be made from the text of the Third Geneva Convention in Article 5); see also Bialke, *supra* note 8, at 2 (reasoning that the United States has applied well-established international law in holding that the Al-Qaeda and Taliban detainees are unlawful combatants not entitled to POW status); David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753, 1779 (2004) (stating the Bush administration's argument that Congress's authorization to use military force against Al-Qaeda includes the authority to detain the enemy until the military conflict ends).

308. See David Aronofsky, *September 11 Reflections from Ground Zero: Parent, International Law Teacher and Rule of Law Perspectives*, 34 CASE W. RES. J. INT'L L. 185, 186–87 (2002) (reasoning that holding the detainees at Guantánamo Bay in limbo while debating the legality thereof does not suffice in a society committed to rule-of-law values); see also Anthony Lewis, *Civil Liberties in a Time of Terror*, 2003 WIS. L. REV. 257, 261–62 (2003) (arguing that the Bush administration has shown disregard for binding international law in its treatment of detainees at Guantánamo Bay, that the U.S. policies toward these detainees may have a damaging effect on our own servicemen and women and that the policies are widely viewed as those of an arrogant superpower whose concern for its own sovereignty trumps everything else); Mofidi & Eckert, *supra* note 12, at 87–88 (positing that the United States must determine POW status on an individual basis in a competent tribunal and that there is a presumption that a captured combatant is a prisoner of war unless determined otherwise).

309. See Jeffrey F. Addicott, *Into the Star Chamber: Does the United States Engage in the Use of Torture or Similar Illegal Practices in the War on Terror?*, 92 KY. L.J. 849, 870 (2003–2004) (arguing that the Al-Qaeda detainees are not entitled to POW status because they are not recognized members of any nation's armed forces and are considered "illegal enemy combatants"). But see Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 161 (2004) (reasoning that the government's attempt to separate the Taliban from Al-Qaeda for Geneva Convention purposes finds no support in the structure of the Conventions themselves, which are triggered by the place of the conflict and not by what particular faction a fighter is associated with).

310. See Roberts, *supra* note 302, at 740 (noting that President Bush has announced that the Third Geneva Convention applies to the Taliban detainees because Afghanistan was a party to the Conventions); see also Yoo, *supra* note 141, at 139 (stating that Afghanistan is a party to the Geneva Conventions); Yoo, *supra* note 230, at 1227 (remarking that both the United States and Afghanistan are parties to the Geneva Conventions).

311. See Azubuike, *supra* note 68, at 149 (remarking that Article 4A(2) does not apply to the Taliban detainees); see also Yoo, *supra* note 141, at 140 (arguing that because members of the Taliban, like members of Al-Qaeda, do not comply with the four conditions of lawful combat expressly incorporated into Article 4A(2) of the Geneva Conventions, they are not entitled to the protections of that Convention); Yoo & Ho, *supra* note 66, at 219 (reasoning that because members of the Taliban militia, like members of Al-Qaeda, do not comply with the four conditions of lawful combat expressly incorporated into Article 4A(2) of the Geneva Conventions, they are not entitled to the protections of that Convention).

312. See Joanna Dingwall, *Unlawful Confinement as a War Crime: The Jurisprudence of the Yugoslav Tribunal and the Common Core of International Humanitarian Law Applicable to Contemporary Armed Conflicts*, 9 J. CONFLICT & SECURITY L. 133, 141 (2004) (stating that the overall object and purpose of the Geneva Conventions is to protect all persons not taking a direct part in hostilities); see also Rod Dixon, *Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 81, 101 (1997) (noting that the fundamental purpose of the Geneva Conventions is to protect civilians who have fallen into enemy hands in times of armed conflict); Imseis, *supra* note 110, at 96 (asserting that the entire purpose of the Fourth Geneva Convention is to protect the interests of civilian persons, not governments, in time of war).



proceeding is not required because the President has plenary authority over foreign affairs,<sup>313</sup> especially in times of war, and there are sufficient safeguards in place to provide the same level of scrutiny as an Article 5 proceeding. Fifth, the President acted in response to the congressional authorization of force, thereby entitling him to detain unlawful combatants pursuant to this authority.<sup>314</sup> Sixth, most critics of the Administration attack its policy decision not to afford detainees the protections of the Geneva Conventions irrespective of the proper legal analysis.<sup>315</sup>

### 1. Al-Qaeda Members Are Not Entitled to Protected Status Under the Geneva Conventions

The Administration is correct that as an international terrorist organization, members of Al-Qaeda cannot be afforded the protections of the Geneva Conventions.<sup>316</sup> Al-Qaeda's operations as a clandestine organization afford it no protection under the Conventions,<sup>317</sup> as its mem-

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313. See Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169, 171 (2004) (quoting Justice Sutherland who asserted that "the President as the sole organ of the federal government in the field of international relations" has the "plenary and exclusive power" to decide "the important complicated, delicate and manifold problems" of foreign relations); see also Mark Strasser, *Domestic Relations*, *Missouri v. Holland, and the New Federalism*, 12 WM. & MARY BILL RTS. J. 179, 183 (2003) (asserting that the Supreme Court may find the President's foreign affairs power to be plenary); Frank Sullivan, Jr., *A Separation of Powers Perspective on Pinochet*, 14 IND. INT'L & COMP. L. REV. 409, 451 (2004) (stating that the U.S. Supreme Court has recognized the "very delicate, plenary and exclusive power" on the part of the President "as the sole organ of the nation in its external relations, and its sole representative with foreign nations").
314. See Bird & Brandt, *supra* note 12, at 433 (stating that President Bush won support from Congress for military action against groups in Afghanistan linked to terrorist groups); see also Cole, *supra* note 307, at 1779 (acknowledging President Bush's argument that Congress's authorization to use military force against Al-Qaeda inherently includes the authority to detain the enemy until the military conflict ends); Catherine Powell, *The Role of Transnational Norm Entrepreneurs in the U.S. "War on Terrorism"*, 5 THEORETICAL INQUIRIES L. 47, 59 (2004) (stating that Congress has acquiesced to the Bush administration's approach to the detainees and has expanded presidential authority to detain and interrogate suspected terrorists).
315. See John Hendren, *Guantánamo Trial is Ruled Unlawful; Judge Says that Detainee was Denied Due Process and that Pentagon Tribunals Are Invalid*, L.A. TIMES, Nov. 9, 2004, at A1 (asserting that the combatant status review tribunals have been widely criticized because they deny the prisoners access to lawyers and use as evidence Bush's determination that all detainees at Guantánamo are enemy combatants); see also Charlie Savage, *Tribunal to Weigh Detainees' Status; Setup Is Response to Supreme Court Ruling on Rights*, BOSTON GLOBE, July 8, 2004, at A3 (noting that international law specialists and human rights advocates have criticized the Bush administration for two years, since it declared that the Guantánamo detainees broke the laws of war and so are not entitled to POW status); Editorial, *Tortured Principles*, BOSTON GLOBE, July 8, 2004, at A14 (stating that the Bush administration continues to ignore criticism of its actions, whether it comes from U.S. courts or the International Red Cross).
316. See Bialke, *supra* note 8, at 37 (stating that members of Al-Qaeda are not soldiers of any state and therefore Al-Qaeda members are not afforded the protections under the Geneva Conventions); see also Murphy, *supra* note 143, at 476–77 (asserting that Al-Qaeda members detained by U.S. officials were classified as unlawful combatants and remained outside the protections of the Geneva Conventions); Chlopak, *supra* note 34, at 7 (discussing the United States' refusal to apply the protections of the Geneva Conventions to Al-Qaeda members).
317. See Janik, *supra* note 23, at 512–13 (examining Al-Qaeda's practices that do not adhere to the principles of war and therefore label its members as enemy combatants who are not entitled to the protections under the Geneva Conventions); see also Yoo & Ho, *supra* note 66, at 217–18 (illustrating that Al-Qaeda's conduct violates the principles of war and Al-Qaeda's members will not be given the protections under the Geneva Conventions). See generally Press Release, U.S. State Dep't, *Judge Rules that Guantánamo Trial Violates U.S., International Law—Halts Pre-trial Hearing of Bin Laden Driver* (Nov. 9, 2004) (stating that Al-Qaeda members are not subject to the protections of the Geneva Conventions).

bers have a status similar to that of spies captured in hostile territory.<sup>318</sup> Moreover, Al-Qaeda is an organization that surpasses national borders and is composed of people of varying nationalities dedicated to advancing extremist ideology and the destruction of political pluralism through violence and terrorism.<sup>319</sup> Al-Qaeda is not a nation state and does not have the capacity to become a party to the Geneva Conventions.<sup>320</sup> Even if Al-Qaeda was assumed to be a nation state, it surely would reject such a suggestion.

Moreover, members of Al-Qaeda do not satisfy the definition of *prisoners of war* in Article 4A(1) of the GPW.<sup>321</sup> In no way can members of Al-Qaeda be considered “[m]embers of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.”<sup>322</sup> Al-Qaeda is not a party to the conflict because it is incapable of becoming a party to the Geneva Conventions.<sup>323</sup> In fact, Al-Qaeda is merely a private organization, and the laws of armed conflict do not authorize hostilities by private individuals.<sup>324</sup> Neither should it be considered a militia or “volunteer corps forming part of such armed forces”

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318. See Bialke, *supra* note 8, at 15 (articulating that the unlawful disguise of Al-Qaeda members hiding among civilians is closely related to the conduct of spies); see also Wallach, *supra* note 44, at 19 n.21 (discussing that when a terrorist is captured while engaging in hostilities, the terrorist is classified as a spy, and according to the Hague regulations, a spy is not afforded the protections under the Geneva Conventions). See generally Ingrid Delupis, *Foreign Warships and Immunity for Espionage*, 78 AM. J. INT'L L. 53, 61–63 (1984) (explaining the classification of a spy according to the Hague regulations and addressing the treatment and protections afforded to captured spies).

319. See Addicott, *supra* note 182, at 227 (stating that Al-Qaeda seeks to achieve its extreme ideological views through violence and destroying those that are outside of its views); see also Aldrich, *supra* note 36, at 891–93 (asserting that Al-Qaeda is an organization composed of people of varying nationalities and is dedicated to advancing political and religious objectives against the United States through violence); Brooks, *supra* note 33, at 710–11 (demonstrating that Al-Qaeda is an equal opportunity employer by composing its organization of people of varying nationalities to engage in violence to further its extreme ideology).

320. See Desai, *supra* note 32, at 1587–90 (articulating that the U.S. government's reason for not affording the protections of the Geneva Conventions to Al-Qaeda detainees was because Al-Qaeda did not constitute a state). See generally Powell, *supra* note 314, at 72–74 (referring to a statement made by the White House spokesperson that Al-Qaeda is an international terrorist organization and not a party to the Geneva Conventions).

321. See Prisoners of War, *supra* note 15, at 3316 (classifying a prisoner of war who is captured during hostilities and is within custodial control of the enemy).

322. See *id.* at 3316 (stating in Article 4 the classes for POW status); see also Azubuike, *supra* note 68, at 150–52 (asserting that members of Al-Qaeda were not members of the Taliban armed forces and do not satisfy the requirements of the Geneva Conventions for POW status as defined in Article 4A(2)). But see Wallach, *supra* note 44, at 26 (stating that some members of Al-Qaeda may have been acting as members of the Taliban militia or volunteer corps, thus entitling them to POW status).

323. See Chlopak, *supra* note 34, at 6–8 (suggesting that because Al-Qaeda does not own any state, the organization could not be a member of the Geneva Conventions); see also Broomes, *supra* note 289, at 125 (illustrating that the Geneva Conventions refer to a party's territory and because Al-Qaeda does not own any territory and is a private terrorist organization, Al-Qaeda will not be considered a party to the conflict). See generally Paust, *supra* note 87, at 332–34 (discussing the Geneva Convention Relative to the Treatment of Prisoners of War and why Al-Qaeda is not a party to the Conventions).

324. See Brief Amicus Curiae of Law Professors, Former Legal Advisers of the Department of State and Ambassadors, Retired Judge Advocates General and Retired Military Commanders and Other International Law Specialists in Support of Respondents at 10, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-334, 03-343) [hereinafter Brief Amicus Curiae of Law Professors] (stating Al-Qaeda is a private organization that is not authorized by the laws of armed conflict to engage in hostilities). See generally Printer, *supra* note 81, at 370–75 (addressing the laws of armed conflict and acknowledging that captured Al-Qaeda members violated the laws of war).

because Al-Qaeda is an international terrorist organization and cannot be considered part of the Taliban's armed forces.<sup>325</sup>

Additionally, members of Al-Qaeda do not satisfy the requirements for POW status in Article 4A(2) of the GPW.<sup>326</sup> First, members of Al-Qaeda do not have a responsible commander because they do not have a traditional military command structure.<sup>327</sup> Instead, they are a decentralized international terrorist organization.<sup>328</sup> Osama bin Laden may act as a figurehead, but he maintains little control similar to that of a military commander.<sup>329</sup> Instead, he acts as a spiritual or ideological leader.<sup>330</sup> Second, Al-Qaeda members certainly do not wear uniforms or

325. See Jackson, *supra* note 290, at 208 (stating that Al-Qaeda is not the official army of the Taliban, which is the government of Afghanistan, and that the Taliban has its own army). *But see* Azubuike, *supra* note 68, at 153–54 (asserting that Al-Qaeda should be considered part of the Taliban's armed forces because the two are so intertwined as to be indistinguishable). See generally Vierucci, *supra* note 181, at 866–71 (discussing the Taliban as the central government of Afghanistan and that the separate Al-Qaeda members did not qualify as legal armed forces under the Geneva Convention).

326. See Yoo, *supra* note 230, at 1226–27 (demonstrating that Al-Qaeda is a nonstate terrorist organization and not a contracting party to the GPW and that, therefore, its members are not entitled to POW status when captured); see also Yoo, *supra* note 141, at 139–40 (articulating that the GPW provides POW status to captured members of armed forces that satisfy the four criteria in Article 4A of the GPW). See generally *United States v. Lindh*, 212 F. Supp. 2d 541, 541 (2002) (showing that John Walker Lindh was not entitled to POW status and prisoner immunity under Article 4 of the GPW because he was unable to prove that the Taliban satisfied the four criteria in Article 4).

327. See Jackson, *supra* note 290, at 201–02 (demonstrating that Al-Qaeda is an organization that acts as an umbrella for terrorist cells worldwide and lacks any clear military structure); see also Clover, *supra* note 32, at 360–64 (stating that Al-Qaeda does not have any particular conventional military command structure). See generally Geraghty, *supra* note 18, at 577–78 (detailing the command and control structure of Al-Qaeda, which includes terrorist operations as part of its undertakings).

328. See Thomas Michael McDonnell, *The Death Penalty—An Obstacle to the “War Against Terrorism”*, 37 VAND. J. TRANSNAT'L L. 353, 396–98 (2004) (demonstrating that Al-Qaeda is a network rather than a single unified military organization, which is becoming even more decentralized over time); see also Charles V. Peña, *Iraq: The Wrong War*, 9 NEXUS 119, 134 (2004) (establishing that Al-Qaeda is a decentralized international terrorist organization, making it harder to identify and neutralize). See generally *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2635 (2004) (asserting that Al-Qaeda is an organization with global membership, which finances smaller independent terrorist networks).

329. See Federica Bisone, *Killing a Fly with a Cannon: The American Response to the Embassy Attacks*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 93, 109 (2000) (stating that Osama bin Laden serves more “metaphorically as a terrorist Internet to which other terrorists may plug in” rather than as a military leader); see also Michele L. Malvesti, *Bombing Bin Laden: Assessing the Effectiveness of Air Strikes as a Counter-Terrorism Strategy*, 26 FLETCHER F. WORLD AFF. 17, 25 (Winter/Spring 2002) (emphasizing the continuity of the Al-Qaeda organization in the event of the demise of Osama bin Laden because he is more of a figurehead rather than a leader acting as a linchpin to the organization's viability). See generally Daniel Pipes, *Terrifying Enthusiasm; Many Muslims Simply Love bin Laden*, WASH. TIMES, Oct. 25, 2001, at A23 (demonstrating that Osama bin Laden is achieving iconic status through his ideological and religious movement).

330. See Sara N. Scheideman, *Standards of Proof in Forcible Responses to Terrorism*, 50 SYRACUSE L. REV. 249, 259 (2000) (indicating that Osama bin Laden is not the mastermind behind the attacks but rather only an inspirational orator); see also Bruce Zagaris, *UN Reports Problems with International Sanctions Against Al Qaeda*, 20 NO. 11 INT'L ENFORCEMENT L. REP. 477, 477 (2004) (asserting that Osama bin Laden is the head of the Al-Qaeda organization and is its spiritual leader); Geraghty, *supra* note 18, at 577 (stating that Osama bin Laden is the political and spiritual leader of the Al-Qaeda terrorist organization).

a distinctive insignia.<sup>331</sup> Al-Qaeda's operations would not be effective if it complied with this condition.<sup>332</sup> In fact, the paradigm of Al-Qaeda's operations is clandestine terrorist attacks requiring concealment.<sup>333</sup> Third, members of Al-Qaeda do not carry their arms openly on a consistent basis.<sup>334</sup> Even though this requirement may have been satisfied at times during the fighting in Afghanistan, it is the exception that proves the rule.<sup>335</sup> Fourth, Al-Qaeda does not conduct its operations in accordance with the laws of war because it is a terrorist group committed to using violence against military and civilian targets to achieve political and religious objectives.<sup>336</sup>

## 2. Taliban Members Are Not Entitled to Protected Status Under the Geneva Conventions

As the Administration acknowledges, the analysis of the status of the Taliban detainees presents a more complex problem.<sup>337</sup> Even so, the best solution is that they are not entitled to

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331. See Lucien J. Dhooge, *A Previously Unimaginable Risk Potential: September 11 and the Insurance Industry*, 40 AM. BUS. L.J. 687, 739 (2003) (asserting that Al-Qaeda members have never worn uniforms bearing the requisite insignia); see also C.J. Chivers, *Aftereffects: Terror Network; Instruction and Methods from Al Qaeda Took Root in North Iraq with Islamic Fighters*, N.Y. TIMES, Apr. 27, 2003, at 26 (indicating that Al-Qaeda members don't wear uniforms); Clarence Page, *Prisoner of a War of Words*, CHI. TRIB., Jan. 30, 2002, at 25.
332. See Bialke, *supra* note 8, at 31 (describing how Al-Qaeda members intentionally disguised themselves to achieve the element of surprise); see also Printer, *supra* note 81, at 373 (arguing that Al-Qaeda members do not wear uniforms in order to blend in with the civilian populace); Michael J. Glennon, *Justice Demands Different Treatments for Those Who Wage War Against Us*, WASH. POST, Dec. 23, 2001, at B1 (alleging that operations would be problematic for Al-Qaeda if its members wore uniforms).
333. See Aldrich, *supra* note 36, at 893 (alleging that Al-Qaeda is a clandestine organization that operates through terrorist attacks); see also Edward Alden & Mark Huband, *Report Paints a Bleak Picture on Global Measures*, FIN. TIMES (London), Dec. 3, 2003, at 2 (noting that Al-Qaeda has established a geographically diverse, clandestine series of networks to support and sustain its terrorist activities); John C. Yoo, *With "All Necessary and Appropriate Force"; In Interrogations, U.S. Actions Align with Treaties and Congress' Wishes*, L.A. TIMES, June 11, 2004, at 13 (reporting that Al-Qaeda's purpose is to inflict civilian casualties through surprise attack).
334. See Araujo, *supra* note 18, at 128 (maintaining that Al-Qaeda operatives do not carry arms openly); see also Jackson, *supra* note 290, at 209; Mofidi & Eckert, *supra* note 12, at 87 (stating that Al-Qaeda members often conceal their weapons).
335. See Lindh, 212 F. Supp. 2d at 572 (exemplifying a situation in which an Al-Qaeda trained operative, Lindh, carried weapons openly); see also Brian W. Earley, Note, *The War on Terrorism and the Enemy Within: Using Military Commissions to Prosecute U.S. Citizens for Terrorist-Related Violations of the Laws of War*, 30 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 75, 90 (2004) (indicating that Al-Qaeda members sometimes carry weapons openly); Rivkin & Casey, *supra* note 241, at A19 (arguing that although Al-Qaeda members sometimes carried arms openly, they did not do so consistently and therefore do not meet the Geneva Convention criteria).
336. See United States v. Bin Laden, 92 F. Supp. 2d 225, 228, 241 (S.D.N.Y. 2000) (recognizing that Al-Qaeda is a terrorist organization committed to using violence against civilians); see also Broomes, *supra* note 289, at 125–27 (demonstrating that Al-Qaeda does not conduct its operations according to the rules of law); *By the Laws of War, They Aren't POWs*, WASH. POST, Mar. 3, 2002, at B3 (suggesting that Al-Qaeda members are unlawful combatants because, among other things, they do not conduct their operations according to the rules of law).
337. See K. Elizabeth Dahlstrom, *The Executive Policy Toward Detention and Trial of Foreign Citizens at Guantánamo Bay*, 21 BERKELEY J. INT'L L. 662, 676 (2003) (detailing how the Bush administration reversed its original position on the status of the Taliban detainees); see also Akbar, *supra* note 74, at 202 (showing that the Bush administration supported two incompatible views of the status of the Taliban detainees); John Mintz, *Debate Continues on Legal Status of Detainees*, WASH. POST, Jan. 28, 2002, at A15 (analyzing the confusion within the Bush administration about the status of the Taliban detainees).

POW status.<sup>338</sup> Three of the Administration's arguments must be weighed, two of which favor protection under the Conventions.<sup>339</sup> The most important factor, however, Article 4A(2), weighs in favor of denying protection to the Taliban.<sup>340</sup>

First, the Administration's argument that the Taliban fail to satisfy the requirements of Article 4A(1) of the GPW because they are not "[m]embers of the armed forces of a Party to the conflict [nor] members of militias or volunteer corps forming part of such armed forces"<sup>341</sup> is weak. Even though the Administration is correct that the Taliban was not the internationally recognized government of Afghanistan<sup>342</sup> and may have been nothing more than a faction engaged in a civil war, Afghanistan remained a party to the Geneva Conventions,<sup>343</sup> which must be accorded significant weight. Therefore, this factor weighs in favor of affording the Taliban the protections of the Geneva Conventions.<sup>344</sup>

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338. See Swanson, *supra* note 47, at 944–46 (discussing the Administration's position that the Taliban detainees are not entitled to POW status). *But see* Ralph Michael Stein, "Artillery Lends Dignity to What Otherwise Would Be a Common Brawl": An Essay on Post-modern Warfare and the Classification of Captured Adversaries, 14 PACE INT'L L. REV. 133, 148 (2002) (opining that the Taliban should be accorded POW status); Lee Dembart, *For Afghans in Cuba, Untested Legal Limbo: Old Laws Hard to Apply to Modern Terrorism*, INT'L HERALD TRIB., Jan. 25, 2002, at 1 (establishing that a strong argument can be made to support POW status for Taliban detainees).
339. See James Terry, *Al Qaeda and Taliban Detainees—An Examination of Legal Rights and Appropriate Treatment*, 79 INT'L L. STUD. 441, 447–49 (2003) (reasoning that the Taliban fail to meet the criteria in either Article 4A(1) or (2) and therefore should not be accorded protection under the Geneva Convention); *see also* Nafziger, *supra* note 73, at 12 (addressing the arguments that the Taliban fail to meet the criteria in Article 4A(1) and (2)); Dorf, *supra* note 84 (analyzing arguments as to why the Taliban should be denied POW status).
340. See Caron & Sloss, *supra* note 241, at 795 n.77 (reiterating the government's position that the Taliban detainees do not qualify for POW status because they fail to meet the criteria in Article 4A(2)); *see also* Murphy, *supra* note 35, at 479 (quoting U.S. Secretary of Defense Donald Rumsfeld's statement that the Taliban detainees do not qualify for POW status because they fail to meet the criteria in Article 4A(2)). *But see* Anderson, *supra* note 100, at 629 (declaring that the question of whether Taliban detainees meet the criteria in 4A(2) is still debatable).
341. See Prisoners of War, *supra* note 15, at 3316 (listing one of the criteria for attaining POW status); *see also* Yoo & Ho, *supra* note 66, at 218 (arguing that the Taliban at best are members of a militia); Bryan Bender, *Fighting Terror/The Military Campaign; Red Cross Disputes US Stance on Detainees*, BOSTON GLOBE, Feb. 9, 2002, at A1 (restarting the Administration's position on the POW status of the detainees).
342. See Brief Amicus Curiae of Law Professors, *supra* note 324, at 11–12 (stating that the Taliban was not the recognized government of Afghanistan); *see also* Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT'L L.J. 7, 24 (2003) (emphasizing that the Taliban is not recognized as the government of Afghanistan); Shannon A. Middleton, Note, *Women's Rights Unveiled, Taliban's Treatment of Women in Afghanistan*, 11 IND. INT'L & COMP. L. REV. 421, 422 (2001) (declaring that the recognized government of Afghanistan is not the Taliban).
343. See Aldrich, *supra* note 36, at 893 (indicating that Afghanistan was a party to the Geneva Conventions); *see also* W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493, 505 (2003) (positing that the Taliban was a faction engaged in a civil war); ICRC, *supra* note 53 (listing the states that are parties to the Geneva Conventions).
344. See Powell, *supra* note 314, at 73–74 (connecting the role of Afghanistan under the Geneva Conventions to the status of the Taliban detainees); *see also* Clover, *supra* note 32, at 360 (stating that Afghanistan's presence at the Geneva Convention should be accorded significant weight in determining the status of Taliban detainees); Seelye, *supra* note 36, at A1 (distinguishing between the status of Al-Qaeda, which was not part of the Geneva Convention, and the Taliban, which was, through its association with Afghanistan, a party to the Convention).

Second, the Administration's analysis of Afghanistan as a "failed state"<sup>345</sup> is unpersuasive, but the concept of *failed states* enjoys support among international law scholars:

The most dramatic examples of the decline in state authority can be found in countries where government and civil order have virtually disappeared. Recent examples are Liberia, Somalia, and Afghanistan. The term "failed states" has come to be used for these cases and others like them. The United Nations has continued to treat them as member states, entitled in principle to "sovereign equality," but it has also recognized the necessity for international action that would go beyond relief and development aid in order to restore effective governmental functions.<sup>346</sup>

This would seem to support the President's determination that Afghanistan was a failed state;<sup>347</sup> however, the Administration's reasoning is unpersuasive. Essentially, the Administration argues that Afghanistan fails to satisfy the State Department's four tests for statehood because of its refugee problem, lack of international recognition and inability to contain the entire country.<sup>348</sup> Although true, Afghanistan should not be considered a failed state simply because of the Tali-

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345. See Brief Amicus Curiae of Law Professors, *supra* note 324, at 12 (quoting a military expert on Afghanistan as a failed state); see also Vierucci, *supra* note 181, at 868 (referring to the presidential counsel's statement that Afghanistan is a failed state); Juan Gonzalez, *Latino Pride? Look Again*, DAILY NEWS (N.Y.), Jan. 6, 2005, at 12 (commenting on White House Counsel Alberto Gonzales' analysis of Afghanistan as a failed state).

346. See Oscar Schacter, *The Decline of the Nation-State and Its Implications for International Law*, 36 COLUM. J. TRANSNAT'L L. 7, 18 (1997) (claiming that the decline of the nation-state has led to discrete groups gaining control of these previously defined territories); see also John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT'L L. 782, 782 (2003) (asserting that sovereignty is still critical to most thinking regarding international relations and international law); Winston P. Nagan & Craig Hammer, *The New Bush National Security Doctrine and the Rule of Law*, 22 BERKELEY J. INT'L L. 375, 413 (2004) (proclaiming that the U.N. Charter stipulates that international obligations are not trumped by sovereign equality or independence).

347. See Ruth E. Gordon, *Some Legal Problems with Trusteeship*, 28 CORNELL INT'L L.J. 301, 302 (1995) (emphasizing the dangers of the disintegration of nation-states and the corresponding need for international intervention); see also John Linarelli, *Peace-Building*, 24 DENV. J. INT'L L. & POL'Y 253, 255 (1996) (calling for a critical assessment of what should be done to rehabilitate failed states to place them on the path to economic, political and social recovery). See generally Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 2013 (2004) (maintaining that international law should not be the driving force to foster democracy in failed states).

348. See Larry Backer, *The Fuhrer Principle of International Law: Individual Responsibility and Collective Punishment*, 21 PENN ST. INT'L L. REV. 509, 539 (2003) (emphasizing that the focus of the campaign in Afghanistan was on the individual Taliban groups within this region and not on the nation itself); see also Diane F. Orentlicher, *Separation Anxiety: International Responses to Ethno-Separatist Claims*, 23 YALE J. INT'L L. 1, 29 (1998) (stating that if a territory fails a test of statehood, it will not be able to prevent noninterference from other states). See generally Joan Fitzpatrick, *Temporary Protection of Refugees: Elements of a Formalized Regime*, 94 AM. J. INT'L L. 279, 292 (2000) (asserting that conflicts within failed states have led to a rise in the number of refugees seeking asylum).

ban's inability to consolidate power and the existence of civil war.<sup>349</sup> Therefore, this factor also weighs in favor of affording the Taliban the protections of the Geneva Conventions.<sup>350</sup>

Third, and most important, the Taliban failed to satisfy the four requirements for POW status under Article 4A(2) of the GPW in the same manner that members of Al-Qaeda failed this test.<sup>351</sup> In fact, its operations and tactics are almost indistinguishable from Al-Qaeda's in Afghanistan.<sup>352</sup> Specifically, it failed to conduct its operations in accordance with the laws of war.<sup>353</sup> The Taliban purposefully targeted civilians, killed journalists and used civilians and mosques as shields.<sup>354</sup> Therefore, its members are not entitled to POW status under Articles 4A(1) and (2).<sup>355</sup>

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349. See John D. Becker, *The Continuing Relevance of Article 2(4): A Consideration of the Status of the U.N. Charter's Limitations on the Use of Force*, 32 DENV. J. INT'L L. & POL'Y 583, 609 (2004) (putting into context the effect that failed states can have on world security); see also Ben N. Dunlap, Note, *State Failure and the Use of Force in the Age of Global Terror*, 27 B.C. INT'L & COMP. L. REV. 453, 453 (2004) (stating that failed states pose a grave threat to world peace and security); Thomas Grant, *Partition of Failed States: Impediments and Impulses*, 11 IND. J. GLOBAL LEGAL STUD. 51, 51 (2004) (enunciating a definition of *failed state* in regard to statehood and international relations).
350. See Jinks & Sloss, *supra* note 63, at 97 (questioning whether the President has the unilateral power to violate the Geneva Convention); see also Franck, *supra* note 269, at 687 (suggesting that enemy combatants are more likely to surrender if they are assured their captors will follow the rules of the Geneva Convention). See generally Vierucci, *supra* note 181, at 867 (exploring the viewpoint that the Geneva Convention's standards may no longer apply to POWs from the Afghanistan conflict).
351. See Bialke, *supra* note 8, at 2 (emphasizing that the United States has applied existing international law to determine that neither Al-Qaeda nor Taliban detainees are entitled to POW status); see also Joan Fitzpatrick, *Rendition and Transfer in the War Against Terrorism: Guantánamo and Beyond*, 25 LOY. L.A. INT'L & COMP. L. REV. 457, 463 (2003) (indicating that both Al-Qaeda and Taliban members were detained without the rights accorded prisoners of war under the Geneva Convention). See generally Jinks, *supra* note 39, at 368 (declaring that the gap is closing between protections offered to a POW and those offered an unlawful combatant).
352. See Barry A. Feinstein, *Bordering on Terror, Global Business in Times of Terror—The Legal Issues: A Paradigm for the Analysis of the Legality of the Use of Armed Force Against Terrorists and States that Aid and Abet Them*, 17 TRANSNAT'L LAW. 51, 64 (2004) (reiterating the problem regarding the inability to distinguish who are the terrorists based on the "safe haven" treatment given them by the Taliban-controlled government in Afghanistan); see also John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 733 (2004) (suggesting that Afghanistan was attacked because it allowed its territory to be used by the Al-Qaeda terrorist organization). See generally Kraft, *supra* note 162, at 1076 (stating that the United States granted POW status to neither Al-Qaeda nor Taliban detainees).
353. See Roberts, *supra* note 302, at 740 (expressing that Taliban detainees were not given POW status because they failed to distinguish themselves from the civilian population and did not act in accordance with the laws and customs of war); see also James Thyo Gathii, *Foreign and Other Economic Rights upon Conquest and Under Occupation: Iraq in Comparative and Historical Context*, 25 U. PA. J. INT'L ECON. L. 491, 502 (2004) (stating that the laws of war seek to reduce the adverse consequences to noncombatants). See generally Joseph Kubler, Comment, *U.S. Citizens as Enemy Combatants; Indication of a Roll-back of Civil Liberties or a Sign of Our Jurisprudential Evolution?*, 18 ST. JOHN'S J. LEGAL COMMENT. 631, 653 (2004) (stating that since Al-Qaeda was neither a state actor nor a dissident force, there was no need to apply the laws of war based on the Geneva Convention).
354. See Brief Amicus Curiae of Law Professors, *supra* note 324, at 10; see also William Bradford, *Barbarians at the Gate: A Post-September 11th Proposal to Rationalize the Laws of War*, 73 MISS. L.J. 639, 823 (2004) (noting that detainees were charged with indiscriminately attacking civilians in locations such as the central mosque); Callen, *supra* note 56, at 1026 (remarking that the Taliban dressed in civilian clothing and used civilians as human shields to protect themselves from attack).
355. See Prisoners of War, *supra* note 15, at 3316 (stating that POW status should be given to members of the armed forces and any volunteers forming these forces even when they are operating outside of their own territory), available at <http://www.unhchr.ch/html/menu3/b/91.htm> (last visited Feb. 7, 2005); see also Clover, *supra* note 32, at 354 (asserting that the Bush administration had been reluctant to classify the Taliban detainees as POWs as defined by Article 4 of the Geneva Convention).

Even if the Administration's argument that Afghanistan is a failed state is unpersuasive, this argument is not necessary to deny the Taliban the protections of the Geneva Conventions.<sup>356</sup> Assuming the President's conclusion that Afghanistan is a failed state is incorrect, the Taliban nevertheless do not qualify for protection under the Convention because they do not satisfy any of the conditions in Article 4A(1) or (2) of the GPW.<sup>357</sup> Indeed, U.S. Ambassador-at-Large for War Crimes Issues Pierre-Richard Prosper supported this proposition by arguing:

We have concluded that the Geneva Conventions do apply . . . to the Taliban leaders who sponsored terrorism. But, a careful analysis through the lens of the Geneva Convention leads us to the conclusion that the Taliban detainees do not meet the legal criteria under Article 4 of the convention which would have entitled them to POW status. They are not under a responsible command. They do not conduct their operations in accordance with the laws and customs of war. They do not have a fixed distinctive sign recognizable from a distance. And they do not carry their arms openly. Their conduct and history of attacking civilian populations, disregarding human life and conventional norms, and promoting barbaric philosophies represents firm proof of their denied status. But regardless of their inhumanity, they too have the right to be treated humanely.<sup>358</sup>

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356. See Edith Y. Wu, *Global Responses and Recourses to Terrorism*, 25 WHITTIER L. REV. 521, 547 (2004) (detailing that Taliban members are not protected by the Geneva Convention because they are unlawful combatants); see also Stephen Vladeck, Comment, *The Detention Power*, 22 YALE L. & POL'Y REV. 153, 171 (2004) (indicating the United States' act of signing the Geneva Convention is equivalent to an act of Congress and should be given the same treatment). But see Jamison, *supra* note 304, at 131 (commenting that the Bush administration conceded that the Geneva Convention does have limited application to Guantánamo detainees).

357. See Berman, *supra* note 86, at 15 (analyzing the conditions that designate the action as a war and the combatants as POWs); see also Henry J. Richardson, *U.S. Hegemony, Race, and Oil in Deciding United Nations Security Council Resolution 1441 on Iraq*, 17 TEMP. INT'L & COMP. L.J. 27, 32 (2003) (asserting that the Taliban's tactics on September 11, 2001, justified the attack on Afghanistan). See generally Brooks, *supra* note 33, at 683 (recognizing that prisoners have certain rights which must be respected based on international treaties the United States has signed).

358. See Murphy, *supra* note 35, at 480 (maintaining that Afghanistan was not a functioning state during the Taliban conflict, so it was not considered a party to the Third Geneva Convention); see also Ambassador Pierre-Richard Prosper, *Status and Treatment of Taliban and al-Qaeda Detainees, Remarks at Chatham House, London, United Kingdom* (Feb. 20, 2002) (discussing the treatment of Taliban captives in a post-9/11 society), at <http://www.state.gov/s/wci/rls/rm/2002/8491.htm>. See generally David A. Martin, *Preventive Detention: Immigration Law Lessons for the Enemy Combatant Debate*, 18 GEO. IMMIGR. L.J. 305, 319 (2004) (stating that Taliban fighters were not entitled to POW status because they themselves failed to observe the laws and customs of war).



### 3. Al-Qaeda and Taliban Detainees Must Not Be Afforded Protection Under the Geneva Conventions to Further the Underlying Policies of the Conventions

The purpose of the Geneva Conventions is to establish standards for the conduct of modern war and to ensure that combatants conduct their operations in accordance with these standards.<sup>359</sup> Unlawful combatants who violate these standards are thereby stripped of the protections of the laws of war.<sup>360</sup> If unlawful combatants, such as Al-Qaeda and Taliban members, are provided the protections of the laws of war under the Geneva Conventions, there will be no “incentive system for appropriate behavior in wartime.”<sup>361</sup>

Currently, the Geneva Conventions channel wartime behavior toward certain standards.<sup>362</sup> If those who violate these standards continue to be afforded the protections of those who follow

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359. See Peter Margulies, *Judging Terror in the “Zone of Twilight”: Exigency, Institutional Equity, and Procedure After September 11*, 84 B.U. L. REV. 383, 437 (2004) (acknowledging that the United States is a signatory to international instruments that define the laws of war, including the treatment of prisoners); see also Jason R. Odesho, Note, *Truth or Dare?: Terrorism and “Truth Serum” in the Post-9/11 World*, 57 STAN. L. REV. 209, 221 (2004) (discussing the Geneva Convention’s effect on treatment of prisoners in regard to techniques such as the use of truth serum); Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantánamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1337 (2004) (expressing that twentieth century laws have specifically been designed to address permissible acts during armed combat).

360. See Ana D. Bostan, *The Right to a Fair Trial: Balancing Safety and Civil Liberties*, 12 CARDOZO J. INT’L & COMP. L. 1, 10 (2004) (reporting that the Supreme Court has stated that belligerents are not entitled to treatment under the laws of war if they are unlawful combatants); see also Wuerth, *supra* note 115, at 1574 (asserting that courts have consistently rejected the argument that unlawful combatants are entitled to be held based on the laws of wars); Susan M. Burns, Comment, *Access to Counsel for “Enemy Combatant” Citizens in Military Detention: A Statutory or Constitutional Right?* Padilla v. Bush, 233 F. Supp. 2d 564, 28 S. Ill. U. L.J. 599, 604 (2004) (remarking that the designation of Al-Qaeda and Taliban captives as unlawful combatants meant the United States did not have to give these detainees POW status).

361. See Brief Amicus Curiae of Law Professors, *supra* note 324, at 13–14 (arguing that if the United States grants the Taliban and Al-Qaeda protections under the laws of war, it will undermine the incentive system of the Geneva Convention); see also Bialke, *supra* note 8, at 9–10 (discussing the incentive system of the Geneva Conventions whereby lawful combatants receive privileges but unlawful combatants are denied them). But see Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT’L L.J. 145, 189 (2000) (asserting that refusing to apply POW status to a prisoner because his government engages in terrorism may weaken the United States’ position when a U.S. soldier is captured).

362. See Charles Lysaght, *The Scope of Protocol II and Its Relation to Common Article 3 of the Geneva Convention of 1949 and Other Human Rights Instruments*, 33 AM. U. L. REV. 9, 27 (1983) (stating that Protocol II of the Geneva Convention constrains behavior within governments and armies as effective international law); see also Dahlstrom, *supra* note 337, at 663 (defining *humanitarian law*, including the Geneva Convention, as including appropriate forms of warfare, behavior and treatment of prisoners during times of war or armed conflict). See generally Bradford, *supra* note 354, at 783–84 (positing that the world needs harsh criminal rules to ensure compliance with international humanitarian law).

these standards, there will be no incentive for parties to follow the laws of war.<sup>363</sup> Commanders will channel their soldiers' behavior toward unlawful conduct, knowing their soldiers will continue to be afforded the protections of the laws of war.<sup>364</sup> This is a result that does not serve the underlying policies of the Geneva Conventions and places lawful belligerents at serious risk.<sup>365</sup> Affording these protections to those who consistently violate the laws of war will foster disrespect of international and customary norms and weaken the protections in place for lawful combatants.<sup>366</sup> Not affording unlawful combatants, such as Al-Qaeda and Taliban detainees, the protections of the Conventions will further the Conventions' purpose and protect the lawful combatants whom the Conventions were meant to protect.<sup>367</sup>

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363. See Callen, *supra* note 56, at 1062–63 (suggesting that denying protection to unlawful combatants may lead many of them to attempt to satisfy the criteria necessary to qualify as prisoners of war); see also Jane Dalton, *Constraints on the Waging of War: Jus in Bello and the Challenge of Modern Conflicts*, 97 AM. SOC'Y INT'L L. PROC. 193, 195 (2003) (explaining that granting POW status to Taliban or Al-Qaeda “demeans the value of the law of armed conflict” and would provide no incentive for nations to adhere to the Geneva Convention). But see Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639, 640–41 (2000) (disputing the view that customary international law influences behavior by arguing that states pursue their own self-interests, and this self-interest and the states' relative power determine the existence of rules of international law).
364. See Heather MacDonald, *Too Nice for Our Own Good*, WALL ST. J., Jan. 6, 2005, at A16 (arguing that Al-Qaeda terrorists take advantage of the United States by violating international law and, when detained, refuse to divulge information because they know the United States is bound by anti-torture provisions and other measures that limit what the United States can do to prisoners); see also Keren R. Michaeli & Yuval Shany, *The Case Against Ariel Sharon: Revisiting the Doctrine of Command Responsibility*, 34 N.Y.U. J. INT'L L. & POL'Y 797, 834 (2002) (noting that military commanders have significant control over their troops and can deter violations of the laws of war).
365. See Yoo, *supra* note 141, at 141–43 (noting that only combatants who meet the four conditions for POW status under the Geneva Conventions receive POW status, and its denial is the most effective method of encouraging compliance with the Conventions). But see Neil McDonald & Scott Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the “War on Terror,”* 44 HARV. INT'L L.J. 301, 301 (2003) (arguing that the Geneva Convention and its principles still apply to the war on terror). See generally Protocol II Additional to the 1949 Geneva Conventions and Relating to the Protection of Victims of Noninternational Armed Conflicts, June 10, 1977, 1977 U.S.T. LEXIS 465, 16 I.L.M. 1442 (stating that the purposes of the Geneva Convention include promoting humane treatment, due process for detainees and protection for noncombatants, the sick and the wounded).
366. See Bialke, *supra* note 8, at 48 (emphasizing that POW status should be granted only to lawful combatants; otherwise, rogue states could subvert international law and support terror without facing severe consequences, to the detriment of legal norms); see also Rivkin & Casey, *supra* note 241, at E3 (asserting similarities between Israel's fight with Hamas and the United States' war on terror and that providing such groups with the benefit of the legal norms they violate gives them incalculable advantages and disadvantages over lawful armed forces). But see Azubuike, *supra* note 68, at 153 (arguing that granting POW status to Al-Qaeda members comports with the spirit of the Geneva Conventions and would not insulate them from criminal prosecution for terrorist attacks, including the one on September 11).
367. See Rivkin & Casey, *supra* note 241, at 34 (discussing that suppression of unlawful combatants is an “important policy priority of civilized nations” and furthers the intent of the Geneva Conventions to protect lawful combatants); see also Yoo & Ho, *supra* note 66, at 215 (contending that Al-Qaeda, as a nonstate actor, does not escape the laws of war, and exempting it from such laws would create a perverse incentive for other terrorist groups to follow the pattern of Al-Qaeda); John Riley, *Debate over Application of Prisoner Treaties*, NEWSDAY (N.Y.), May 16, 2004, at A7 (exploring the legal limbo surrounding the Al-Qaeda and Taliban detainees).

Critics of the Administration argue that no person can fall outside the protections of the Conventions.<sup>368</sup> This argument is fatally flawed because it ignores historical precedent and a major class of persons always deemed outside the protections of the Conventions: spies and saboteurs.<sup>369</sup> Critics overlook that these groups have been denied the Conventions' protection in the past and have been tried before military commissions.<sup>370</sup>

#### 4. The President's Constitutional Authority and Sufficient Safeguards Eliminate the Need for an Article 5 Tribunal to Determine the Status of Detainees

The best argument of the Administration's critics is that Article 5 always requires a competent tribunal to determine the status of each detainee.<sup>371</sup> Even if the Administration is correct in arguing that the status of detainees is not in question, Article 5 may limit the President's power to unilaterally determine the status of a detainee.<sup>372</sup> The Administration's argument boils down to the fact that the detainees' status is not in doubt because the President, as Commander-in-Chief, is a "competent authority."<sup>373</sup>

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368. See Azubuike, *supra* note 68, at 153 (maintaining that the Geneva Convention is so universally accepted that even Al-Qaeda is not outside its provisions, despite the fact that as a nonstate entity, it could not have signed the Convention); see also Paust, *supra* note 233, at 510–11 (reasoning that all persons during armed conflict, despite their status as lawful or unlawful combatants, have nonderogable rights to due process and cannot lose such rights even if they forfeit the right to POW status under the Conventions); Berman, *supra* note 86, at 13 (stating that the United States' *unlawful combatants* designation seems designed to place the detainees outside the protection of the Conventions).
369. See David L. Herman, *A Dish Best Not Served at All: How Foreign Military War Crimes Suspects Lack Protection Under United States and International Law*, 172 MIL. L. REV. 40, 63 (2002) (arguing that military commissions can try enemy aliens for violations of the law of war, including spying and sabotage); see also Michael H. Hoffman, *Terrorists Are Unlawful Belligerents, Not Unlawful Combatants: A Distinction with Implications for the Future of International Humanitarian Law*, 34 CASE W. RES. J. INT'L L. 227, 228–29 (2002) (stating that spies and saboteurs, among others, were banned under the rules of war and subject to execution upon capture, unlike regular lawful combatants); Ruth Wedgwood, *Judicial Overreach*, WALL ST. J., Nov. 16, 2004, at A24 (discussing the distinction between lawful and unlawful combatants, under the Geneva Conventions).
370. See *Ex parte Quirin*, 317 U.S. 1, 1 (1942) (holding that the United States could try in a military commission eight German-born U.S. residents accused of sabotage and other offenses against the laws of war); see also R. Peter Masterton, *Military Commissions and the War on Terrorism*, 36 INT'L LAW. 1165, 1165 (2002) (noting that military commissions have long been used to deal with those who violate the laws of war, including international terrorists); Mundis, *supra* note 156, at 321 (observing that spies and saboteurs are treated differently from other combatants).
371. See Jinks, *supra* note 39, at 372 (enumerating the criticisms of U.S. policy on enemy combatants and arguing that the United States' determination that enemy combatants are not POWs is flawed). See generally Caron & Martinez, *supra* note 2, at 785 (asserting that "the Supreme Court's decision in *Hamdi*, along with its decision to exercise jurisdiction over the Guantánamo detainees in *Rasul v. Bush*, is a sharp and much needed rebuke to the U.S. government's position" in its treatment of detainees).
372. See Daryl Mundis, *Has Lady Liberty Lost Her Way?*, 2 J. INT'L CRIM. JUST. 2, 6 (2004) (asserting that the text of Article 5 requires a competent tribunal and not the President to determine whether someone is a lawful combatant); see also Lugosi, *supra* note 8, at 238–40 (arguing that the President's detention of prisoners at Guantánamo and the refusal to grant them POW status violates Article 5); Chlopak, *supra* note 34, at 8 (indicating that Article 5 gives detainees legal protections until it can be determined that they do not qualify for POW status).
373. See Zagaris, *supra* note 2 (framing the government's position as one that has the authority to determine the status of detainees and to imprison such people indefinitely); see also Jinks & Sloss, *supra* note 63, at 100–02 (examining the position that the President had broad discretionary power in foreign affairs and is not bound by the Geneva Convention with respect to the Guantánamo detainees).

Despite the persuasiveness of the Administration's argument, a recent decision by a U.S. district court casts doubt on this line of reasoning.<sup>374</sup> During one of the military commissions convened in Guantánamo Bay stemming from the Supreme Court's recent decisions in *Hamdi*,<sup>375</sup> *Padilla*<sup>376</sup> and *Rasul*,<sup>377</sup> a U.S. district court stopped the "trial of a Yemeni prisoner suspected of being a member of Al-Qaeda, ruling that the special military tribunals like the one the suspect faced at the naval base in Cuba are contrary to principles of American justice."<sup>378</sup>

The court granted the petition for writ of habeas corpus because the detainee's status was not determined by a competent tribunal and because the procedures established for military commissions were inadequate.<sup>379</sup> "The law of war includes the Third Geneva Convention, which requires trial by court-martial as long as Hamdan's POW status is in doubt."<sup>380</sup> The court then argued that because the requirement in Article 5 had been implemented by army regulations, which "is in keeping with the general international understandings of the meaning of Article 5," the government's argument that there was no doubt regarding Hamdan's status was eviscerated.<sup>381</sup> Furthermore, "[t]he President is not a 'tribunal' . . . [and] [t]he government must con-

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374. See *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 152 (2004) (granting a plaintiff-detainee's right to have a competent tribunal determine whether he was entitled to POW status); see also *The Law and Guantánamo*, INT'L HERALD TRIB., Nov. 11, 2004, at 8 (discussing the court ruling that Hamdan cannot be tried by a military commission until his status is determined by a competent tribunal).

375. See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2633 (2004) (holding that a citizen-detainee seized during military action in Afghanistan has due process rights such that he could not be detained indefinitely without receiving some due process).

376. See *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2724–25 (2004) (holding that habeas corpus jurisdiction was limited to the district in which the detainee was confined, and the commander of the military confinement facility was the only proper custodial official for habeas corpus purposes).

377. *Rasul v. Bush*, 124 S. Ct. 2686, 2696 (2004) (holding that the Guantánamo Bay naval base is U.S. territory and because petitioners are within the United States, they are entitled to invoke the authority of the federal courts in making habeas corpus challenges to their detention).

378. See Lewis, *supra* note 3, at A1 (responding to the judge's decision, the Department of Justice announced that "by conferring protected legal status under the Geneva Conventions on members of Al-Qaeda, the Judge has put terrorism on the same legal footing as legitimate methods of waging war"); see also *Hamdan*, 344 F. Supp. 2d at 152 (holding that the rules of the military commissions are inconsistent with the code of military justice and are unlawful); Press Release, U.S. Dep't of Justice, Statement of Mark Corallo, Director of Public Affairs on the *Hamdan* Ruling (Nov. 8, 2004) (explaining that the Administration immediately announced, "[T]he President properly determined that the Geneva Conventions have no legal applicability to . . . Al-Qaeda, a terrorist organization that is not a state . . . the President's power to convene military commissions to prosecute crimes against the laws of war is inherent in his authority as Commander in Chief."), available at [http://www.usdoj.gov/opal/pr/2004/November/04\\_opa\\_735.htm](http://www.usdoj.gov/opal/pr/2004/November/04_opa_735.htm) (last visited Feb. 7, 2005).

379. See *Hamdan*, 344 F. Supp. 2d at 155 (holding that because Hamdan had not been judged an offender under the law and because the procedures of the military commissions ordered by President Bush were inadequate, Hamdan's petition for a writ of habeas corpus should be granted in part); see also 10 U.S.C.S. § 836 (2005) (explaining that the tribunals prescribed by the President must apply the Federal Rules of Evidence of the criminal courts of the United States as long as they are not inconsistent with § 836). See generally Mil. Order 222, 66 F.R. § 57833 (2001) (declaring that a national security emergency exists).

380. *Hamdan*, 344 F. Supp. 2d at 160 (holding that the Geneva Convention applies and that the power to convene military tribunals must come from either case law or congressional legislation); see also Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, arts. 4–5, 6 U.S.T. 3316, T.I.A.S. 3364 (describing how POW status is determined under the Geneva Convention).

381. *Hamdan*, 344 F. Supp. 2d at 162 (holding that until a competent tribunal determines whether Hamdan's treatment is governed by the Geneva Convention, he has to be treated as such and noting that this mandate is incorporated into army regulations); see also 10 U.S.C.S. § 839 (2005) (allowing for the presence of the accused under certain circumstances during a court martial). See generally Army Regulation 190-8, *supra* note 247 (detailing how army regulations determine the status of those captured during conflict).

vene a competent tribunal (or address a competent tribunal already convened) and seek specific determination as to Hamdan's status under the Geneva Conventions."<sup>382</sup>

Even though the court's reasoning is valid, the President should be afforded significant deference as Commander-in-Chief to determine the status of unlawful combatants.<sup>383</sup> The court in *Hamdan* ignored the President's constitutional authority to wage war and purposefully interfered with the authority that was constitutionally granted to the President alone.<sup>384</sup>

The war powers thus invest "the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war."<sup>385</sup> These powers include the authority to detain those captured in armed struggle . . . [T]he Supreme Court has shown great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs.<sup>386</sup>

As the Supreme Court declared in *Hamdi*, the President has the constitutional authority to declare enemy combatants.<sup>387</sup> Thus, there is no doubt about their status under the Geneva Conventions, despite the argument of critics that Article 5 always requires a hearing to deter-

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382. *Hamdan*, 344 F. Supp. 2d at 162 (holding that the President is not a tribunal and does not have the authority to determine that Al-Qaeda members are not prisoners of war); see also Memorandum from William H. Taft IV, Legal Adviser, Dep't of State, to Counsel to the President (Feb. 2, 2002) (suggesting that the President comply with Article 4 of the Geneva Convention for policy reasons and to protect the lives of American soldiers), available at <http://www.fas.org/sgp/othergov/taft.pdf> (last visited Feb. 7, 2005); Lewis, *supra* note 3, at A1 (explaining that an appellate judge held that detainees were entitled to proceedings under a competent tribunal if their prisoner status was unclear).

383. See *Ex parte Quirin*, 317 U.S. 1, 26–27 (1942) (holding that the President has power to "carry into effect all laws defining and punishing laws against nations"); see also David Glazier, Note, *Kangaroo Court or Competent Tribunal? Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2012–15 (explaining that the Uniform Code of Military Justice allows the President to establish rules and regulations in the formation of a military commission that are uniform with civilian legal procedures and the UCMJ "to the extent practicable"). See generally *Rasul*, 124 S. Ct. at 2700 (holding that the President does have authority over the military where the judicial branch may not interfere) (citing *Johnson v. Eisentrager*, 339 U.S. 763 (1950)).

384. See *Hamdan*, 344 F. Supp. 2d at 167 (holding that the President's role as a source of final review in a military commission is not inconsistent with the Uniform Code of Military Justice); see also *Hamdi*, 124 S. Ct. at 2633 (dissent by Scalia, J.) (arguing that the executive branch has broad discretion to conduct war when the nation is under attack).

385. *Hamdi v. Rumsfeld*, 316 F.3d 450, 463 (4th Cir. 2003) (quoting *Quirin*, 317 U.S. at 26), *vacated by Hamdi*, 124 S. Ct. 2633 (2004).

386. *Id.* (holding that the Constitution grants the President broad powers during wartime); see also *Rasul*, 124 S. Ct. at 2700 (Kennedy, J., concurring) (finding that the judicial branch defers to the executive branch in areas of military affairs). See generally Caron & Sloss, *supra* note 241, at 792–93 (discussing how President Bush claims the authority to detain captured enemy combatants indefinitely).

387. *Hamdi*, 124 S. Ct. at 2639–40 (holding that detention through the AUMF was lawful because there is no bar to the United States holding one of its citizens as an enemy combatant); see also *Quirin*, 317 U.S. at 26–27 (holding that the President has the authority to make rules to protect the nation during wartime). See generally Caron & Martinez, *supra* note 2, at 783 (presenting several of the challenges that have arisen as the result of recent decisions on the subject of enemy combatants).

mine a detainee's status.<sup>388</sup> The President's authority should be given significant deference by the judiciary to interpret federal and international law.<sup>389</sup> Moreover, as Justice Thomas wrote in dissent in *Hamdi*:

The Executive Branch, acting pursuant to the powers vested in the President by the Constitution and with explicit congressional approval, has determined that Yaser Hamdi is an enemy combatant and should be detained. This detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision.<sup>390</sup>

Furthermore, there are sufficient safeguards in place to accomplish the same goal as the Article 5 tribunal.<sup>391</sup> The U.S. military currently conducts an ongoing process of interviews, screening and review to determine that each detainee is indeed an unlawful combatant.<sup>392</sup> For example, more than 10,000 detainees were screened in Afghanistan, and most were released.<sup>393</sup> There are at least four levels of screening and review before a person is labeled an unlawful

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388. See U.S. CONST. art. I, § 9 cl. 2 (explaining that "[t]he Privilege of the Writ of Habeas Corpus should not be suspended, unless when in cases of rebellion or invasion the public safety may require it"); see also *Hamdi*, 124 S. Ct. at 2638 (holding that Article 5 of the Geneva Convention does not require a hearing to determine the status of a detainee). But see Paust, *supra* note 233, at 512–14 (arguing that when the status of a detainee is uncertain, that prisoner's status should be determined by a competent tribunal).

389. See Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 847 (1989) (quoting Alexander Hamilton's argument for a strong executive power in interpreting treaties: "He who is to execute the laws must first judge for himself of their meaning"); see also *Foster v. Neilson*, 27 U.S. (8 Pet.) 253, 314 (1829) (explaining that treaties address themselves to the political, not the judicial, department and should be interpreted by the President). But see Paust, *supra* note 233, at 527–28 (suggesting that the judiciary should take a more active role in interpreting the law and not allow the President extensive discretion).

390. *Hamdi*, 124 S. Ct. at 2674–75 (Thomas, J., dissenting) (rejecting petitioner's plea for the issuance of a writ of habeas corpus because the President had declared Hamdi an "enemy combatant"—a power granted to the executive branch during wartime).

391. See U.S. DEPT OF DEFENSE, *Military Commissions Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism* (Mar. 21, 2002) (describing the procedures established in the military commissions for trials of those who are part of the war on terrorism), available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> (last visited Feb. 7, 2005); see also Press Briefing by Richard Boucher, Spokesperson, U.S. Dep't of State, in Washington, D.C. (Feb. 8, 2002) (illustrating the efforts the United States has made to ensure that detainees will receive fair trials), available at <http://www.state.gov/r/pa/prs/dpb/2002/7918.htm>. See generally Brief Amicus Curiae of Law Professors, *supra* note 324, at 8 (explaining that the President has agreed to treat prisoners in a manner consistent with the Third Geneva Convention of 1949).

392. See Brief Amicus Curiae of Law Professors, *supra* note 324, at 17 (describing the process of "interviews, screening and review" the United States uses to ensure that each detainee is a combatant); see also Aldrich, *supra* note 36, at 891–92 (describing the legal status of captured Al-Qaeda members). See generally Benjamin Weiser, *A Nation Challenged; Ex-Prosecutor Wants Tribunals to Retain Liberties*, N.Y. TIMES, Jan. 8, 2002, at 13A (describing how implementing safeguards will lend more credit to the government's efforts to fight terrorism).

393. William Taft, *Guantánamo Detention Is Legal and Essential*, FIN. TIMES, Jan. 12, 2004, at 19 (explaining that only detainees who pose "special security, intelligence or law enforcement concerns are transferred to Guantánamo" for confinement); see also Brief Amicus Curiae of Law Professors, *supra* note 324, at 17 (explaining the safeguards the Department of Defense uses to ensure that innocent civilians are not mistakenly held as prisoners); Secretary of Defense Donald Rumsfeld, Remarks to Greater Miami Chamber of Commerce (Feb. 13, 2004) (explaining the process by which detainees are either released, transferred or held), available at <http://www.defenselink.mil/transcripts/2004/tr20040213-0445.html> (last visited Feb. 7, 2005).

combatant and transferred to Guantánamo.<sup>394</sup> Assessments are made in the field, by a military screening team at a holding facility, by a general officer assigned by the Central Command and ultimately by an internal Department of Defense review panel.<sup>395</sup> The detainee is once again assessed at Guantánamo by the Southern Command, and a recommendation is made about the status of the detainee before the final decision is made by the Secretary of Defense.<sup>396</sup> This review process, even though it is not categorized as an Article 5 hearing, provides the kind of factual inquiry expected by Article 5 to protect a person not intended to be detained as an unlawful combatant.<sup>397</sup>

### 5. The President Is Authorized to Use All Necessary and Appropriate Force and Need Not Formally Declare War to Authorize the Detention of Unlawful Combatants

The President's authority to detain Al-Qaeda and Taliban members stems from the congressional authorization of force on September 18, 2001.<sup>398</sup> In that joint resolution, Congress gave the President the authority "to use all necessary and appropriate force against those nations,

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394. See Brief Amicus Curiae of Law Professors, *supra* note 324, at 17; see also Secretary of Defense Donald Rumsfeld, Remarks to Greater Miami Chamber of Commerce (Feb. 13, 2004) (stating that the detainees are assessed on various levels according to the level of threat they pose to the United States and its allies), available at <http://www.defenselink.mil/transcripts/2004/tr20040213-0445.html> (last visited Feb. 7, 2005); DEP'T OF DEF., Fact Sheet, Guantánamo Detainees (detailing the thorough process for determining enemy combatant status prior to transfer to Cuba), available at <http://www.defenselink.mil/news/Apr2004/d20040406gua.pdf> (last visited Feb. 6, 2005).

395. See Brief Amicus Curiae of Law Professors, *supra* note 324, at 17–18 (explaining that screening teams have conducted this four-part process in both Vietnam and the Gulf War); see also Vierucci, *supra* note 243, at 300–02 (noting the procedure for combatant assessment as provided for under the Geneva Convention and its presumption of POW status). See generally DEP'T OF DEFENSE, DoD News Briefing on Military Commissions (Mar. 21, 2002) (explaining the final stage the detainee must face, that of a military commission), available at <http://www.defenselink.mil/transcripts/2002/t03212002sd.html> (last visited Feb. 7, 2005).

396. See Brief Amicus Curiae of Law Professors, *supra* note 324, at 18 (noting the detailed process of combatant review that takes place before and after a recommendation with respect to the detainees' status); see also DEP'T OF DEF., Order: Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantánamo Bay Naval Base, Cuba (May 11, 2004) (modifying the procedures by which the administrative review process is conducted with respect to the detainees and providing the authority to empanel as many review boards as necessary in order to establish status), available at <http://www.defenselink.mil/news/May2004/d20040518gtmreview.pdf> (last visited Feb. 7, 2005); DEP'T OF DEF., Briefing on Detainee Operations at Guantánamo Bay (Feb. 13, 2004) (reporting that the detainees are screened by an "integrated team of interrogators, analysts, behavioral scientists and regional experts"), available at <http://www.defenselink.mil/transcripts/2004/tr20040213-0443.html> (last visited Feb. 7, 2005).

397. See Brief Amicus Curiae of Law Professors, *supra* note 324, at 20 (claiming that the screening process, although not specifically called an Article 5 proceeding, is a sufficient inquiry to protect any person who may have been swept up in the conflict); see also Bialke, *supra* note 8, at 54–55 (stating that because the President determined en masse that the detainees were unlawful combatants, no official Article 5 tribunal was necessary). But see Brief Amicus Curiae of Retired Military Officers in Support of Petitioners at 6, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-334, 03-343) (contending that under the Geneva Convention, combatants should initially be given the protection of the Geneva Convention and POW status until their actual status can be determined).

398. See Joint Resolution, *supra* note 17 (empowering the President to respond to the terrorist attacks of September 11); see also Evans, *supra* note 67, at 1835 (stating that President Bush's executive order authorizing military commissions cited the joint resolution among its legal bases); Lugosi, *supra* note 8, at 230 (commenting that the resolution allowed the President to protect U.S. interests anywhere in the world).

organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.”<sup>399</sup> The joint resolution specifically provided the President with the authority to determine by himself, as Commander-in-Chief, who perpetrated the attacks and to respond accordingly.<sup>400</sup>

Any claim that the President was not afforded the specific authority to detain unlawful combatants is unfounded because the resolution could not have envisioned all possible circumstances that would present themselves in the war on terror.<sup>401</sup> Instead, Congress thought the appropriate measure was to provide the President, as Commander-in-Chief, with all the necessary and appropriate force,<sup>402</sup> whatever that may be. This certainly encompasses the authority to detain individuals who may operate outside the customary laws of war.<sup>403</sup> Indeed, the President used this authority during World War II and may use it today.<sup>404</sup> Moreover, the Supreme

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399. See Joint Resolution, *supra* note 17 (specifically authorizing the President to use “necessary and appropriate force” to combat terrorism); see also Brief Amicus Curiae of Law Professors, *supra* note 324, at 3–4 (asserting that this authorization was made after the “extraordinary acts of war” on September 11). See generally Juan R. Touruella, *On the Slippery Slopes of Afghanistan: Military Commissions and the Presidential Power*, 4 U. PA. J. CONST. L. 648, 651 (2002) (listing additional post-September 11 legislation passed by Congress).

400. See Joint Resolution, *supra* note 17 (allowing the President to take action against those he determines perpetrated the attack). But see Jonathan Turley, *Art and the Constitution: The Supreme Court and the Rise of the Impressionist School of Constitutional Interpretation*, 2004 CATO SUP. CT. REV. 69, 93–95 (2004) (arguing that a broad interpretation of the “necessary and appropriate force” language of the resolution is sharply contrary to congressional intent).

401. But see *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (holding that congressional authority should never be interpreted to violate the law of nations if any other construction is possible).

402. See Jinks & Sloss, *supra* note 63, at 129–31 (admitting that Congress considered a severe response to the attacks appropriate, but questioning whether it would allow the President to engage in conduct contrary to the Geneva Conventions); see also Laura Taylor Swain, *Liberty in the Balance: The Role of the Third Branch in a Time of Insecurity*, 37 SUFFOLK U. L. REV. 51, 53 (2004) (noting that this action was also taken in order for the United States to exercise its right of self-protection from terrorism). See generally Clover, *supra* note 32, at 353 (detailing how detainment stemmed from the congressional resolution).

403. See Clover, *supra* note 32, at 383–85 (stating that the language of the resolution is so broad that despite the term *appropriate*, the President may use all necessary force). But see Franck, *supra* note 269, at 687–88 (reviewing the government’s assertions that its powers under the resolution are without much limit).

404. See *Ex parte Quirin*, 317 U.S. 1, 35–37 (1942). The court found that

those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission. This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war recognized by this government. . . . Entry upon our territory in time of war by enemy belligerents, including those acting under the direction of the armed forces of the enemy, for the purpose of destroying property used or useful in prosecuting the war, is a hostile and war-like act. It subjects those who participate in it without uniform to the punishment prescribed by the law of war for unlawful belligerents.

*Id.*; see also Paul Haridakis, *The War on Terrorism: Military Tribunals and the First Amendment*, 9 COMM. L. & POL’Y 317, 336 (2004) (noting a prolonged history of Presidents acting beyond the scope of public and judicial scrutiny during wartime). But see Orentlicher & Goldman, *supra* note 266, at 658 (alleging that President Bush’s military order goes beyond the boundaries of *Quirin* and reaches people who aided terrorism, even though they are not combatants as in *Quirin*).



Court in *Hamdi* specifically addressed this issue and found that the lack of specific language authorizing detention did not limit the President's power to detain unlawful combatants:

[I]t is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of "necessary and appropriate force," Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.<sup>405</sup>

No formal declaration of war is required because Al-Qaeda declared war against the United States more than ten years before the 9/11 attacks.<sup>406</sup> After bombing American peacekeepers in Yemen in 1992, Al-Qaeda perpetrated the 1993 attack on the World Trade Center.<sup>407</sup> American soldiers were attacked in 1994 in Riyadh, Saudi Arabia, and again in 1995 at the Khobar Tower barracks, which killed 19 and wounded 372 American soldiers.<sup>408</sup> The American embassies in Kenya and Tanzania were attacked by Al-Qaeda in 1998, resulting in 212 deaths and 4,500 casualties.<sup>409</sup> And after a failed attack in 2000, Al-Qaeda successfully attacked the USS *Cole* in

405. See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2633 (2004) (noting that keeping combatants from the battlefield is an integral part of waging war); see also Jenny S. Martinez, *Availability of U.S. Court to Review Decision to Hold U.S. Citizen as Enemy Combatant—Executive Power in War on Terror*, 98 AM. J. INT'L L. 782, 784 (2004) (noting that a factor in the *Hamdi* decision was a weighing of the interests between Hamdi's interest in physical liberty and the government's interest in waging war effectively); Charles H. Whitebread, *Significant Pronouncements of the High Court*, 46-DEC ORANGE COUNTY LAW. 14, 18 (2004) (noting that *Hamdi* focuses significantly on the President's expanded powers during war but only while a "relevant conflict is ongoing").

406. See Brief Amicus Curiae of Law Professors, *supra* note 324, at 4 (describing a decade of attacks on Americans and American interests by Al-Qaeda); see also John Kifner, *The World; A Tide of Islamic Fury, and How It Rose*, N.Y. TIMES, Jan. 30, 2005, § 9, at 4 (providing a timeline of the rise of religious fundamentalism in the world); Louis J. Freeh, *Before 9/11 and After*, WALL ST. J., Apr. 12, 2004, at A18 (questioning what would have happened had the United States declared war on Al-Qaeda prior to September 11).

407. See Brief Amicus Curiae of Law Professors, *supra* note 324, at 10 (noting the attack on Yemen peacekeepers and the first attack on the World Trade Center); see also Mofidi & Eckert, *supra* note 12, at 82 (stating that Osama bin Laden was linked to various attacks including the 1993 World Trade Center bombing); *Threats and Responses; Excerpts from the Testimony of Freeh and Reno Before the 9/11 Commission*, N.Y. TIMES, Apr. 14, 2004, at A16 (providing that the attacks on peacekeepers in Yemen were the subject of an FBI indictment in June 1998).

408. See Peter Edin, *A Revised View of an Infamous Day*, N.Y. TIMES, June 20, 2004, § 4, at p. 2, col. 2 (noting that Al-Qaeda and Iran may have put aside their differences in the Khobar Towers bombing to unite against a common enemy); Dan Eggen, *9/11 Panel Links Al Qaeda, Iran; Bin Laden May Have Part in Khobar Towers, Report Says*, WASH. POST, June 26, 2004, at A12 (reporting that although the attack originally was tied to the Iranian group Hezbollah, a link to Osama bin Laden possibly existed); see also *Behind the Persian Curtain*, CHI. TRIB., July 21, 2004, at C22 (expressing concern over the link between Iran and Al-Qaeda and its possible repercussions in the future).

409. See *In Brief/Tanzania; Suspect in Embassy Bombing Acquitted*, L.A. TIMES, Dec. 23, 2004, at A4 (reporting that the nearly simultaneous attacks were blamed on Al-Qaeda); see also *Major Terror Attacks*, HARTFORD COUR., Mar. 12, 2004, at A3 (listing among recent major terror attacks the August 7, 1998 attacks on U.S. embassies in Dar es Salaam and Nairobi). See generally Alexandra Zavis, *U.S. Worry over Terrorism Extends Through Much of Africa*, MILWAUKEE J. SENT., Mar. 12, 2004 (stating that the bombings of the embassies in Kenya and Tanzania are just a fraction of the terrorist activity at work in Africa).

Yemen in 2001.<sup>410</sup> Moreover, in 1998 Osama bin Laden issued a fatwa declaring war against all Americans, Jews, Christians and apostate Muslims.<sup>411</sup> Plans to attack the United States continue today.<sup>412</sup>

Furthermore, the applicability of the laws of armed conflict does not require a formal declaration of war.<sup>413</sup> Indeed, the commentary to GPW Article 2 states: "There is no need for a formal declaration of war, or for the recognition of the existence of a state of war, as preliminaries to the application of the Convention."<sup>414</sup> The GPW states that the Conventions "shall apply to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."<sup>415</sup> More-

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410. See Symposium, *America Fights Back: The Legal Issues*, 11 CARDOZO J. INT'L & COMP. L. 831, 834 (2001) (listing the attack on the USS *Cole* among pre-9/11 signals that terrorists had targeted the United States); John F. Burns & Steven Lee Meyers, *The Warship Explosion: The Overview; Blast Kills Sailors on U.S. Ship in Yemen*, N.Y. TIMES, Oct. 13, 2000, at A1 (reporting the previous day's explosion on the American destroyer, the USS *Cole*); see also Neil MacFarquhar, *2 Plotters Get Death for Attack on Cole; Yemen Judge Gives 4 Others Jail Time for Fatal Bombing*, CHI. TRIB., Sept. 30, 2004, at C1 (stating that those accused of bombing the USS *Cole* were linked to Al-Qaeda and were sentenced to death for their actions).

411. See Brief Amicus Curiae of Law Professors, *supra* note 324, at 10; see also Evan Kohlmann, *A Web of Terror*, 6 J. COUNTERTERRORISM & SEC. INT'L 1, 3 (2000) (explaining the meaning of bin Laden's fatwa and his worldwide call to Muslims to participate in his declaration of war); Mohamad Bazzi, *Analysis: From bin Laden, a Political Truce*, NEWSDAY (N.Y.), Nov. 3, 2004, at A2 (stating that the 1998 fatwa aimed primarily at the destruction of Americans and their allies).

412. See Paul Harris et al., *Focus: The Return of al Qaeda: Striking Back: Just as the West Began to Hope That the War on Terror Was Won, a Wave of Bombings Threatens to Take the Global Nightmare to a New Level: Bombers Blow Hope to Pieces*, OBSERVER, May 18, 2003, at 15 (indicating that Al-Qaeda terrorists have not been defeated and are recruiting new forces and planning new attacks around the globe); see also David Johnston, *On Alert for Terror Activity Timed to Disrupt Election, Agencies Find Little Reason to Worry*, N.Y. TIMES, Nov. 3, 2004, at 3 (examining the possibility of new terrorist attacks against the United States, primarily after the 2004 presidential election); Neil MacFarquhar, *As Terrorists Strike Arab Targets, Escalation Fears Arise*, N.Y. TIMES, Apr. 30, 2004, at 13 (responding to bin Laden's call to unite, the Islamic "jihadis" will attempt to rise up against America).

413. See Brief Amicus Curiae of Law Professors, *supra* note 324, at 10 (commenting that the traditional declaration of war is not required in present-day situations concerning armed conflicts and aggression); see also Berman, *supra* note 86, at 16 (requiring states to look to the characteristics of the conflict and not the presence of a formal declaration of war); Ruth Wedgwood, *Military Commissions: Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT'L L. 328, 335 (2002) (stating that the Geneva Conventions do not require states to formally declare war).

414. See ICRC, *supra* note 53 (quoting the ICRC commentary regarding Article 2 of the Geneva Convention Relative to the Treatment of Prisoners of War); see also Major Geoffrey S. Corn, "To Be or Not to Be, That Is the Question": *Contemporary Military Operations and the Status of Captured Personnel*, 1999 ARMY LAW. 1, 4 (1999) (reflecting on the present Geneva Convention, which does not require a formal declaration of war); W. Michael Reisman & James Silk, *Which Law Applies to the Afghan Conflict?*, 82 AM. J. INT'L L. 459, 461 (1988) (mentioning Pictet's commentary that there is no longer any need for a formal declaration of war).

415. See Prisoners of War, *supra* note 15, at 3316 (stating that war or armed conflict does not have to be recognized by each high contracting party in order for the Convention to apply to the parties); see also Georgios C. Petrochilos, *The Relevance of the Concepts of War and Armed Conflict to the Law of Neutrality*, 31 VAND. J. TRANSNAT'L L. 575, 578 (1998) (explaining that the Geneva Conventions will apply to high armed-conflict situations even if all parties do not recognize the hostilities); Walter Gary Sharp, Sr., *Revoking an Aggressor's License to Kill Military Forces Serving the United Nations: Making Deterrence Personal*, 22 MD. J. INT'L L. & TRADE 1, 1 (1998) (stating the Conventions apply to any "state of war" even if all the parties involved do not realize the heightened conflict).

over, the United States has not formally declared war since World War II.<sup>416</sup> For example, no formal declaration of war was announced authorizing hostilities in Vietnam, the Persian Gulf War or the invasion of Iraq in 2003.<sup>417</sup> Instead, the President acted pursuant to a joint resolution of Congress authorizing him to use all “necessary and appropriate force” against Al-Qaeda and the Taliban.<sup>418</sup>

Despite this authorization of force, one criticism of the Administration’s legal analysis must be made. The Administration argued that customary international law does not bind the President.<sup>419</sup> This argument is questionable in light of the Supreme Court’s recent decision in *Sosa v. Alvarez-Machain*,<sup>420</sup> which reaffirmed the principle of *Paquete Habana*<sup>421</sup> that international law is part of the law of the United States.<sup>422</sup>

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416. See John Alan Cohan, *Legal War: When Does It Exist and When Does It End?*, 27 HASTINGS INT’L & COMP. L. REV. 221, 239 (2004); see also Harold Hongju Koh, Comment, *The Coase Theorem and the War Power: A Response*, 1991 DUKE L.J. 122, 127 (1991) (stating that formal declarations of war in the United States have fallen into “desuetude” since WWII).

417. See Brief Amicus Curiae of Law Professors, *supra* note 324, at 10; see also Geraghty, *supra* note 18, at 564 (asserting that the Vietnam, Persian Gulf and Iraq wars involved no formal declaration of war by the United States); J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. REV. 1402, 1425 (1992) (commenting that there was no need for formal declaration by the President during the Vietnam, Persian Gulf and Iraq wars).

418. “Joint resolutions generally, as their name would suggest, require the approval of both Houses of Congress, and if signed by the President, have the force of law.” *Padilla v. Bush*, 233 F. Supp. 2d 564, 598 (S.D.N.Y. 2002), *rev’d on other grounds*. See also *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004) (reviewing the Court’s examination of the President’s wartime powers and powers as Commander-in-Chief); Michael D. Ramsey, *Presidential Declarations of War*, 37 U.C. DAVIS L. REV. 321, 331 (2003) (affirming that Congress has given the President power to do what is “necessary and proper” to protect the United States); Harvey Rishikof, *Is it Time for a Federal Terrorist Court? Terrorists and Prosecutions: Problems, Paradigms, and Paradoxes*, 8 SUFFOLK J. TRIAL & APP. ADVOC. 1, 4 (2003) (stating that Congress’s joint resolution gives the President discretion to do what is necessary and proper during times of war); Touruella, *supra* note 399, at 651 (asserting the President has the powers delegated to him by Congress in times of war).

419. See David Golove, *Conference International Law and Justice in the Twenty-First Century: The Enduring Contributions of Thomas M. Franck: Contributions: Military Tribunals, International Law, and the Constitution: A Franckian-Madisonian Approach*, 35 N.Y.U. J. INT’L L. & POL’Y 363, 364 (2003) (expressing that the Administration does not believe that all international law is part of federal law; hence, the President is not bound by it); see also Malvina Halberstam, *International Kidnaping: In Defense of the Supreme Court Decision in Alvarez-Machain*, 86 AM. J. INT’L L. 736, 740 (1992) (suggesting that the President has discretion to decide whether to breach a treaty or violate an international law because he, along with Congress, is in the best position to make decisions regarding foreign affairs); Jordan J. Paust, *May the President Violate Customary International Law?: The President Is Bound by International Law*, 81 AM. J. INT’L L. 377, 378 (1987) (assessing, in disbelief, that some academics, as well as some politicians, believe the President is not bound by international law).

420. 124 S. Ct. 2739, 2739 (2004) (recognizing that international law, or the “law of nations,” is part of the domestic law of the United States).

421. 175 U.S. 677, 700 (1900) (stating that “international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination”).

422. *Alvarez-Machain*, 124 S. Ct. at 2764 (finding that “[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations”); see also Jonathan I. Charney, *May the President Violate Customary International Law?: The Power of the Executive Branch of the United States Government to Violate Customary International Law*, 80 AM. J. INT’L L. 913, 914 (1986) (stating that the *Paquete Habana* Court adopted a “monist” view that international law is incorporated into U.S. federal law); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1208 (1988) (quoting from *Paquete Habana* that international law is “part of our law”).

Even though the *Sosa* Court reaffirmed that international law is part of the law of nations, there are four restrictions on when a court may resort to international law.<sup>423</sup> As the *Paquete Habana* Court held and the *Sosa* Court reaffirmed, “where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.”<sup>424</sup> Thus, a court may resort to the law of nations in the absence of a treaty, executive or legislative action, or judicial decision.<sup>425</sup> Here, the Administration has a plausible argument that resort need not be made to the law of nations because the President has acted pursuant to executive and legislative action in declaring the detainees outside the protections of the Geneva Conventions.<sup>426</sup>

#### 6. Critics of the Administration’s Decision Not to Afford Detainees the Protections of the GPW Attack This as a Matter of Policy and Not Law

Notwithstanding the criticisms of the Administration’s legal analysis, which offer persuasive and compelling arguments for the applicability of the Geneva Conventions to the detainees, a majority of the Administration’s critics attack the underlying policy decision that the Conventions do not apply.<sup>427</sup> This distinction merits discussion.

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423. See Katharine Shirey, *The Duty to Compensate Victims of Torture Under Customary International Law*, 14 INT’L LEGAL PERSP. 30, 32 (2004) (examining the requirements under which a court will recognize international law as customary order:

(a) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations, (b) continuation or repetition of the practice over a considerable period of time; (c) conception that the practice is required by, or consistent with, prevailing international law; and (d) general acquiescence in the practice by other states.

See also Akbar, *supra* note 74, at 211 (listing the four criteria that a court will review when deciding whether international law is, or should be, customary in the United States); Joseph Miller, Note, *Extending Extraterritorial Abduction Beyond Its Limit: United States v. Alvarez-Machain*, 6 PACE INT’L L. REV. 221, 231 (1994) (stating that in order for international law to be an accepted custom, it must satisfy a set of general elements).

424. *Alvarez-Machain*, 124 S. Ct. at 2766–77 (quoting *Paquete Habana*, 175 U.S. at 700).

425. See Brooks, *supra* note 33, at 736 (declaring that in times of heightened national security, executive and legislative actions are given greater deference because those branches are in the best position of knowing security risks); see also Donald J. Kochan, *Political Economy of the Production of Customary International Law: The Role of Non-governmental Organizations in U.S. Courts*, 22 BERKELEY J. INT’L L. 240, 250 (2004) (contending that without treaty, executive or legislative action or judicial decision, international law will be applied as controlling law); Murphy, *supra* note 35, at 831 (commenting that the President’s decision pertaining to the detainees has not violated the U.S. Constitution because he has not violated any congressional enactments or any treaties that would question his executive powers); Eric George Reeves, Note, *United States v. Javino: Reconsidering the Relationship of Customary International Law to Domestic Law*, 50 WASH. & LEE L. REV. 877, 884 (1993) (stating that the courts must resort to the customs of civilized nations when no treaty or controlling executive or legislative act or judicial decision has been found).

426. See Jinks & Sloss, *supra* note 63, at 101 (noting the President’s treatment of the detainees is similar to the rules under the Conventions, but he has reserved the right to deviate from the treaties if it is a military necessity); see also Desai, *supra* note 32, at 1588–89 (analyzing the President’s rationale in the treatment of the Al-Qaeda and Taliban detainees at Guantánamo Bay).

427. See Azubuike, *supra* note 68, at 150 (arguing there are plausible reasons to apply the Conventions to both the Taliban and Al-Qaeda detainees); see also Wallach, *supra* note 44, at 22 (asserting the Convention does apply to the detainees, according to Article 4(3) of the GPW); Chlopak, *supra* note 34, at 7 (explaining how the Administration’s decision not to apply the Conventions and POW status to the detainees resulted from a misinterpretation of Article 4 of the Fourth Convention and is not correct).

Most critics of the Administration attack the President's policy instead of studying the text of the Conventions and engaging in an analysis thereof.<sup>428</sup> Most policy criticisms contain certain statements that fuse policy criticism and attacks on legal analysis.<sup>429</sup> For example, most critics of the policy decision not to apply the Geneva Conventions argue that the Administration's conclusion has no basis in international law.<sup>430</sup> Some of this criticism is understandable in light of the abuses that have taken place at Abu Ghraib and the concerns that have been raised in its wake.<sup>431</sup> However, the policy decision not to apply the Geneva Conventions is different from the legal conclusion. The legal conclusion provided by Administration lawyers may be a "bold and unconventional interpretation of the Third Geneva Convention,"<sup>432</sup> but it is not illegal. The policy decision, on the other hand, is open to criticism on a number of grounds.

This article makes no judgment about the wisdom of this policy. It simply endeavors to point out that some critics of the Administration have unfairly attacked its legal analysis when the appropriate target for their criticism should be policymakers. Critics of the Administration would do well to make a distinction that they criticize the policy judgment not to apply the Geneva Conventions to detainees and not the legal truth that the Conventions do not apply.

Foremost among critics of the Bush administration policies is Kenneth Roth, executive director of Human Rights Watch.<sup>433</sup> He has argued that the Administration ignored the public

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428. See Jinks & Sloss, *supra* note 63, at 97 (attacking U.S. policy toward detainees); see also Jinks, *supra* note 39, at 370 (criticizing U.S. policy on how to treat detainees); Richard J. Wislon, *United States Detainees at Guantánamo Bay: The Inter-American Commission on Human Rights Responds to a "Legal Black Hole,"* 10 HUM. RTS. BR. 2, 5 (2003) (noting that the U.S. policy may allow it to do whatever it wants with respect to detainees).

429. See Stephen Eriksson, *Humiliating and Degrading Treatment Under International Humanitarian Law: Criminal Accountability, State Responsibility, and Cultural Considerations*, 55 A.F. L. REV. 269, 271 (2004) (noting that there are policy considerations and legal arguments contrary to the position the United States has taken); see also Ratner, *supra* note 281, at 912 (contending that neither the international laws of war nor the Geneva Convention authorize the United States to act in the way that it has).

430. See Steven Gillers, *Tortured Reasoning: The Justice. Department Attorneys Who Advised the White House on Military Prisoner Policy Bear Responsibility*, AM. LAW., July 1, 2004 (arguing that the OLC lawyers bear the moral and legal responsibility for detainee abuse because of their incompetent legal advice); see also Jeffrey K. Shapiro & Lee A. Casey, *Let Lawyers Be Lawyers*, AM. LAW., Sept. 1, 2004 (refuting Gillers' article and defending the OLC analysis); Caron & Sloss, *supra* note 241, at 795 (arguing that international law does not support the United States' stance on detainees).

431. See Aldrich, *supra* note 36, at 893 (arguing that the United States, in its treatment of detainees, has neglected the Geneva Convention); see also James Thyo Gathii, *Torture, Extraterritoriality, Terrorism, and International Law*, 67 ALB. L. REV. 335, 349 (2003) (criticizing the United States' failure to provide fundamental protections required under international law); Daniel Rothenberg, *"What We Have Seen Has Been Terrible": Public Presentational Torture and the Communicative Logic of State Terror*, 67 ALB. L. REV. 465, 469 (2003) (raising concerns about the ultimate effects of U.S. policy).

432. See Bialke, *supra* note 8, at 1 (noting that although the United States has not followed a conventional interpretation of the Geneva Convention, its acts have still been legal); see also Lugosi, *supra* note 8, at 238 (noting the criticism the United States has taken for not adopting a more traditional interpretation of the Geneva Convention).

433. See David Marcella, *Human Rights in Political Transitions: Gettysburg to Bosnia*, 19 BERKELEY J. INT'L L. 412, 417 (2001) (commenting on Kenneth Roth's criticism of the Bush administration); see also Kenneth Roth & Ruth Wedgwood, *Combatants or Criminals? How Washington Should Handle Terrorists* (May/June 2004) (criticizing the Bush administration), available at <http://www.foreignaffairs.org/20040501faresponse83312/ruth-wedgwood-kenneth-roth/combatants-or-criminals-how-washington-should-handle-terrorists.html> (last visited Feb. 7, 2005); Human Rights Watch Decries Iraq War (Jan. 26, 2004) (chastising the way the Bush administration has handled detainees), available at <http://www.commondreams.org/headlines04/0126-07.htm> (last visited Feb. 7, 2005).

policy implications of its decision to apply the laws of war and that the Administration's decision to declare detainees as unlawful combatants is a "troubling policy."<sup>434</sup> Roth challenges the Administration's policy of using the laws of war and not subjecting combatants to domestic criminal law.<sup>435</sup> Unfortunately, he fails to make any legal argument that the Geneva Conventions do not apply to the detainees or that the laws of war are inapplicable; he asserts only that the Administration's decision to apply the laws of war is a regrettable policy.<sup>436</sup>

Additionally, *The Economist* recently attacked the Administration's policy conclusion without addressing the Conventions directly:

The biggest mistake . . . was one that will haunt America for years to come. It lay in dealing with prisoners-of-war by sending hundreds of them to the American base at Guantánamo Bay in Cuba, putting them in a legal limbo, outside the Geneva conventions and outside America's own legal system. That act reflected a genuinely difficult problem: that of having captured people of unknown status but many of whom probably did want to kill Americans, at a time when to set them free would have been politically controversial, to say the least. That difficulty cannot neutralise the damage caused by this decision, however. Today, Guantánamo Bay offers constant evidence of America's hypocrisy, evidence that is disturbing for those who sympathise with it, cause-affirming for those who hate it. This administration, which claims to be fighting for justice, the rule of law and liberty, is incarcerating hundreds of people, whether innocent or guilty, without trial or access to legal representation. The White House's proposed remedy, namely military tribunals, merely compounds the problem.<sup>437</sup>

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434. See Kenneth Roth, *The Law of War in the War on Terror*, FOREIGN AFF. (Jan./Feb. 2004) (discussing his concern over the Bush administration's decision to declare the detainees unlawful combatants), available at <http://www.foreignaffairs.org/20040101facomment83101/kenneth-roth/the-law-of-war-in-the-war-on-terror.html> (last visited Feb. 7, 2005); see also Kenneth Roth, *An Open Letter to President Bush on the Torture of Al-Qaeda Suspects* (Dec. 27, 2002) (addressing concerns about the United States' decision to view detainees as unlawful combatants), available at <http://www.counterpunch.org/roth1227.html> (last visited Feb. 7, 2005); Kenneth Roth, *Trial, Detention, or Release?* (May 17, 2002) (arguing that it is extremely difficult to determine the intent necessary for classification as an unlawful combatant), available at <http://www.crimesofwar.org/expert/detain-roth.html> (last visited Feb. 7, 2005).

435. See Kristie Barrow, *NGOs in Security Politics: The International Criminal Court* (Sept./Oct. 2003) (noting Roth's argument about the atrocities that have been committed), available at <http://www.utas.edu.au/government/APSA/KBarrowfinal.pdf> (last visited Feb. 7, 2005); see also Tim Grieve, *Stress and Duress: A Salon Interview with Human Rights Watch's Kenneth Roth* (May 6, 2004) (arguing that domestic criminal law should apply to the detainees), available at <http://www.thinkingpeace.com/pages/arts2/arts195.html> (last visited Feb. 7, 2005); Kenneth Roth, Human Rights Watch, *Summary of International and U.S. Law Prohibiting Torture and Other Ill-Treatment of Persons in Custody* (May 24, 2004) (noting that regardless of whether a person is a detainee or POW, the United States prohibits torture and other ill treatment of anyone in custody), available at <http://www.hrw.org/english/docs/2004/05/24/usint8614.htm> (last visited Feb. 7, 2005).

436. See Joanne Laurier, *Human Rights Groups: U.S. May Be Guilty of "Collective Punishment" War Crime in Iraq* (Jan. 17, 2004) (commenting that Roth focuses on the laws of war), available at <http://www.wsws.org/Articles/2004/jan2004/hrww-j17.shtml> (last visited Feb. 7, 2005); see also *U.S. Circumvents Courts with Enemy Combatants Tag* (June 13, 2002) (citing Roth criticizing the use of the laws of war), available at <http://www.commondreams.org/news2002/0613-08.htm> (last visited Feb. 7, 2005).

437. See *ECONOMIST*, *The Incompetent or the Incoherent?* (Oct. 28, 2004) (attacking the Bush administration's conclusion that the detainees were unlawful combatants), available at [http://www.economist.com/displayStory.cfm?Story\\_ID=3329802](http://www.economist.com/displayStory.cfm?Story_ID=3329802) (last visited Feb. 7, 2005).

Such policy critiques are welcome and beneficial to the public debate but fuel the misconception that the Administration—the Office of Legal Counsel in particular—provided faulty legal advice to the President.<sup>438</sup>

In essence, the complaint of most critics is that the United States has set a “double standard in the war on terror in which the United States would hold others accountable for international laws it said it was not itself obligated to follow.”<sup>439</sup> Additional policy criticisms stem from the human rights concern that, because of the U.S. decision not to apply the Conventions to the detainees, U.S. soldiers will be mistreated or afforded similar treatment in future conflicts.<sup>440</sup> These are all valid policy arguments and concerns but do not address the legal analysis under the GPW.

## V. Conclusion

This article has sought to explain the various legal arguments provided by both sides of the debate concerning whether the Geneva Conventions apply to the Taliban and Al-Qaeda detainees captured in Afghanistan. It began by setting the stage for the Administration’s decision that the Geneva Conventions did not apply to the detainees by explaining the actions taken by the Administration in the aftermath of 9/11.<sup>441</sup> The legal analysis provided by the Administration, through the Office of Legal Counsel, followed this background. The arguments of critics of the Administration were also provided.

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438. See *Bush Advisors Debate Detainee Status* (Jan. 26, 2002) (noting that all of President Bush’s advisers agreed that the detainees were not POWs), available at <http://archives.cnn.com/2002/US/01/26/ret.powell.detainees/?related> (last visited Feb. 7, 2005); see also *Gonzales Defends Terror Suspect Advice* (Jan. 5, 2005) (noting the criticism of the advice that President Bush received), available at <http://abcnews.go.com/Politics/wireStory?id=391886> (last visited Feb. 7, 2005); *Providing Legal Advice on U.S. Military Activities* (explaining that the Office of Legal Counsel is responsible for providing advice to the President), available at <http://www.watchingjustice.org/issues/subIssue.php?docId=410> (last visited Feb. 15, 2005).

439. See Isikoff, *supra* note 148 (expressing concern about the U.S. policy of holding itself above the law); see also Sperber, *supra* note 41, at 172 (claiming that the United States follows international law only when it is convenient); Nagan & Hammer, *supra* note 346, at 376 (arguing that the United States will often modify international law to suit its interests).

440. See Goldman & Tittmore, *supra* note 45, at 27 (quoting Fact Sheet, White House Press Office).

441. See Richard B. Bilder & Detley F. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT’L L. 689, 689 (2004) (explaining that the United States determined that the Geneva Convention did not apply to Taliban detainees or anyone suspected of being linked to Al-Qaeda); see also Murphy, *supra* note 35, at 821 (explaining why the Geneva Convention does not apply to Al-Qaeda).

This article concluded that the Administration's interpretation of the Geneva Conventions is the most appropriate conclusion and that many critics have attacked the policy decisions made by the Administration more aggressively than its legal conclusions. Because of the novelty of the issue, the United States should be found to be in compliance with international law, even though its actions may stretch the boundaries of acceptable conduct under the Geneva Conventions.<sup>442</sup> Although critics of the Administration are able to make strong arguments that the Conventions apply, specifically relating to Article 5 of the GPW,<sup>443</sup> the best legal conclusion is that provided by the Administration. The Al-Qaeda and Taliban detainees clearly do not satisfy the conditions for POW status set out in Article 4.<sup>444</sup> Moreover, the President, as Commander-in-Chief, has the constitutional authority to declare enemy combatants.<sup>445</sup> This power should continue to be given significant deference by the judicial branch.

Finally, this article makes no judgment about the policy decisions made by the Administration, specifically whether the policy not to apply the Geneva Conventions was a faulty one or whether the detainees are subject to indefinite detention. Instead, this article has sought to clarify and focus the debate by arguing that the criticisms of the Administration's policy decisions are distinct from those directed at its legal conclusions.

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442. See Addicott, *supra* note 309, at 892 (commenting on U.S. government's stance that its actions have complied with international law); see also Bialke, *supra* note 8, at 4 (noting that the United States has treated detainees fairly and in accordance with international law); *Detainment of Al Qaeda and Taliban Fighters* (Feb. 3, 2002) (explaining why the acts of the United States are in compliance with the Geneva Convention and international law), available at <http://www.newsac.com/ftvsnl27-12n.html> (last visited Feb. 15, 2005).

443. See Beattie & Stevens, *supra* note 236, at 1000–01 (arguing under Article 5 of the GPW that the Conventions should apply); see also Wallach, *supra* note 44, at 18 (arguing that the United States has failed to comply with the GPW); Berman, *supra* note 86, at 37 (highlighting the significance of Article 5 of the GPW and the Geneva Convention).

444. See Akbar, *supra* note 74, at 195 (explaining why Taliban detainees are not POWs under Article 4); see also Jinks, *supra* note 56, at 1516 (noting that the official U.S. position is that the detainees do not qualify as POWs); Murphy, *supra* note 35, at 823 (describing in detail why Taliban forces are not POWs).

445. See *Padilla v. Bush*, 233 F. Supp. 2d 564, 598–99 (S.D.N.Y. 2002) (holding that the President has the authority to seize and indefinitely detain enemy combatants during a time of war); see also Schaffer, *supra* note 22, at 1470 (noting the presidential powers under Article II).





## The Bells of Hell: An Assessment of the Sinking of ANR *General Belgrano* in the Context of the Falklands Conflict

Saad Gul\*

*The right of belligerents to adopt means of injuring the enemy is not unlimited.*

—The Hague Convention of 1907<sup>1</sup>

*There was only silence, save for an eerie tinkling sound on the sonar, like breaking glass or metal, echoing back through the water, like the far-lost chiming of the bells of hell.*

—A contemporary account of the death throes of the *Belgrano*<sup>2</sup>

### I. Introduction

On May 2, 1982, the British nuclear submarine HMS *Conqueror* torpedoed the Argentine cruiser *General Belgrano*.<sup>3</sup> The cruiser sank rapidly, leaving approximately 350 dead. The attack drew widespread condemnation, both because of its location outside the immediate combat area and the allegedly disproportionate loss of life.<sup>4</sup>

This article evaluates the British action in light of international law and concludes that the United Kingdom was within its rights in sinking the *General Belgrano*. Part II provides a brief account of the conflict. Part III gives the strategic picture—the justification or otherwise of the British position in the conflict as a whole. Part IV focuses on the specific engagement in question—the sinking of the *General Belgrano*—in light of international law. In so doing, it distills the myriad of legal issues surrounding the sinking into two parts: First, as discussed in Part V, did the spatial aspect of the British attack—outside the total exclusion zone—render the attack illegal? Second, was the British attack, which resulted in the loss of about 350 lives—a huge casualty

1. The Hague Convention (IV) of 1907 Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 22, 36 Stat. 2277, 2301, 1 Bevans 631, 631 [hereinafter Hague Convention].
2. SANDY WOODWARD & PATRICK ROBINSON, ONE HUNDRED DAYS: THE MEMOIRS OF THE FALKLANDS BATTLE GROUP COMMANDER 161 (Naval Institute Press 1992) [hereinafter WOODWARD & ROBINSON].
3. *Id.* at 155 (describing Admiral Woodward's order to torpedo the *Belgrano*); see also Andreas Laursen, *Critical Essay: NATO, the War over Kosovo, and the ICTY Investigation*, 17 AM. U. INT'L L. REV. 765, 803 n.160 (2002) (pinpointing the date of the sinking of the *Belgrano*); Scott C. Truver, *Symposium: Law of the Sea: The Law of the Sea and the Military Use of the Oceans in 2010*, 45 LA. L. REV. 1221, 1236 (1985) (describing how the *Belgrano* had been torpedoed).
4. See MARTIN MIDDLEBROOK, OPERATION CORPORATE: THE FALKLANDS WAR: 1982, at 150 (Viking Adult 1985) (examining the criticism that immediately followed the British attack on the *Belgrano*); see also John R. Bolton, *Symposium: War and the United States Military: Is There Really "Law" in International Affairs?*, 10 TRANSNAT'L L. & CONTEMP. PROBS. 1, 42 (2000) (discussing how a British lawsuit condemned the government for attacking outside the designated exclusion zone).

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count in a limited conflict—disproportionate and therefore illegal? This question is addressed in Part VI. Finally, Part VII evaluates the overall legality of the sinking in light of international law.

## II. The Conflict

On April 2, 1982, 1400 Argentine naval marines, under the command of Admiral Carlos Busser, wrested the Falkland Islands (known to Argentina as the Malvinas<sup>5</sup>) from British control.<sup>6</sup> Within hours of the takeover, the British government dispatched a naval task force under Admiral Sandy Woodward to the South Atlantic to reestablish British sovereignty over the islands.<sup>7</sup> Two days later, the U.N. Security Council passed Resolution 502, demanding that Argentina immediately withdraw its forces from the islands.<sup>8</sup>

On April 23, the British government established a defensive sea area (DSA) or “defensive bubble” around the task force,<sup>9</sup> declaring that any aircraft or warship in the South Atlantic that threatened the safety of the British force was subject to attack.<sup>10</sup> Facing an imminent encounter with the task force, Argentina imposed an air and sea blockade around the islands on April 26.<sup>11</sup> On April 30, the United Kingdom declared a 200-mile “total exclusion zone” (TEZ) around the Falkland Islands and warned that any ship entering it would be sunk.<sup>12</sup>

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5. For the sake of brevity, this article refers to the islands as the Falklands.
  6. See Simon Houston, *Under Siege: The Falklands Conflict Day 1*, DAILY REC. (Scot.), Mar. 23, 2002, at 28–29 (relating the details of Admiral Busser’s invasion of the Falklands).
  7. MIDDLEBROOK, *supra* note 4, at 70 (asserting that the British ordered their navy dispatched at approximately the time the Argentine troops were landing in the Falklands); see also *Four Nuclear Subs Will Spearhead Flotilla*, N.Y. TIMES, Apr. 9, 1982, at A8; Jay Ross, *British Admiral Says Task Force Is Nearing Islands; Leading Vessels Put on Alert for Tonight*, WASH. POST, Apr. 23, 1982, at A1.
  8. Thomas M. Franck, Comment, *Dulce et Decorum est: The Strategic Role of Legal Principles in the Falklands War*, 77 AM. J. INT’L L. 109, 111 (1983); see also S.C. Res. 502, U.N. SCOR, 37th Sess., 2530th mtg. at 15, U.N. Doc. S/RES/502 (1982); Commander Roger D. Scott, *Getting Back to the Real United Nations: Global Peace Norms and Creeping Interventionism*, 154 MIL. L. REV. 27, 45 n.109 (1997) (describing the purpose of Resolution 502).
  9. GEORGE K. WALKER, *THE TANKER WAR 1980–88: LAW AND POLICY* 129 (U.S. Naval War C. Int’l Law Studies, vol. 84, 2000) [hereinafter *TANKER WAR*]; see also Christopher Michaelsen, *Maritime Exclusion Zones in Times of Armed Conflict at Sea: Legal Controversies Still Unresolved*, 8 J. CONFLICT & SECURITY L. 363, 373 (2003) (explaining the defensive sea bubble); General Belgrano: *Cruiser that Died Alone*, ECONOMIST, May 8, 1982, at 21.
  10. MIDDLEBROOK, *supra* note 4, at 14; see also Bloom, *Bid to Step up Pressure on Galtieri*, FIN. TIMES (London), Apr. 26, 1982, § 1, at 1 (citing defense experts on the effect of a defensive bubble); Richard Norton-Taylor, *Falkland Details Withheld/Changes in the Rules of Engagement During Falklands Conflict*, GUARDIAN (London), Aug. 30, 1984, at 1 (quoting the British warning to Argentina on April 23, 1982).
  11. Nicolas J. Watkins, Comment, *Disputed Sovereignty in the Falkland Islands: The Argentina-Great Britain Conflict of 1982*, 11 FLA. ST. U. L. REV. 649, 652 (1983); see also *THE FALKLANDS WAR: LESSONS FOR STRATEGY, DIPLOMACY, AND INTERNATIONAL LAW* 97 (Alberto Coll & Anthony Arend eds., 1985); George Russell, *Girding for the Big One; After a Sharp Setback, the British Attack “With All We’ve Got,”* TIME, June 21, 1982, at 40.
  12. Watkins, *supra* note 11, at 651; see also Robert W. Stannard, *Recent Development: The Laws of War: An Examination of the Legality of NATO’s Intervention in the Former Yugoslavia and the Role of the European Court of Human Rights in Redressing Claims for Civilian Casualties in War*, 30 GA. J. INT’L & COMP. L. 617, 624 (2002); Larry Rohter, *Hunt for Falklands Wreck Opens Old Wounds*, N.Y. TIMES, Mar. 1, 2003, at A6.

Two days later, the HMS *Conqueror* torpedoed the Argentine cruiser *General Belgrano* within the DSA but 30 nautical miles outside the TEZ.<sup>13</sup> The *General Belgrano* sank within minutes; approximately 350 people on board perished.<sup>14</sup> Its loss was a severe blow to the Argentine war effort, essentially confining the Argentine navy to its own territorial waters.<sup>15</sup> The British government subsequently claimed that at the time of the attack, nearly the entire Argentine navy was approaching the TEZ.<sup>16</sup>

The sinking of the *Belgrano* proved to be the turning point of the war. Admiral Anaya's navy retreated to its home ports and failed to challenge the British blockade on the islands.<sup>17</sup> With the Falklands garrison cut off from mainland logistical support, its fate was sealed. For the second time in two centuries, Argentina lost the Falklands.<sup>18</sup>

Quite apart from the skepticism surrounding the British claim to the islands, the sinking itself has always been controversial in legal circles for several reasons. First, the ship was outside the TEZ at the time of attack.<sup>19</sup> Second, the sinking of a large cruiser with a staggering loss of life represented the dramatic escalation of a conflict that had hitherto been mercifully limited in its body count.<sup>20</sup> Critics charged that the British attack and the consequent death toll were

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13. Jane Gilliland, Note, *Submarines and Targets: Suggestions for New Codified Rules of Submarine Warfare*, 73 GEO. L. J. 975, 993 (1985); see also Thomas M. DiBiagio, *Federal Jurisdiction over Foreign Governments for Violations of International Law: Foreign Sovereign Immunity and the Alien Tort Statute After Amerada Hess Shipping Corp. v. Argentine Republic*, 12 MD. J. INT'L L. & TRADE 153, 170 (1988) (asserting that the *Belgrano* was torpedoed outside the TEZ set by the British); Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 392 n.8 (1993) (alleging that the *Belgrano* was outside the TEZ when it was attacked).
  14. Watkins, *supra* note 11, at 652; see also Debra L. Silverman, Note & Comment, *Freedom of Information: Will Blair be Able to Break the Walls of Secrecy in Britain?*, 13 AM. U. INT'L L. REV. 471, 487 (1997) (setting the number of casualties from the sinking of the *Belgrano* at 368); *Falklands Logbook*, WASH. POST, Feb. 11, 1985, at A17.
  15. Gilliland, *supra* note 13, at 994.
  16. ADRIAN ENGLISH ET AL., *BATTLE FOR THE FALKLANDS* (2): NAVAL FORCES 21 (1985); see also Bloom, *supra* note 10, at 1 (quoting British Defense Secretary John Nott as saying that a "heavily armed surface attack group . . . was close to the Total Exclusion Zone and was closing on elements of our Task Force which was only hours away").
  17. ENGLISH, *supra* note 16, at 21; see also Tony Perry, *The State: A Life on a Truly Operatic Scale*, L.A. TIMES, Feb. 1, 2004, at B8; Schumacher, *Argentine Report Urges Trial of Ex-Leaders*, N.Y. TIMES, Nov. 24, 1983, at A8 (describing the surrender of the Argentine navy under the direction of Admiral Anaya).
  18. See Gilliland, *supra* note 13, at 994. But see James S. Corum, *Argentine Airpower in the Falklands War: An Operational View*, 16 AIR & SPACE POWER J., 59, 65 (stating that the ground and naval battles were secondary to the air battles, which actually decided the conflict); see also Guillermo I. Martinez, *U.S. the Scapegoat*, SUN-SENTINEL (Fort Lauderdale, FL), Sept. 16, 2004, at A29 (quoting an Argentinean interviewee who cited U.S. involvement as the reason for the Argentinean loss of the Falklands).
  19. See Saul David, *Deadly and Covert*, DAILY TELEGRAPH (LONDON), July 7, 2001, at 4 (noting that the *General Belgrano* was moving away from the British fleet and it was outside of the exclusion zone when it was attacked); Gardam, *supra* note 13, at 392 n.8; see also William Burns, *Thatcher Is Not Like Other Pensioners*, HERALD (GLASGOW), Mar. 29, 2002, at 19 (commenting that when British Prime Minister Margaret Thatcher's popularity hit an all-time low, she ordered the sinking of the ship while it was outside the exclusion zone).
  20. See Guy Liardet, *The Sinking of the Belgrano*, TIMES (LONDON), July 15, 2000 (stating that the reason for the controversy surrounding the sinking was that it was the first heavy loss of life); see also *World News: UK: Court Rejects Belgrano Case*, FIN. TIMES (LONDON), July 20, 2000, at 11 (reporting that the European Court of Human Rights dismissed a case wherein relatives of the 323 sailors killed on the *Belgrano* had attempted to recover from Britain). But see generally Maj. James Francis Gravelle, *Contemporary International Legal Issues—The Falkland (Malvinas) Islands: An International Law Analysis of the Dispute Between Argentina and Great Britain*, 107 MIL. L. REV. 5, 19 (1985) (stating that the casualties resulting from the conflict were great on both sides, both Argentinean and British).

grossly disproportionate to the nature of the conflict.<sup>21</sup> Adding to the apparent unseemliness of the attack, the *General Belano* apparently had been ordered to withdraw from the effort to challenge the British task force and was headed toward its home port.<sup>22</sup> These accusations concerning the British actions are discussed below in relation to international law.

### III. Conflict Strategy: The Larger Picture

Britain maintained throughout the course of the war that it was exercising its Article 51 rights under the U.N. Charter,<sup>23</sup> and it was careful to follow that article's requirements. For example, Britain continuously updated the Security Council with respect to measures it was undertaking as self-defense,<sup>24</sup> which included dispatch of the task force and the declaration of the TEZ.<sup>25</sup> The British further justified its actions under the terms of Security Council Resolution 502.<sup>26</sup> The Security Council had passed the resolution less than forty-eight hours after the

21. See Daniel Statman, *Targeted Killing*, 5 THEORETICAL INQ. L. 179, 182–83 (2004) (commenting that critics feel the war was unjustified because it was only for the sake of formal sovereignty, and the mere violation of property rights is not sufficient to justify killing another human being). See generally Gardam, *supra* note 13, at 391 (stating that at the time of the incident, the Argentinean submarine was outside the TEZ declared by the English); Maj. Robert A. Ramey, *Armed Conflict on the Final Frontier: The Law of War in Space*, 48 A.F. L. REV. 1, 149 (2000) (noting that the law of war allows destruction of targets when it is not disproportionate to the objective sought).

22. See RUBEN O. MORO, THE HISTORY OF THE SOUTH ATLANTIC CONFLICT: THE WAR FOR THE MALVINAS 123 (1989); David, *supra* note 19, at 4; Julian S. Lake, *The South Atlantic War: A Review of Lessons Learned*, DEF. ELECTRONICS 86 (claiming that intercepted messages confirmed the Argentines' claim that the *Belgrano* was withdrawing from the conflict at the time it was attacked).

23. See U.N. CHARTER art. 51, which states:

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

Gravelle, *supra* note 20 (analyzing Great Britain's claim that it was defending national sovereignty in the Argentinean war and stating that it was in fact extending its values instead of conserving them, as is permitted under Article 51); Watkins, *supra* note 11, at 671 (claiming that Great Britain was properly acting to defend herself under Article 51 because Argentinean troops had landed on the islands).

24. See UN CHARTER art. 51. See generally Gravelle, *supra* note 20 (stating that Article 51 requires a state to report the actions it has taken to the Security Council, which then decides the character of the action). But see Norton-Taylor, *supra* note 10 (citing new evidence for finding that the reports of warnings to Argentina were given to the Security Council five days after the *Belgrano* had been torpedoed).

25. See Glenn Frankel, *Britain Admits to Heavy Casualties in Falklands*, WASH. POST, June 11, 1982, at A1 (reporting on Britain's withholding of information relating to casualties in the conflict). See generally Elinor Goodman & Bridget Bloom, *Britain Steps up Military Pressure over Falklands*, FIN. TIMES (London), May 10, 1982, at 1 (stating that the British ambassador to the United Nations was advised on certain points as the task force continued to attack Argentinean targets).

26. British Prime Minister Margaret Thatcher insisted throughout the course of the conflict that "[a]ll the Argentines have to do . . . is honour U.N. Security Council Resolution 502." See S.C. Res. 502, UN SCOR, 37th Sess., Supp., Doc. 14947 (1982) (demanding that Argentina remove all forces from the Falklands); see also M. HASTINGS & S. JENKINS, THE BATTLE FOR THE FALKLANDS 100 (2d ed. 1985).

Argentine invasion,<sup>27</sup> and its terms explicitly demanded that Argentina, not Britain, immediately withdraw its military forces from the islands.<sup>28</sup>

Security Council resolutions enjoy preeminent status in international law—Article 24(1) of the U.N. Charter vests the Security Council with “primary responsibility for the maintenance of international peace and security.”<sup>29</sup> Under Article 25, “The Members of the U.N. agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”<sup>30</sup> Article 48 imposes a similar obligation.<sup>31</sup> Because they embody both the support of the members of the United Nations as well as the norms of international law,<sup>32</sup> Security Council resolutions are afforded the “highest possible legislative dignity known to contemporary man” under Chapter VII of the U.N. Charter.<sup>33</sup> Britain and Argentina were both original members

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27. See S.C. Res. 502, UN SCOR, 37th Sess., Supp., Doc. 14947 (1982) (condemning the Argentinean occupation of the islands and pushing for a resolution to the conflict); see HASTINGS & JENKINS, *supra* note 26, at 150. See generally Andrew Knight, *The Conduct of American Foreign Policy: Ronald Reagan's Watershed Year?*, \_\_\_ FOREIGN AFF. 511 (1983) (suggesting that the speedy passage of Resolution 502 was for diplomatic purposes).
  28. See S.C. Res. 502, UN SCOR, 37th Sess., Supp., Doc. 14947 (1982) (condemning the Argentinean occupation of the islands and pushing for a resolution to the conflict); see HASTINGS & JENKINS, *supra* note 26, at 150; Whitaker & Clifton, *supra* note 28, at 48 (stating that Resolution 502 calls for an Argentinean withdrawal).
  29. See U.N. CHARTER art. 24, para. 1; Jorge Alberto Ramirez, *Iraq War: Anticipatory Self-Defense or Unlawful Unilateralism?*, 34 CAL. W. INT'L L.J. 1, 12 (2003) (noting that the later-developed Chapter VII came out of Article 24, which gives the Security Council the primary responsibility for maintaining international peace and security); August Reinisch, Comment, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*, 95 AM. J. INT'L L. 851, 856 (2001) (stating that some commentators have concluded that the Security Council may not even be bound by general international law).
  30. See U.N. CHARTER art. 25; see Lori Fisler Damrosch, *ASIL Insight: Recent Security Council Actions Concerning Internal Conflicts: Economic Sanctions*, AM. SOC. INT'L L. NEWSLETTER, Jan. 1994 (stating that Security Council decisions are binding on all member nations under Articles 25 and 48 of the Charter); see also Jonathan A. Frank, *A Return To Lockerbie and the Montreal Convention in the Wake of the September 11th Terrorist Attacks: Ramifications of Past Security Council and International Court of Justice Action*, 30 DENV. J. INT'L L. & POL'Y 532, 537 (2002) (noting that under Article 25, decisions of the Security Council preempt any actions taken by the International Court of Justice upon member nations).
  31. See U.N. CHARTER art. 48 (stating that the court is in control of the conduct and details of all cases coming before it); Jan Wouters, *The European Union and 'September 11'*, 13 IND. INT'L & COMP. L. REV. 719, 767 n.280 (2003) (stating that under Article 48, Security Council decisions must be carried out by the member nations directly and through certain specific international agencies); see also Matthias J. Herdegen, *The "Constitutionalization" of the UN Security System*, 27 VAND. J. TRANSNAT'L L. 135, 146 (1994) (commenting that Article 48 requires member nations to implement Security Council decisions according to the Council's determination).
  32. See Brigitte Stern, *Custom at the Heart of International Law*, 11 DUKE J. COMP. & INT'L L. 89, 89 (2001) (arguing that custom and accepted practices are the paramount source of international law) (quoting and translating PAUL REUTER, INTRODUCTION AU DROIT DES TRAITES 38 (1972)); see also Louis B. Sohn, "Generally Accepted" International Rules, 61 WASH. L. REV. 1073, 1073 (1986) (noting that it is universally agreed that certain norms make up a main source of international law). See generally 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, 141 (1998) (arguing that international customs and norms run against an international ban on the use of mercenaries by UN member nations).
  33. See U.N. CHARTER arts. 39–51 (providing for procedures member nations are to undertake pursuant to Security Council decisions). See generally Paul Conlon, *Lessons from Iraq: The Functions of the Iraq Sanctions Committee as a Source of Sanctions Implementation Authority and Practice*, 35 VA. J. INT'L LAW 633, 655 (1995) (defending the Security Council's practice of meeting in closed sessions without informing all affected states); Paul Conlon, *How Legal Are Jordan's Oil Imports from Iraq?*, 6 J. TRANSNAT'L L. & POL'Y 109, 123 (1996) (criticizing the extent to which decisions of the Security Council are adhered to without question).

of the United Nations and consequently bound by the terms of the Charter to respect Resolution 502.<sup>34</sup>

To address Argentine protests over Britain's status as a permanent member of the Security Council, Sir Anthony Parsons, the British ambassador, submitted the resolution under Article 40 of Chapter VII.<sup>35</sup> This assuaged Argentine concerns in that it did not address the merits of the competing claims to the islands<sup>36</sup>—Article VII actions are “without prejudice to the rights, claims, or position of the parties concerned.”<sup>37</sup> However, the resolution was also unequivocal in explicitly “demanding an immediate withdrawal of all Argentine forces from the Falkland Islands (Islas Malvinas).”<sup>38</sup>

When it refused to withdraw its forces from the islands, Argentina could be deemed to be in breach of its international obligations.<sup>39</sup> Under the terms of the Charter, the Security Coun-

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34. See U.N. CHARTER, Signatories (indicating that both Great Britain and Argentina signed the original U.N. Charter in 1945); see also SYDNEY D. BAILEY & SAM DAWS, *THE PROCEDURE OF THE UN SECURITY COUNCIL*, 16–17 (3d ed. 1998). See generally Ambassador Diego Ramiro Guelar, Conference, *Neutrality, Morality, and the Holocaust; Argentinean Neutrality and the “Black Legend,”* 14 AM. U. INT’L L. REV. 201, 202 (1998) (listing Argentina’s history, including its support for the Axis Powers, before eventually joining the United Nations as an original member).
  35. See Bailey & Daws, *supra* note 34, at 16–17 (discussing the debate regarding Great Britain’s ability to vote on the draft resolution it had proposed); see also Domingo E. Acevedo, *The U.S. Measures Against Argentina Resulting from the Malvinas Conflict*, 78 AM. J. INT’L L. 323, 324 (1984) (discussing the speech made to the United Nations shortly after the Falkland invasion occurred). See generally Roger K. Smith, *The Legality of Coercive Arms Control*, 19 YALE J. INT’L L. 455, 460 (1994) (indicating that Article 40 allows the United Nations to take provisional measures to deal with adverse actions).
  36. See Damrosch, *supra* note 30, at 465 (maintaining that Argentina may have some legitimate claims to the Falklands); see also Michaelsen, *supra* note 9, at 373 (explaining that the allowance of Great Britain to set up a naval exclusion zone is not in accordance with Argentina’s competing claims to these islands); Sarah Ramage, *The Return of Article 42: Enemy of the Good for Collective Security*, 5 PACE INT’L L. REV. 211, 285 (1993) (noting that the ability of nations to secure their own borders is a compelling argument supporting the Falkland invasion).
  37. See U.N. CHARTER art. 40, para. 1 (detailing the need under Article 40 to follow the provisional measures determined by the Security Council).
  38. See S.C. Res. 502, UN SCOR, 37th Sess., Supp., Doc. S/15047 (1982) (providing that the actual resolution made to the UN Security Council on April 3, 1982, called for an immediate end to hostilities and an immediate withdrawal of all Argentine forces); see also Robin A. Cooper, *The United Nations Charter and the Use of Force: Is Article 2(4) Still Workable?* 78 AM. SOC’Y INT’L L. PROC. 68, 68 (1984) (recognizing that the Security Council immediately demanded a withdrawal from the Falklands); Kathryn S. Elliott, Comment, *The New World Order and the Right of Self-Defense in the United Nations Charter*, 15 HASTINGS INT’L & COMP. L. REV. 55, 62 (1991) (asserting that similar situations have led to the United Nations calling for the immediate withdrawal by invading forces).
  39. See Margo Kaplan, Comment, *Using Collective Interests to Ensure Human Rights: An Analysis of the Articles of State Responsibility*, 79 N.Y.U. L. REV. 1902, 1913 (2004) (commenting that the invasion of the Falkland Islands is not the only instance of Argentina being accused of breaching its international obligations); see also Teresa M. O’Toole, Comment, *Amerada Hess Shipping Corp. v. Argentine Republic: An Alien Tort Statute Exception to Foreign Sovereign Immunity*, 72 MINN. L. REV. 829, 830 (1988) (addressing whether Argentina’s breach of its international obligations disqualified it from sovereign immunity in foreign jurisdictions). See generally Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance through Global Government Networks*, 118 HARV. L. REV. 1255, 1255 (2005) (discussing the balance that countries must find between their own sovereignty and international obligations).

cil, was obliged to “take account of” this willful defiance of international law.<sup>40</sup> Furthermore, the British efforts to remove Argentine forces after they refused to leave in accordance with Resolution 502 were within the terms of the U.N. Charter.<sup>41</sup>

The Argentines and their partisans took strong exception to this reasoning; their view was that in recapturing their own islands, they could not have committed aggression or violated the Charter.<sup>42</sup> Jeanne Kirkpatrick, then the U.S. Permanent Representative to the United Nations, summarized this view thus: “The Argentineans have been claiming for 200 years that they own those islands.<sup>43</sup> If they own those islands, then moving troops into them is not armed aggression.”<sup>44</sup> Argentina specifically protested that in redressing a historic wrong predating the Char-

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40. See U.N. CHARTER art. 40, para. 1 (detailing the Article 40 provision that calls for nations to comply with provisional measures requested by the Security Council); see also Thomas G. LaRussa, Comment, *Human Rights Litigation on Behalf of Children Under the Alien Tort Claims Act and the Foreign Sovereign Immunities Act*, 10 GEO. IMMIGR. L.J. 707, 716 (1996) (informing that because of its willful invasion of the Falklands, Argentina did not receive absolute sovereign immunity). See generally Adam C. Belsky, *Implied Waiver Under the FSIA: A Proposed Exception for Violations of Peremptory Norms of International Law*, 77 CAL. L. REV. 365, 372 (1989) (enumerating that countries will be held liable in foreign jurisdictions for violations of international law).
41. See Anthony C. Arend, *International Law and the Recourse to Force: A Shift in Paradigms*, 27 STAN. J. INT'L L. 1, 32 (1990) (commenting that an aggrieved nation could justifiably use force to rectify certain situations); see also Craig Scott, *A Memorial for Bosnia: Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the United Nations Security Council's Arms Embargo on Bosnia and Herzegovina*, 16 MICH. J. INT'L L. 1, 64 (1994) (arguing that Great Britain was justified in its act of self-defense with respect to removing Argentina from the Falkland Islands). See generally L.F.E. Goldie, *The Gladisch Committee of the Law of Naval Warfare: A German Effort to Develop International Law During WWII*, 85 AM. J. INT'L L. 746, 748 (1991) (explaining that Great Britain had the legal authority to set up defensive zones during the Falklands War).
42. See David W. Floren, *Antarctic Mining Regimes: An Appreciation of the Attainable*, 16 J. ENVTL. L. & LITIG. 467, 475 (2002) (revealing that the act of violence committed against the Falklands was committed solely to gain support for Argentina's new military government); see also Roberto Laver, *The Falklands/Malvinas: A New Framework for Dealing with the Anglo-Argentine Sovereignty Dispute*, FLETCHER F. WORLD AFF., Summer 2001, at 147 (commenting that Falkland sovereignty was such a critical matter that Argentina would not consider opening diplomatic talks with Great Britain unless this issue was addressed). See generally Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452, 454 (1991) (stating that current issues in the Gulf are very similar to the issues dealt with during the Falklands War).
43. See Watkins, *supra* note 11, at 650 (recognizing that the dispute between Argentina and Great Britain over the Falklands dates back to the eighteenth century); see also Mark Weisburd, *The War in Iraq and the Dilemma of Controlling the International Use of Force*, 39 TEX. INT'L L.J. 521, 552 (2004) (citing that Argentina has long claimed sovereignty over the Falkland Islands). See generally Ian Martinez, *Spain's "Splendid Little War" with Morocco*, 37 INT'L LAW. 871, 880 (2002) (asserting that a contiguity argument was similarly used by Argentina in its attempt to take the Falklands from Great Britain).
44. See LAWRENCE FREEDMAN, *BRITAIN AND THE FALKLANDS WAR* 39 (Anthony Seldon & Peter Hennessy eds., 1988) (emphasizing that Argentina after it invaded the Falklands did not anticipate the hostile response received from Great Britain); see also Anthony C. Arend, *The United Nations and the New World Order*, 81 GEO. L.J. 491, 523 (1993) (suggesting that the attack by Argentina on the Falkland Islands was simply an attempt to right the past injustice of having its land impermissibly seized from it). See generally Joshua E. Kastenberg, *The Use of Conventional International Law in Combating Terrorism: A Maginot Line for Modern Civilization Employing the Principles of Anticipatory Self-Defense and Preemption*, 55 A.F. L. REV. 87, 96 (2004) (defining what actions are viewed as armed aggression).



ter, its actions could not be construed as violating the Charter.<sup>45</sup> Argentine Foreign Minister Nicanor Costa-Mendez told the Security Council:

No provision of the Charter can be taken to mean the legitimization of situations which have their origin in wrongful acts, in acts carried out before the Charter was adopted, and which subsisted during its prevailing force. Today, in 1982, the purposes of the Organization cannot be invoked to justify acts carried out in the last century in flagrant violation of principles that are today embodied in international law.<sup>46</sup>

Despite Argentina's stipulation as to the merits of its claim to the islands, its use of force had violated international law.<sup>47</sup> Article 2(3) of the Charter specifically requires member states to settle their disputes by peaceful means.<sup>48</sup> Similarly, Article 2(4) requires members to refrain from "the threat or use of force" against the territorial integrity of member states.<sup>49</sup> There is no separate provision permitting force to settle disputes that predate the Charter.<sup>50</sup> Therefore, despite its protestations, Argentina had violated the provisions of the Charter by undertaking military action to settle a territorial dispute.

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45. See Gravelle, *supra* note 20, at 63–64 (highlighting that the situation did not call for the use of force by Argentina); see also Peter Lindsay, *The Ambiguity of GATT Article XXI: Subtle Success or Rampart Failure?*, 52 DUKE L.J. 1277, 1286 (2003) (reporting that Argentina was simply exercising its inherent right when it took over the Falklands). See generally Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477, 522 (1998) (commenting on other actions that have attempted to address historical wrongs).
  46. See Gravelle, *supra* note 20, at 63–64 (expressing that protection of one's own territory is supported by the world's nations).
  47. See M.O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, 39 VA. J. INT'L L. 1069, 1084 (1999) (stating that Argentina's invasion of the Falklands was a violation of international law); see also Gravelle, *supra* note 20, at 63–64 (remarking that Britain adamantly declares that no shots were fired and denies that it seized the islands by force or ejected an Argentine authority there in 1833). See generally Robert M. Jarvis, *International Law*, 12 NOVA L. REV. 547, 549 (1988) (commenting that Argentina was under strict international scrutiny after the Falklands invasion).
  48. See U.N. CHARTER art. 2, para. 3 (emphasizing that peaceful means should be used by all members to settle disputes); see also Kaplan, *supra* note 39, at 1931 (acknowledging that countries used peaceful means such as trade sanctions to protest the Falklands invasion); see also Georgios C. Petrochilos, *The Relevance of the Concepts of War and Armed Conflict to the Law of Neutrality*, 31 VAND. J. TRANSNAT'L L. 575, 600 (1998) (clarifying that some nations would have supported Argentina's claim for the Falklands if not for the military action).
  49. See U.N. CHARTER art. 2, para. 4 (stating that all members should restrain from the use of threats and violence in regard to international relations); see also Michaelsen, *supra* note 9, at 373 (emphasizing that Argentina's aggression toward the Falklands made it susceptible to hostile attacks). See generally Rex J. Zedalis, *Protection of Nationals Abroad: Is Consent the Basis of a Legal Obligation?*, 25 TEX. INT'L L.J. 209, 215 (1990) (stating that there must be proximity between the armed attack and the response for the use of force to be viewed as justified).
  50. See HASTINGS & JENKINS, *supra* note 26, at 150 (detailing the naval battles that occurred during the Falklands War); see also Gravelle, *supra* note 20, at 63–64 (describing an analysis of international law regarding the dispute over the Falkland Islands). See generally John D. Becker, Comment, *The Continuing Relevance of Article 2(4): A Consideration of the Status of the U.N. Charter's Limitations on the Use of Force*, 32 DENV. J. INT'L L. & POL'Y 583, 583 (2004) (asserting that U.N. policy is clear regarding the use of force only in dire situations such as self-defense).

Finally, in assessing British actions, it is important to understand that the U.N. Charter does not affect the right of self-defense.<sup>51</sup> Britain steadfastly maintained that its actions were rooted in terms of Article 51, which upholds the “*inherent* right of individual or collective self-defense” in the event of armed attack.<sup>52</sup> It should be noted that Article 51 does not *create* the right of self-defense.<sup>53</sup> Rather, it reflects a norm that was already well established prior to World War II by, among others, the 1919 Covenant of the League of Nations, the Locarno Treaty and the 1928 Treaty of Paris.<sup>54</sup> The drafters of Article 51 explicitly noted that they sought to “safeguard the right of self-defense, not restrict it.”<sup>55</sup>

The Charter’s right of self-defense has been recognized throughout its history.<sup>56</sup> The drafters of Article 2(4), for instance, noted that “legitimate self-defense remains admitted and unim-

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51. See Gravelle, *supra* note 20, at 63–64 (asserting that acts of self-defense should be immediately reported to the U.N. Security Council); see also Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT’L L. 526, 533 (2004) (recognizing that Great Britain had the right of self-defense during the Falklands War); Lynn N. Hughes, *Realism Intrudes: Law, Politics, and War*, 25 HOUS. J. INT’L L. 415, 434 (2003) (suggesting that Great Britain did not have to seek permission to act defensively to protect the Falklands from attack).
  52. See Acevedo, *supra* note 35, at 324 (noting Article 51’s recognition of the inherent right of individual and collective self-defense); see also Joseph P. Bialke, *United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict*, 50 A.F. L. REV. 1, 2 (2001) (examining the right to use force as self-defense when a state is attacked); Davis Brown, *The Role of Regional Organizations in Stopping Civil Wars*, 41 A.F. L. REV. 255, 240 n.19 (1997) (quoting from Article 51 of the U.N. Charter that there is an inherent right of self-defense); Gravelle, *supra* note 20, at 58 (stating Britain’s reasoning, according to Article 51, concerning its inherent right to self-defense).
  53. See *Report of the International Commission on the Work of Its Fifty-Third Session*, U.N. GAOR, 57th Sess., Supp. No 10, at 43, U.N. Doc. A/56/10 (2001), reprinted in JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXTS AND COMMENTARIES* (Cambridge Univ. Press 2002) (commenting that Article 51 preserves the already existing right to self-defense).
  54. See George K. Walker, *Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said*, 31 CORNELL INT’L L.J. 321, 344 (1998) (commenting on the widely accepted view of self-defense prior to WWII); see also Mikael Nabati, Comment, *International Law at a Cross-Roads: Self-Defense, Global Defense and Preemption (A Call to Rethink the Self-Defense Normative Framework)*, 13 TRANSNAT’L L. & CONTEMP. PROBS. 771, 775 (2003). See generally Gravelle, *supra* note 20, at 58 (examining Article 51 and Article 2(4) and how the right of self-defense should be used by all member nations of the U.N. Charter).
  55. See D.W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 188 (Frederick A. Praeger, Inc. 1958); see also Elizabeth Seebode Waldrop, *Integration of Military and Civilian Space Assets: Legal and National Security Implications*, 55 A.F. L. REV. 157, 219 (2004) (noting the drafting history to Article 51 does not narrow the definition of customary law and thereby does not restrict the right of self-defense); Leo Van Den Hole, Comment, *Anticipatory Self-Defense Under International Law*, 19 AM. U. INT’L L. REV. 69, 75–78 (2003) (explaining that the drafting history of Article 51 leaves the preexisting, inherent right of self-defense unaffected).
  56. See Christopher C. Joyner & Anthony Clark Arend, *Anticipatory Humanitarian Intervention: An Emerging Legal Norm?*, 10 U.S. A.F. ACAD. J. LEGAL STUD. 27, 34–35 (2000) (discussing some of the historical events the U.N. noted while examining the right to self-defense); see also Kastenber, *supra* note 44, at 89–90 (showing how two significant articles of the Charter, Article 51 and Article 2(4), both discuss self-defense and the use of force against another state). See generally Louis Fisher, *Panel I: War Powers and Foreign Affairs: Sidestepping Congress: Presidents Acting Under the UN and NATO*, 47 CASE W. RES. L. REV. 1237, 1256 (1997) (noting that in complying with the U.N. Charter, all countries involved recognize and abide by the Charter’s rules of self-defense).

paired.”<sup>57</sup> Similarly, the International Court of Justice has noted that Article 2(4) reflects principles based on customary norms as well as treaty law: “The principle of non-use of force, for example, may thus be regarded as a principle of customary international law.”<sup>58</sup>

Under the terms of Article 103, the Charter trumps any competing treaties.<sup>59</sup> Some commentators cite as evident “the rule according to which all previous obligations inconsistent with the terms of the Charter should be superseded by the latter.”<sup>60</sup> Therefore, Argentina, for instance, could not rely on the Rio Treaty, whose terms reflected the supremacy of the Charter;<sup>61</sup> Britain

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57. See BOWETT, *supra* note 55, at 188 (quoting the drafting Committee I from San Francisco regarding Article 51); see also Timothy Kearley, *Regulation of Preventive and Preemptive Force in the United Nations Charter: A Search for Original Intent*, 3 WYO. L. REV. 663, 715 n.288 (2003) (using the Committee report to confirm that the use of legitimate self-defense remains “admitted and unimpaired”). See generally Schachter, *supra* note 42, at 1633–34 (citing the Commission I report from San Francisco to demonstrate that the use of legitimate self-defense has remained unimpaired).
  58. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. MERITS 14 (June 27) (stating the court’s view that the principle of nonuse of force is now regarded as customary law); see also Carin Kahgan, *Jus Cogens and the Inherent Right to Self Defense*, 3 ILSA J. INT’L & COMP. L. 767, 780 n.57 (1997) (examining the court’s approach to nonuse of force as customary law); Erin L. Guruli, Comment, *The Terrorism Era: Should the International Community Redefine Its Legal Standards on Use of Force in Self-Defense?*, 12 WILLAMETTE J. INT’L L. & DISP. RESOL. 100, 103 (2004) (citing the I.C.J. article in asserting that refraining from the use of force is customary law, not just a rule under the U.N. Charter).
  59. See U.N. CHARTER art. 103 (stating, “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”); see also Jose E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT’L L. 873, 878 (2003) (explaining how the Security Council relies on Article 103 to trump any inconvenient treaty law that opposes the U.N. Charter); Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 92 AM. J. INT’L L. 243, 266 (1998) (stating that Article 103 makes it clear that subsequent agreements or treaties may not impose their contradictory obligations on states); Franck, *supra* note 8, at 521 (referring to Libya’s rights under the Montreal Convention as inferior to Article 103 rights because 103 “trumps” the Convention).
  60. See LELAND M. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 615 (World Peace Found. 1969) (1949) (reviewing the articles of the U.N. Charter, regarding their superseding effect on any other treaty or agreement that is inconsistent with the Charter); see also John Norton Moore, *Grenada and the International Double Standard*, 78 AM. J. INT’L L. 145, 158 (1984) (observing that the Charter will prevail over any inconsistent agreement that conflicts with its rules and international rights); see also Daniel Pickard, *When Does Crime Become a Threat to International Peace and Security?*, 12 FLA. J. INT’L L. 1, 3 (1998) (stating that in the event of conflict, Article 103 ensures the U.N. Charter’s domination over all other international treaties and agreements).
  61. See Inter-American Treaty of Reciprocal Assistance (the Rio Treaty), Sept. 2, 1947, art. 2, 62 Stat. 1681, 700, 21 U.N.T.S. 77, 95 (stating that high contracting parties under the Rio Treaty will refer to the U.N. Charter in times of conflict); see also John Norton Moore, *The Inter-American System Snarls in Falklands War*, 76 AM. J. INT’L L. 830, 830–31 (1982) (explaining that the Rio Treaty, under its provisions, obligates its contracting parties to refer to the rights and duties under the U.N. Charter); Bernard Gwertzmann, *Haig Reported Short of Goal as He Leaves Buenos Aires*, N.Y. TIMES, Apr. 20, 1982, at A16 (examining the U.S. advice to Argentina not to invoke the Rio Treaty, because Britain would easily counter an attack justified as self-defense under the Charter).

was similarly unable to invoke the North Atlantic Treaty.<sup>62</sup> The Security Council must approve any self-defense measures undertaken under the umbrella of a regional defense organization.<sup>63</sup>

In any event, analysis of the relevant treaties indicates that even absent Article 103 and Security Council Resolution 502, the treaties would not have applied. Article 5 of the North Atlantic Treaty limits its applicability to North America, Europe and the North Atlantic;<sup>64</sup> Article 3 of the Rio Treaty limits applicability of the treaty to situations of self-defense.<sup>65</sup>

Therefore, Resolution 502 was, under the terms of Article 25, fully in accord with the underlying norms and principles of the U.N. Charter. The Charter is the closest authority in existence to an *ex cathedra* declaration of international law.<sup>66</sup> Consequently, operating under the umbrella Resolution 502 and Article 51, Britain was entitled to take military action to defend its territorial integrity;<sup>67</sup> strategically, its goals were aligned with international law. An

62. See North Atlantic Treaty, Apr. 4, 1949, art. 1, 63 Stat. 2241, 2242, 34 U.N.T.S. 244 (stating that parties to this Treaty will abide by the articles of the U.N. Charter when conflict arises); see also Broderick C. Grady, Note, *Article 5 of the North Atlantic Treaty: Past, Present, and Uncertain Future*, 31 GA. J. INT'L & COMP. L. 167, 181–82 (2002) (the North Atlantic Treaty's explicit mention of the U.N. Charter acknowledges the former's secondary position to the Charter); *Spain Says British Move Could Divide the West*, N.Y. TIMES, June 11, 1982, at A15 (commenting that NATO had supported Britain's action of self-defense against Argentina because it participated in the shared principles of international law within the Charter).

63. See U.N. CHARTER art. 53, para. 1 (“[N]o enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council”); see also Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT'L L.J. 7, 11–12 (2003) (noting that any measures exercised in the right of self-defense must be reported immediately to the Security Council for approval); Judith A. Miller, *National Security: NATO's Use of Force in the Balkans*, 45 N.Y.L. SCH. L. REV. 91, 92–93 (2001) (analyzing the Security Council's duty of maintaining world peace in accordance with the U.N. Charter and how contracting states must report activities of aggression and self-defense).

64. See North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 244; see also Davis L. Brown, *European Collective Security in the Next Millennium*, 42 A.F. L. REV. 201, 204 (1997) (quoting Article 5 of the Treaty); Gravelle, *supra* note 20 (commenting that the North Atlantic Treaty is applicable only to North America, the North Atlantic and Europe); see also Michael A. Goldberg, Note, *Mirage of Defense: Reexamining Article Five of the North Atlantic Treaty After the Terrorist Attacks on the United States*, 26 B.C. INT'L & COMP. L. REV. 77, 79 (2003) (reviewing Article 5 and the geographical areas to which it applies).

65. Inter-American Treaty of Reciprocal Assistance (the Rio Treaty), Sept. 2, 1947, art. 3, 62 Stat. 1681, 1700, 21 U.N.T.S. 77, 95 (recognizing that Article 3 limits the treaty in the application of self-defense because it is subject to Article 51 of the U.N. Charter); see also Gravelle, *supra* note 20; James P. Rowles, “Secret Wars,” *Self-Defense and the Charter—A Reply to Professor Moore*, 80 AM. J. INT'L L. 568, 573 n.18 (1986) (examining Article 3's limitation on self-defense in order to be in accordance with Article 51 of the U.N. Charter).

66. See, e.g., THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 79 (Bruno Simma ed., Oxford Univ. Press 1995) (1994) (commenting on how international law is embedded in the U.N. Charter); see also Jost Delbruck, *Prospects for a “World (Internal) Law?”: Legal Developments in a Changing International System*, 9 IND. J. GLOBAL LEGAL STUD. 401, 428 (2002) (asserting the U.N. Charter as the source of international law); David Vesel, *The Lonely Pragmatist: Humanitarian Intervention in an Imperfect World*, 18 BYU J. PUB. L. 1, 9 (2003) (examining the view that the U.N. Charter is accepted as customary international law). See generally Guy R. Philips, *Rules of Engagement: A Primer*, 1993 ARMY LAW. 4, 10–11 (1993) (commenting that articles of the U.N. Charter are recognized as customary law in today's world).

67. See Gravelle, *supra* note 20, at 56 (recognizing Argentina's breach of peace under Resolution 502 and how Britain had the right to act in self-defense under Article 51); see also Fernando R. Teson, Book Note, *Crisi Falkland-Malvinas e Organizzazione*, 81 AM. J. INT'L L. 556, 560 (1987) (citing commentary of Britain's right of self-defense under Resolution 502 and Article 51); Watkins, *supra* note 11, at 671 (asserting Britain's actions of self-defense as valid under Resolution 502 and Article 51).

assessment of its tactical conduct, which culminated in the sinking of the *Belgrano*, follows in the next section.

#### IV. Tactical Strategy: Legal Overview

The use of exclusion zones dates back to at least the 1904 Russo-Japanese war.<sup>68</sup> Although neither the 1958 nor the 1982 Law of the Sea Conventions established such zones, they are generally respected as a matter of customary law.<sup>69</sup> Widely used by the major belligerents, including the United States in both WWI and WWII, these zones are generally recognized as legitimate under the customary law of maritime conflict.<sup>70</sup>

Thus, both Argentina and Britain were within their legal rights in establishing their respective exclusion zones.<sup>71</sup> However, these rights are by no means exclusive. It is a norm of international law, codified in the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*,<sup>72</sup> that “[a]ttack on or capture of opposing naval forces, once there is a state of war, can occur anywhere except within neutral waters, and then under special circumstances.”<sup>73</sup>

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68. See TANKER WAR, *supra* note 9, at 403 (noting that the Russo-Japanese War declared what was to be the first of what are now called war zones); see also Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1162–64 (1999) (discussing the use of war zones, beginning with the Russo-Japanese War through later historical wars and times of conflict between states); James H. Doyle, Jr., *The Law of Naval Operations (International Law Studies, Vol. 64)*, 87 AM. J. INT’L L. 172, 174 (1993) (book review) (discussing the use of war zones in the Russo-Japanese War).
  69. See Doyle, *supra* note 68, at 174 (noting that certain exclusion zones are authorized by customary law as long as they respect the rights of neutral commerce); see also Ronald S. McClain, *The Coastal Fishing Vessel Exemption from Capture and Targeting: An Example and Analysis of the Origin and Evolution of Customary International Law*, 45 NAVAL L. REV. 77, 121 (1998) (explaining that the use of exclusion zones has been a well-established practice of many countries for at least several decades).
  70. See GEORGE K. WALKER, *THE LAW OF NAVAL WARFARE: TARGETING ENEMY MERCHANT SHIPPING* 121, 122 (Richard J. Grunawalt ed., 1993); see also Louise Doswald-Beck, *Current Development: The San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 89 AM. J. INT’L L. 192, 192–94 (stating that scholars underscored their views of the legitimacy of exclusion zones with the creation of the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, which helped clarify the state of customary law); Gilliland, *supra* note 13, at 994 (explaining that the use of exclusion zones in maritime conflict serves to protect those not directly involved in the conflict, as well as combatants who are involved).
  71. See TANKER WAR, *supra* note 9, at 403 (stating that a British or Argentine attack upon opposing naval forces within their respective exclusion zones was permissible under international law); see also Gilliland, *supra* note 13, at 995 (describing the view of some commentators that exclusion zones “provide a limited, proportional, and effective response to certain crisis situations that may arise,” as seen in the conflict between Britain and Argentina); Watkins, *supra* note 11, at 672 (arguing that the British action of implementing the exclusion zones in response to the Argentine invasion of the Falklands was justified).
  72. See Int’l Inst. of Humanitarian Law, *SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA* 22 (Louise Doswald-Beck ed., 1995) [hereinafter *SAN REMO MANUAL*] (clarifying the modern law of naval warfare).
  73. See TANKER WAR, *supra* note 9, at 405 (arguing that the declaration that opposing forces would be subject to attack within the British and Argentine exclusion zones was merely a declaration of intent to act in accordance with the laws of maritime conflict); see also Doswald-Beck, *supra* note 70, at 192 (explaining that the *San Remo Manual* states that neutral vessels cannot be attacked except when they are aiding or attempting to aid the enemy in some way).

The Law of Armed Conflict arrives at the same result. It divides the oceans into two categories: territorial waters and the high seas.<sup>74</sup> Belligerents are entitled to wage war anywhere except the territorial waters of neutral nations (and even there under certain circumstances), subject only to the other principles of the Law of Armed Conflict.<sup>75</sup> Under this analysis, most commentators believe that the *General Belgrano's* location outside the TEZ at a time of war did not exempt the ship from enemy attack.<sup>76</sup>

An inquiry under the Law of the Sea Convention produces a similar conclusion. It is true that Article 301 of the Convention, echoing the language of Article 2(4) of the Charter, requires all states to refrain from the "threat or use of force" on the high seas.<sup>77</sup> Similarly, Article 88 restricts use of the high seas to "peaceful purposes."<sup>78</sup> However, as with the analysis of Arti-

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74. See TANKER WAR, *supra* note 9, at 405 (noting that the LOAC also differentiates between the territorial seas of belligerents and those of neutrals); see also John Astley III & Michael N. Schmitt, *The Law of the Sea and Naval Operations*, 42 A.F. L. REV. 119, 129 (1997) (explaining the specific geographical features that distinguish national from international waters and control the movement of warships and military aircraft); J. Ashley Roach, Symposium, *The Hague Peace Conferences: The Law of Naval Warfare at the Turn of Two Centuries*, 94 AM. J. INT'L L. 64, 67 (2000) (commenting that international law recognized territorial waters and high seas as the only two jurisdictional zones and stating that the outer limits of the territorial waters have been extended over the past century).
75. See *Final Report: Helsinki Principles on the Law of Maritime Neutrality 2.1*, in INT'L LAW ASS'N, REPORT OF THE SIXTY-EIGHTH CONFERENCE HELD AT TAIPEI, TAIWAN, REPUBLIC OF CHINA 496 (1998) (noting that the Helsinki Principles state: "If neutral waters are permitted or tolerated by the coastal State to be used for belligerent purposes, the other belligerent may take such action as is necessary and appropriate to terminate such use"); TANKER WAR, *supra* note 9 (announcing the general rule that it is a violation of the LOAC to wage war in neutral territorial waters); see also Steven M. Barney, *Innocent Packets? Applying Navigational Regimes from the Law of the Sea Convention by Analogy to the Realm of Cyberspace*, 48 NAVAL L. REV. 56, 76 (2001) (recognizing that the main principle of the law of neutrality is that belligerents may not undertake hostile action in neutral territory and that any hostile act by a belligerent in waters of neutral territories is a violation of neutrality).
76. See YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 107 (Cambridge, 2004) (claiming that because enemy warships are military targets subject to attack at sight, they do not gain any protection by staying away from an exclusion zone); see also Bolton, *supra* note 4, at 42 (affirming that the Argentine government believes Britain's attack on the *Belgrano* was a legal act of war and asserting that the 200-mile limit did not put the ship in a zone of safety).
77. See United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 301, 1833 U.N.T.S. 397 (1994) (stating that in performing their rights and duties under the Convention, parties "shall refrain from any threat or use of force against the territorial integrity or political independence of any State"); see also Anne Bardin, *Coastal State's Jurisdiction over Foreign Vessels*, 14 PACE INT'L L. REV. 27, 63 (2002) (stating that parties "shall refrain from any threat or use of force" that is inconsistent with the principles of international law embodied in the U.N. Charter); W. Allan Edmiston, III, Comment, *Showdown in the South China Sea: An International Incidents Analysis of the So-Called Spy Plane Crisis*, 16 EMORY INT'L L. REV. 639, 673 (2002) (concluding that Article 301 of the Charter is more restrictive than other international agreements).
78. See United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 88, 1833 U.N.T.S. 397 (1994) (stating simply that the high seas are reserved for peaceful purposes); see also George K. Walker & John E. Noyes, "Words, Words, Words": *Definitions for the 1982 Law of the Sea Convention*, 32 CAL. W. INT'L L.J. 343, 361 (2002) (claiming that Article 88 does not preclude the use of the high seas by naval forces, but it does preclude their use for aggressive purposes).

cle 2(4), a blind and literal application of these terms would put every law-abiding nation at the mercy of nations that were willing to act lawlessly.<sup>79</sup> International law could not countenance such an absurd result.

In addition, Article 103 of the Charter deems the Charter as paramount over all other treaties, including the Law of the Sea Convention.<sup>80</sup> Therefore, both articles of the Law of the Sea are generally construed with reference to self-defense rights in light of Charter Article 51 and underlying *jus cogens* norms; they are deemed to apply to the aggressor but not to the lawful self-defense actions of the defending state.<sup>81</sup> Therefore, as long as Britain was acting under the umbrella of its Article 51 rights, Argentina and the *General Belgrano* could not find shelter under the provisions of the Law of the Sea Convention.<sup>82</sup>

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79. See George V. Galdorisi & Alan G. Kaufman, *Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict*, 32 CAL. W. INT'L L.J. 253, 274–78 (2002) (illustrating that there is much discussion of the meaning and interplay of the articles, such that states do not apply them with unbending rigidity); see also Michael N. Schmitt & Richard J. Grunawalt, *Land and Maritime Zones of Peace in International Law*, 91 AM. J. INT'L L. 568, 569 (1997) (book review) (alleging that the literal terms of Article 88 preclude military activities per se, but noting that the provision itself is insufficient to require demilitarization); George K. Walker, *The Interface of Criminal Jurisdiction and Actions Under the United Nations Charter with Admiralty Law*, 20 MAR. L.J. 217, 222 (1996) (stating that the provisions of the LOS Convention are trumped by U.N. Charter norms, such as a state's inherent right of self-defense).
80. See U.N. CHARTER art. 103 (stating that in conflicts of member states between the U.N. Charter and other international agreements, the U.N. Charter shall take precedence); see also Alvarez, *supra* note 59 (arguing that the superiority of Article 103 also extends to economic, social and cultural rights); Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529, 578 (1998) (positing that states have never called the precedence of Article 103 into question and, in fact, view it as a framework for "permissible governmental activity").
81. See ROBIN R. CHURCHILL & ALAN V. LOWE, *THE LAW OF THE SEA* 272 (3d ed. 1999) (maintaining that the British TEZ was one of the measures taken in exercise of its right of self-defense under Article 51); see also U.N. CHARTER art. 51 (declaring that members of the United Nations have an inherent right to use self-defense if they come under armed attack); John-Alex Romano, Note, *Combating Terrorism and Weapons of Mass Destruction: Reviving the Doctrine of a State of Necessity*, 87 GEO. L.J. 1023, 1025 (1999) (acknowledging that Article 51 gives states an inherent right of self-defense when subject to an armed attack, but admitting that *armed attack* is a term that is narrowly construed).
82. See *Final Report: Helsinki Principles on the Law of Maritime Neutrality 2.1*, in INT'L LAW ASS'N, REPORT OF THE SIXTY-EIGHTH CONFERENCE HELD AT TAIPEI, TAIWAN, REPUBLIC OF CHINA 496 (1998) (stating that "no state may rely upon the Principles stated herein in order to evade obligations laid upon it in pursuance of a binding decision of the Security Council. Nor shall the present principles be construed as denying the inherent right of individual or collective self-defence recognized in Article 51 of the Charter"); see also Gilliland, *supra* note 13, at 1004 (noting a British officer's contention that in attacking the *General Belgrano* the British navy was acting in self-defense); see also Watkins, *supra* note 11, at 671 (arguing that the British right of self-defense was granted through Article 51 and also by customary international law).

Nevertheless, the sinking has always been controversial.<sup>83</sup> For one thing, it is undisputed that the *Belgrano*'s bearing at the time of attack was toward its home base.<sup>84</sup> A second point of controversy stems from the fact that the doomed cruiser appeared to pose no immediate threat to British forces at the time.<sup>85</sup> These factors led critics to question whether the sinking was lawful under laws of armed conflict.<sup>86</sup>

Implicit in this criticism is an apparent willingness to treat the *Belgrano*, clearly a military target, akin to any other nonmilitary objective.<sup>87</sup> In their refusal to differentiate between military and civilian targets in a time of war, however, these detractors are on shaky legal ground.<sup>88</sup> The International Court of Justice has been emphatic about the distinction.<sup>89</sup> Similarly, Article 52(2) of Protocol I to the Geneva Conventions directs that attacks are to be strictly limited to

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83. See Gardam, *supra* note 13, at 392 (explaining that one of the reasons for the controversy surrounding the sinking of the *General Belgrano* is that there is a question about whether the British response was proportional to the Argentine transgression); see also Stannard, *supra* note 12, at 624 (commenting that former British Prime Minister Margaret Thatcher was heavily criticized for the decision to bomb the *General Belgrano*, and attempts were made to extradite her to Argentina); General Belgrano: *Cruiser That Died Alone*, *ECONOMIST*, May 8, 1982, at 21 (claiming that there were many questions following the sinking of the *General Belgrano* as to whether the ship was truly a threat to the British navy).
84. See INGRID DETTER, *THE LAW OF WAR* 184 (2d ed. 2000); see also Lake, *supra* note 22, at 86 (declaring that before being attacked, the *General Belgrano* had been ordered to return to port and was carrying out the order at the time it was attacked); Whitaker & Clifton, *supra* note 28, at 28 (reporting that before being attacked the *General Belgrano* was steaming toward the Argentine coast).
85. See DETTER, *supra* note 84, at 184; see also Lake, *supra* note 22, at 86 (claiming that in order to avoid any threats, the *General Belgrano* was returning to port as ordered when it was attacked); Whitaker & Clifton, *supra* note 28, at 28 (asserting that as the British attack occurred, crewmen of the *General Belgrano* were taking naps and playing chess, among other things, and were not prepared for an attack on the British).
86. See DETTER, *supra* note 84, at 184 (explaining that the legality of the sinking of the *Belgrano* might be questionable because some commentators have questioned war zones in which ships are sunk after a warning); Gardam, *supra* note 13, at 391–92 (explaining that *jus ad bellum* and *jus in bello* require that belligerents consider that the balance between responding to a grievance and the cost in lives of their response be proportional); see also Philips, *supra* note 66, at 24 (describing Admiral Woodward's belief that rules of engagement played an important role in his experience during the Falklands War).
87. See Doswald-Beck, *supra* note 70, at 199–200 (explaining that the writers of the *San Remo Manual* attempted to limit the sinking of merchant ships by clearly defining what constitutes military activity by a merchant vessel); see also Michaelsen, *supra* note 9, at 372–74 (recounting that the government of the United Kingdom regarded as hostile all vessels in the TEZ that were operating in support of Argentina's occupation of the Falkland Islands); Drew Middleton, *Small, Savage Falklands War Holds Major Lessons*, *N.Y. TIMES*, May 23, 1982, at D1 (illustrating the military role the *Belgrano* played in the conflict).
88. See Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) June 8, 1977, art. 43, 16 I.L.M. 1391, 1410 (effective Dec. 7, 1978) (explaining that Article 43 of the Protocol defines *combatant* in a way that would suggest that those aboard the *Belgrano* were combatants, not civilians); see also Watkins, *supra* note 11, at 672–74 (arguing that the United Kingdom had the right to sink the *Belgrano* under international law).
89. See, e.g., Advisory Opinion on the Legality of the Threat of Use of Nuclear Weapons, 35 I.L.M. 809, 935 (1996) (stating that an attack against military targets need not be abandoned because the attack will inflict suffering). But see Gilliland, *supra* note 13, at 988 (suggesting that all vessels within exclusion zones are targets, with the exception of commercial fishing boats). See generally Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, art. 2–3 at 4, 6 U.S.T. 3516 (explaining that at minimum combatants who have laid down their arms or who are no longer in combat should be treated humanely).



military objectives.<sup>90</sup> Protocol I is not directly applicable by its terms to naval warfare; however, it restates customary norms that are strongly influential and do apply by analogy to all methods of warfare.<sup>91</sup> For instance, the United States, which has not acceded to the Protocols, does recognize that to some extent their provisions “reflect customary international law” and has pledged to follow them to that extent.<sup>92</sup>

Protocol I defines *military objectives* as those objects that can make an effective contribution to military action and whose removal offers a military advantage.<sup>93</sup> Similarly, the *United States Commander's Handbook on the Law of Naval Operations*, basing its analysis on customary norms, sets forth the following criteria for determining military objectives and thus valid targets:

[C]ombatants and those objects which, by their nature, location, purpose or use, effectively contribute to the enemy's war-fighting or war-sustaining capability and whose total or partial destruction, capture or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack.<sup>94</sup>

Therefore, under both Protocol I and customary norms, the *Belgrano* was a legitimate military objective and consequently amenable to attack if (1) it was contributing to the Argentine war effort, and (2) its removal offered a military advantage.

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90. See Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) June 8, 1977, art. 52, 16 I.L.M. 1391, 1414 (effective Dec. 7, 1978) (explaining that Article 52(2) of the Protocol defines *military object* in such a manner that it applies readily to naval vessels).
  91. See TANKER WAR, *supra* note 9, at 516 (stating that Protocol I applies to naval warfare because it applies to all forms of warfare); see also Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) June 8, 1977, art. 52, 16 I.L.M. 1391, 1414 (effective Dec. 7, 1978) (defining *military object*); Theodor Meron, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AM. J. INT'L L. 678, 681 (1994) (calling for the United States to ratify Protocol I because most nations, including the United States, adhered to it during the Gulf War of 1992).
  92. See ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 2.1.1 (A.R. Thomas & J.C. Duncan eds., Naval War Coll. Int'l Studies No. 75, 1999) [hereinafter ANNOTATED SUPPLEMENT]; see also Message from the President Transmitting Protocol II Additional to the 1949 Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts, Jan. 29, 1987, S. Treaty Doc. 100-2, 26 I.L.M. 561, 564 (agreeing that certain provisions of Protocol I reflect customary law, even if the Protocol has been rejected by the United States); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 702 (1987) (describing customary international law as it relates to human rights).
  93. See TANKER WAR, *supra* note 9, at 531 (explaining the concept of *military objectives*). But see Message from the President Transmitting Protocol II Additional to the 1949 Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts, Jan. 29, 1987, S. Treaty Doc. 100-2, 26 I.L.M. 561, 562-64 (stating that the president did not support the passage of Protocol I because of its reference to wars of national liberation). See generally Hans-Peter Gasser, *The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 81 AM. J. INT'L L. 912, 924 (1987) (positing that the treaty will succeed even without the support of the United States, but asking the United States to reconsider its position).
  94. See James Gilliland Dalton, *The Influence of Law on Sea Power in Desert Storm/Desert Shield*, 41 NAVAL L. REV. 27, n.114 (explaining that the *Commander's Handbook on the Law of Naval Operations* is well respected internationally); see also ANNOTATED SUPPLEMENT, *supra* note 92 (quoting the handbook to illustrate that the *Belgrano* was a warship); Doswald-Beck, *supra* note 70, at 199-200 (explaining that the drafters of the *San Remo Manual* held that a ship was “belligerent” if it in any way assisted the enemy with a military objective).

First, the contribution of the *Belgrano* to the Argentine war effort is evident: At 13,500 tons, she was one of the largest warships in the Argentine fleet.<sup>95</sup> Second only to the carrier *Veinticinco de Mayo*, she led one of two Argentine naval task forces attempting to prevent Admiral Sandy Woodward's task force from reaching the Falklands.<sup>96</sup> In Woodward's assessment, she was no "pushover" and possessed armaments superior to anything at his disposal.<sup>97</sup>

Second, her removal offered a clear military advantage in both tactical and strategic terms. Admiral Fieldhouse, the British naval chief, believed that the loss of the *Belgrano* had "cut the heart out of the Argentinean Navy."<sup>98</sup> Reeling from the blow, the Argentine navy retreated to its own waters and made no further attempt to challenge Admiral Woodward and a steadily tightening blockade of the islands.<sup>99</sup> This, in turn, doomed the Malvinas garrison. "Unable to resupply the garrison on the islands by sea, and unable to break the air blockade over the islands, Argentina lost the Falklands."<sup>100</sup>

## V. The Importance of Location: A Pig in the Parlor or the Barn?<sup>101</sup>

The *Belgrano* sinking 30 miles outside the TEZ was a legitimate act under the law of naval warfare, TEZ or no TEZ, and whether *Belgrano* appeared to turn toward the UK task force or not. There is no indication that Britain had declared it would not attack Argentine military forces elsewhere, and cer-

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95. See ANNOTATED SUPPLEMENT, *supra* note 92 (explaining that international law defines a *warship* as a ship that bears the external markings of its nationality, is under the command of a duly commissioned officer and is manned by a crew under the military discipline); see also *Argentine Ship's Sinking*, N.Y. TIMES, May 9, 1982, at A16 (illustrating the size and importance of the *General Belgrano* to Argentina's navy).
  96. See ENGLISH ET AL., *supra* note 16, at 33; Schumacher, *supra* note 17 (describing the dimensions of the *Belgrano*). See generally Astley & Schmitt, *supra* note 74, at 154–55 (explaining the role of an exclusionary zone during wartime).
  97. See WOODWARD & ROBINSON, *supra* note 2, at 148 (recounting the threat the *General Belgrano* posed to the British Navy); see also Truver, *supra* note 3, at 1236 (explaining how vulnerable sea vessels are to "smart" and "dumb" weapons alike); Tim Jones, *How Britain Got Lucky in the Falkland Islands War*, CHI. TRIB., Mar. 10, 1992, at 3 (discussing the types of weapons possessed by Argentina and the threat they posed to the *Conqueror*).
  98. See MIDDLEBROOK, *supra* note 4, at 151 (describing the effect of the sinking of the *Belgrano* on Argentina's navy); see also Eric Pace, *Lord Lewin, 78, British Strategist in Falklands*, N.Y. TIMES, Jan. 27, 1999 (Obituary), at A23 (quoting a British newspaper, which claimed that the sinking of the *Belgrano* was the turning point of the war). See generally Ellen Lutz & Kathryn Sikkink, *The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America*, 2 CHI. J. INT'L L. 1, 1 (2001) (relating how the capture of a high-ranking Argentine navy official during the Falklands/Malvinas War led to his prosecution for human rights violations in Argentina).
  99. See William Ruhe, *Submarine Lessons*, in MILITARY LESSONS OF THE FALKLAND ISLANDS WAR: VIEWS FROM THE UNITED STATES, 8–9 (Bruce W. Watson & Peter M. Dunn eds., 1985) (describing how the loss of the *Belgrano* forced the Argentine navy to retreat to its own waters). See generally Michael G. Fraunces, Note, *The International Law of Blockade: New Guiding Principles in Contemporary State Practice*, 101 YALE L.J. 893, 893 (1992) (relating the primary purposes of the blockade and its effect on neutral states).
  100. See Gilliland, *supra* note 13, at 994 (describing how the sinking of the *Belgrano* led to Argentina's loss of the Falklands); see also Janis A. Kreslins, 1982, *America and the World: Chronology; Latin America; The Falkland Islands War*, 1983 FOREIGN AFF. 740 (1983) (listing the chronology of events that led to Argentina's defeat in the Falkland Islands War); David A. Brown, *British to Establish Military Presence on Falklands*, AVIATION WEEK & SPACE TECH., June 21, 1982, at 20 (explaining how quickly Argentina's defenses around Port Stanley collapsed).
  101. See *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) (quoting Sutherland, J.: "A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard.").

tainly no indication it would not attack ships like *Belgrano* if they appeared to be moving toward the UK force with ship-killing missiles aboard.<sup>102</sup>

A belligerent cannot absolve itself of its responsibilities under the law of armed conflict and international humanitarian law merely by declaring a war zone.<sup>103</sup> The declaration of a war zone must be based on some rationale, and the ambit and enforcement of the war zone must be directly related to such underlying rationale.<sup>104</sup> In his assessment of the developing norms for such zones, Professor Fenrick has noted that “[t]here must be a proportional and demonstrable nexus between the zone and the self-defence requirements of the state establishing the zone.”<sup>105</sup>

The Argentine view is that the declaration of the TEZ demarcated the area of combat operations<sup>106</sup> and gave the British ample room to achieve its stated objective of retaking the Falklands:

[Commander Brown’s sinking of the *Belgrano*] was . . . an event that was played out with the cards stacked in his favor against a much weaker foe, an action that doomed the hapless crew members of the *General Belgrano* to a watery grave, in an undeclared war, in an area that his own government had supposedly agreed was off limits to hostile action, and through which the Argentine naval units were steaming, lulled into a false sense of security.<sup>107</sup>

Air Commodore Moro’s words, stark in their bitterness, succinctly lay out the Argentine case in chief against the British.<sup>108</sup> The subtext is that the British deliberately misled its oppo-

102. See Bolton, *supra* note 4, at 42 (explaining that the captain of the *Belgrano* understood that staying out of the 200-mile limit did not mean that his ship would be free from attack). *But see* Robert Shrimley, *National News: Britain Faces Legal Action over Sinking of Belgrano*, FIN. TIMES, June 30, 2000, at 2 (explaining that family members of the soldiers who died in the attack sued the British government on the grounds that the *Belgrano* was outside the theater of operations when the HMS *Conqueror* torpedoed the ship).

103. See Astley & Schmitt, *supra* note 74, at 154 (explaining that the establishment of a combat zone does not confer any additional authority on the party who establishes such a zone—that it is simply a warning zone); Mohamed S. Elewa, *Genocide at the Safe Area of Srebrenica: A Search for a New Strategy for Protecting Civilians in Contemporary Armed Conflict*, 10 MSU-DCL J. INT’L L. 429, 439–40 (defining *armed conflict* as whenever there is protracted armed violence between states and noting that in these situations, international humanitarian law applies).

104. See Fraunces, *supra* note 99, at 910–11 (asserting that in the Falklands War, zones were set up to keep the battle from penetrating the mainland). *See generally* Galdorisi & Kaufman, *supra* note 79, at 253–54 (commenting on an economic rationale for declaring an exclusionary zone).

105. See TANKER WAR, *supra* note 9, at 409 (claiming that the sanctions for entrance into the zone will vary based upon this principle); W.J. Fenrick, *The Exclusion Zone Device in the Law of Naval Warfare*, 24 CAN. Y.B. INT’L L. 91, 118 (1986); Michael N. Schmitt, *Clipped Wings: Effective and Legal No-Fly Rules of Engagement*, 20 LOY. L.A. INT’L & COMP. L.J. 727, 760–61 (1998) (discussing the self-defense requirements for attacking in a no-fly zone).

106. See MORO, *supra* note 22, at 129 (explaining that as a result, the *Belgrano* attempted to stay away from said zone); Goldie, *supra* note 41, at 748 (discussing the differing viewpoints on the British TEZ). *But see* Watkins, *supra* note 11, at 673 (taking the opposite position that the zone was set up merely as a defensive measure, and it did not preclude vessels outside the zone from being attacked).

107. MORO, *supra* note 22, at 130.

108. See Bolton, *supra* note 4, at 42 (asserting that the case against the British primarily revolved around the fact that the ship was sunk outside of the exclusion zone). *See generally* Brian Mueller, Note, *The Falkland Islands: Will the Real Owner Please Stand Up*, 58 NOTRE DAME L. REV. 616, 616 (discussing the protracted conflict between the Argentines and the British); Stannard, *supra* note 12, at 624 (comparing the Argentinean case against the British to the Belgrade bombings in Yugoslavia).

nents about the spatial limitations of conflict.<sup>109</sup> If indeed the British had seduced the Argentine flotilla into a sense of complacency by deliberately misleading them as to the nature of the TEZ, such an action would probably constitute an unlawful ruse.<sup>110</sup> Although some ruses are lawful in naval warfare, perfidy is not.<sup>111</sup> Deliberately luring an adversary to destruction with false assurances of safe conduct would constitute perfidy.<sup>112</sup>

Perfidy involves a situation that would prevent the adversary from taking precautions that it would otherwise deem necessary.<sup>113</sup> *The United States Commander's Handbook on the Law of Naval Operations* similarly defines *perfidy* in terms of Article 37(1) of Geneva Protocol I: "Acts of perfidy are deceptions designed to invite the confidence of the enemy to lead him to believe that he is entitled to . . . protected status under the law of armed conflicts, with the intention to betray that confidence."<sup>114</sup>

The analysis, therefore, rests on whether the British deliberately cultivated a false sense of security in the *Belgrano* flotilla, perhaps by implying that activity outside the TEZ would be safe.<sup>115</sup> There is some evidence to buttress the Argentine position that the flotilla did not take

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109. See MORO, *supra* note 22, at 130 (claiming that there seems to be another, more mysterious motive for the sinking); Watkins, *supra* note 11, at 652 (detailing the events following the declaration of the TEZ). See generally 'Belgrano' Relatives Seek Redress, THE INDEPENDENT (London), July 5, 2000, at 6 (reporting that the survivors of those who died on the *Belgrano* are filing suit because Britain attacked outside what they believe to be the spatial limitations of the conflict).
  110. See William H. Ferrell, *No Shirt, No Shoes, No Status: Uniforms, Distinctions, and Special Operations in International Armed Conflict*, 178 MIL. L. REV. 94, 94 (2003) (indicating that acts which invite the enemy to believe that it is under the protection of the rules of international law, with intent to betray that confidence, constitute perfidy); Roach, *supra* note 74, at 72 (explaining that under the law of naval warfare and the *San Remo Manual*, perfidy is an unlawful ruse as opposed to lawful ruses such as camouflage and misinformation). See generally Patricia Zengel, *Assassination and the Law of Armed Conflict*, 134 MIL. LAW. REV. 123, 129–30 (noting that the reasoning behind the perfidy restrictions is not necessarily humanitarian).
  111. See TANKER WAR, *supra* note 9, at 425 (stating that ruses can be lawful or unlawful, but that a ruse in which a warship pretends to be a hospital ship or a medical transport is unlawful); see also Eric A. Posner, *Centennial Tribute Essay: A Theory of the Laws of War*, 70 U. CHI. L. REV. 297, 299 (2003) (asserting that rules against perfidy are said to reflect early "chivalric values"); Thomas C. Wingfield, *Taking Aim at Regime Elites: Assassination, Tyrannicide, and the Clancy Doctrine*, 22 MD. J. INT'L L. & TRADE 287, 317 n.63 (1999) (showing that perfidy is a narrower concept than treachery but that they can be distinguished from lawful ruses in a similar fashion).
  112. See TANKER WAR, *supra* note 9, at 427 (illustrating that perfidy is not as broad a concept as treachery but that both can be distinguished from lawful ruses in a similar manner); see also Walter Gary Sharp, Sr., Symposium, *The United Nations, Regional Organizations, and Military Operations: Article: Protecting the Avatars of International Peace and Security*, 7 DUKE J. COMP. & INT'L L. 93, 183 n.133 (citing the Geneva Protocol for what constitutes perfidy). See generally Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT'L L. 1, 51 (2004) (showing that guerilla warfare is sometimes considered perfidy).
  113. See TANKER WAR, *supra* note 9, at 427 (noting that when an aircraft purports to be disabled, enemy ships should not attack it as they otherwise might in order to allow passenger and crew evacuation); see also Ariane L. DeSausure, *The Role of the Law of Armed Conflict During the Persian Gulf War: An Overview*, 37 A.F. L. REV. 41, 57 n.91 (1994) (noting that specific acts of perfidy include flying a Red Cross flag or feigning a cease-fire).
  114. See Adam Liptak, *A Nation at War: Geneva Conventions; Public Opinion Effort Leans on Rules of War*, N.Y. TIMES, Mar. 26, 2003 (asserting that the Iraqis have resorted to perfidy on various occasions and that it has been informally illegal ever since the beginning of rules of warfare).
  115. See Doswald-Beck, *supra* note 70, at 204 (noting that one of the most controversial aspects of zone warfare is what self-help actions a belligerent may take in neutral waters when a combat zone has been declared); *Submarines and Targets: Suggestions for New Codified Rules of Submarine Warfare*, 73 GEO. L.J. 975, 993 (1985) (detailing how the TEZ was declared by the British).

precautions because it considered itself outside the combat zone.<sup>116</sup> Air Commodore Moro's account, for instance, shows the crew "standing down" as they steam away from the TEZ.<sup>117</sup>

Even Admiral Woodward conceded that the actions of the *Belgrano* and her escorts were not those of naval units braced for battle.<sup>118</sup> The doors and hatches were not secured—a basic safety precaution when hostilities are expected.<sup>119</sup> The cruiser and her escorts were not positioned in an appropriate defensive formation.<sup>120</sup> The flotilla lumbered along at the constant, slower speed of a peacetime fleet, rather than the variable, faster speeds expected of naval units facing a threat.<sup>121</sup> Finally, Captain Bonzo did not use the active sonar available to him.<sup>122</sup>

Under these circumstances, the sinking struck even the ratings of the Royal Navy as sordid: "What was the purpose of declaring geographical limits within which enemy ships would be liable to attack, only to act outside them. . . . [?]"<sup>123</sup> Indeed, Britain appears to have been embarrassed enough by the indecorum of the attack to ensure it would not happen again: It

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116. See MORO, *supra* note 22, at 125 (stating that the crew of the *Belgrano* was caught completely unaware by the attack). *But see* Astley & Schmitt, *supra* note 74 (alleging that because a ship is outside of the exclusion zone does not make it immune from attack). See generally Joanna Bourke, Comment & Analysis: *From Surrey to Basra, Abuse Is a Fact of British Army Life: Officers Who Blame 'a Few Bad Apples' Ignore a Culture of Brutalization*, GUARDIAN, Feb. 26, 2005, at 22 (noting that in the Falklands War, British troops were prepared for battle by various exercises to stimulate their aggression).

117. See MORO, *supra* note 22, at 124–25 (stating that the soldiers seemed to rest easy as they sailed away from the war zone); see Sharp, *supra* note 112, at 125–26 (quoting the Geneva Convention in stating that persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms, are subject to protected status).

118. See DiBiagio, *supra* note 13, at 171 n.82 (suggesting that the ship was not battle-ready by referring to the *Belgrano* as a "creaking 43-year-old cruiser"). *But see* Truver, *supra* note 3, at 1231 (noting that the Argentinean ships had to at least look capable of retaking the islands in order for a successful campaign to be waged).

119. See WOODWARD & ROBINSON, *supra* note 2, at 161 (explaining that this is why the blast moved so quickly and caused such a high degree of damage). See generally Meron, *supra* note 91, at 242–43 (noting that perfidy laws were enacted in order to protect combatants from these sorts of situations); Weston D. Barnett, *Mediterranean Mare Clausum in the Year 2000?: An International Law Analysis of Peacetime Military Navigation in the Mediterranean*, 34 NAVAL L. REV. 75, 79 n.19 (1985) (explaining that sailors manning battle stations is considered preparation for battle).

120. See John Staples, *Expedition Seeks the Belgrano*, SCOTSMAN, Feb. 6, 2003, at 7 (noting that the ship could not have been positioned in a defensive formation, because it was sailing away); see also John Woodward, *Victory at Sea: The Compelling Story of the Battle for the Falklands—Day Two*, DAILY MAIL (London), Jan. 21, 1992, at 29 (observing that the *Belgrano* was not in a defensive formation).

121. See Diana Gould, *Letter: Warning That Came Too Late for Belgrano*, GUARDIAN (London), May 8, 1992, at 20 (remarking that the *Belgrano* was moving at a relatively slow speed).

122. See Peter Paterson, *Belgrano Was Fair Game*, DAILY MAIL (London), July 6, 2004, at 47 (noting that Bonzo did not have the sonar turned on); see also *Victor Meets Vanquished After 18 Years to Make Post-War Amends*, IRISH TIMES, Dec. 28, 2000, at 14 (remarking the sonar did not work that well and was not on during the attack).

123. See HASTINGS & JENKINS, *supra* note 26, at 150; see also Peter Beaumont, *Belgrano Captain Breaks Silence: Argentine Commander Casts New Light on Falklands War Controversy*, OBSERVER, May 25, 2003, at 7 (noting the criticism of the attack because the *Belgrano* was sailing away from the exclusion zone); *Freedom of Information: The Whole Story? Five Major Controversies That the Act Could Resolve*, OBSERVER, Dec. 26, 2004, at 6 (commenting on why some view the attack as a war crime because the *Belgrano* was sailing away when the British fired upon it).

promptly extended the TEZ right up to the limits of Argentina's territorial waters.<sup>124</sup> Even some British authors suggest that this would have been more appropriate before the attack.<sup>125</sup>

Admiral Woodward disputes this entire line of reasoning.<sup>126</sup> Although conceding that the actions of Captain Bonzo "suggested he believed he was in no real danger," Admiral Woodward attributes those actions to a failure to "accept the reality of the situation." Even so, Admiral Woodward concedes that the captain was far from alone in his beliefs.<sup>127</sup> He emphasizes that Captain Bonzo was aware of the April 23 DSA declaration—"a warning . . . that Argentinean ships posing any threat to the business of the British Fleet would be sunk . . ."<sup>128</sup> Therefore, Woodward argues, the *Belgrano's* open posture was attributable to her commander's incompetence, not British perfidy.

The official British view is that Britain had repeatedly emphasized that it reserved its *full* Article 51 self-defense rights—rights preeminent in international conflict law.<sup>129</sup> In particular, in its April 23 warning, the British government had explicitly warned that, in addition to other measures, it retained the right "to take whatever additional measures may be needed in exercise of its right of self-defense" under Article 51 of the U.N. Charter.<sup>130</sup> The declaration unequivocally stated that any Argentine military assets that could pose a threat to British forces in the South Atlantic were subject to attack: "Argentinean warships . . . which could amount to a threat . . . will encounter the appropriate response."<sup>131</sup> The notice was released to the media and passed on to the Swiss government with a request that it be relayed to the Argentine high command.<sup>132</sup>

124. See *Falkland Islands War Timeline: April to June 1982* (commenting on the subsequent expansion of the exclusion zone), available at <http://www.sama82.org/1982/may/> (last visited Feb. 26, 2005); see also *Falklands Diary* (noting that the exclusion zone was expanded shortly after the attack), available at [http://www.hms-yarmouth.com/falklands\\_diary.htm](http://www.hms-yarmouth.com/falklands_diary.htm) (last visited Feb. 26, 2005).

125. See Beaumont, *supra* note 123, at 7 (commenting on criticism to sink the ship while it was outside of the exclusion zone); see also *World Politics and Current Affairs: America and the Falklands*, ECONOMIST, Nov. 12, 1983, at 49 (noting that even in Britain, many writers were critical of the sinking of the *Belgrano*).

126. WOODWARD & ROBINSON, *supra* note 2, at 161–62; see also Philips, *supra* note 66, at 24 (noting that Woodward was aware of the capabilities of the *Belgrano* and recognized that it was a threat to his safety).

127. See Robert McLaughlin, *Still in Command*, HERALD (Glasgow), Feb. 1, 1992, at 19 (commenting on Woodward's criticism of Captain Bonzo); see also Woodward, *supra* note 120, at 29 (criticizing Captain Bonzo's actions).

128. See WOODWARD & ROBINSON, *supra* note 2, at 161; see also Adam Haney, *Corned Beef Raid on Embassy: British Patriotism and the Falkland Conflict* (noting that the British sent the Argentines a warning, of which Bonzo should have been aware, on April 23), available at <http://www.loyno.edu/history/journal/1998-9/Haney.htm#17> (last visited Feb. 26, 2005).

129. See U.N. CHARTER art. 51; see also TANKER WAR, *supra* note 9, at 406.

130. MIDDLEBROOK, *supra* note 4, at 412; see also *Case Study in the Behaviour of an Allie*, ECONOMIST, Nov. 12, 1983, at 49 (noting the letter of April 23, warning that the British would not hesitate to fire on ships it perceived as threats).

131. See John Ezard, *Argentina Lays to Rest Belgrano Loss*, GUARDIAN (London), Mar. 23, 1989 (admitting that the Argentines were aware that the entire South Atlantic was an operational zone); see also Jon Snow, *Counting the Costs of the Falklands War*, WASH. POST, May 18, 1986 at 4 (remarking that even though the *Belgrano* was moving away, the ship was still a threat).

132. See David Chater, *Viewing Guide*, TIMES NEWSPAPER LTD., July 5, 2004, at 24 (commenting that the British had sent a warning to Argentina, via the Swiss, on April 23).

This did not permit the British to do what they liked. Under the law of armed conflict or Article 51, they were still obliged to observe necessity and proportionality principles, but only in evaluating actions that would result in excessive damage to platforms that were *not* proper targets.<sup>133</sup> By these standards, Argentine platforms employed in the Argentine occupation of the Falklands—in any capacity—would be military threats to the task force's objectives and thus valid targets.<sup>134</sup>

The *Belgrano* clearly fell into this category. Admiral Woodward unequivocally considered the *Belgrano*, along with the Argentine navy, a threat to his fleet.<sup>135</sup> Nor was he mistaken in his assessment—within 48 hours, the Argentines launched fierce attacks, causing severe British losses, most notably the destroyer *Sheffield*.<sup>136</sup> Ultimately, as Admiral Woodward explained, drawing on institutional expertise dating back to Nelson, the direction, positioning and current location of an enemy ship is irrelevant to the calculus of threat perception.<sup>137</sup> Any of these was subject to change rapidly.<sup>138</sup> “What matters is [the enemy’s] position, his capability and what I believe to be his intention.”<sup>139</sup>

The Argentine military certainly did not limit its actions to its own exclusion zones. For instance, on June 8, 1982, the Argentine air force repeatedly attacked the Liberian-flagged, U.S.-owned tanker *Hercules*.<sup>140</sup> At the time of attack, the *Hercules* was 600 nautical miles from Argentina, 500 miles from the Falklands and well outside the “war zones” designated by the

133. See R.A. Malviya, *Laws of Armed Conflict and Environmental Protection: An Analysis of Their Inter-Relationship* (commenting on the law of proportionality), available at <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/5.html> (last visited Mar. 10, 2001).

134. See Beaumont, *supra* note 123, at 7 (noting that Bonzo later admitted that the *Belgrano* understood the situation and perceived itself to be a valid target).

135. See WOODWARD & ROBINSON, *supra* note 2, at 148; see also *The Falklands War 1982* (commenting that Woodward was concerned for the safety of his ship and crew), available at <http://www.royal-navy.mod.uk/static/pages/3530.html> (last visited Feb. 26, 2005).

136. See MIDDLEBROOK, *supra* note 4, at 156; see also Brendan P. Rivers, *Sheffield Destroyed!* (remarking that the *Sheffield* was sunk a few days after the *Belgrano*), available at <http://static.highbbeam.com/j/journalofelectronicdefense/march012001/sheffielddestroyedbritishdestroyerattackedin1982/> (last visited Mar. 1, 2001).

137. See WOODWARD & ROBINSON, *supra* note 2, at 156. See generally Philips, *supra* note 66, at 18 (discussing the multiple concerns present in making a decision as to whether to attack an aircraft); Bolton, *supra* note 4, at 42 (acknowledging that during the war the risk and danger of attack was not limited to the designated 200-mile zone).

138. See WOODWARD & ROBINSON, *supra* note 2, at 156. See generally Astley & Schmitt, *supra* note 74, at 154 (explaining that the practical effects of the exclusionary zones are precautionary); Watkins, *supra* note 11, at 673 (noting that legitimate preemptive attacks are allowed by international law).

139. WOODWARD & ROBINSON, *supra* note 2, at 156.

140. See *Argentine Republic v. Amerasia Hess Shipping Corp.*, 488 U.S. 428, 431 (1989) (describing the circumstances surrounding the attack of the *Hercules*). See generally W. Michael Reisman & Monica Hakimi, *Illusion and Reality in the Compensation of Victims of International Terrorism*, 54 ALA. L. REV. 561, 565 (2003) (presenting the legal basis for jurisdiction used in *Amerasia Hess*); Jami J. Campisano, Note, *Foreign Sovereign Immunities Act Is Exclusive Basis for Exercising Subject Matter Jurisdiction in Suits Against Foreign States: Argentine Republic v. Amerasia Hess Shipping Corp.*, 13 MAR. LAW. 327, 327 (1989) (describing the nature of the claim brought against Argentina by United Carriers, Inc.).

belligerents.<sup>141</sup> Both the U.S. government and the operator of the vessel had informed the Argentinean authorities about the ship's location and the nature of its voyage.<sup>142</sup> Severely damaged, the *Hercules* had to be scuttled.<sup>143</sup> The Second Circuit denounced the Argentine attack as a clear violation of international law and akin to piracy.<sup>144</sup>

The *Hercules* incident and other Argentinean violations of international law do not grant Britain carte blanche to violate international law; the *San Remo Manual* holds that violations by one belligerent do not release the other party from its obligations.<sup>145</sup> However, Argentina's willingness to attack a neutral oil tanker outside the war zone does make its indignation over an attack on a warship on the high seas seem disingenuous.<sup>146</sup>

Given the *Belgrano's* military status, it is hard to see how its location outside the TEZ somehow rendered it sacrosanct under international law.<sup>147</sup> As Sir John Nott, Britain's defense secretary during the conflict, noted recently: "I remain astonished to this day that anyone should consider the momentary compass bearing of the *Belgrano's* passage to be of any consequence whatever . . . Any ship can turn about in an instant."<sup>148</sup>

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141. See *Argentine Republic*, 488 U.S. at 431 (holding that under the circumstances, the Foreign Sovereign Immunities Act did not authorize jurisdiction over the Argentine Republic for the attack on the *Hercules*); see also Monroe Leigh, *Decision: Amerada Hess Shipping Corp. v. Argentine Republic*, 82 AM. J. INT'L. L. 126, 126 (1988) (recounting the positioning of the *Hercules* when attacked); Adam C. Belsky, Mark Merva & Naomi Roht-Arriaza, Comment, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CAL. L. REV. 365, 371 n.31 (1989) (identifying the specific coordinates where the *Hercules* was located at the time of attack).

142. See *Argentine Republic*, 488 U.S. at 431 (holding that under the circumstances, the Foreign Sovereign Immunities Act did not authorize jurisdiction over the Argentine Republic for the attack on the *Hercules*); see also William R. Dorsey III, *Reflections on the Foreign Sovereign Immunities Act After Twenty Years*, 28 J. MAR. L. & COM. 257, 297 (1997) (highlighting that Argentina had been given notice that the *Hercules* would be passing in proximity to the war zones); Campisano, *supra* note 140, at 327 (noting that Argentina and Great Britain had been put on notice about the neutral vessel).

143. See *Argentine Republic*, 488 U.S. at 431 (holding that under the circumstance,s the Foreign Sovereign Immunities Act did not authorize jurisdiction over the Argentine Republic for the attack on the *Hercules*); see also O'Toole, *supra* note 39, at 829 (providing the total loss sustained by the *Hercules*). See generally William F. Webster, Note, *Amerada Hess Shipping Corp. v. Argentine Republic: Denying Sovereign Immunity to Violators of International Law*, 39 HASTINGS L.J. 1109, 1120 (1988) (explaining the final fate of the *Hercules* after the attack).

144. See *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 424 (2d Cir. 1987), *rev'd on other grounds*, 488 U.S. 428 (1989) (the U.S. Supreme Court eventually set aside the judgment for lack of subject-matter jurisdiction); see also Leigh, *supra* note 141, at 126 (explaining the analysis and finding by the Second Circuit of the attack under international law). See generally Virginia Morris, Note & Comment, *Sovereign Immunity for Military Activities on the High Seas: Amerada Hess v. Argentine Republic*, 23 INT'L LAW. 213, 213 (1989) (finding that law would not protect Argentina for the actions that violated international law).

145. SAN REMO MANUAL, *supra* note 72, at 22.

146. See Douglas M. Evans, Comment, *Sovereign Immunity—Foreign Sovereign Immunities Act—Jurisdiction Granted Under Alien Tort Statute*, *Amerada Hess Shipping Corp. v. Argentine Republic*, 12 SUFFOLK TRANSNAT'L L.J. 687, 688 (1989) (highlighting the neutral position of the *Hercules*, which made its attack arguable). See generally LaRussa, *supra* note 40, at 717 (implying the willingness of Argentina to violate settled principles of international law); Webster, *supra* note 143, at 1120 (noting that attacking a neutral vessel without cause is a complete violation of international law and without immunity).

147. See DINSTEN, *supra* note 76, at 248 (stating that some protected platforms, such as hospital ships, do not lose their protected status, even inside an exclusion zone). See generally Gilliland, *supra* note 13, at 997 (noting the importance of distinguishing the origin of vessels outside and inside the zone).

148. See Francis Elliott, *Belgrano Ordered to Attack British Ships on Day Before Sinking, Secret Report Reveals; Falklands War New Official History May Finally Settle Controversy*, INDEP. ON SUNDAY (London), Dec. 28, 2003, at 6.



The detractors' views are further weakened when considered in light of the April 23 DSA declaration. In his assessment of the engagement, Admiral Woodward stresses the importance of that warning.<sup>149</sup> Although the literature on the subject largely ignores it,<sup>150</sup> Woodward makes clear that he considered the DSA warning rather than the TEZ proclamation as controlling in arriving at his decision.<sup>151</sup> Under the terms of the warning, the pivotal question was if the *Belgrano* posed any threat to the British fleet;<sup>152</sup> as the next section shows, the danger was a very real one.

## VI. Proportionality: Burning the Barn to Toast a Pig?<sup>153</sup>

Great Britain wished to be seen as the wronged party. . . . [W]e should accept the first shot, which would become a new *casus belli* and which would then of course, be 'not our fault'. It was, however, clear to me that if the Argentines knew what they were doing and hit one of my carriers, we would not need a *casus belli*, a reason to *start* a war. The war would already be over.<sup>154</sup>

The above words convey some idea of the struggle that Western nations encounter when going to war—there is an overwhelming desire to be seen as the wronged party, as the one with the just cause.<sup>155</sup> The political demands of this desire must inevitably be balanced against the

149. See WOODWARD & ROBINSON, *supra* note 2, at 161. See generally Gravelle, *supra* note 20 (detailing the actions taken against Argentina, including the establishment of an exclusion zone); Gilliland, *supra* note 13, at 993 n.130 (emphasizing that the British warning was not limited to the exclusion zone).

150. DINSTEIN, *supra* note 76, at 107.

151. See Michaelsen, *supra* note 9, at 372–74 (highlighting the specific warning that came with the establishment of the “defensive bubble”). See generally Walter L. Jacobsen, *A Juridical Examination of the Israeli Attack on the U.S.S. Liberty*, 36 NAVAL L. REV. 1, 29 (1986) (explaining the characteristics and purposes of maritime security zones); Bloom, *supra* note 10, at 11 (announcing Britain’s new measure to protect their ships and aircraft).

152. See WOODWARD & ROBINSON, *supra* note 2, at 161. See generally Don Wallace Jr., *International Law and the Use of Force: Reflections on the Need for Reform*, 19 INT’L LAW. 259 (1985) (presenting the invasion by Argentina as an example of armed attack which explains the threat posed by the *Belgrano*); Watkins, *supra* note 11, at 651–52 (stressing the menacing position of the *Belgrano* even after the TEZ was imposed).

153. See *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (noting the words of Justice Frankfurter, concerning a statute that seemed extremely overbroad considering its supposed objective: “Surely, this is to burn the house to roast the pig.”).

154. See WOODWARD & ROBINSON, *supra* note 2, at 108 (explaining that Great Britain wished to be seen as having just cause and was justified in responding militarily to the Argentinean invasion of the Falkland Islands).

155. See, e.g., Jack Beard, *Military Action Against Terrorists Under International Law: America’s New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J.L. & PUB. POL’Y 559, 583 (2002) (justifying the U.S. attack against the Taliban and Al-Qaeda based on the terrorist attacks of September 11); see also Lori Fisler Damrosch & Bernard H. Oxman, *Agora: Future Implication of the Iraq Conflict: Editor’s Introduction*, 97 AM. J. INT’L L. 553, 555 (2003) (describing the United States’ stated justification for the preemptive invasion of Iraq as a continuation of lawful collective self-defense); Henry J. Richardson, *U.S. Hegemony, Race, and Oil in Deciding United Nations Security Council Resolution 1441 on Iraq*, 17 TEMP. INT’L & COMP. L.J. 27, 35–36 (2003) (criticizing the Bush administration’s attempts to demonstrate a just cause for the Iraq War and convince the international community of the war’s legal validity).

requirements of military necessity.<sup>156</sup> In this regard, post-war criticisms of the *Belgrano* sinking have centered on the allegedly disproportionate nature of the *Conqueror's* action and the staggering death toll in the context of a small, localized conflict.<sup>157</sup> This view, analogous to the common law view of proportional self-defense, holds that since Article 51 confines the use of force to self-defense, it also implicitly limits the use of force to whatever is "reasonably necessary under the circumstances" of the conflict.<sup>158</sup>

This view does have some acceptance. For instance, the *San Remo Manual* stresses that the right of self-defense under Article 51 of the U.N. Charter is subject to restrictions and limitations, "including in particular the principles of necessity and proportionality."<sup>159</sup> Further, belligerent powers in the course of naval operations must "not exceed the degree and kind of force . . . required to repel an armed attack."<sup>160</sup> In a similar vein, the justification of a combat action depends on the gravity of the threat confronted.<sup>161</sup> The test that the *San Remo Manual* lays out is perhaps best encapsulated in the commentary to Section 3:

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156. See Patrick McLain, Note, *Settling the Score with Saddam: Resolution 1441 and Parallel Justifications for the Use of Force Against Iraq*, 13 DUKE J. COMP. & INT'L L. 233, 277–78 (2003) (explaining that the Bush Doctrine justified the desired invasion of Iraq by alleging that Iraq pursued or possessed weapons of mass destruction and constituted an imminent threat necessitating the use of force). See generally Gilliland, *supra* note 13, at 979–80 (defining the requirements of military necessity as only that degree and kind of force required to achieve military objectives, in compliance with the laws of war).
157. See Christopher Greenwood, *Neutrality, the Rights of Shipping and the Use of Force in the Persian Gulf (Part I)*, 82 AM. SOC'Y INT'L L. PROC. 146, 169 (1988) (remarking that although the *Belgrano* may have been a legitimate military target, the great loss of life had to be taken into account based on the notion of proportionality); see also Belgrano: *A Triumph or Dastardly Attack?*, W. DAILY PRESS (Bristol), July 5, 2004, at 31, available at WESTLAW, 2004 WLNR 2114505 (noting criticism of the British sinking of the *Belgrano*); cf. Statman, *supra* note 21, at 181 (asserting that the British attack on the Falklands was legally and morally justified even though the Argentinean invasion would not have led to the deaths of any British citizens or acts of oppression).
158. See Greenwood, *supra* note 157, at 169 (commenting that Article 51 limits the use of force to what is reasonably necessary); see also John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 776–77 (2004) (analogizing self-defense in international law and its conventional conception in criminal law, including the doctrine of proportionality). See generally Van Den Hole, *supra* note 55, at 79–80 (illustrating that Article 51 recognized the inherent right of self-defense).
159. See SAN REMO MANUAL, *supra* note 72, at 7 (noting that self-defense under Article 51 is limited by general international law, including necessity and proportionality); see also Gardam, *supra* note 13, at 403 (recognizing proportionality as an essential component of Article 51's self-defense scheme); Leich, *supra* note 59, at 726 (stating that any use of force in self-defense under Article 51 must meet standards of necessity and proportionality to be lawful).
160. See SAN REMO MANUAL, *supra* note 72, at 7 (indicating that the principles of proportionality and necessity also apply to naval warfare); see also Walker, *supra* note 54, at 373–74 (noting that the *San Remo Manual* holds naval commanders accountable for their use of force). See generally Doswald-Beck, *supra* note 70, at 197 (explaining principles behind the manual, including that the principle of proportionality would limit the extent of self-defense measures).
161. See SAN REMO MANUAL, *supra* note 72, at 7 (stating that the justification for use of force depends on the gravity of the threat); see also Christopher M. Petras, *The Use of Force in Response to Cyber-Attacks on Commercial Space Systems—Reexamining "Self-Defense" in Outer Space in Light of the Convergence of U.S. Military and Commercial Space Activities*, 67 J. AIR L. & COM. 1213, 1261 (2002) (commenting that the purpose of self-defense is to repel or prevent an attack, but the act must not exceed the original provocation); see also William H. Taft IV, *Symposium: Reflection on the ICJ's Oil Platforms Decision*, 29 YALE J. INT'L L. 295, 306 (2004) (illustrating that the proportionality of self-defense is measured in light of the threat faced).

The effect of these principles [necessity and proportionality] is that the State which is the victim of an armed attack is entitled to resort to force against the attacker but only to the extent necessary to defend itself and to achieve such defensive goals repelling the attack, recovering territory and removing threats to its future security.<sup>162</sup>

Similarly, the International Law Commission holds that proportionality is “inherent in the notion of self-defence.”<sup>163</sup> It defines *proportionality* in terms of the U.N. Charter, a clear allusion to Articles 51 and 2(4).<sup>164</sup> This view implies that the very concept of self-defense entails a measured response; a reaction must be in proportion to the objective and keep in mind the original stimulus in order to remain legal.<sup>165</sup>

The International Court of Justice takes a similar view, explaining that “there is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.”<sup>166</sup>

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162. See SAN REMO MANUAL, *supra* note 72, at 7 (clarifying the limits on the use of force in self-defense); see also Michael C. Bonafede, Note, *Here, There, and Everywhere: Assessing the Proportionality Doctrine and U.S. Uses of Force in Response to Terrorism After the September 11 Attacks*, 88 CORNELL L. REV. 155, 169–70 (2002) (listing limitations on the Article 51 right to self-defense). See generally D.G. Stephens & M.D. Fitzpatrick, *Legal Aspects of Naval Mine Warfare*, 21 LOY. L.A. INT'L & COMP. L.J. 553, 569–70 (1999) (offering general proposition that proportionality of force by a state runs on a continuum depending on the legal authority for such force).
163. See Crawford, *supra* note 53, at 167 (finding proportionality inherent in the notion of self-defense); see also John Alan Cohan, *The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law*, PACE INT'L L. REV. 283, 337 (2003) (holding proportionality to be a fundamental law of war); see also Jill M. Sheldon, Note, *Nuclear Weapons and the Laws of War: Does Customary International Law Prohibit the Use of Nuclear Weapons in All Circumstances?*, 20 FORDHAM INT'L L.J. 181, 223 (1996) (explaining that the requirements of proportionality and necessity limit the right of self-defense).
164. See Crawford, *supra* note 53, at 167 (defining *proportionality* with reference to U.N. Charter Articles 2(4) and 51); see also Brad R. Roth, *Terror Symposium: Terrorism and the Inherent Right to Self-Defense*, 10 MSU-DCL J. INT'L L. 542, 544 (2001) (noting that Article 51 clearly permits force only when it comes within the “inherent right of self-defense,” incorporating the concept of proportionality). See generally U.N. CHARTER art. 51 (stating that nothing in the U.N. Charter impairs the collective right of self-defense against armed aggression).
165. See Gardam, *supra* note 13, at 404 (asserting that a state, in defending itself, must always keep proportionality in mind or it risks crossing the line into unlawful reprisal); see also Richard J. Grunawalt, *The JCS Standing Rules of Engagement: A Judge Advocate's Primer*, 42 A.F. L. REV. 245, 251 (1997) (noting that the proportion of force used must be no greater than the degree of force reasonably required to counter the hostile act); cf. Yoo, *supra* note 158, at 757 (defining proportionality in the context of preemptive self-defense as the amount of force necessary to prevent the harm weighed against versus the likelihood of preventing the harm and its magnitude of harm).
166. See *Military and Paramilitary Activities (Nicaragua v. U.S.)*, 1986 I.C.J. 14, 94 (June 27) (stating that self-defense warrants only measures that are necessary and proportional to the action); see also *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 245 (July 8) (discussing that the dual conditions of proportionality and necessity apply under Article 51, no matter the means of force employed); see also Kastenber, *supra* note 44, at 108–10 (indicating that the ICJ relied on both customary international law and the language of Article 51 in the *Nicaragua* decision).

Therefore, the principle of proportionality is a well-established norm in international law governing naval warfare, including the *Conqueror's* action.<sup>167</sup> Exceeding the limits of proportionality therefore opens a subject to charges of wrongful or unlawful conduct—in a word, aggression.<sup>168</sup>

The next question addresses the definition of *proportionality*. As evidenced by Admiral Woodward's frustration at the beginning of this section, the problem with a common law self-defense approach to proportionality is that it effectively permits the aggressor to define the terms of an engagement.<sup>169</sup> In the case of the *General Belgrano*, Sir Rex Hunt, the British governor of the Falklands, protested that such an interpretation would permit action only as the Argentineans saw fit.<sup>170</sup> The result would be a paradox where international law would effectively constrain only those acting in self-defense.<sup>171</sup>

However, international law does not mandate such absurd outcomes. It defines *proportionality* not only in terms of the aggression committed, but also relative to what is required to undo

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167. See TANKER WAR, *supra* note 9, at 151–52 (establishing that proportionality is a norm in international law on naval warfare); see also Gardam, *supra* note 13, at 391 (asserting that proportionality is a fundamental component of the law on the use of force). See generally Stephens & Fitzpatrick, *supra* note 162, at 567–68 (explaining the historic Caroline exchange, which established that self-defense could be legally justified only under certain circumstances).
168. See Crawford, *supra* note 53, at 167 (clarifying lawful limits of international armed conflict and self-defense); see also Mary Ellen O'Connell, *American Exceptionalism and the International Law of Self-Defense*, 31 DENV. J. INT'L L. & POL'Y 43, 47–48 (2002) (arguing that, prior to the 2003 U.S. invasion of Iraq, such an attack would constitute unlawful aggression because no legitimate self-defense justification would support an invasion).
169. See Abraham D. Sofaer, *Joint Luncheon with the Section of International Law and Practice of the American Bar Association*, 82 AM. SOC'Y INT'L L. PROC. 420, 426–27 (1988) (arguing that proportional limits on self-defense disadvantage weaker states that are unable to use proportional countermeasures against stronger aggressor states); cf. Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 416 (1991) (contending that proportional force requirements in self-defense disadvantage women who use a weapon against a male aggressor armed only with his hands, given the natural strength disparity between women and men). But see Cohan, *supra* note 163, at 105 (recognizing that proportional self-defense also allows the injured state to take into account prior aggressions, as "cumulative proportionality," in determining the appropriate degree of force to use in response).
170. See REX HUNT, MY FALKLAND DAYS 228 (2d ed. 2002) (contending that it would be "absurd" to allow an aggressor to dictate the limits of a military engagement); see also Belgrano: *A Triumph or Dastardly Attack?*, W. DAILY PRESS (Bristol), July 5, 2004, at 31 (describing the *Belgrano's* apparent retreat as only temporary and noting that its intent was to fool the British into not attacking it, even though it was a fully armed warship). See generally Jane A. Meyer, Note, *Collective Self-Defense and Regional Security: Necessary Exceptions to a Globalist Doctrine*, B.U. INT'L L.J. 392, 398 (1993) (arguing that a narrow interpretation of an "armed attack" under Article 51 could severely restrict the ability of a nation to defend itself from actions that, although threatening or harmful, do not rise to the level of an actual attack).
171. See *People v. McLeod*, 25 Wend. 483, 1841 N.Y. LEXIS 240 at \*8 (N.Y. Sup. Ct., July 1841) (providing that the proportionality constraints under common law self-defense were to be nothing less than what was absolutely necessary); see also Dale Stephens, *Rules of Engagement and the Concept of Unit Self-Defense*, 45 NAVAL L. REV. 126, 151 (1998) (stating that the proportionality requirement in common law self-defense limits the right to only the most urgent situations and that the need for immediacy of an actual or imminent attack is problematic); see also Nabati, *supra* note 54, at 777 (demonstrating that the concept of proportionality invokes very specific time constraints in common law self-defense).

the actions and prevent their recurrence in the future:<sup>172</sup> “Proportionality contemplates responses parallel in intensity to an initial aggression and designed to discourage future attacks.”<sup>173</sup>

Similarly, the *United States Commander’s Handbook on the Law of Naval Operations* explains proportionality as “[t]he requirement that the use of force be in all circumstances limited in intensity, duration and scope to that which is reasonably required to counter the attack or threat of attack and to ensure the continued safety of U.S. forces . . . .”<sup>174</sup> Consequently, the scale of the British action was defined by the British objective of retaking the Falklands and not by the limited engagements that had taken place hitherto in the conflict.<sup>175</sup>

Therefore, although the Argentines are correct in pointing out that their “armed forces had gone to great lengths to ensure that the enemy sustained no casualties,” most experts agree such actions are not dispositive in the proportionality equation.<sup>176</sup> Indeed, it was in Argentina’s strategic interest to limit bloodshed to strengthen its diplomatic hand in negotiations taking place elsewhere.<sup>177</sup> Britain, however, was operating on an entirely different premise: “[T]he British strategic purpose was to defeat the enemy’s air and sea forces before the amphibious landing force

172. See *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1349 (2004) (explaining an instance when the President of the United States used proportional self-defense to prevent an additional terrorist attack); see also Bialke, *supra* note 52, at 20–21 (comparing the once-limited rule of self-defense to the now broader definition, which includes preemptive strikes to prevent future attacks). But see *State v. Ashley*, No. 9605003410, 1998 Del. Super. LEXIS 357 at \*13 (Del. Super. Ct., Aug. 24, 1988) (showing that when there is no pattern or chance for recurrence, self-defense will not be an option for response).

173. TANKER WAR, *supra* note 9, at 156 (giving examples of proportional self-defense tactics equal in intensity to the initial aggression).

174. See ANNOTATED SUPPLEMENT, *supra* note 92, at 307; see also Thomas C. Wingfield, *Forcible Protection of Nationals Abroad*, 104 DICK. L. REV. 439, 465 (2000) (defining *proportionality* as the reciprocal limitation on the scope, duration and intensity of the response).

175. See Mueller, *supra* note 108, at 623 n.59 (indicating that the British objectives for retaking the Falklands centered on trade and not any military objectives); see also Gilliland, *supra* note 13, at 992–93 (claiming that the scale of the British action in the Falklands was small because of the isolation of the territory and the imbalance in the size of the forces). See generally Watkins, *supra* note 11, at 651 (describing the retaking of the Falklands by the British and claiming it to be the reestablishment of British pride and sovereignty).

176. See MORO, *supra* note 22, at 126 (stating that this view does not trigger concerns that, in allowing the defending state too much latitude in checking the aggressor, the exception may swallow the rule); see also William J. Fenrick, *The Rule of Proportionality in Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 107 (1982) (noting that too expansive an interpretation may effectively suspend the proportionality principle for the duration of hostilities); Thomas J. Herthel, *On the Chopping Block: Cluster Munitions and the Law of the War*, 51 A.F. L. REV. 229, 248 (2001) (acknowledging that the proportionality standard does recognize casualties); Eric Talbot Jensen, *Unexpected Consequences from Knock-on Effects: A Different Standard for Computer Network Operations?*, 18 AM. U. INT’L L. REV. 1145, 1177 (2003) (discussing that the proportionality factor must take into account likely casualties but adding that other factors may be considered, including military advantages and precautions).

177. See MORO, *supra* note 22, at 133–40; see also Goldie, *supra* note 41, at 748 (emphasizing that the Argentinean strategy was tactically offensive in nature); Jerome I. Levinson, *The International Financial System: A Flawed Architecture*, 23 FLETCHER F. WORLD AFF. 1, 11 (1999) (commenting that if Argentina pursued a radical strategy in the retaking of the Falklands, it would ruin access to other financial markets); Franck, *supra* note 8, at 123–24 (remarking that the bloodshed occurring from the Argentine invasion of the Falklands would have been “unthinkable” if the international community had fought against armed aggression).

was committed. To achieve this, it was vital to seize the earliest opportunity to remove one or more major Argentine surface threats from the battlefield.”<sup>178</sup>

Under international law, Britain was not obliged to calibrate its actions to the gradations hitherto used by Argentina<sup>179</sup>—a response need not be limited to the level of force used in the preceding or initiating attack: “[I]n the case of action taken for the specific purpose of halting and repelling an armed attack, this does not mean that the action should be more or less commensurate with the attack. Its lawfulness cannot be measured except by its capacity for achieving the desired result.”<sup>180</sup>

This view is embodied in the current International Law Commission report, which provides that “Article 51 [of the ILC articles] relates proportionality primarily to the injury suffered.”<sup>181</sup> The ILC does include two other factors that might be incorporated into the calculus for determining proportionality: the “gravity of the internationally wrongful act” and “the rights in question.”<sup>182</sup> Argentina’s wrongful act was the use of force in violation of Article 51 to

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178. See HASTINGS & JENKINS, *supra* note 26, at 148; see also McClain, *supra* note 69, at 96–97 (referring to a specific example of the British attacking an Argentinean sea vessel as part of their effort to defeat the Argentinean sea forces during the battle for the Falklands); see also Truver, *supra* note 3, at 1236 (describing the sinking of the *General Belgrano* by the British as a naval attack on the Argentineans, showing that it was the strategy of the British to defeat the enemy’s sea forces). See generally Richard A. Morgan, *Military Use of Commercial Communication Satellites: A New Look at the Outer Space Treaty and “Peaceful Purposes,”* 60 J. AIR L. & COM. 237, 322 (1994) (stating that the British purposefully acted in self-defense during the Falklands controversy).

179. See David J. Bederman, Book Review, *The New International Law in an Old Age of Indeterminacy: The Shield of Achilles: War, Peace, and the Course of History*, 81 TEX. L. REV. 1521, 1540 (2003) (clarifying that although modern international law allows for gradations, it recognizes that not all states have sovereign equality and that some will ultimately be stronger in military might); see also Christopher J. Le Mon, Note, *Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested*, 35 N.Y.U. J. INT’L L. & POL. 741, 748 (2003) (noting that international law no longer follows a system of gradation based on levels of combat). But see David J. Bederman, *The ILC’s State Responsibility Articles: Counterintuiting Countermeasures*, 96 AM. J. INT’L L. 817, 831 (2002) (announcing that a calibrated recourse to a “nonforcible” attack may be preferable in some instances).

180. See *Addendum to Eighth Report on State Responsibility*, UN Doc. A/CN.4/318/Add. 8, Y.B. INT’L L. COMM 13, at 69–70 (1981) (stating that state responsibility served as a deterrent to international concepts such as obligations); Bederman, *supra* note 179, at 822 (stating that actions for halting or repelling an attack do not mean they have to be more or less commensurate with the attack); see also TANKER WAR, *supra* note 9, at 152 (finding that the responses need not be identical to be proportional).

181. See Crawford, *supra* note 53, at 344 (maintaining that proportionality primarily relates to the injury suffered in effort to find equitable results); see also Thomas Michael McDonnell, *Cluster Bombs over Kosovo: A Violation of International Law?*, 44 ARIZ. L. REV. 31, 68 (2002) (noting that the proportionality principle in warfare limits the means and methods, especially in the area of the injury suffered); Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT’L L. 1, 33 (2004) (maintaining that proportionality emphasizes a prohibition of “superfluous injury or unnecessary suffering”).

182. See Crawford, *supra* note 53, at 344; see also Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: Use of Force and Arms Control*, 98 AM. J. INT’L L. 597, 598 (2004) (listing the factors of self-defense and proportionality and including the gravity of the wrongdoing as the triggering of the right); Ben Saul, *Compensation for Unlawful Death in International Law: A Focus on the Inter-American Court of Human Rights*, 19 AM U. INT’L L. REV. 523, 537–38 (2004) (considering the ILC’s draft for dealing with international wrongs and finding human rights and the gravity of the wrong to be two factors in the proportionality of international warfare).

settle a territorial dispute;<sup>183</sup> Britain's rights in terms of the ILC definition were its rights to territorial integrity under Article 2(4) of the U.N. Charter.<sup>184</sup>

Therefore, the proportionality of Britain's actions is to be evaluated in terms of the force required to eject the Argentinean garrison from the Falklands, rather than the strength of the force that Argentina had hitherto committed to the conflict. Admiral Woodward's objectives came direct from the British Cabinet—he was to ensure that “the islands returned to British administration.”<sup>185</sup> Thus, the return of the islands was the yardstick against which his actions were to be evaluated.<sup>186</sup>

With immediate reference to the *Belgrano* sinking, proportionality is calculated based on the contribution the cruiser could have made to the Argentine effort to retain the Falklands, rather than on her prior actions in the conflict.<sup>187</sup> Argentine experts such as Air Commodore Moro vigorously protest that as an elderly cruiser at the end of her effective life, the *General Belgrano* could have done little to stop the British force from sailing in and reoccupying the Falk-

183. See Sean D. Magenis, Note, *Natural Law as the Customary International Law of Self Defense*, 20 B.U. INT'L L.J. 413, 431 n.96 (2002) (remarking that the Argentinean use of force in the Falklands territorial controversy was “unjustified”); see also John Yoo, *Agora: Future Implication of the Iraq Conflict: International Law and the War in Iraq*, 97 AM. J. INT'L L. 563, 572 n.47 (2003) (labeling Argentina's use of force as a violation of Article 51).

184. See U.N. CHARTER art. 51, art. 2 para. 4 (stating that the United Nations will take measures to maintain international peace and that members shall refrain from the use of force in territorial disputes); see also Jason Barkham, *Information Warfare and International Law on the Use of Force*, 34 N.Y.U. J. INT'L L. & POL. 57, 74–75 (2001) (proclaiming that the British did have the right to act in anticipatory self-defense under Article 51); Watkins, *supra* note 11, at 670–71 (finding Britain's right to invoke self-defense written in Article 51).

185. See HASTINGS & JENKINS, *supra* note 26, at 80; see also Schmitt, *supra* note 105, at 759 n.104 (showing that Admiral Woodward was concerned that the orders from the administration, about retaking the Falklands, would include instructions to wait for the enemy to fire the first shot); Sir David Williams, *Globalization and Governance: The Prospects for Democracy: Part II: Globalization, Democracy, and Domestic Law*, 10 IND. J. GLOBAL LEGAL STUD. 157, 169 (2003) (stressing that it was the Cabinet's decision to commit the large military forces to the armed conflict over the Falklands). See generally Philips, *supra* note 66, at 17 (explaining Admiral Woodward's plan to return the Falklands to the British and determining the Argentineans as an adversary).

186. See Robert Garrahan, *Reciprocity, Proportionality, and the Law of Treaties*, 34 VA. J. INT'L L. 295, 398–99 (1994) (applying Robert Ago's principle of proportionality in determining that the same consequences can follow any breach of international obligation); see also Watkins, *supra* note 11, at 674 (showing that Ago's defense actions could be measured by the return of the Falklands to Britain because Britain has continuously held the Falklands and due to that fact the Argentinean actions were unjustified). See generally George K. Walker, *Principles for Collective Humanitarian Intervention to Succor Other Countries' Imperiled Indigenous Nationals*, 18 AM. U. INT'L L. REV. 35, 49 (2002) (citing to Ago's principle of necessity in international warfare and stating that it has been supported by case law).

187. See Gardam, *supra* note 13, at 393 (questioning whether the sinking of the *General Belgrano* with a thousand men on board was proportional to the threat the cruiser could have posed); see also Gilliland, *supra* note 13, at 993 n.130 (stating that the British sinking of the *Belgrano* was a proportional response to the radical evasive steering of the ship in an area that was being patrolled by British submarines); Watkins, *supra* note 11, at 651 (describing the menacing threat of the *Belgrano* to the British fleet just two days before the British sank the ship).

lands.<sup>188</sup> Seen in this light, the loss of the ship and about 350 people does indeed seem “the most merciless, and apparently most unconscionable, act of the war.”<sup>189</sup>

Therefore, the legality of the *Conqueror*’s action seems to be dependent on whether the *Belgrano* posed a threat to the British war effort. Given the popular perception of an easy British victory, it is easy to understand why some scholars are skeptical of the sinking.<sup>190</sup> For instance, Professor Ingrid Detter writes: “[I]t is highly questionable whether the sinking was compatible with international law, especially as *The General Belgrano* . . . posed no threat to the British armed forces.”<sup>191</sup>

Professor Detter’s view reflects how the British became victims of their own success. The Malvinas garrison was routed so thoroughly and the British success was so convincing that the conflict seemed completely lopsided.<sup>192</sup> The *Belgrano* affair suffers from the same hindsight bias. As Admiral Woodward noted: “It had been, by any standards, a textbook operation . . . which

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188. See MORO, *supra* note 22, at 117–41 (opining that the *General Belgrano* was nearing the “outer limits” of its useful life); see also *Mayday in the South Atlantic*, ECONOMIST (U.S.), May 8, 1982, at 19 (describing the *General Belgrano* as a creaking 43-year-old cruiser). But see Middleton, *supra* note 87, at D2 (claiming that in the new era of military encounters, the age of vessels is no longer dispositive of their effectiveness, as the weapons they carry have become technologically advanced).

189. See MORO, *supra* note 22, at 125 (denouncing the British accounts of the events leading up to the sinking of the *General Belgrano* as conflicting and “divorced from reality”); see also Stannard, *supra* note 12, at 624 (reporting that Margaret Thatcher, then Prime Minister of England, had been highly criticized for her decision to bomb the *General Belgrano*); Perry, *supra* note 17, at B8 (describing the gruesome manner in which many of the 323 crew members aboard the *General Belgrano* perished); Nicholas Tozer & Antonio Rodriguez Villar, *Thatcher Being Sued Over Falklands War*, UNITED PRESS INT’L, June 30, 2000 (noting the comments of attorneys for the individuals who lost family members in the sinking of the *General Belgrano*, who stated that Margaret Thatcher “violated the right to life” of the Argentine servicemen when she ordered the vessel torpedoed).

190. See Woodward, *supra* note 120, at 19 (quoting a British captain on board the *Conqueror* who stated that the Argentine fleet was “pathetic,” its ships were largely obsolete and the *General Belgrano* crew members exhibited minimal skills in the operation of their vessel). See generally Lake, *supra* note 22, at 86 (emphasizing the Argentine navy’s lack of aggressiveness and effectiveness in comparison to that of the British naval fleet).

191. See DETTER, *supra* note 84, at 184; see also R. Laidlaw, *Belgrano Blots UK’s Book*, SUNDAY MAIL, Sept. 22, 1985 (claiming that the commanding officer of the *Conqueror* did not see the *General Belgrano* as an immediate threat to anyone in the British armed forces); *Court OKs Suit Against Thatcher in Sinking*, UNITED PRESS INT’L, July 18, 2000 (commenting that a member of the British Parliament stated the *General Belgrano* posed no threat to British forces and that the decision to sink her was based on ulterior motives). But see Beaumont, *supra* note 123, at 7 (explaining that most historians underestimate the threat level the *General Belgrano* posed to the British campaign to reclaim the Falkland Islands).

192. See, e.g., W. Michael Reisman, *The Struggle for the Falklands*, 93 YALE L.J. 287, 287 (1983) (commenting that the U.S. media viewed the “Argentinean motives and capabilities with derision and encouraged the notion that the Falklands War was comic opera”); see also Lawrence Freedman, *Reconsiderations: The War of the Falkland Islands, 1982*, FOREIGN AFF., Fall 1982, at 196 (describing the British victory in reclaiming the Falklands as appearing to be effortless); *General Leopoldo Galtieri Argentine Dictator Who Ordered the Invasion of the Falkland Islands to Distract Attention from the Economy*, DAILY TELEGRAPH (London), Jan. 13, 2003, at 23 (alleging that the Argentine military never considered that England would send 8,000 British troops and a large task force of warplanes and warships to defend English control of the Falklands).



is probably why it all sounds so simple, almost as if anyone could have done it. The best military actions always do.”<sup>193</sup>

The assessments of the May 1 situation coming from Woodward’s operations room and from the British naval headquarters at Northwood could not have been more different. The Argentines had apparently launched a deadly pincer movement, spearheaded by the *Belgrano* on the one hand and the *Veintecinco de Mayo* on the other.<sup>194</sup> “The aircraft of the one, and the Exocet-carrying destroyers of the other, could both get in close to us very quickly.”<sup>195</sup> Had that happened, the Argentines would have held all the tactical advantages; the British would have had only limited countermeasures available.<sup>196</sup> Woodward’s assessment of the situation was grim:

It was clear enough that unless we were extraordinarily lucky we could find ourselves in major trouble here, attacked from different directions, by different weapons requiring different responses, all in the half-light of a dawn which would be silhouetting us. At the very least, it was going to be a two-pronged strike, a straightforward pincer movement on us. . . . [During recent exercises, the Americans] had failed to deal with a much lesser threat, with a far greater capability.<sup>197</sup>

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193. See WOODWARD & ROBINSON, *supra* note 2, at 161 (commenting that the British Royal Navy had invested many years in training its naval officers to ensure the success of this type of operation); see also Walker, *supra* note 186, at 80 (concluding that decisions made during the time of war may be clouded, while hindsight is always 20/20); David Nagy & Robert S. Dudley, *Lessons for U.S. in Britain's Victory*, U.S. NEWS & WORLD REP., June 14, 1982, at 37 (arguing that the British victory in reclaiming the Falklands updated the blueprint for how to use overwhelming power in remote locations).
194. See WOODWARD & ROBINSON, *supra* note 2, at 147 (declaring that the movements of the *General Belgrano* and the *Veintecinco de Mayo* appeared to Admiral Woodward to be a “classic” pincer movement); see also *Sinking the Belgrano was a Decisive Military Action*, SUNDAY TIMES, Oct. 24, 1993 (noting that Admiral Woodward had every reason to believe the Argentine forces were engaged in a pincer movement, which required an immediate response to protect the British navy). But see *Belgrano Families Court Battle*, BIRMINGHAM EVENING MAIL, July 4, 2000, at 21 (asserting that key members of the Chief of Defense staff and several naval admirals believed the British navy was at serious risk of an imminent Argentine pincer movement).
195. See WOODWARD & ROBINSON, *supra* note 2, at 149 (indicating that the calm weather allowed for rapid movement via air or sea); see also *Argentine Airpower in the Falklands War: An Operational View*, AIR & SPACE POWER J., Aug. 20, 2002 (discussing how one of the greatest British weaknesses during the Falkland conflict was their lack of long-range, early-warning aircraft, which allowed Argentine air forces to fly in relatively undetected); *Sinking the Belgrano Was a Decisive Military Action*, SUNDAY TIMES, Oct. 24, 1993 (recognizing that the *General Belgrano* and her escorting destroyers were fitted with anti-aircraft and anti-ship missiles that had a range of 13 miles).
196. See WOODWARD & ROBINSON, *supra* note 2, at 149 (arguing that the long southern night gave the Argentine navy an extended period of darkness to execute the pincer movement virtually undetected); see also Watkins, *supra* note 11, at 673 (examining how international laws of war consider the capability and reaction time of the forces in determining the lawfulness of military action); Steve Polak, *War Best Fought by Veterans*, AUSTRALIAN, Mar. 21, 2000, at C13 (affirming that successful pincer movements can offer an enormous tactical advantage to the orchestrating force).
197. See WOODWARD & ROBINSON, *supra* note 2, at 149 (positing that the more than 200-mile distance between the *General Belgrano* and the *Veintecinco de Mayo* did not decrease the potential effectiveness of the pincer movement); see also David, *supra* note 19, at 4 (quoting Admiral Woodward that he was concerned about the Argentine forces engaging in a pincer attack and therefore decided to “take out one claw of the pincer”). See generally Philips, *supra* note 66, at 4 (affirming the decision of Admiral Woodward to fire upon the *General Belgrano* in the context of the international rules of war).

The situation, therefore, was significantly more precarious than is popularly believed.<sup>198</sup> Under the circumstances, Woodward's choices were clear: "I had to take out one claw of the pincer."<sup>199</sup> Indeed, he would have far preferred to take out the carrier, but he had no idea of its location.<sup>200</sup>

Of course, Admiral Woodward is hardly a disinterested historian. A cynic might challenge the veracity of his account, written years after the events transpired, particularly if the admiral and his civilian superiors were anxious to avoid unwelcome trips to Strasbourg or even the Hague.<sup>201</sup> However, other experts have independently arrived at the same conclusions that Woodward recorded in his memoirs.<sup>202</sup> They agree that the *Belgrano* task force was perilously close to the Burdwood Bank, shallows over which it would have been impossible for the British to have maintained their observation of the Argentinean flotilla.<sup>203</sup> It would also have put the *Belgrano*

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198. See Elliott, *supra* note 148, at 6 (expressing the defense secretary's view that the *General Belgrano* engagement was extremely dangerous because of the mobile nature of seafaring vessels and therefore required immediate military action); see also *Military Leader, Not a Moralist*, FIN. TIMES (London), Jan. 30, 1992, § 1, at 18 (noting that Admiral Woodward, an experienced military officer, believed the *General Belgrano*, which had been involved in the pincer maneuver previously, intended to engage in such a tactic again); *Timing of Attack on Belgrano*, TIME, Jan. 9, 1992 (describing the precarious position of the British naval fleet as the pincer movement was executed by the *General Belgrano* and the *Veintecinco de Mayo*).
  199. See WOODWARD & ROBINSON, *supra* note 2, at 149 (indicating that the solution to the pincer movement predicament had to be determined quickly); see also Kenneth J. Hagan, *Sink the Belgrano!*, N.Y. TIMES, June 14, 1992, at G22 (remarking that Admiral Woodward viewed the time immediately prior to eliminating one part of the pincer movement as the only time he believed he risked defeat by the Argentine navy).
  200. See FREEDMAN, *supra* note 44, at 51 (indicating that the British war cabinet had given permission for a submarine to sink the *Veintecinco de Mayo*; however, no submarine was able to locate her); see also WOODWARD & ROBINSON, *supra* note 2, at 149 (expressing that the *General Belgrano* and her destroyers were a second-choice target thrust to the forefront because the British fleet was unable to locate the preferred carrier target, the *Veintecinco de Mayo*).
  201. See ARTHUR GAVSHON & DESMOND RICE, *THE SINKING OF THE BELGRANO* 111 (1984) (acknowledging the position of Captain Bonzo of the Argentine navy that he was not engaging in a pincer movement, as evidenced by the 350-mile separation between the *General Belgrano* and the *Veintecinco de Mayo*); see also Stannard, *supra* note 12, at 624 (recognizing that families of the victims aboard the *General Belgrano* did sue Britain under Article 2 of the European Convention on Rights).
  202. See FREEDMAN, *supra* note 44, at 53 (asserting that British forces acted in accordance with accurate intelligence stating the Argentine government had ordered a general attack involving the *General Belgrano*); see also MIDDLEBROOK, *supra* note 4, at 151 (claiming that the *General Belgrano* and her escorting destroyers were not on a "summer cruise" but instead a mission to destroy the British aircraft-carriers); Alan Travis, *The Day in Politics: Ponting Advised Us Against Disclosure—Heseltine/Parliamentary Row Over Official Secrets Trial of Civil Servant*, GUARDIAN (London), Feb. 19, 1985 (noting the comments of the defense secretary that the presence of the *General Belgrano* was a "major threat" to the British naval fleet). But see GAVSHON & RICE, *supra* note 201, at 111 (denouncing the assertion of the British ministry of defense that the *General Belgrano* was part of a pincer movement).
  203. See MIDDLEBROOK, *supra* note 4, at 151 (alleging that had the British naval fleet lost the *General Belgrano* over the Burdwood Bank, the loss of British life could have been tremendous); see also Lake, *supra* note 22, at 86 (reporting that it would not only be difficult to trail the *General Belgrano* in the shallow water, but that if detected a submarine would be highly vulnerable to attack). But see GAVSHON & RICE, *supra* note 201, at 160 (describing as fanciful the British justification for firing upon the *General Belgrano* because of her proximity to the Burdwood Bank).

within a short dash of Woodward's task force.<sup>204</sup> The situation was critical: "If . . . the *Belgrano* and her escorts had come over the Burdwood Bank that night and loosed off a salvo of Exocets . . . loss of life would have been enormous, the task force would have been crippled, public opinion would have been baying for resignations and courts martial" and the war would be over.<sup>205</sup>

Even one of Woodward's severest critics, Air Commodore Moro, a planner on the Argentine general staff during the conflict, concedes that the admiral and his staff were deeply concerned about a potential Argentine onslaught—an onslaught they believed they could not weather.<sup>206</sup> This is the determinative fact in evaluating the *Conqueror's* action—ultimately, the admiral's *contemporaneous* assessment is pivotal in evaluating his actions from a legal standpoint.

Under international law, actions are assessed in light of the information available to the commander at the scene.<sup>207</sup> For instance, Protocol I and the Conventional Weapons Convention both limit the liability of the commander to the information available when the decision to launch the attack is taken.<sup>208</sup> The *San Remo Manual* also incorporates this as the standard for naval warfare.<sup>209</sup> The convictions of Axis naval officers at Nuremberg and Tokyo for violating the norms of international maritime warfare were based on what the defendants knew, or should have known, at the time of their decision making.<sup>210</sup>

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204. See MIDDLEBROOK, *supra* note 4, at 151 (claiming that the propinquity of the British fleet to the Burdwood Bank greatly increased the opportunity for the *General Belgrano* to effectively use her Exocets); see also Norton-Taylor, *supra* note 10 (outlining the positions of the defense secretary and the armed forces minister that the close proximity of the *General Belgrano* to the TEZ posed a major threat to the British fleet). But see FREEDMAN, *supra* note 44, at 51–52 (arguing that the British task force was in no danger of an attack by the *General Belgrano*, as she had reversed course and was traveling away from the border of the TEZ).

205. See MIDDLEBROOK, *supra* note 4, at 151 (referring to a statement by a British official regarding the sinking of the Argentine ship); see also Steven Rattner, *Mrs. Thatcher Under Attack at Home Over Cruiser*, N.Y. TIMES, May 5, 1982, at A18 (quoting Thatcher's statement defending the sinking of the Argentine cruiser).

206. See MORO, *supra* note 22, at 123 (stating that the British commander viewed the Argentine forces as an extreme threat). But see FRITZ L. HOFFMANN & OLGA MINGO HOFFMANN, SOVEREIGNTY IN DISPUTE: THE FALKLANDS/MALVINAS: 1493–1982, at 169 (1984) (suggesting that the Argentine ship posed no real threat to the British).

207. See Nathan A. Canestaro, *Legal and Policy Constraints on the Conduct of Aerial Precision Warfare*, 37 VAND. J. TRANSNAT'L L. 431, 457 (2004) (referring to the principle of military necessity); see also Wingfield, *supra* note 174, at 137–38 (stating that a commander's actions are judged based on the information available to him at the time).

208. See TANKER WAR, *supra* note 9, at 129; see also Walker, *supra* note 186, at 80–81 (acknowledging that under Protocol I a commander's liability is judged based on his assessment of the information available); Walker, *supra* note 54, at 373 (stating that Protocol I of the Geneva Convention mandates that a commander's actions be judged based on his assessment of the information available).

209. See SAN REMO MANUAL, *supra* note 72, at 22 (stating that commanders shall do everything in light of the information available to ensure that attacks are limited to military objectives); see also George K. Walker, *The Lawfulness of Operation Enduring Freedom's Self-Defense Responses*, 37 VAL. U. L. REV. 489, 529 (2003) (indicating that the *San Remo Manual* is in agreement with Protocol I); George K. Walker, *Self-Defense Against the Use of Force in International Law*, 91 AM. J. INT'L L. 757, 759 (1997) (book review) (stating that the legitimacy of an attack is determined based on the information that the commander knew at the time).

210. See SAN REMO MANUAL, *supra* note 72, at 22 (commenting on the rules regarding a commander's decision to attack); see also Anthony D'Amato, *Superior Orders vs. Command Responsibility*, 80 AM. J. INT'L L. 604, 607 (1986) (referring to the Nuremberg trial where it was held that a commander is judged based on what he knew or should have known); see also Lara Liebman, *From Nuremberg to Bosnia: Consistent Application of International Law*, 42 CLEV. ST. L. REV. 705, 732–33 (1994) (commenting on the defense of superior orders as it was used in the Nuremberg trials).

And on this pivotal point—the admiral’s contemporaneous assessment—the facts are not in dispute. Both sides agree that the British leadership feared the *Belgrano* and the threat she represented to the British task force.<sup>211</sup> They differ on the reasonableness of this fear, but this is ultimately irrelevant.<sup>212</sup> In the context of international law, the plausibility of the commander’s fears is tangential at best; the paramount factor is his contemporaneous assessment.<sup>213</sup> Because Admiral Woodward undoubtedly (and, in light of subsequent events, not unreasonably) feared the *Belgrano*, he was within the bounds of international law in taking action against her.<sup>214</sup>

It is significant that Admiral Woodward and the British leadership were cognizant of proportionality concerns on both legal and diplomatic grounds.<sup>215</sup> For instance, gravely concerned about the threat posed by the Argentine air force, they considered tactically advantageous attacks on bases on the Argentine homeland.<sup>216</sup> However, there was no question that such a raid would have been “viewed as a major escalation and was ruled out for this reason.”<sup>217</sup>

The *Belgrano*, however, was in an altogether different category. Unbeknownst to her crew, the Royal Navy had observed her being refueled on the morning of May 1.<sup>218</sup> Such a refueling strongly hinted that the *Belgrano* task force was sailing on a long mission.<sup>219</sup> Thereafter, although the task force stayed out of the engagement zone, it seemed to be positioning itself as part of an overall Argentine pincer strategy aimed at denying Woodward access to the Falklands, if not

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211. See MORO, *supra* note 22, at 123 (noting that the British commander believed the Argentine forces posed a serious threat); see also WOODWARD & ROBINSON, *supra* note 2, at 161 (referring to the threat posed by the Argentine ship); Rattner, *supra* note 205, at A18 (referring to a statement by the British prime minister indicating that the Argentine ship posed a serious threat to British forces).
  212. See TANKER WAR, *supra* note 9, at 160 (commenting on the reasonableness of the British commander’s fears); see also Gilliland, *supra* note 13, at 1005 n.130 (arguing that Britain was justified in sinking the *General Belgrano*); *Why Britain Raised the Stakes*, N.Y. TIMES, May 5, 1982, at A26 (commenting on the perceived threat of the Argentine force).
  213. See TANKER WAR, *supra* note 9, at 160 (referring to the British commander’s assessment of the situation); see also Gardam, *supra* note 13, at 413 n.90 (stating that military commanders must reach decisions based on all available information). See generally Fenrick, *supra* note 176, at 109 (referring to Protocol I of the Geneva Conventions).
  214. See MIDDLEBROOK, *supra* note 4, at 127–28 (referring to journal entries of the British commander indicating that he perceived a serious threat). But see PETER CALVERT, *THE FALKLANDS CRISIS: THE RIGHTS AND THE WRONGS* 113 (Pinter, 1982) (arguing that the British sinking of the *General Belgrano* was in violation of international law).
  215. See FREEDMAN, *supra* note 44, at 81 (speaking on the concept of proportionality in war); see also Gardam, *supra* note 13, at 413 n.8 (questioning the proportionality of the action taken by the British commander); Ramey, *supra* note 21, at 39 (describing the principle of proportionality in the rules of war).
  216. See FREEDMAN, *supra* note 44, at 81 (commenting on the perceived threat posed by the Argentine air force).
  217. See *id.* at 81 (commenting on the possible escalation of the war). See generally Doyle, *supra* note 68, at 988–90 (discussing the sinking of the *General Belgrano*).
  218. See MIDDLEBROOK, *supra* note 4, at 148 (stating that the British had been observing the *General Belgrano* for some time prior to the attack); see also HOFFMANN & MINGO HOFFMANN, *supra* note 206, at 169 (noting that the British commander admitted he had been following the Argentine ship for 30 hours prior to the attack). See generally *Britain’s Leader Visits Falklands*, N.Y. TIMES, Jan. 9, 1983, at 1 (referring to Margaret Thatcher’s visit to the Falklands after the war).
  219. See MIDDLEBROOK, *supra* note 4, at 148 (commenting on the *Belgrano* task force). See generally Middleton, *supra* note 87, at 2 (stating that the British ship stalked and sank the *General Belgrano*); Edward Schumacher, *Argentina Confirms Loss of Its Cruiser; Says 123 of 1,042 on Board Have Been Saved*, N.Y. TIMES, May 4, 1982, at A1 (detailing the attack of the *General Belgrano*).

destroying his fleet.<sup>220</sup> Under the circumstances, Woodward was well within his rights to move against an apparent threat to his forces.<sup>221</sup>

There is one final twist in the saga. Argentina maintains that the adverse weather had caused the cancellation of naval operations against the British task force and that the *General Belgrano* was withdrawing from the war.<sup>222</sup> Furthermore, it insists that the British had intercepted signals to this effect and that the British Admiralty was aware of the *Belgrano's* retreat.<sup>223</sup> Therefore, sinking the *Belgrano* was akin to shooting a retreating soldier in the back.<sup>224</sup>

On the other hand, Admiral Woodward contends that he was not aware the *Belgrano* had been ordered to disengage.<sup>225</sup> Because signals intelligence and cipher technology remain highly sensitive and information about them is jealously guarded—even at the expense of negatively affecting Britain's image—the truth of what the admiral knew and when he knew it will remain elusive.<sup>226</sup>

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220. See MIDDLEBROOK, *supra* note 4, at 151 (referring to the Argentine military strategy); see also Gilliland, *supra* note 13, at 1005 n.130 (arguing that the attack on the *General Belgrano* was justified even though the ship was outside the exclusion zone); Watkins, *supra* note 11, at 672–73 (suggesting that Great Britain was within its rights when it sank the Argentine ship, despite the *Belgrano's* position outside of the exclusion zone).
  221. See Astley & Schmitt, *supra* note 74, at 155 n.141 (stating that the *General Belgrano* was a valid military target regardless of its location). See generally Statman, *supra* note 21, at 180–81 (discussing the legality of the British attack on the *General Belgrano*); Watkins, *supra* note 11, at 672–73 (arguing that the British sinking the *General Belgrano* was an act of self-defense).
  222. See MORO, *supra* note 22, at 123 (stating that the commander was ordered to set aside any plan to attack); see also Gilliland, *supra* note 13, at 993 n.130 (commenting that the *General Belgrano* was outside the exclusion zone and was steaming away from it when the *Conqueror* attacked); *The Belgrano Affair, Up to a Point Minister*, ECONOMIST, Nov. 10, 1984, at 18 (expressing that the *Belgrano* was an ancient cruiser well out of gunnery range and possibly sailing away from the task force).
  223. See MORO, *supra* note 22, at 124 (indicating that the location of the *General Belgrano* was not lost on British enemy intelligence); see also *Case Study in the Behavior of an Ally*, ECONOMIST, Nov. 12, 1983, at 49 (indicating that the *Belgrano* was hit as a result of intelligence passed by American satellites); see also General Belgrano: *Cruiser that Died Alone*, ECONOMIST, May 8, 1982, at 29 (positing that the British navy trailed the cruiser ever since it left the Argentine coast).
  224. See MORO, *supra* note 22, at 125 (noting that the Argentine convoy was moving away from the exclusion zone when the *General Belgrano* was sunk); see also Beaumont, *supra* note 123, at 7 (stating that the *General Belgrano* was an aging cruiser and was sunk as it steamed out of the British maritime exclusion zone); James Morton, *McCowan: Indefatigable*, INDEPENDENT (London), Sept. 1, 2003, at 16 (reporting that a British defense document revealed that the *General Belgrano* had been sailing out of the Falklands exclusion zone).
  225. See WOODWARD & ROBINSON, *supra* note 2, at 218 (alleging that at the time he did not know the *General Belgrano* turned for home and safety); see also *Sinking the Belgrano was Decisive Military Action*, SUNDAY TIMES, Oct. 24, 1993 (stating that Admiral Woodward received intelligence and had reason to believe that a full-scale attack was developing). See generally Norton-Taylor, *supra* note 10, at 1 (reporting that Admiral Woodward requested a change in the rules of engagement so that the *Conqueror* could attack the *Belgrano*).
  226. See Elliott, *supra* note 148, at \_\_\_\_ (reporting that then Prime Minister Margaret Thatcher was under ferocious attack for ordering the sinking of the *Belgrano*); see also Ian Leigh, *When the Whistle is Mightier Than the Law*, TIMES (London), Mar. 2, 2004, at 5 (arguing that the British government can protect intelligence without restricting the rights of potential whistle-blowers); *Parliament: Security—Special Branch Quizzes Shayler on Plot*, INDEPENDENT (London), Nov. 1, 2000, at 8 (discussing the public-interest defense against charges of breaching the Official Secrets Act).

For the purpose of evaluating the legality of the *Conqueror's* action, however, it is irrelevant. Even if the *Belgrano* flotilla had been ordered to withdraw, there is no suggestion that it had surrendered.<sup>227</sup> Under international law, a military unit, even one that is retreating, is not entitled to safe conduct until it surrenders.<sup>228</sup> It is the position of the U.S. government, for instance, that “[t]he law of war permits the attack on enemy combatants and enemy equipment at any time, wherever located, whether advancing, retreating, or standing still.”<sup>229</sup>

Thus, for example, the United States was within its rights in destroying retreating Iraqi units from Kuwait City during the first Gulf War on the “highway of death.”<sup>230</sup> Similarly, even if Admiral Woodward had been aware that the *Belgrano* was disengaging from the conflict, he was under no obligation to permit it to escape.<sup>231</sup> If he did, he could not rule out the possibility that Argentina would later use it against him at a time and place of its choosing.<sup>232</sup>

The problem in ultimately evaluating the sinking is that, although both the *San Remo Manual* and Protocol I contain cautions with regard to proportionality, the terms *excessive* and *disproportionate* are not independently defined.<sup>233</sup> Indeed, Protocol I seems to speak largely in

227. See Hagan, *supra* note 199, at G22 (recognizing that the Argentine surface navy withdrew only after the sinking of the *General Belgrano*); see also Norton-Taylor, *supra* note 10, at 8 (expressing that Prime Minister Thatcher did not believe Argentina would withdraw after the *General Belgrano* was sunk); Walter Pincus, *British Got Crucial Data in Falklands, Diary Says*, WASH. POST, Dec. 23, 1984, at A1 (indicating that the order to sink the *Belgrano* was given even when London knew the Argentine fleet was withdrawing).

228. Keith D. Barber, *No Fire This Time: False Accusations of American War Crimes in the Persian Gulf*, 146 MIL. L. REV. 235, 267 (1994) (book review) (asserting that it is permissible to attack enemy forces in retreat); see also SAN REMO MANUAL, *supra* note 72, at 16 (listing classes of vessels exempt from attack, including those granted safe conduct); Doswald-Beck, *supra* note 70, at 202 (recognizing that under customary law, vessels are granted safe conduct by agreement between the parties).

229. Barber, *supra* note 228, at 267 (stating that the law of war permits attack on enemy combatants who are retreating); see also Canestaro, *supra* note 207, at 8 (emphasizing that both the Hague IV Convention and the law of war permit attacks upon valid military targets at any time or place); Patrick J. Sloyan, *Cheney: Fair Fight; Report Says Burials, Bombings of Fleeing Iraqis Legal*, NEWSDAY, Apr. 11, 1992, at 7 (citing the Pentagon report which recognized that the law of war permits the attack of enemy combatants at any time whether advancing, retreating or standing still).

230. See Barber, *supra* note 228, at 267 (discussing the attack by U.S. forces on a retreating Iraqi convoy heading out of Kuwait City); see also Brian Duffy, *A U.S. News Review Reveals Serious Flaws in the Gulf War*, U.S. NEWS & WORLD REP., Mar. 16, 1992, at 35 (reporting that the Bush administration came under pressure to end the war after attacks on Iraqi vehicles on the “highway of death”); Dean Fischer, *Kuwait's Cleanup*, TIME, Jan. 27, 1992, at 26 (noting the reconstruction efforts in Kuwait and on the “highway of death” one year after the attack).

231. See Gilliland, *supra* note 13, at 993 n.130 (commenting that the *General Belgrano's* course did not matter in light of the importance of radical evasive steering when a ship is in an area known to be patrolled by submarines); see also Watkins, *supra* note 11, at 673 (indicating that the law has not traditionally required a state to wait until it is actually attacked before taking measures of self-defense, and several factors are considered); *The Belgrano Affair, Up to a Point Minister*, ECONOMIST, Nov. 10, 1984, at 18 (reporting that the Argentines had been warned that any threat to the British task force anywhere in the South Atlantic would be met appropriately).

232. See TANKER WAR, *supra* note 9, at 153–54 (positing that during hostilities, an Argentine frigate could represent a potential asset for prolonging and perhaps enlarging the conflict); see also General Belgrano, *Cruiser that Died Alone*, ECONOMIST, May 8, 1982, at 29 (indicating that the exclusion zone around the Falklands seemed to imply that the Argentine ships would not be attacked outside it). But see Belgrano's *Captain Recounts Sinking*, N.Y. TIMES, June 14, 1992, at A7 (denying reports that the *General Belgrano* posed a threat to British warships in the area).

233. See SAN REMO MANUAL, *supra* note 72, at 122–24 (explaining that the term *excessive* is somewhat subjective in marginal cases); see also TANKER WAR, *supra* note 9, at 352 (describing the use of necessity and proportionality to determine when to attack or defend a target).

terms of damage to civilian or protected installations, not to an unequivocal military target such as the *Belgrano*.<sup>234</sup> Even approaching the matter from an anti-British angle and including military targets in the ambit of the *San Remo Manual* and Protocol I, experts have concluded that conformance requires commanders to make decisions while considering reasonable military assessments and expectations and the potential resulting damage.<sup>235</sup>

This interpretation, which stretches customary and treaty law to its breaking point in favor of the Argentineans, still favors Admiral Woodward and the decision to sink the *Belgrano*. The British undoubtedly faced a dire and imminent threat:<sup>236</sup> "To take the worst possible case, *Belgrano* and her escorts could now set off toward us and, steaming through the dark, launch an Exocet attack on us from one direction just as we were preparing to receive a missile and bomb strike from the other."<sup>237</sup> That would have left the Royal Navy, already at the end of its tether in logistical support and armament range, two unenviable choices: (1) destruction of the fleet, or (2) to be "squeezed out of our own Total Exclusion Zone like a pip from an orange."<sup>238</sup>

Under such circumstances, when a commander confronts a threat for which his only two options are engagement or withdrawal, he can hardly be faulted for choosing the former. Wood-

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234. See SAN REMO MANUAL, *supra* note 72, at 123 (recognizing that Protocol I considers that those who plan an attack shall ensure that all feasible precautions are taken to avoid losses of civilian lives); see also Astley & Schmitt, *supra* note 74, at 148 n.116 (reiterating that an enemy merchant vessel must be part of the enemy's war-fighting effort before it acquires the character of a military target); see also Roach, *supra* note 74, at 72 (confirming that the *San Remo Manual* adopts the relevant provisions of the First Additional Protocol to the 1949 Geneva Conventions, which prohibit perfidy).

235. See SAN REMO MANUAL, *supra* note 72, at 123 (remarking that the hindsight rule will not be violated if commanders made a decision in good faith on the basis of information that was available to them when they made the decision); see also George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT'L L. 1, 18 (1991) (stating that those responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources available to them at the relevant time); Catherine Wallis, *Legitimate Targets of Attack: Considerations When Targeting in a Coalition*, 2004 ARMY LAW. 44, 46 (2004) (asserting that those ordering or executing an attack must have sufficient information available to determine whether destruction offers a definite military advantage).

236. See Watkins, *supra* note 11, at 673 (concluding that a state may exercise its authority on the high seas in exceptional circumstances when doing so is necessary to forestall a real threat to its territorial integrity and general security); see also General Belgrano; *Cruiser that Died Alone*, ECONOMIST, May 8, 1982, at 29 (reporting that all official statements from the British government have emphasized that the *General Belgrano* was threatening British ships); Pincus, *supra* note 227, at A1 (describing an April 30, 1982, diary passage about the area threatened by the cruiser *Belgrano*).

237. See WOODWARD & ROBINSON, *supra* note 2, at 205 (describing the possibility of an Argentine attack on the British battle group and the necessary evasive action); see also Michael Evans, *Exocet That Still Shocks*, TIMES (London), June 26, 2001 (detailing actual Exocet attack on the HMS *Sheffield* by two Argentine Super Etendard aircraft); *Sinking the Belgrano was Decisive Military Action*, SUNDAY TIMES, Oct. 24, 1993 (stating that Admiral Woodward received intelligence about the aggressive intentions of the Argentine fleet and believed that a full-scale attack was developing).

238. See WOODWARD & ROBINSON, *supra* note 2, at 205 (asserting that Woodward did not want to leave the TEZ but needed to take some form of action); see also Peter Archer, *On British Carrier, Pilot Recounts Order: "Engage,"* N.Y. TIMES, May 10, 1982, at A9 (describing an incident inside the 200-mile TEZ around the Falkland Islands involving an Argentine spy ship); Peter Osnos, *Britain Ends Restrictions in Falklands' Waters*, WASH. POST, July 23, 1982, at A24 (reporting the end of the 200-mile TEZ around the Falklands that Britain had imposed at the height of the South Atlantic crisis).

ward put it succinctly: “[W]hen it may be us or them, my choice was simple enough—*them*.”<sup>239</sup> His data and decision making may have been flawed, but his ultimate decision was almost certainly not disproportionate, and thus not illegal.<sup>240</sup>

## VII. Conclusion

*New occasions teach new duties and responsibilities, and if international law is to remain credible, it must parallel technical developments.*<sup>241</sup>

Four years after diplomatic relations were restored with Britain in 1990, Argentina conceded that the attack on the *General Belgrano* was “a legal act of war.”<sup>242</sup> To his unending credit, Captain Hector Bonzo, commanding officer of the ill-fated *Belgrano*, has always rejected criticism of the *Conqueror*’s action and insisted that he viewed the sinking as a legitimate act of war.<sup>243</sup> He has continually emphasized that he would have sunk any British ship, regardless of its location.<sup>244</sup> As such, he considered his own warship a valid target in wartime.<sup>245</sup> Furthermore, he made clear that his decision to steam away from the TEZ was a temporary maneuver, and his crew was prepared for battle.<sup>246</sup> He explained: “Our mission . . . wasn’t just to cruise around on patrol but to attack . . . . When they gave us the authorisation [sic] to use our weapons, if necessary, we had to be prepared to attack. Our people were completely trained. I would say we were anxious to pull the trigger.”<sup>247</sup>

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239. See WOODWARD & ROBINSON, *supra* note 2, at 149 (pointing to the occasional necessity of attacking during wartime); see also Mark J. Osiel, *Obedying Orders: Atrocity, Military Discipline, and the Law of War*, 86 CAL. L. REV. 939, 1004 (1998) (arguing that military necessity will justify killing surrendering soldiers if they could not be taken as prisoners of war without abandoning the mission); Sharp, *supra* note 112, at 96 (emphasizing that sometimes military necessity permits the destruction of enemy soldiers or even other people whose destruction is incidentally unavoidable during an armed conflict).
240. See Philips, *supra* note 66, at 8 (supporting Admiral Woodward’s decision in the Falklands War); see also Guy P. Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1, 54 n.235 (emphasizing that officers are selected for their ability to lead men into combat).
241. See TANKER WAR, *supra* note 9, at 140; see also Janet Sarver & Abby Cohen Smutny, *Wrap-up Panel: A Summary of Remarks*, 98 AM. SOC’Y INT’L L. PROC. 367, 367 (2004) (stressing that international law evolves in response to the changes in technology and economic forces); Brian C. Lewis, Note, *Prevention of Computer Crime Amidst International Anarchy*, 41 AM. CRIM. L. REV. 1353, 1371–72 (2004) (emphasizing the importance of promulgating uniform international laws in order to coordinate investigation and prosecution of rising computer crimes).
242. Bolton, *supra* note 4, at 41.
243. L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 330 (Manchester 1993); see also Bolton, *supra* note 4, at 41 (stating that Captain Bonzo realized from the beginning of the conflict that being outside of the exclusion zone did not guarantee safety).
244. GREEN, *supra* note 243, at 330; see also Elliott, *supra* note 148, at 6 (indicating that Hector Bonzo had orders to attack the British fleet).
245. GREEN, *supra* note 243, at 330; see also Watkins, *supra* note 11, at 672 (explaining that the British were justified in their attack, despite the *Belgrano* being 36 miles from the exclusion zone).
246. See Elliott, *supra* note 148, at 6 (indicating the *Belgrano* had orders to attack); see also Belgrano Was Fair Game: Secret History: Sink the Belgrano (July 7, 2004) (explaining that although the *Belgrano* was sailing away from the islands, it planned to return the following day), available at <http://forum.keypublishing.co.uk/archive/index.php?t-28073.html> (last visited Feb. 25, 2005).
247. See Elliott, *supra* note 148, at \_\_\_\_ (explaining that their mission was to attack and not simply to cruise around).



Nevertheless the sinking and the accompanying loss of life remain controversial, even in Britain.<sup>248</sup> Even defenders of the action concede that the attack weakened British standing in the conflict and almost turned into a catastrophic political reversal “because of the premium the international community put on the appearance of avoiding escalation.”<sup>249</sup> In the final analysis, the underlying morality of the attack may always be debated. But the ultimate inference to be drawn from the episode may be that international law is simply not ready to pass judgment on the rectitude of all military decisions taken in the heat of armed conflict.<sup>250</sup> Critiques of the sinking seemingly are based not on the merits of the legal questions, but on larger questions of morality and the very existence of warfare as a tool of statecraft.<sup>251</sup>

Those questions are beyond the ambit of this article; however, so long as warfare continues, in the words of Clausewitz, as “politics . . . with other means,” rules of conduct for wars will be needed.<sup>252</sup> In light of those rules, as Captain Bonzo has always maintained and the Argentine government recognizes today, the attack on the *Belgrano* in no way defied established international law.<sup>253</sup> Nevertheless, this admission does not address the underlying tension between the brutality implicit in the very nature of warfare and attempts to restrain its worst excesses through a regime of international law.<sup>254</sup> Because this tension is unlikely to be resolved in the immediate future, it is all but certain that *Luisa Diamantina Romero de Ibanez & Roberto Guillermo Rojas v. United Kingdom* will not be the last case of its kind brought before an international tribunal.<sup>255</sup>

248. See GAVSHON & RICE, *supra* note 201, at \_\_\_\_ (emphasizing the American ambassador's criticism of the British actions in the Falklands); see also Steven McGinty, *Secret History: Sink Belgrano* (July 12, 2004) (noting that criticism surrounding the *Belgrano* sinking began to emerge soon after the incident), available at <http://lists.lysator.liu.se/pipermail/sverifandom/2004-July/026226.html> (last visited Mar. 15, 2005).

249. See FREEDMAN, *supra* note 44, at 81 (stating that although the sinking of the *Belgrano* strategically was a smart move politically, it created a disaster); see also Stannard, *supra* note 12, at 624 (outlining the criticism surrounding the *Belgrano* sinking and emphasizing the attempts to extradite Prime Minister Margaret Thatcher).

250. See David L. Peace, *Major Maritime Events in the Persian Gulf War: Missiles on Target; The Law of Targeting and the Tanker War*, 82 AM. SOC'Y INT'L L. PROC. 146, 169 (1988) (emphasizing difficulties in applying the rules of international law to military activities); see also Astley & Schmitt, *supra* note 74, at 154 n.141 (arguing that the attack on the *Belgrano* by a British submarine was a valid military action).

251. See CARL VON CLAUSEWITZ, *ON WAR* (Michael Howard & Peter Paret, trans., 2d ed. 1989) (1832); see also Gililand, *supra* note 13, at 978 (demonstrating the absolute necessity of adjusting international law to reflect the changing nature of contemporary warfare). See generally DETTER, *supra* note 84, at 166.

252. See David D. Caron, *The Rule-Outcome Paradox, Madness Cascades and the Fog of Preemption: Seeking the "Best Rule" for Use of Force*, 27 HASTINGS INT'L & COMP. L. REV. 481, 481 (2004) (emphasizing the need to change the rules of war to reflect the changing warfare); see also Mohamed M. El Zeidy, *Universal Jurisdiction in Absentia: Is it a Legal Valid Option for Repressing Heinous Crimes?*, 37 INT'L LAW. 835, 855 (2003) (outlining the necessity of creating laws governing war and war crimes that are universal in nature). See generally DETTER, *supra* note 84, at 166.

253. See Bolton, *supra* note 4, at 42 (stating that Captain Hector Bonzo realized from the beginning of the conflict that being outside of the exclusion zone did not guarantee safety).

254. See Gardam, *supra* note 13, at 402 (discussing the concept of *proportionality*, prohibiting excessive use of force, engraved in the international rules of war); see also Canestaro, *supra* note 207, at 454 (explaining the core principles of the international rules of war and emphasizing that there is a limit on the means of injuring the enemy); Truver, *supra* note 3, at 1238 (noting the exceptional compliance with international laws even in times of war and the absolute necessity of such laws).

255. See Bolton, *supra* note 4, at 41; Stannard, *supra* note 12, at 620 (examining a suit by Yugoslavian citizens against NATO's use of force in Yugoslavia and comparing the possible outcome to that in the *Belgrano* case); see also Claus Kress, *The German Chief Federal Prosecutor's Decision Not to Investigate the Alleged Crime of Preparing Aggression Against Iraq*, 2 J. INT'L CRIM. JUST. 245, 258 (2004) (explaining the decision of the German prosecutor not to investigate the alleged crimes in Iraq and pointing to the uncertainty of international law).

## Fine Artists' Resale Royalty Right Should Be Enacted in the United States

Katreina Eden\*

### I. Introduction

A fine artist's resale royalty right, also known as the *droit de suite* within the European community, is the right of a fine artist to be compensated with a percentage of the sales proceeds of any subsequent sale of his or her works.<sup>1</sup> The *droit de suite* has long been established in several European countries, but the United States has never enacted such a right.<sup>2</sup> Although it is still an unresolved issue in America, Congress has made some promising steps toward enacting an artist's resale royalty right.<sup>3</sup>

Artists should be entitled to a resale royalty right in their work just as authors are.<sup>4</sup> For example, authors have the opportunity to partake in an ongoing revenue stream under copy-

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1. Van Kirk Reeves, *International Transactions in the Art Market*, in ART LAW HANDBOOK 470 (Roy S. Kaufman ed., 2000); see also Michael B. Reddy, *The Droit de Suite: Why American Fine Artists Should Have the Right to a Resale Royalty*, 15 LOY. L.A. ENT. L.J. 509, 510 (1995) (indicating that the artist's resale royalty law, or *droit de suite*, was enacted by France in 1920); Edward J. Damich, *Moral Rights Protection and Resale Royalties for Visual Art in the United States: Development and Current Status*, 12 CARDOZO ARTS & ENT. L.J. 387, 389–90 (1994) (discussing the possibilities for resale royalty rights for artists in the United States).
  2. See RALPH E. LERNER & JUDITH BRESLER, ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS AND ARTISTS 1001 (2d ed. 1998) (commenting that the United States has not enacted a *droit de suite*, unlike several European countries); see also Jennifer B. Pfeffer, Comment, *The Costs and Legal Impracticalities Facing Implementation of the European Union's Droit de Suite Directive in the United Kingdom*, 24 NW. J. INT'L L. & BUS. 533, 560–61 (2004) (stating that the United Kingdom's handling of problems in implementing the *droit de suite* could determine whether the United States would consider instituting it); Vincent Chiapetta, *The Desirability of Agreeing to Disagree: The WTO, TRIPS, International IPR Exhaustion and a Few Other Things*, 21 MICH. J. INT'L L. 333, 379 n.251 (2000) (noting that unlike many European nations, the United States has no *droit de suite* provision).
  3. See *Morseburg v. Baylon*, 621 F.2d 972 (9th Cir. 1980) (holding that California could enact and enforce a resale royalties act without fear of federal preemption); see also Tom G. Palmer, Editorial, *Artists Don't Deserve Special Rights*, WALL ST. J., Mar. 8, 1988, § 1, at 34 (arguing against a bill introduced in Congress which would grant resale royalty rights to artists). See generally *European Union Directive Requires Members to Adopt (or Improve) Artist's Resale Royalty Right by January 1, 2006*, ENT. L. REP., June 2002 [hereinafter *Adopt or Improve Resale Royalty Right*] (stating that U.S. artists will not receive royalties from the resale of their artworks in Europe because the United States does not provide for resale royalties).
  4. See Jay B. Johnson, Comment, *Copyright: Droit de Suite: An Artist Is Entitled to Royalties Even After He's Sold His Soul to the Devil*, 45 OKLA. L. REV. 493, 494 (1992) (arguing that it would be appropriate to provide artists with resale royalties); see also Karen M. Corr, Comment, *Protection of Artwork Through Artists' Rights: An Analysis of State Law and Proposal for Change*, 38 AM. U. L. REV. 855, 855 (1989) (suggesting that the United States adopt perpetual, nontransferable integrity rights for artists). See generally Jimmy A. Frazier, Comment, *On Moral Rights, Artist-Centered Legislation and the Role of the State in Art Worlds: Notes on Building a Sociology of Copyright Law*, 70 TUL. L. REV. 313, 313 (1995) (stating that the state should offer moral rights because its decision influences whether and what artists will produce).

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right law with such rights as the reproduction right,<sup>5</sup> under which the author can bargain for royalties in the future sales of multiple copies of the work.<sup>6</sup> Because each of a fine artist's works is unique (there usually being only one original), such an artist does not have the same opportunity to bargain for royalties of future sales.<sup>7</sup> Establishing an artists' resale royalty right will help equalize this unfair treatment of artists under the copyright law.

In 1990 Congress enacted the Visual Artists Rights Act, which gave some moral rights protection to artists but did not include a resale royalty right.<sup>8</sup> In 1992, because of the widespread debate of resale royalties in the United States, the Register of Copyrights issued a report<sup>9</sup> to Congress in conjunction with the Visual Artists Rights Act of 1990. This report stated that there was not sufficient economic and copyright policy justification to establish a resale royalty in the United States.<sup>10</sup>

Although the Copyright Office report did not recommend implementing a resale royalty at that time, it stated that Congress may want to take another look at enacting the right in

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5. See 17 U.S.C. § 106(1) (2005); *Perris v. Hexamer*, 99 U.S. 674, 675 (1879) (holding that an owner has the exclusive right to make copies of the work); see also *Arnstein v. Edward B. Marks Music Corp.*, 82 F.2d 275, 275 (stating that § 4952 of the Revised Statutes gave to artists the exclusive right to copy their work).
  6. See 17 U.S.C. § 106(1) (stating that the owner of a copyright has the exclusive right to reproduce the copyrighted work); see also *Johnson*, *supra* note 4, at 494 (stating that in California, the seller must pay 5 percent of each sale to the artist); *N.Y. Times Co. v. Tasini*, 533 U.S. 483 (2001) (holding that an author's contribution to a newspaper could not be reproduced outside of the newspaper format without consent).
  7. See *Johnson*, *supra* note 4, at 503–04 (noting that visual artists gain income from only the first sale of a work, while authors and musicians are able to obtain income from multiple sales); see also Jill I. Prater, *When Museums Act Like Gift Shops: The Discordant Derivative Works Exception to the Termination Clause*, 17 LOY. L.A. ENT. L.J. 97, 116–17 (1996) (commenting that American laws do not adequately protect visual artists because they typically create singular works); Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 114 (1997) (arguing that a visual artist's copyright covers principally reproductions and gives the artist much less control over the uses made of his original work once it is sold).
  8. See Visual Artists Rights Act of 1990, 17 U.S.C. § 106A (1990) (enacting an artist's right of attribution and integrity and also requiring that a study be done on the feasibility of implementing a resale royalty right); see also *Quality King Distribs., Inc. v. L'Anza Research Int'l, Inc.*, 523 U.S. 135, 149 n.1 (1998) (holding that an alleged infringer could use the "first sale doctrine" as a defense despite the Visual Artists Rights Act's expansion of visual artists' rights). See generally Note, *Visual Artists' Rights in a Digital Age*, 107 HARV. L. REV. 1977, 1985 (1994) (outlining the rights covered by the Visual Artists Rights Act).
  9. U.S. COPYRIGHT OFF., *DROIT DE SUITE: THE ARTIST'S RESELL ROYALTY* (1992) [hereinafter ARTIST'S RESELL ROYALTY]; see also *Morning Edition* (NPR radio broadcast, Mar. 9, 2002) (discussing the differing viewpoints of artists concerning the then-impending report to Congress); Damich, *supra* note 1, at 406 (stating that the Copyright Office Report concluded that artists have no legitimate economic interests that would be helped by a resale royalty).
  10. See ARTIST'S RESELL ROYALTY, *supra* note 9, at 149 (stating that sufficient economic justification for establishing resale royalty rights for artists is lacking); see also Damich, *supra* note 1, at 406 (stating that the report to Congress indicated a lack of economic interests to be protected by resale royalty rights in the United States); Patty Gerstenblith, *Architect as Artist: Artist's Rights and Historic Preservation*, 12 CARDOZO ARTS & ENT. L.J. 431, 451 n.109 (1994) (noting that the report recommended that the United States not establish a federal resale royalty right because of a lack of justification for such a right).

America if the European community harmonized its existing *droit de suite* laws.<sup>11</sup> In July 2001, the European Union came to an agreement that resale royalties for artists should be statutory as early as 2006 and no later than 2012.<sup>12</sup> With this unification in Europe, Congress should now reconsider enacting an artists' resale royalty right in the United States.

This article discusses the harmonizing of the *droit de suite* within the European Union and whether the United States should enact such a law within its own borders. Part II gives an overview of the history of the resale royalty right. Part III analyzes the study conducted under the Visual Artists Rights Act of 1990, which discusses the feasibility of implementing a resale royalty right in the United States. Part IV presents the European Union's new system for artists' royalties and examines the effect this law is having on the sale of art in Europe. Finally, Part V discusses the opposing views of establishing a resale royalty right in the United States.

## II. History of Artists' Resale Royalty Right

As noted, the resale royalty is the right of an artist to be compensated with a percentage of the sales proceeds of any subsequent sale of his or her works.<sup>13</sup> Just as the copyright law allows authors to bargain for future royalties from the reproduction of multiple copies of their work, a resale royalty act would provide similar opportunities for artists.<sup>14</sup>

Because artists create works that are not capable of being copyrighted, they do not have the same opportunity to bargain for future royalties as authors do with the sale of their work.<sup>15</sup> Even though some artists produce in multiples, a lack of sufficient data exists to accurately

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11. See ARTIST'S RESEAL ROYALTY, *supra* note 9, at 149 (advising Congress to watch and wait regarding the then-ongoing convention in Europe on intellectual property rights); see also Reddy, *supra* note 1, at 511 (noting that the 1992 report advised Congress to wait and see how Europe went about harmonizing its intellectual property laws before deciding upon whether a *droit de suite* would be appropriate in the United States); Pfeffer, *supra* note 2, at 560–61 (stating that the United States could consider the ways in which England handles problems of implementing the *droit de suite* in determining whether to create a similar right in the United States).
  12. See Daniel Dombey & Tony Thorncroft, *Artist Royalty Rights Decided*, FIN. TIMES (London), July 4, 2001, at 2 (noting that the European parliament voted to introduce artist royalty rights not later than 2012); see also *Adopt or Improve Resale Royalty Right*, *supra* note 3, at 4 (stating that variations in intellectual property law between European nations will vanish by 2006); Henry Hansmann & Erinier Kraakman, *The Evolution of Property Rights: A Conference Sponsored by the Searle Fund and Northwestern University School of Law: Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. 373, 373 (2002) (discussing the European Union's 2001 adoption of a directive mandating a resale royalty right in all member states).
  13. See Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. INT'L L.J. 41, 55 (1998) (stating that resale royalties earn the artists a percentage of the profits when others exploit their work); see also Reeves, *supra* note 1, at 470; Damich, *supra* note 1, at 389–90 (defining the *droit de suite* as the right of an artist to profit for sales of his work subsequent to the first sale).
  14. See Michael E. Hoowitz, *Artists' Rights in the United States: Toward Federal Legislation*, 25 HARV. J. ON LEGIS. 153, 157 (1988); see also Symposium, *Intellectual Property: Theory, Privilege, and Pragmatism*, 16 CAN. J.L. & JURIS. 191, 203 (2003) (arguing that resale royalty rights are needed to give artists compensation when their work is resold by others for substantial profits). See generally Gerstenblith, *supra* note 10, at 451, n.109 (noting that the 1992 report to Congress gave suggestions for implementing resale royalty rights).
  15. See Johnson, *supra* note 4, at 503–04 (stating that visual artists gain income from only the first sale of a work, while authors and musicians are able to obtain income from multiple sales); Prater, *supra* note 7, at 116–17 (commenting that American laws do not adequately protect visual artists because such artists typically create singular works); see also Hansmann & Santilli, *supra* note 7, at 114 (arguing that a visual artist's copyright covers principally reproductions and gives the artist much less control over the uses made of his original work once it is sold).

compare those who create in many and those who create in limited, or unique, copies.<sup>16</sup> The policy behind the artists' resale royalty is to create a right for artists that is similar to the reproduction right for authors under copyright law.<sup>17</sup>

### A. The European Experience

There is much diversity with regard to the *droit de suite* throughout Europe. Laws governing the *droit de suite* vary from country to country.<sup>18</sup> Several countries, including the United Kingdom, do not have a *droit de suite* law at all.<sup>19</sup>

The *droit de suite* was first recognized in France in 1920 but was not included in French copyright law until 1957.<sup>20</sup> The rationale for the *droit de suite* was that the fine artist was not protected by copyright law like the writer and composer merely because of the nature of the

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16. ARTIST'S RESALE ROYALTY, *supra* note 9, at 145. See 17 U.S.C. § 101 (defining *visual art* as a work that is created either as a single copy or in a limited edition of 200 copies or fewer); see also Note, *Copyright Royalties for Visual Artists: A Display-Based Alternative to the Droit de Suite*, 76 CORNELL L. REV. 510, 514 (1991) (stating that copyright law is more effective for writers than for fine artists because an author's work is specifically produced for multiple use, while the fine artist creates one-of-a-kind works).
  17. See Carla M. Miller, *A Tribute to Honorable Raymond L. Sullivan: Notes: New Technology and Old Protection: The Case for Resale Royalties on the Retail Sale of Used CDs*, 46 HASTINGS L.J. 217, 240 (1994) (noting that proponents of *droit de suite* argue that it is unfair for the artist to be able to profit only from the first sale of his work); see also Cary T. Platkin, *In Search of a Compromise to the Music Industry's Used CD Dilemma*, 29 U.S.F. L. REV. 509, 521 (1995) (contending that a resale royalty is needed for fine artists who do not have the opportunity to exploit their work in multiples); Reddy, *supra* note 1, at 516 (explaining the rationale for *droit de suite* was that fine artists were not protected under copyright law in the same way authors were).
  18. See LEONARD D. DUBOFF & SALLY HOLT CAPLAN, *THE DESKBOOK OF ART LAW*, at S-104 (2d ed. 1993) (indicating that thirty-six countries have adopted similar rights for visual artists); see also LERNER & BRESLER, *supra* note 2, at 1004-08 (listing more than thirty countries that have adopted some form of *droit de suite* legislation; providing dates of enactment and designation of provisions); Marilyn J. Kreitsinger, *Droit de Suite: The Artist's Right to a Resale Royalty*, 15 HASTINGS COMM. & ENT. L.J. 967, 968 n.4 (1993) (explaining that of the thirty-six countries that provide for the *droit de suite*, few have effective mechanisms for enforcing it).
  19. See Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the Resale Right for the Benefit of the Author of an Original Work of Art, 2001 O.J. (L 272) 32 [hereinafter EU Directive] (observing that differences in national provisions should be harmonized; proposing that artists retain rights to receive royalties on the selling price of works of art when these are resold within the European Union by art market professionals); see also John Henry Merryman, *The Proposed Generalisation of the Droit de Suite in the European Communities*, 1 INTELL. PROP. Q. 16, 17 (1997) (noting that the right has been rejected in many civil law nations, including Austria, Netherlands and Switzerland); Clare Sellars, *Directive on Resale Rights for Artists*, 13 ENT. L. REV. 24, 24 (2002) (explaining that the United Kingdom's opposition to recognizing resale rights for artists is because of the country's dominance in the art sector; opining that the United Kingdom will not implement the European Union directive until 2012).
  20. See *Law of March 11, 1957*, art. 42, [1957] J.O. 2723, [1957] B.L.D. 197, reprinted in 1 JOHN HENRY MERRYMAN & ALBERT E. ELSEN, *LAW, ETHICS, AND THE VISUAL ARTS* 213 (2d ed. 1987) (extending to authors of graphic and plastic works an inalienable right to proceeds from private sales and public auctions); see also LERNER & BRESLER, *supra* note 2, at 1002 (noting that the *droit de suite* was not codified until 1957); Frazier, *supra* note 4, at 338 (explaining that the 1920 statutory scheme was thought to remedy the inequities felt by visual artists).

fine artist's work.<sup>21</sup> Abel Ferry, the original sponsor of the French *droit de suite* bill, summarized the legal basis for this new right:

We are not asking for a share of the profits on a possible speculation, but for the extension of the laws on artistic property, regardless of the existence of an appreciation or depreciation in value. There is a gap in this developing branch of the law on literary and artistic property. Literary men, musicians, and playwrights are members of powerful associations. They can exact for each recital, each performance, each publication, a fee which occasionally gives them large revenues. They derive their fortune from the people generally while the painter earns his living from the single collector. What he creates cannot be published but has, however, the character of personal property and this is why the provisions of a code drafted when literary and artistic property was not even known are urged against him. While the property of other intellectual workers is full and undivided, that of the artist is incomplete.<sup>22</sup>

The 1957 French copyright law requires registration of the work with the French government by the artist before he or she could claim the right.<sup>23</sup> This requirement was implemented in order to establish a proven record of authentication.<sup>24</sup> Under French law, the artist will

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21. See André Lucas et al., *France*, in INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 4[3][e], at FRA-82 (Melville B. Nimmer & Paul Edward Geller eds., 2004) (explaining that the right was narrowly drawn to reach authors of drawings, paintings and sculptures, because reproduction rights for these works yield small returns while reproduction rights for literary or musical works yield substantial profits); see also Reddy, *supra* note 1, at 516 (clarifying that the motivation was to correct the superficial distinction); Pfeffer, *supra* note 2, at 537–38 (identifying the purpose of the *droit de suite* as compensatory).
  22. See LILIANE DE PIERREDON-FAWCETT, *The Droit de Suite*, in LITERARY AND ARTISTIC PROPERTY: A COMPARATIVE LAW STUDY 19, 154 n.80 (John M. Kernochan ed. & Louise Martin-Valiquette trans., 1991) (quoting and discussing Ferry's 1913 report on the bill to inaugurate the *droit de suite*; contrasting Ferry's view with views that hold that visual artists are indistinguishable from literary authors); see also Reddy, *supra* note 1, at 518 & n.88 (quoting Ferry's report).
  23. See MERRYMAN & ELSEN, *supra* note 20, at 213–14 (providing that “ministerial regulations” shall control and commenting that the artist or his or her agent must register the claim to resale proceeds in the *Journal Officiel*); see also DUBOFF & HOLT CAPLAN, *supra* note 18, at S-103 (outlining the registration requirement).
  24. See MERRYMAN & ELSEN, *supra* note 20, at 213–14 (remarking that the creation of a public register of this sort was thought to be useful for several purposes, including authentication); see also Rita E. Hauser, *The French Droit de Suite: The Problem of Protection for the Underprivileged Artist Under the Copyright Law*, 6 BULL. COPYRIGHT SOC'Y 94, 99–100 (1959) (commenting that the ministerial decree under the law was aimed at authenticating works of art); Monroe E. Price, *Government Policy and Economic Security for Artists: The Case of the Droit de Suite*, 77 YALE L.J. 1333, 1352 & n.52 (1968) (noting criticisms of the registration policy, including that it entails an expensive enforcement bureaucracy).

receive three percent of the total sales price of the artwork each time it is sold at public auction if the sale price was more than 10,000 francs.<sup>25</sup> The right is inalienable and extends to the artist for his or her life plus fifty years.<sup>26</sup>

Since it was first developed in France, the *droit de suite* has been adopted by several other countries, including Germany and Italy.<sup>27</sup> The German statute provides for a five percent royalty to artists of the total resale price of a work if the resale price was more than 100 German marks.<sup>28</sup> The Italian statute gives the artist a percentage of the difference between the seller's purchase price and the resale price when the work was sold at a gain.<sup>29</sup>

Currently, *droit de suite* laws, like those discussed above, operate on a country-by-country basis.<sup>30</sup> However, since the establishment of the European Economic Community's Single Mar-

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25. See MERRYMAN & ELSÉN, *supra* note 20, at 213 (stipulating the three percent rate); see also Diane B. Schuder, *Art Proceeds Act: A Study of the Droit de Suite and a Proposed Enactment for the United States*, 61 NW. U. L. REV. 19, 28–29 (1966) (defending the theoretical foundations of the three percent rate); Carole M. Vickers, Note, *The Applicability of the Droit de Suite in the United States*, 3 B.C. INT'L & COMP. L. REV. 433, 438–39 (1980) (acknowledging the establishment of the uniform rate and its repeal of the former progressive tariff system).
  26. See MERRYMAN & ELSÉN, *supra* note 20, at 213 (codifying the inalienable right to participate in the proceeds and extending the right for fifty years after the artist's death); see also GAVIN MCFARLANE, A PRACTICAL INTRODUCTION TO COPYRIGHT 37–38 (1982) (highlighting the general rule that a copyright in artistic works extends for the life of the author and a post-mortem period of fifty years; suggesting that recognition of the right's non-assignability and lifespan may vary by domestic law); Paul Katzenberger, *The Droit de Suite in Copyright Law*, 4 INT'L REV. INDUS. PROP. & COPYRIGHT L. 361, 363 (1973) (remarking that the inalienability of the right derives from the Berne Convention for the Protection of Literary and Artistic Works and protects against an artist's waiver of the right).
  27. See LERNER & BRESLER, *supra* note 2, at 1004 (asserting that the *droit de suite* is well established in France, Germany, Italy and Spain); see also Kreitsinger, *supra* note 18, at 979–80 tbl.1 (comparing the *droit de suite* laws of France, Germany, Belgium, Italy, California, Czechoslovakia, Uruguay and Yugoslavia); Shira Perlmutter, *Resale Royalties for Artists: An Analysis of the Register of Copyrights' Report*, 16 COLUM.-VLA J.L. & ARTS 395, 395 & n.5 (1992) (acknowledging that more than thirty countries have followed France's lead).
  28. See *Law of September 16, 1965*, No. 51, art. 26, reprinted in 1 JOHN HENRY MERRYMAN & ALBERT E. ELSÉN, LAW, ETHICS, AND THE VISUAL ARTS 214 (2d ed. 1987) (providing that the five percent obligation does not apply if the sale price is less than 100 German marks); see also LERNER & BRESLER, *supra* note 2, at 1003 (noting that the German statute follows the French approach); Katzenberger, *supra* note 26, at 367–68 (explaining that the statutory rate is deeply rooted in principles of German copyright law, namely that the artist shall participate in all commercial exploitation of the work regardless of whether a profit is realized).
  29. See *Law of April 22, 1941*, No. 633, art. 144, reprinted in 1 JOHN HENRY MERRYMAN & ALBERT E. ELSÉN, LAW, ETHICS, AND THE VISUAL ARTS 215 (2d ed. 1987) (providing that artwork authors shall receive a percentage of the pecuniary difference present at resale); see also DUBOFF & HOLT CAPLAN, *supra* note 18, at S-104 (describing Italy's complex sliding-scale approach; declaring that the system is "unduly burdensome"); LERNER & BRESLER, *supra* note 2, at 1004 (noting that the difference in rates among countries enforcing the *droit de suite* is to be expected); Reeves, *supra* note 1, § 7.03[C][1][b], at 470 (indicating that the percentage of the sale proceeds of subsequent sales varies according to the statutes of different countries, in an amount between three and five percent).
  30. See LEONARD D. DUBOFF, ART LAW IN A NUTSHELL 254 (2d ed. 1993) (noting that some form of the *droit de suite* is available in those countries recognizing it); see also 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8C.04[A][2] & n.19 (2004) (discussing the *droit de suite* provisions within an international framework and indicating where they function well); Johnson, *supra* note 4, at 493 & n.4 (listing the various countries that have adopted comparable legislation).

ket program, effective January 1, 1993, unification of the varying *droit de suite* laws is being discussed.<sup>31</sup>

## B. Introduction in America

The resale royalty right did not become widely known in the United States until 1973 when a confrontation between painter Robert Rauschenberg and art dealer Robert Scull came to the public's attention. At a New York auction, Scull received an enormous profit on the resale of Rauschenberg's painting, *Thaw*.<sup>32</sup> This auction has been made into a documentary film, which captures the encounter between Scull and Rauschenberg.<sup>33</sup> Rauschenberg became very angry and since then has actively supported efforts to establish a resale royalty in the United States.<sup>34</sup>

31. See *Commission Decision of 23 December 1992 on the Setting-up of an Advisory Committee for Coordination in the Internal Market Field*, arts. 1–7, 1993 O.J. (L 26) 18, 19 (establishing a committee, consisting of two representatives from each member state, to remove barriers to commerce within the European Union and develop means of cooperation); see also Beryl R. Jones, *An Introduction to the European Economic Community and Intellectual Properties*, 18 BROOK. J. INT'L L. 665, 687 (1992) (indicating that there has been an effort to harmonize conflicting *droit de suite* legislation through a study of artists' rights); Emile Noel, *The Institutions of the European Community*, 15 SUFFOLK TRANSNAT'L L.J. 514, 534–35 (1992) (positing that the promulgation of the economic program is consistent with the broad policy guidelines of the EEC treaty); Richard Wainwright, *Technological Change in the European Union: Key Issues Including Commonality of Standards, Integration as Promoting Change, and Impact of Change on a Unified Economic Grouping*, 25 CAN.-U.S. L.J. 81, 83 (1999) (EEC principal legal adviser and head of internal market team opining that such directives are usually meant to counteract the threat of balkanization by member states on matters of public concern).
32. See John Henry Merryman, *The Wrath of Robert Rauschenberg*, 40 J. COPYRIGHT SOC'Y 241, 247–49 (1993) (discussing the infamous controversy of how Rauschenberg sold the painting in 1958 for \$900 and then Scull resold the painting at an auction in 1973 for \$85,000 and evaluating its consequences for establishing the *droit de suite* in the United States); see also Reddy, *supra* note 1, at 520–21 (observing that this auction brought resale rights to public attention and triggered the introduction of *droit de suite* legislation in Ohio and California); Neil F. Siegel, *The Resale Royalty Provisions of the Visual Artists Rights Act: Their History and Theory*, 93 DICK. L. REV. 1, 3 (1988) (emphasizing that although the controversy of the Scull affair provided impetus for the introduction of resale royalty bills, only California's bill has passed into law).
33. See Richard Mayer, *California Arts Legislation Goes Federal*, 15 HASTINGS COMM. & ENT. L.J. 981, 981–82 (1993) (discussing the details of the documentary film and providing an account of the unfriendly exchange between Rauschenberg and Scull); see also Merryman, *supra* note 32, at 247 (mentioning the film and describing the encounter, during which Rauschenberg famously complained to Scull, "I've been working my ass off for you to make all that profit"); Baruch D. Kirschenbaum, *The Scull Auction and the Scull Film*, ART J., Sept. 1979, at 50 (dissecting the film and defining its importance).
34. See MARY LYNN KOTZ, RAUSCHENBERG, ART AND LIFE 173 (1990) (describing Rauschenberg's activism, which included testifying before Congress for legislation to provide artists with resale royalty rights, as well as establishing two major pro-artist organizations); see also LEO STEINBERG, ENCOUNTERS WITH RAUSCHENBERG (A LAVISHLY ILLUSTRATED LECTURE) 16, 72 n.8 (2000) (analyzing an interview in which Rauschenberg blames the art world's morass on commercialism); Merryman, *supra* note 32, at 247 (indicating that Rauschenberg has been a firm supporter of the *droit de suite* since the scandal; noting that the film of the auction is regularly employed in support of the resale royalty right).



Within five years of that auction, the first resale royalty bills were introduced in Congress as well as in Ohio and California.<sup>35</sup> However, none of the bills passed at that time.<sup>36</sup>

Later, in California, a bill was successfully resubmitted in 1976. It became effective on January 1, 1977.<sup>37</sup> California thereby became the first state in America to adopt a resale royalty right similar to the European *droit de suite*.

### C. The California Resale Royalty Statute

The California Resale Royalty Statute is found in section 986 of the California Civil Code.<sup>38</sup> The statute applies only to fine art, which is defined as “an original painting, sculpture or drawing, or an original work of art in glass.”<sup>39</sup> Under the statute, the artist receives five percent of the total resale price if the work is sold for more than the purchase price paid by the seller.<sup>40</sup>

The statute also provides that if the seller cannot locate and pay the artist within ninety days, then an amount equal to five percent of the sale shall be transferred to the Arts Council.<sup>41</sup>

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35. See Reddy, *supra* note 1, at 520–21 (noting the introduction of the first resale royalty bills by California and Ohio); see also Siegel, *supra* note 32, at 2–3 (discussing the events that led to the introduction of resale royalty bills in Congress, California and Ohio); Steven C. Schechter, *Understanding the Rights of Visual Artists*, N.J. LAW., Dec. 2004, at 20, 26 (indicating that California was the first state to pass legislation ensuring artists a continuing financial interest in their works).

36. See Prater, *supra* note 7, at 118 (stating that no federal bill on resale royalty has been passed to date); see also Reddy, *supra* note 1, at 521 (indicating that only California eventually passed the resale royalty bill into law); Katharine F. Rowe, *Visual Art and the First Amendment; Moral Rights; Resale Royalties*, 312 PRAC. L. INST. 307, 402–03 (1991) (explaining the failure of the resale royalty bill in Congress and in New York and eight other states).

37. See DUBOFF & HOLT CAPLAN, *supra* note 18, at S-92; see also LERNER & BRESLER, *supra* note 2, at 1012 (stating that California is the only state to have adopted *droit de suite* legislation, which became effective in 1977); Mark Gimbel, Comment, *Some Thoughts on the Implications of Trusted Systems for Intellectual Property Law*, 50 STAN. L. REV. 1671, 1681 (1998) (indicating that California is the only state that has enacted resale royalty rights).

38. CAL. CIV. CODE § 986 (West 2003) (noting the responsibility of the seller when selling a work of fine art and explaining the rights of the artist to resale royalties upon the sale of his or her work).

39. See CAL. CIV. CODE § 986(c)(2) (defining what constitutes fine art under the statute); see also Robert H. Jacobs, Inc. v. Westoaks Realtors, Inc., 159 Cal. App. 3d 637, 644 (Cal. Ct. App. 1984) (concluding that work prepared under contract for commercial use by its purchaser does not qualify as fine art and therefore is not subject to the California Resale Royalties Act); Brian Garrity et al., *CD Pricing, Used Sales Debated: Concerns Rise Over High Retail Profile of Used CDs*, BILLBOARD, June 8, 2002 (discussing *droit de suite* legislation as being applied only to works of fine art and arguing how it may be tailored to fit the specific needs of the U.S. recording industry).

40. See CAL. CIV. CODE § 986(a), (b)(4) (stating the amount in resale royalties that an artist would receive upon sale of his or her work); see also Damich, *supra* note 1, at 405 (explaining the five percent royalty right of the artist under the California statute).

41. See CAL. CIV. CODE § 986(a)(2) (discussing what should be done if the seller cannot locate and pay the artist).

Money received by the council is then deposited into an account in the special deposit fund in the state treasury.<sup>42</sup> The Arts Council must then attempt to locate and pay the artist.<sup>43</sup>

The statute further provides that if the artist does not receive the five percent royalty, he or she may bring an action for damages within three years after the date of sale or one year after the discovery of the sale, whichever is longer.<sup>44</sup> An heir, legatee or personal representative may claim the royalty for an artist for up to twenty years after the artist's death.<sup>45</sup>

The California resale royalty statute has withstood one judicial challenge in *Morseburg v. Balyon*.<sup>46</sup> In that case, the plaintiff-appellant, an art dealer, sold some paintings which required him to pay royalties under the California Resale Royalties Act.<sup>47</sup> He then brought an action challenging the constitutionality of the act, claiming that it was preempted by the 1909 Copyright Act and that it violated the Due Process and Contracts Clauses of the Constitution.<sup>48</sup>

The court held that: (1) The California Act was not preempted by the 1909 Copyright Act; (2) the California Act did not violate Due Process; and (3) the California Act did not vio-

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42. See CAL. CIV. CODE § 986(a)(4) (explaining what the Arts Council does with any money received); see also Martin Bressler & Robert L. Seigel, *Retroactive Protection of Visual Arts Published Without a Copyright Notice: A Proposal*, 7 CARDOZO ARTS & ENT. L.J. 115, 138 (1988) (explaining that the artist's royalties are payable through the Arts Council or to the council's operating fund if the artist cannot be located). See generally Australian Government Department of Communications, Information Technology and the Arts, *Proposed Resale Royalty Arrangement Discussion Paper*, 40-42 (2004) (providing a comparison of resale royalty arrangements throughout the world, including California), available at [http://www.dcita.gov.au/\\_data/assets/pdf\\_file/12024/Proposed\\_Resale\\_Royalty\\_Arrangement\\_Discussion\\_Paper.pdf](http://www.dcita.gov.au/_data/assets/pdf_file/12024/Proposed_Resale_Royalty_Arrangement_Discussion_Paper.pdf) (last visited Feb. 25, 2005).

43. See CAL. CIV. CODE § 986(a)(5) (stating the required actions of the Arts Council); see also *High Court Upholds Artists' Royalties*, N.Y. TIMES, Nov. 11, 1980, at C14 (stating that the Arts Council has the duty of finding the artist if the seller cannot locate him or her). See generally Pfeffer, *supra* note 2, at 559 (explaining the difficulty California has had in enforcing the statute).

44. See CAL. CIV. CODE § 986(a)(3) (stating the ability of the artist to bring an action for damages within a certain time frame); see also J. WILLIAM MASTERSON ET AL., CALIFORNIA CIVIL PRACTICE BUSINESS LITIGATION § 69:2 (2004) (explaining the rights of the artist if there is a failure to pay or transfer five percent of the sale price of the work of art). See generally Lee D. Neumann, *The Berne Convention and Droit De Suite Legislation in the United States: Domestic and International Consequences of Federal Incorporation of State Law for Treaty Implementation*, 16 COLUM.-VLA J.L. & ARTS 157, 160 (1992) (indicating the rights of an artist under the Resale Royalties Act).

45. CAL. CIV. CODE § 986(a)(7) (applicable only to artists who die after January 1, 1983).

46. 621 F.2d 972 (9th Cir. 1980) (holding that the California Act has not been preempted by the 1909 Copyright Act, does not violate due process and does not violate the Contracts Clause); see also *Artists' Royalties Case Declined*, 1980 FACTS ON FILE, Nov. 14, 1980, at 868 B2 (stating that the U.S. Court of Appeals for the Ninth Circuit upheld the act, citing a 1973 Supreme Court ruling); *California Statute Requiring Payment of Royalty to Original Artist upon Resale of Work of Fine Art Upheld as Constitutional*, ENT. L. REP., Aug. 1, 1979 (explaining the court's reasoning in upholding the constitutionality of the California Resale Royalties Act).

47. See *Morseburg*, 621 F.2d at 974 (explaining that plaintiff sold two paintings which then required him to pay royalties under the California Act); see also Johnson, *supra* note 4, at 495-96 (stating that the art dealer sold paintings which required him to make royalty payments to the artists); *California Statute Requiring Payment of Royalty to Original Artist upon Resale of Work of Fine Art Upheld as Constitutional*, ENT. L. REP., Oct. 1, 1980 (indicating that after *Morseburg* sold two paintings, he argued that the act was unconstitutional and unenforceable).

48. See *Morseburg*, 621 F.2d at 974-75 (explaining *Morseburg's* basis for bringing the suit); see also JESSICA L. DARRABY, ART, ARTIFACT, AND ARCHITECTURAL LAW § 9:49 (2d ed. July 2004) (reiterating the plaintiff-dealer's arguments that the California Resale Royalties Act is unconstitutional); Rowe, *supra* note 36, at 580-81 (describing *Morseburg's* constitutional challenges to the California Resale Royalties Act).

late the Contracts Clause.<sup>49</sup> The court said that the Copyright Act of 1909 did not explicitly forbid the enactment of such an act by a state.<sup>50</sup> The right provided by the California Resale Royalties Act was an additional right that was not afforded the artist under the Copyright Act.<sup>51</sup> The California Act, therefore, was not in conflict with the 1909 Act and was not preempted by it.<sup>52</sup>

With regard to the Due Process issue, the appellant asserted that he had lost a fundamental property right because the California Act affects "the very heart of" the relationship between buyers and sellers of art.<sup>53</sup> The court said, however, that it was not unlawful for the legislation

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49. See *Morseburg*, 621 F.2d at 972 (holding that the California Act is constitutional); see also William A. Carleton, Note, *Copyright Royalties for Visual Artists: A Display-Based Alternative to the Droit de Suite*, 76 CORNELL L. REV. 510, 532 (1991) (indicating the court of appeals' decision to uphold the act against a federal preemption challenge); Timothy M. Casey, Note, *The Visual Artists Rights Act*, 14 HASTINGS COMM. & ENT. L.J. 85, 104 (1991) (stating that the California Resale Royalties Act was not preempted by the Copyright Act).
  50. See *Morseburg*, 621 F.2d at 977 (holding that California had the power to enact the Resale Royalties Act). See generally *Goldstein v. California*, 412 U.S. 546, 571 (1973) (holding that state legislation, in the absence of statutory federal preemption, is constitutional so long as the actions of the states are consistent with, and not in derogation of, any congressional legislation or constitutional principles); David E. Shipley & Jeffrey S. Hay, *Protecting Research: Copyright, Common-Law Alternatives, and Federal Preemption*, 63 N.C. L. REV. 125, 154 (1984) (stating the fundamental preemption issue of whether "the two laws function harmoniously rather than discordantly").
  51. See *Morseburg*, 621 F.2d at 977 (concluding that the Copyright Act did not grant the rights afforded an artist by the Resale Royalties Act); see also Jennifer R. Clarke, Note, *The California Resale Royalties Act as a Test Case for Preemption Under the 1976 Copyright Law*, 81 COLUM. L. REV. 1315, 1327-28 (1981) (explaining the court's reasoning that the California Act did not conflict with federal copyright law); Michael E. Horowitz, Note, *Artists' Rights in the United States: Toward Federal Legislation*, 25 HARV. J. ON LEGIS. 153, 196-97 (1988) (discussing the court's reasoning that the Copyright Act neither addressed resale royalties for artists nor evidenced hostility to resale royalty provisions).
  52. See Paul Heald, *Federal Intellectual Property Law and the Economics of Preemption*, 76 IOWA L. REV. 959, 1001 (1991) (stating the Ninth Circuit's decision that the Act was not preempted by the Copyright Act of 1909); see also Francis J. Flaherty, *Art Law: Novel Legal Initiatives Are Changing the Practice of an Unusual Specialty*, NAT'L L.J., Sept. 3, 1984, at 1 (indicating that the art dealers, who challenged the Resale Royalty Act as being preempted by the Copyright Act, lost the suit). See generally *Federal Preemption: Two Renditions of a Fundamental Theme*, MONDAQ BUS. BRIEFING, July 7, 1999 (suggesting that the presumption against preemption depends on the subject matter being regulated and indicating ways in which congressional intent to preempt a state law can be found).
  53. See *Morseburg*, 621 F.2d at 979 (citing appellant's arguments that he had lost a fundamental property right and that the California Act affects art sellers' and buyers' interactions); see also Colleen P. Battle, Comment, *Righting the "Tilted Scale": Expansion of Artists' Rights in the United States*, 34 CLEV. ST. L. REV. 441, 464 (1985/1986) (specifying appellant's argument that the required payment of a five percent royalty after a transfer of ownership was tantamount to restraining his property rights); Clarke, *supra* note 51, at 1327-28 (elaborating appellant's argument that the California Act conflicted with artists' exclusive rights to vend their work in initial sales).

to readjust rights or burdens solely because it upsets otherwise settled expectations of buyers and sellers.<sup>54</sup> Therefore, the California Act did not violate Due Process.<sup>55</sup>

Finally, the court found that the California Act was also not affected by the Contracts Clause. The court stated that the Contracts Clause was not absolute, nor are all impairments of contracts improper.<sup>56</sup> Hence, the Act did not violate the Contracts Clause.<sup>57</sup> The court found that the California Act is therefore constitutional.

Even though the California Act has withstood judicial challenge, there is not enough evidence of its use to establish its effectiveness in the United States to promote enactment of a federal law. There is no clear evidence of what conclusions can be drawn from the California experience.<sup>58</sup> Because California is the only state to have such a law, it is hard to implement because the national art market is larger than California's.<sup>59</sup> Dealers will often perform their transactions outside of California, or with transactions conducted within the state, they might

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54. See *Morseburg*, 621 F.2d at 979–80; see also Bressler & Seigel, *supra* note 42, at 131–32 (finding that retrospective civil legislation violates due process only when it is arbitrary and irrational); Neel Chatterjee, Symposium, *Imperishable Intellectual Creations: The Limits of the First Sale Doctrine*, 5 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 383, 411 (1995) (noting that royalties do not limit sellers' ability to rent or sell the work to whomever they wish). See generally *Warner Bros., Inc. v. Wilkinson*, 533 F. Supp. 105, 108 (D. Utah 1981) (stating the *Morseburg* principle that the California Act is limited to the exclusive right of the copyright owner to transfer the material for a consideration to others, and does not provide a right to transfer the work free of all regulation).
55. See Bressler & Seigel, *supra* note 42, at 138 (referring to the court's upholding the retroactive application of the statute, notwithstanding the Due Process challenge); see also Robert Ernest Craven, Jr., Comment, *Moral Rights for Muralists: Expanding Artists' Rights Under California Civil Code Section 987*, 24 U.C. DAVIS L. REV. 531, n.43 (1990) (reporting the Ninth Circuit Court of Appeals' holding that the Act did not violate Due Process but rather served as economic regulation promoting artistic endeavors); Neumann, *supra* note 44, at 160–61 (explaining that the Act was neither arbitrary nor capricious, nor affected fundamental rights to a constitutionally excessive degree).
56. See *Morseburg*, 621 F.2d at 979; see also *Chico's Pizza Franchises, Inc. v. Sisemore*, 544 F. Supp. 248, 249 (E.D. Wash. 1981) (citing the Ninth Circuit as holding that deference is normally given to a statute, which will be sustained as against the Contracts Clause where it serves a "broad and generalized economic or social purpose"); *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 22–23 (1977) (establishing *Morseburg's* analytical approach to the Contracts Clause by permitting states broad power to adopt general regulatory measures without self-inhibition in the face of possibly impairing private contracts).
57. See Johnson, *supra* note 4, at 497 (explaining that because of the California Act's important public purpose and because the increased obligation placed upon the buyer is not severe, the California Act did not violate the Contracts Clause); see also Douglas W. Kmiec & John O. McGinnis, *The Contracts Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, n.130 (1987) (justifying the act as an impairment of property rather than as a contract); Rowe, *supra* note 36, at 404 (citing the court's conclusion).
58. See Heald, *supra* note 52, at 1002 (speculating that the California Act may cause the price of art to soar, yet requiring an empirical study to determine whether the Act is more efficient than federal law); see also Platkin, *supra* note 17, at 521–22 (insisting that *droit de suite* needs national enforcement in order to effectuate the necessary reform); Reddy, *supra* note 1, at 523 (observing that the results of the California statute are "mixed," due to the seller's unwillingness to disclose necessary information to artists).
59. See Frazier, *supra* note 4, at 339 (explaining that expensive litigation and a small market have accounted for the statute's ineffectiveness); see also Heald, *supra* note 52, at 1002 (cautioning that the California statute may raise the price of art, thus affecting society at large). But see Ken Lovern, *Evaluating Resale Royalties for Used CDs*, 4 KAN. J.L. & PUB. POL'Y 113, 116 (1994) (weighing arguments as to whether such legislation will have an adverse effect on the primary art market).

attempt to subvert the system by not disclosing the buyer's name or the selling price, among other details.<sup>60</sup>

This avoidance strategy is evidence that a resale royalty right is needed in U.S. federal law. However, the effectiveness of a federal right in the United States cannot be established through California's statistics alone. Because California is the only state to have such a right, it is hard to foresee how successful a resale royalty right in federal law would be. Therefore, the United States must look to other well-established *droit de suite* countries for guidance.

### III. The Visual Artists Rights Act of 1990

A decade after the *Morseburg* decision,<sup>61</sup> Congress passed the Visual Artists Rights Act of 1990<sup>62</sup> to protect the moral rights of artists throughout the United States. This was due in part to pressure from senators in Congress.<sup>63</sup> Many efforts were made prior to 1990 to introduce artists' resale royalty rights into federal legislation.<sup>64</sup>

In 1987, a Visual Artists Rights Act was introduced to Congress that contained a resale royalty provision patterned after the Italian system.<sup>65</sup> This bill provided for a resale royalty of

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60. See Reddy, *supra* note 1, at 523–24. See generally Frazier, *supra* note 4, at n.227 (predicting that a resale royalty would have the detrimental result of fewer exhibits by dealers); Pfeffer, *supra* note 2, at 559 (emphasizing that the burden is on the artist to enforce the inevitably expensive right to royalty).

61. 621 F.2d 972 (holding that the California Act was not preempted by the 1909 Copyright Act, nor did it violate due process or the Contracts Clause).

62. See 17 U.S.C. § 106 (2002) (stipulating that the copyright owner has the exclusive rights to reproduce the copyrighted work, among other rights); see also 1990 U.S.C.A.N. 6915, 6915 (stating that VARA protects certain visual artists' reputations and their works of art and that the act is analogous to the Berne Convention's "moral rights"); David Goldberg & Robert J. Bernstein, *Legislation by the 101st Congress*, N.Y.L.J., Jan. 18, 1991, at 2 (observing that Congress enacted moral rights for artists in the act).

63. See LERNER & BRESLER, *supra* note 2, at 1008 (noting that Senators Javits and Kennedy have both advocated artists' resale rights); see also Reddy, *supra* note 1, at 524–25 (citing the bill as providing for the payment of a royalty of seven percent from the resale profit whenever the sale price of a work of fine art was 150 percent above the purchase price). See generally Kathryn A. Kelly, *Moral Rights and the First Amendment: Putting Honor Before Free Speech?*, 11 U. MIAMI ENT. & SPORTS L. REV. 211, 224 (1994) (observing that Senators Kennedy and Kasten put forth legislation in 1989 which eventually became the Visual Artists Rights Act of 1990).

64. See LERNER & BRESLER, *supra* note 2, at 1008 (stating that many efforts were made to incorporate *droit de suite* law into federal legislation); see also Anne Marie Cook, Note, *The Colorization of Black and White Films: An Example of the Lack of Substantive Protection for Art in the United States*, 63 NOTRE DAME L. REV. 309, 329 (1988) (reporting past unsuccessful attempts to provide substantive protection for U.S. art); Craven, *supra* note 55, at 540–41 (mentioning previous failed attempts to protect visual artists' moral rights by legislation).

65. See Visual Artists Rights Act, S.1619, H.R. 3221 (1987) (stipulating that the seller shall pay a royalty to the author of a sold work that is pictorial, graphic or sculptural); see also LERNER & BRESLER, *supra* note 2, at 1008 (noting that the Visual Artists Rights Act of 1987 contained a resale royalty provision patterned on the Italian idea); Christopher R. Mathews, *VARA's Delicate Balance and the Crucial Role of the Waiver Provision: Its Current State and Its Future*, 10 UCLA ENT. L. REV. 139, 142 (2003) (emphasizing that the bill's controversial resale royalty provision portended its failure to pass); Horowitz, *supra* note 51, at 153–54 (stating that in 1987, Senator Kennedy proposed a bill to amend the contemporary U.S. copyright law and to protect artists' moral rights and royalty rights).

seven percent of the difference between the seller's purchase price and the resale price of a work.<sup>66</sup> The royalty did not apply to resale prices of less than \$1,000 or if the seller made less than a 50 percent gain on the sale.<sup>67</sup> The Copyright Office was to administer the law under this bill, and the artist would be required to register in order to be eligible for royalties.<sup>68</sup>

Then in 1988, another bill was introduced in Congress, but this time there was no resale royalty provision.<sup>69</sup> Instead, the bill required that the National Endowment for the Arts conduct a one-year study analyzing the economic effects and the means of implementing ways for artists to participate in the commercial exploitation of their work after the first sale of the work, which included an artists' resale royalty right.<sup>70</sup> This bill was not passed, but it laid the groundwork for the 1990 legislation.<sup>71</sup>

The 1990 act granted certain moral rights of attribution and integrity to fine artists.<sup>72</sup> It guaranteed the right to claim or disclaim authorship in a work.<sup>73</sup> It also granted limited rights

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66. See LERNER & BRESLER, *supra* note 2, at 1008–09; see also Carleton, *supra* note 49, at 532–33 (affirming the bill's provision for a royalty of seven percent of the difference between the seller's purchase price and the amount the seller receives in exchange for the work); Carl D. Lobell, *Representing Artists, Collectors and Dealers: Business Relationships*, 297 PLI/PAT 425, 472 (1990) (declaring that under this bill, the seller would be required to pay the artists or his surviving heirs a seven percent royalty).
  67. See LERNER & BRESLER, *supra* note 2, at 1009; see also Casey, *supra* note 49, at 102 (noting that the resale royalty provision applies to sales of at least \$1,000); Lobell, *supra* note 66, at 472 (finding this provision of the bill to be applicable only to a work worth more than \$1,000 being resold for a profit of at least 50 percent).
  68. See LERNER & BRESLER, *supra* note 2, at 1009; see also Kreitsinger, *supra* note 18, at 970 (remarking that the bill required artists and sellers to register with the Copyright Office); Siegel, *supra* note 32, at 2 (showing legislative intent to empower the Copyright Office to monitor the bill's system).
  69. See Visual Artists Rights Act, S.1198, H.R. 2690 (1989) (providing for a study on resale royalties, rather than stipulating their usage); see also LERNER & BRESLER, *supra* note 2, at 1009 (relating that the Visual Artists Rights Act of 1988 contained no resale royalty provision); Lobell, *supra* note 66, at 472 (observing that the revised Visual Artists Rights Act did not have a resale royalty provision).
  70. See Visual Artists Rights Act of 1988, H.R. 3221, 100th Cong. § 3(d)(1) (1988) (originally conferring a resale royalty right, later replaced with the NEA study provision); see also LERNER & BRESLER, *supra* note 2, at 1009 (noting the lack of a resale royalty provision in the 1988 bill); Lobell, *supra* note 66, at 472–73 (explaining the substitution of the NEA study for the resale royalty provision in the 1988 bill).
  71. See LERNER & BRESLER, *supra* note 2, at 1009; see also Joseph Zuber, *The Visual Artists Rights Act of 1990: What It Does and What it Preempts*, 23 PAC. L.J. 445, 470 (1990) (ascribing the genesis of the 1990 act to the 1988 bill); Rowe, *supra* note 36, at 579–80 (noting the identical nature of the 1988 bill and the 1990 act).
  72. See Visual Artists Rights Act of 1990 § 603, 17 U.S.C. § 106A (1990); see also Joshua W. Andrews, Comment, *The Fine Art of Copyright Protection: A Suggestion for Change in the Application of the Fair Use Doctrine*, 36 U.S.F. L. REV. 759, 765 (2002) (labeling the grant of moral rights of attribution and integrity in the 1990 act "specific"); Vera Zlatarski, "Moral" Rights and Other Moral Interests: Public Art Law in France, Russia and the United States, 23 COLUM.-VLA J.L. & ARTS 201, 220 (1999) (stating that the 1990 act granted certain moral rights of attribution and integrity to artists).
  73. See Visual Artists Rights Act of 1990 § 603 (allowing artists to claim or disclaim authorship); see also Roberta Rosenthal Kwall, "Author-Stories: Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine," 75 S. CAL. L. REV. 1, 1 (2001) (noting that the protections cover only intentional modifications that impair the artist's reputation); Geri J. Yonover, *The Precarious Balance, Moral Rights, Parody and Fair Use*, 14 CARDOZO ARTS & ENT. L.J. 79, 81–82 (1996) (calling the grant of rights of attribution and integrity the first recognition of European moral rights by a federal act in the United States).

to prevent distortion, mutilation or modification of a work,<sup>74</sup> as well as the destruction of a work of recognized stature.<sup>75</sup> It further granted the right, under some circumstances, to prevent destruction of a work that is incorporated into a building.<sup>76</sup>

Similar to the 1988 bill, the Visual Artists Rights Act of 1990 did not contain a resale royalty provision.<sup>77</sup> The act also required that a study be conducted on whether or not a royalty right should apply.<sup>78</sup> The study was to be conducted in consultation with other appropriate departments and agencies of the United States, foreign governments and groups involved in the creation, exhibition, dissemination and preservation of works of art, including artists, art dealers, collectors of fine art and curators of art museums.<sup>79</sup>

Along with the consultation, the Register of Copyrights held public hearings.<sup>80</sup> One of these hearings was held in San Francisco in January 1992, and another was held in New York City

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74. See Visual Artists Rights Act of 1990 § 603 (granting artists limited rights to preserve the integrity of their work); see also William Belanger, *U.S. Compliance with the Berne Convention*, 3 GEO. MASON IND. L. REV. 373, 384–85 (1995) (defining rights of inclusion); Ralph E. Lerner, *Dealing with the Business Side of Art*, 79 A.B.A. J. 84, 84 (1993) (stating that artists may protect their works from intentional destruction, mutilation or modification under VARA).
  75. See Visual Artists Rights Act of 1990 § 603 (prohibiting the destruction of a work of recognized stature); see also Burton Ong, *Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights*, 26 COLUM. J. L. & ARTS 297, 300 (2003) (stating that the artist has the right to prevent the destruction of a work of recognized stature); Francesca Garson, Note, *Before That Artist Came Along, It Was Just a Bridge: The Visual Artists Rights Act and the Removal of Site-Specific Artwork*, 11 CORNELL J. L. & PUB. POL'Y 203, 227 (2001) (noting that while VARA prevents the destruction of a work of recognized stature, it does not define that term of art).
  76. See Visual Artists Rights Act of 1990 § 604 (conferring a limited right to prevent destruction of a work of art incorporated into a building); see also *Carter v. Helmsley-Spear*, 6 F. Supp. 303, 313–14 (S.D.N.Y. 1994), *overruled on other grounds*, 71 F.3d 77 (2d Cir. 1995) (examining VARA's application to works of art incorporated in buildings); William A. Tannenbaum, *Copyright Protection Extended to Buildings*, NAT'L L.J., Feb. 24, 1992, at 31 (noting that VARA applies to works of art incorporated in buildings).
  77. See Hansmann & Kraakman, *supra* note 12, at 378 (stating that Congress did not include a resale royalty provision in the 1990 act); see also Carleton, *supra* note 49, at 532–33 (noting that the resale royalty provision had been removed when the 1990 act was proposed). But see Edward J. Damich, *The Visual Artists Rights Act of 1990: Towards A Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 974 (1991) (pointing out that the 1988 bill initially contained a resale royalty provision).
  78. See Visual Artists Rights Act of 1990 § 608(b)(1) (requiring further study on the issue of a resale royalty); see also LERNER & BRESLER, *supra* note 2, at 1009 (attributing the study to debate within the art community over *droit de suite*); Laura Van Tuyl, *Do Not Fold, Mutilate, or Trash Your Calder Would Be Nice in Blue? Cap That Spray Can; New Law Defines Artists' Rights*, CHRISTIAN SCI. MONITOR, Dec. 24, 1990 (labeling the study a "compromise").
  79. See Visual Artists Rights Act of 1990 § 608(b)(2) (directing the Register of Copyrights to consult with specific outside groups in conducting the study); see also *Request for Information, Study on Resale Royalties for Works of Art*, 56 Fed. Reg. 4110 (Feb. 1, 1991) (requesting input from groups and people involved in the creation, exhibition, dissemination and preservation of works of art); Larry S. Karp & Jeffrey M. Perloff, *Legal Requirements That Artists Receive Resale Royalties*, 13 INT'L REV. L. & ECON. 163, n.3 (1993) (listing the groups that were to be consulted for the study).
  80. See *Notice of Public Hearings*, 57 Fed. Reg. 1281 (Jan. 13, 1992) (giving notice of public hearings to be held in New York City and San Francisco on the issue of resale royalties); see also Al J. Daniel, Jr., *Intellectual Property in the Uruguay Round: The Dunkel Draft and a Comparison of United States Intellectual Property Rights, Remedies, and Border Measures*, 25 N.Y.U. J. INT'L L. & POL. 1751, n.90 (1993) (stating that hearings were conducted in New York City and San Francisco as well as Washington, D.C); Schechter, *supra* note 35, at 20 n.53 (noting that two public hearings were held as part of the study).

in March of that same year.<sup>81</sup> Finally, in December 1992, the Register of Copyrights issued a report to Congress summarizing its findings.<sup>82</sup>

The report was divided into five parts and an appendix.<sup>83</sup> Part I discussed the foreign experience with *droit de suite*.<sup>84</sup> Part II focused on the American experience with the artists' resale royalties.<sup>85</sup> Part III provided an analysis of written comments and hearings.<sup>86</sup> Part IV discussed the integration of the resale royalty into U.S. law and Part V gave conclusions and recommendations.<sup>87</sup>

The Copyright Office's analysis of the written comments and testimonials at the hearings, as well as statistical evidence, revealed that there was not enough hard data to determine empirically if the royalty was a viable option for artists in the United States.<sup>88</sup> Because the Copyright Office lacked sufficient data about several important facts, it could not accurately compare artists with other creative persons, such as authors, to establish if there was unfair treatment under copyright law.<sup>89</sup>

Because the American experience did not provide enough evidence on the effectiveness of a resale royalty right, the Copyright Office had to look to other *droit de suite* countries as a frame

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81. See COPYRIGHT OFFICE, *Droit de Suite: The Artist's Resale Royalty*, reprinted in 16 COLUM.-VLA J.L. & ARTS 381, 381 (1992) [hereinafter Copyright Office Report] (reporting that information was gathered at two public hearings in New York and San Francisco); see also LERNER & BRESLER, *supra* note 2, at 1009 (stating that hearings were held in New York City and San Francisco in 1992); Kreitsinger, *supra* note 18, at 970 (noting that New York and San Francisco were chosen for the public hearings because of their large art communities).
  82. See Copyright Office Report, *supra* note 81, at 381 (1992) (stating that the report was published in December 1992); see also Gerstenblith, *supra* note 10, at n.109 (noting that the report was published in December 1992 pursuant to congressional directive); Platkin, *supra* note 17, at n.79 (stating that the report was released in December 1992).
  83. See Copyright Office Report, *supra* note 81, at 381 (discussing the organization of the report); see also Perlmutter, *supra* note 27, at 286 (outlining the structure of the report); Reddy, *supra* note 1, at 525–26 (discussing the organization of the report).
  84. See DARRABY, *supra* note 48, at 9:39 n.4 (citing to Part I of the report dealing with foreign experience with *droit de suite*).
  85. See Reddy, *supra* note 1, at 525–26 (discussing the organization of the December 1992 Copyright Office Report on resale royalties).
  86. See Perlmutter, *supra* note 27, at 286 (outlining the structure of the Copyright Office Report).
  87. See Reddy, *supra* note 1, at 525 (outlining the topics covered in the last two parts of the report).
  88. See ARTIST'S RESELL ROYALTY, *supra* note 9, at 145 (emphasizing the lack of evidence available to support the contention that resale royalty rights would give artists the favorable treatment that other creators already enjoy under the Copyright Act); see also Gerstenblith, *supra* note 10, at 451 (stating that the Register of Copyrights had economic and copyright law–based justifications for not creating a U.S. resale royalty right); LERNER & BRESLER, *supra* note 2, at 800–01 (noting that the report did not support the creation of royalty rights legislation in the United States partly because of the act's uncertain results in Europe).
  89. See ARTIST'S RESELL ROYALTY, *supra* note 9, at 145 (stressing that the administrative hearing process and scholarly research did not supply what these important facts would be); see also Reddy, *supra* note 1, at 530–31 n.189 (stating that the Copyright Office lacks the data required to determine if artists would receive benefits from collecting a resale royalty); Jeffrey C. Wu, Note, *Art Resale Rights and the Art Resale Market: A Follow-up Study*, 46 J. COPYRIGHT SOC'Y U.S.A. 531, 539 (1999) (explaining that both proponents and critics agree there is a lot of uncertainty regarding the benefits of establishing a resale royalty right).



of reference.<sup>90</sup> Some of the countries the Copyright Office focused on were France, Germany, Italy and Belgium because a *droit de suite* has existed in these countries for many decades.<sup>91</sup> The Copyright Office found both positive and negative impacts of the *droit de suite* on the art market.<sup>92</sup> But, pertaining to the resale royalty in the United States, the Copyright Office believed it was not the time to create such a right under federal law.<sup>93</sup>

Even though the report recommended that the United States not establish a resale royalty right at the time, it gave hope for the future.<sup>94</sup> The report stated that, at the time, there did not seem to be a legitimate economic interest of visual artists that would be helped by a resale royalty.<sup>95</sup> But it left open a window for Congress to address the issue again if the European Community were to harmonize its law with regard to the *droit de suite*.<sup>96</sup>

It would be important for the United States to establish a federal resale royalty right if the European Union harmonizes its law because unification in the art market is essential to its effectiveness for artists. In order for the economic interests of fine artists to be helped by the resale royalty right, there needs to be unification among the traders to avoid negative consequences such as forum shopping and sham sales.<sup>97</sup>

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90. See ARTIST'S RESALE ROYALTY, *supra* note 9, at 145 (citing the need to examine existing royalty schemes in Europe for the purpose of evaluating their success); see also Siegel, *supra* note 32, at 20–21 (concluding that Europe has been well ahead of the United States in terms of establishing artists' resale royalty rights). But see Reddy, *supra* note 1, at 531 (commenting that the U.S. Copyright Office ignored favorable evidence from France's royalty system).
  91. See ARTIST'S RESALE ROYALTY, *supra* note 9, at 145–48 (describing the various applications of the *droit de suite* in these countries); see also Siegel, *supra* note 32, at 2 (listing a host of countries that have adopted the *droit de suite*); Casey, *supra* note 49, at 104 (naming the European countries that have some form of *droit de suite*).
  92. See ARTIST'S RESALE ROYALTY, *supra* note 9, at 145–49 (evaluating the resale royalty concept in the United States and abroad); see also Terry Ingram, *Law Changes May Slow a Busy Market*, AUSTL. FIN. REV., Apr. 3, 2004, at 38 (commenting on the various effects of resale royalty legislation on the Australian art market). See generally Will Bennett, *Tax Blow to Britain's Pounds 3BN Art Market*, DAILY TELEGRAPH, Feb. 25, 2005, at 002 (addressing the negative impact that the EU-imposed *droit de suite* may have on the English art market).
  93. See ARTIST'S RESALE ROYALTY, *supra* note 9, at 149 (basing this conclusion on the shortage of data justifying the establishment of a *droit de suite*); see also LERNER & BRESLER, *supra* note 2, at 800–01 (noting the report's finding that creating resale royalty legislation in the United States would not be feasible); Gerstenblith, *supra* note 10, at 451 (summarizing the Copyright Office's conclusion that the establishment of a resale royalty right in the United States is not favorable).
  94. See Gerstenblith, *supra* note 10, at 451 (presenting the Copyright Office's recommendations for creating a model federal copyright system should Congress enact a resale royalty right); see also Reddy, *supra* note 1, at 511 (noting how the report encouraged the United States to wait and see how resale royalty rights develop in Europe); Frazier, *supra* note 4, at 342 (acknowledging the possibility of a future U.S. resale royalty right).
  95. See ARTIST'S RESALE ROYALTY, *supra* note 9, at 143 (asserting that the value of artworks, unlike other creative works, is driven by their scarcity in the market); see also Damich, *supra* note 1, at 405 (explaining why a resale royalty might actually hurt, rather than benefit, the contemporary art market); Prater, *supra* note 7, at 119 (discussing the ongoing debate about whether resale royalty legislation would protect artists' economic interests).
  96. See ARTIST'S RESALE ROYALTY, *supra* note 9, at 149 (summing up the influence of *droit de suite* legislation in Europe on a future U.S. policy in this area); see also Damich, *supra* note 1, at 405 (mentioning the possibility of the United States establishing resale royalty legislation if standardization of such legislation occurs in Europe); Prater, *supra* note 7, at 119 (expressing the Copyright Office's proposal that the United States will contemplate the adoption of a resale royalty policy consistent with that of the European Union).
  97. See ARTIST'S RESALE ROYALTY, *supra* note 9, at 105, 148 (referring to whether resale royalty rights have affected the art market in California); see also Perlmutter, *supra* note 27, at 298 (arguing that a federal statute would prevent domestic forum shopping by art purchasers). See generally Ingram, *supra* note 92, at 38 (noting that the new resale royalty policy in Australia would curb the frequency of sham sales).

#### IV. The European Union's Harmonized Law

After a long period of deliberation, the European Union will in the near future finally harmonize its law concerning artist resale royalties.<sup>98</sup> The European Union, founded in November 1993, consists of twenty-five independent states and four waiting for admission, and was created to enhance political, economic and social cooperation throughout the European communities.<sup>99</sup>

The decision to unify resale royalties was finally reached in early July 2001.<sup>100</sup> The European parliament voted to introduce artists' royalty rights as early as 2006 and no later than 2012.<sup>101</sup> The resale right would ensure that artists, or their estates for up to 70 years after their death, benefit from the subsequent sales of the artists' works.<sup>102</sup> This law would give artists similar rights to those enjoyed by authors and composers who receive ongoing copyright royalties.<sup>103</sup>

Under the proposed directive, royalties will be paid for works with a resale price of more than 3,000 Euros (\$2,565).<sup>104</sup> From the resale price, artists will receive a royalty ranging from 0.25 percent for the highest priced work to five percent for the lowest priced works; the maxi-

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98. See Daniel, *supra* note 80, at 772–73 (reporting that hearings have been held in Europe with regard to standardizing *droit de suite* laws); see also Pfeffer, *supra* note 2, at 548 (discussing how differences in the English system of law have caused problems in harmonizing European resale royalty laws); Dombey & Thorncroft, *supra* note 12, at 2 (announcing the expected introduction of such rights in Europe sometime between 2006 and 2012).

99. See *The European Union at a Glance*, Europa (listing the EU member states), at [http://europa.eu.int/abc/index\\_en.htm#](http://europa.eu.int/abc/index_en.htm#) (last visited Feb. 28, 2005); see also *European Union*, European Union (providing a list of the EU member states), at <http://userpage.chemie.fu-berlin.de/adressen/eu.html> (last visited Feb. 28, 2005). See generally Joel C. Atencio, *Former Rebel Stronghold Is Transformed into Thriving Agrarian Reform Community*, MANILA BULL., June 24, 2004 (noting the formation and current size of the European Union), available at 2004 WL 82578603.

100. See Pfeffer, *supra* note 2, at 533 (announcing that the EU implemented a *droit de suite* directive in 2001); see also Dombey & Thorncroft, *supra* note 12, at 2 (reporting that the decision was reached on July 3, 2001). See generally EU Directive, *supra* note 19, at 32 (setting forth the language of the European Union's resale royalty right legislation, which had been in the works since June 2001).

101. See Pfeffer, *supra* note 2, at 542–43 (explaining the reasons for the six-year extended deadline for implementing the *droit de suite*); see also Dombey & Thorncroft, *supra* note 12, at 2 (noting the breakdown of the vote among the European Parliament members); *Adopt or Improve Resale Royalty Right*, *supra* note 3, at 4 (referring to the unification of resale rights, which is supposed to take place by January 1, 2006, pursuant to the new EU directive).

102. See EU Directive, *supra* note 19, art. 17, at 33 (establishing the duration of the resale right); see also *European Initiative to Harmonize Resale Rights*, 8 NO. 5 J. PROPRIETARY RTS. 32, 32 (1996) (citing that legislation establishing resale rights in the European Union would permit such rights to last 70 years beyond the author's life); Catherine Seville, *Current Development European Union Law III. Intellectual Property*, 53 INT'L & COMP. L.Q. 487, 491 (2004) (indicating that the term of the resale right is the same as the copyright term).

103. See EU Directive, *supra* note 19, arts. 3–4, at 32 (stating the intent of the directive); see also Wu, *supra* note 89, at 536–38 (analyzing the comparison between resale rights and the copyright protections enjoyed by composers and authors in the United States); cf. Elliot C. Alderman, *Resale Royalties in the United States for Fine Visual Artists: An Alien Concept*, 40 J. COPYRIGHT SOC'Y U.S.A. 265, 267–68 (1992) (arguing that a resale right in the United States would not put visual artists on an equal footing with authors and composers in the marketplace).

104. See EU Directive, *supra* note 19, ch. II, art. 3, at 35 (stating that the member states of the European Union may use their discretion to set resale prices for works of art as long as the minimum price does not exceed 3,000 Euros); see also Pfeffer, *supra* note 2, at 543 (emphasizing that the directive authorizes member states to set sale prices upon which the artist will receive royalties); Seville, *supra* note 102, at 490 (explaining that the values of artists' royalties are derived from the sale prices of their works, which cannot be set below 3,000 Euros).

num royalty will be 12,500 Euros.<sup>105</sup> The scope of the resale right will be extended to all acts of resale except those directly between persons acting in a private capacity without the participation of an art market professional.<sup>106</sup> The resale royalty will also be calculated as a percentage of the sale price and not of the increase in value of the work.<sup>107</sup>

This directive was an attempt to harmonize the European Union on the issue of artists' resale royalty rights.<sup>108</sup> The directive stated that it was important to reduce the risk of sales relocating and that the effective functioning of the internal market in works of modern and contemporary art requires the fixing of uniform rates to the widest possible extent.<sup>109</sup>

Similarly, it is important in the United States to reduce the risk of sales relocating and to have a uniformly effective functioning art market.<sup>110</sup> For this reason and several others, discussed below, the United States should establish a federal law for artists' resale royalties similar to what the European Union is now attempting.

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105. See EU Directive, *supra* note 19, ch. II, art. 4, at 35 (setting forth the rates at which an artist's royalty may be determined); see also Daniel Dombey, *Royalties for Artists Agreed*, FIN. TIMES (London), July 20, 2001, at 2 (reporting the specific royalty rates artists will receive based on their lowest and highest priced works). See generally Ian Black & Maev Kennedy, *Art Sales Threat as Europe Sets Levy*, GUARDIAN, Mar. 16, 2000, at 2000 WL 17213804 (noting that the payment and levy schemes of the proposed directive may give buyers the opportunity to purchase expensive pieces of art at a considerable discount).
  106. See EU Directive, *supra* note 19, § 18, at 33 (expressing the precise scope of the resale right under the directive); see also John Burns, *Ballagh Demands Artists Get a Cut of Resold Works*, SUNDAY TIMES (London), Feb. 29, 2004, at 6 (declaring that the terms of the *droit de suite* apply to transactions for the sale of art initiated by galleries or auction houses but do not cover any such transactions between private individuals); *Adopt or Improve Resale Royalty Right*, *supra* note 3, at 4 (defining an *art market professional* as a salesroom, gallery and art dealer).
  107. See EU Directive, *supra* note 19, § 20, at 33 (asserting that royalties are based on the sale prices of various artworks rather than their values); see also Seville, *supra* note 102, at 490 (informing that an artist's right to a royalty is based on the sale price of a particular piece of art). See generally Hansmann & Kraakman, *supra* note 12, at 373 (clarifying that royalty rights enable artists to collect a percentage of the price from the resale of their works).
  108. See *Intellectual Property: Parliament/Council Conciliation on Resale Rights Seemingly Inevitable*, EUR. REP. (Gale Group Inc.), Nov. 8, 2000, at 2000 WL 24319689 (positing that the purpose of the commission's directive was to unify the European Union's laws regarding resale rights); see also *EU Ministers Give Green Light to Harmonizing Art Resale Rights*, AGENCE FRANCE-PRESSE, Mar. 16, 2000, at 2000 WL 2754333 (characterizing the directive as one that has the effect of harmonizing the treatment of resale rights as they relate to artists across the European Union).
  109. See EU Directive, *supra* note 19, §§ 23–24, at 34 (emphasizing the art market's need for standardization and strict adherence to the European Union's rules regarding artists' resale rights); see, e.g., Dalya Alberge, *British Art Trade Fears Losses After Tax Setback*, TIMES (London), Dec. 16, 2000, at 25 (revealing that it is economically efficient to transport valuable piece artwork from England to Switzerland or to the United States for sale to circumvent the burdensome terms of the *droit de suite*). See generally Editorial, *The Art of Trade*, WALL ST. J. (Asia), Dec. 16, 1999 (noting the negative effects the Europeans fear this directive will have on their art market, such as the relocation of several fine artists to Switzerland and the United States).
  110. See ARTIST'S RESELL ROYALTY, *supra* note 9, at 74, 76 (stating that federal law should be applied when state laws conflict with each other); see also Thomas J. Davis, Jr., *Fine Art and Moral Rights: The Immoral Triumph of Emotionalism*, 17 HOFSTRA L. REV. 317, 318, 362–63 (1989) (concluding that separate schemes of state and federal law result in confusion over the jurisdictional bounds of the law and encourage the interstate moving of art). See generally Carol Sky, *Report of the Register of Copyrights Concerning Droit de Suite, The Artist's Resale Royalty: A Response*, 40 J. COPYRIGHT SOC'Y 315, 319–20 (1992) (reiterating the testimony of John Weber of New York's Webster Gallery, who commented that despite the declining art market, sales have not suffered adversely from the imposition of royalty requirements).

## V. Federal Law for Artists' Resale Royalty Rights Should Be Enacted in the United States

Whether to adopt a resale royalty right in the United States has been a long ongoing debate among artists, museums, collectors, auction houses and the like.<sup>111</sup> As yet, no resolution has been found.<sup>112</sup> Arguments from both supporters and opponents of the right are well grounded and deserve attention.

### A. Arguments for Adoption

One of the main reasons that supporters for the adoption of a resale royalty in the United States believe such a right should exist is because of the unfair treatment of artists under current copyright law. Another reason is that an artist should be compensated for the exploitation of his or her work. Finally, incentive for creation is yet another reason supporters believe the resale royalty should be adopted in the United States.

#### 1. Unfair Treatment of Artists by Current Copyright Law

Since its beginnings in Roman law, copyright law has generally concentrated on protecting creations capable of being "reproduced or copied" rather than on individual objects.<sup>113</sup> Supporters state that because of the nature of fine art, copyright law does not provide adequate economic protection as it does to authors and musicians.<sup>114</sup> The value of fine art is based on the

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111. See Terry Ingram, *Royalties to Aid Struggling Artists*, AUSTL. FIN. REV., Apr. 2, 2004 (suggesting that the art community is divided on the issue of whether the United States should grant artists resale royalty rights and payments); see, e.g., Palmer, *supra* note 3, at 34 (arguing that if the United States adopts legislation granting visual artists royalties and moral rights, the likely result is that prominent and established artists will prosper at the expense of struggling artists). See generally Hansmann & Santilli, *supra* note 7, at 96 (remarking that perceptions and opinions on artists' rights have consistently been the source of debate and controversy).

112. See Benjamin S. Hayes, *Integrating Moral Rights into U.S. Law and the Problem of the Works for Hire Doctrine*, 61 OHIO ST. L.J. 1013, 1017–18 (2000) (highlighting that despite the passage of state legislation, such as the Visual Artists Rights Act, moral rights for artists have yet to be completely accepted in the United States). See generally Damich, *supra* note 1, at 406 (admitting that although federal resale royalty law does not exist in the United States, individual states, like California, have enacted such legislation); Davis, *supra* note 110, at 320–24 (suggesting that American copyright law remains to be settled regarding the grant and treatment of moral rights for artists).

113. See Reddy, *supra* note 1, at 534 (acknowledging that the focus of copyright law is on the replicable nature of various works); see, e.g., 17 U.S.C.S. § 102(a) (2005) (establishing that copyright protection covers "any tangible medium of expression" that can be "reproduced"); see also Carleton, *supra* note 49, at 521 (maintaining that the terms of the Copyright Act extend to copies of an original document or form of expression).

114. See Reddy, *supra* note 1, at 532–34 (commenting that unlike writers and composers, fine artists who make their living exclusively through the initial sales of their pieces are limited in economically exploiting their work); see also Perlmutter, *supra* note 27, at 289–93 (opining that copyright law does not favor visual artists and, consequently, such artists cannot secure a consistent or significant return from their creations); Horowitz, *supra* note 51, at 173–77 (attributing the inadequacies of copyright laws in protecting artists' rights to various factors, including their lack of resale right provisions and their partiality for the copyright holder instead of the creator). See generally Johnson, *supra* note 4, at 507–09 (illustrating that artists and the public at large benefit from the grant of royalties, which provides artists with a share of the future value of their work as well as an incentive to create art for people's enjoyment).

work being a one-of-a-kind original rather than one capable of mass reproduction.<sup>115</sup> So, under copyright law, artists are cut off from participating in the subsequent economic exploitation of their work.<sup>116</sup> Copyright law has discriminated in like manner against artists for centuries.<sup>117</sup>

Supporters also state that artists should have access to the same economic opportunities and rewards that other creative persons enjoy under copyright law.<sup>118</sup> Artists should receive a royalty for the ongoing enjoyment of their work just as writers and composers do.<sup>119</sup> Composers receive royalties every time their musical works are performed on the radio.<sup>120</sup> Playwrights

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115. See Shayana Kadidal, *Obscenity in the Age of Mechanical Reproduction*, 44 AM. J. COMP. L. 353, 356–57 (1996) (describing the duplicate or reproduction of a work as one that depreciates the “quality of . . . presence” of the original work); Reddy, *supra* note 1, at 534 (explaining why original artwork is valued more than reproductions); see also Carleton, *supra* note 49, at 515 (conceding an original piece of artwork is more valuable than its copies).
  116. See Reddy, *supra* note 1, at 534 (claiming that because fine art is typically not reproduced en masse, artists do not receive additional royalties and, thus, subsist only on the profits from the first sale of their works). See generally Gerstenblith, *supra* note 10, at 434 (reasoning that artists lose the rights they have in their works once such rights are transferred because the notion of enduring rights in fine art is inconsistent with the tenets of American copyright law); Platkin, *supra* note 17, at 520–21 (indicating that under copyright law, the first-sale doctrine bars fine artists from reaping the profits on future sales of their works).
  117. See, e.g., *European Union Can't Agree on Artist-Royalty Regulation*, MILWAUKEE J. SENTINEL, Dec. 9, 1999 (recognizing that painters and sculptors do not have the same royalty rights as musicians and writers); see Perlmutter, *supra* note 27, at 292 (disputing findings that support the idea that protections under copyright law cover both fine artists as well as composers and authors in a comparable manner); see also *No Assent from EU on Artists' Pay*, ASSOCIATED PRESS, Dec. 7, 1999 (admitting that the European Union is aware of the disparate treatment afforded different types of artists regarding resale rights and royalties).
  118. See Thomas M. Goetzl, *California Art Legislation Goes Federal: Progress in the Protection of Artists' Rights*, 15 HASTINGS COMM. & ENT. L.J. 893, 903 (1993) (providing that because granting visual artists the royalties they deserve is no more difficult than awarding such royalties to musicians and authors, resale rights should be equally implemented among these groups of artists). See generally Damich, *supra* note 1, at 405 (theorizing that artists should be able to enjoy and take advantage of any appreciation in the value of their work); Frazier, *supra* note 4, at 338–42 (conveying that both visual artists and other types of artists, such as writers, are entitled to compensation for the exploitation of their works).
  119. See Thomas M. Goetzl, *In Support of the Resale Royalty*, 7 CARDOZO ARTS & ENT. L.J. 249, 259 (1989) (concluding that fairness and equity in obtaining equal economic rewards is impossible for artists under copyright law); see also Edward J. Markey, *Business Forum: Congress, Taxes and the Arts; Let Artists Have a Fair Share of Their Profits*, N.Y. TIMES, Dec. 20, 1987, at C2 (advocating that visual artists, such as painters and sculptors, should receive royalties and enjoy their success just as musicians, composers and novelists do). But see Dave Hoekstra, *Performers Finally Getting Paid for Their Hits; But Many Musicians Who Helped Songs Succeed Don't Know New Royalties Could Be Headed Their Way if They'd Just Sign up*, CHI. SUN-TIMES, Jan. 20, 2005 (stating that composers and music publishers were the only artists traditionally entitled to royalties under copyright law).
  120. See 17 U.S.C. § 106(4) (2005) (codifying the exclusive rights of the owners of musical works “to perform the copyrighted work publicly”); see also Goetzl, *supra* note 119, at 256 (realizing that songwriters and lyricists retain “exclusive rights” over public performances of their copyrighted works); Andy Bais, *Filscap, ABS-CBN Sign Licensing Agreement*, PHIL. INQUIRER, Jan. 14, 2005, at A2–3 (addressing the expansive rights of composers to receive royalties from public performances of their works, including performances over the radio, in department stores, in eateries and in karaoke bars). See generally Mike Rutledge, *Music Was Played; Now He Must Pay, Suit Says*, CIN-CINNATI ENQUIRER, Jan. 17, 2005, at B1 (demonstrating that radio stations contributed to 26 percent of BMI’s approximately \$673 million of revenues during the 2004 fiscal year).

receive royalties from every ticket sold every time the play is performed.<sup>121</sup> And authors receive royalties for every copy of their book sold.<sup>122</sup> Why should artists not get the same rights every time their work is exploited?

The Copyright Act of 1976 does grant a right to display a work publicly, which could be valuable to the artist because it addresses the manner in which artwork is often exploited.<sup>123</sup> This right, however, is extinguished once the work is sold because of the first-sale doctrine.<sup>124</sup> Thus, a purchaser of art can exhibit the work in a museum or elsewhere without paying the artist a royalty.<sup>125</sup> This would never be allowed for the public performance of a musical work, for example.<sup>126</sup>

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121. See 17 U.S.C. § 106(4) (2005) (extending exclusive rights to copyright owners to perform "literary, musical, dramatic, and choreographic works" publicly); see also Perlmutter, *supra* note 27, at 294 (analogizing a resale royalty to the payment a playwright receives that stems from ticket sale revenues for the exclusive performance of copyrighted plays); Maralee Buttery, Note, *Blanket Licensing: A Proposal for the Protection and Encouragement of Artistic Endeavor*, 83 COLUM. L. REV. 1245, 1261 (1983) (assessing the various copyrights at issue when a producer buys copies of a play). See generally Beth Freemal, Note & Comment, *Theatre, Stage Directions & Copyright Law*, 71 CHI.-KENT L. REV. 1017, 1039 (1996) (discussing the contracts between producers and playwrights, including the terms that provide for the payments a playwright receives each time his play is performed).
  122. See 17 U.S.C. § 106(2) (2002) (stating the right to prepare derivative works); see also Goetzl, *supra* note 119, at 257 (acknowledging that authors receive royalties for the sale of copies of their books); Dan Rosen, *New Video Game: Japan's Video Game Producers Lose at the Litigation Game*, 6 VAND. J. ENT. L. & PRAC. 119, 119 (2003) (demonstrating that the author earns revenues on the first sale of each new book).
  123. See 17 U.S.C. § 106(5) (indicating that the owner has the right to publicly display any copyrighted work); see also Ben Depoorter, *The Several Lives of Mickey Mouse: The Expanding Boundaries of Intellectual Property Law*, 9 VA. J.L. & TECH. 4, 102 (2004) (detailing how copyright law gives authors five exclusive rights, including the right of public display); Peter Randall, Note, *Will Copyright Eat Gator? The Conflict Between Copyright, the Computer Desktop, and Customization of the Internet Experience*, 2003 U. ILL. J.L. TECH. & POL'Y 259, 272 (2003) (stating that the Copyright Act of 1976 gives owners certain rights including the right to display works publicly).
  124. See 17 U.S.C. § 109(c) (1997) (detailing the first-sale doctrine); see also Stephen J. Davidson & Scott J. Bergs, *Open, Click or Download: What Have You Agreed to? The Possibilities Seem Endless*, 16 NO. 4 COMPUTER LAW. 1, 3 (1999) (noting that the first-sale doctrine ends the rights to distribution after the first sale of that particular copy); Perlmutter, *supra* note 27, at 290 (announcing that the first-sale doctrine deprives the author of any benefit from resale after the initial sale of the original work).
  125. See Perlmutter, *supra* note 27, at 292 (discussing the unfairness to artists economically under current copyright law); see also Carleton, *supra* note 49, at 544-45 (analyzing the "Sculpture of the Sixties" art show as an example of viewers coming to see the work of particular artists where the museum received all the financial benefits); Lobell, *supra* note 66, at 472 (demonstrating that artists do not receive compensation for the exhibition or exploitation of their works after sales).
  126. See Goetzl, *supra* note 119, at 259 (remarking that despite the protests from radio, paying for performance rights has not closed the market for contemporary music); see also Todd Hagins, *Robbing Peter Gabriel to Pay Paul's Diner: Plunder, the Free Market, and the Fairness in Music Licensing Act*, 7 TEX. REV. L. & POL. 385, 417 (2003) (presenting the fact that performance rights royalties are the largest source of income for songwriters and music publishers); Lidia Pedraza, *MP3: Second Verse*, 7 UCLA ENT. L. REV. 343, 348 (2000) (recognizing that collecting public performance royalties is important because it is a big source of income for musical works owners).

## 2. Compensation for the Exploitation of a Creator's Work

Another reason supporters of the resale royalty right think it should be adopted in the United States is the concept of compensation for the exploitation of a creator's work.<sup>127</sup> Supporters insist that artists should be compensated for the continual exploitation of their work just as other creative authors are.<sup>128</sup> Other creative authors receive this compensation under the copyright law, but the scope of protection for fine artists in the United States is very limited. There is not even a common law equivalent to the *droit de suite* in the United States and, therefore, no recourse for the artist concerning resale royalties.<sup>129</sup>

A royalty paid to a creative author is really for the use of the work, not for the work itself.<sup>130</sup> For example, when a musical work is performed on the radio, the royalty paid is for the use of the work, not the actual object. So, too, when a painting is sold, a portion of the price is for the intended use of seeing the painting.<sup>131</sup> Likewise, when the painting is resold, it has a new audience, such as with a play that has different audiences at different times and each production receives a royalty.<sup>132</sup>

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127. See Chatterjee, *supra* note 54, at 408 (addressing how the policy behind resale royalties for visual artists is that they should be able to share in any profits as a result of their work); see also Platkin, *supra* note 17, at 521 (maintaining that those supporting resale royalties for fine artists claim their necessity based on the uniqueness of the art created and the lack of ability to exploit multiples). See generally Alderman, *supra* note 103, at 266–67 (providing that resale royalties would allow fine artists to gain more money as the value of their works increased).
  128. See Perlmutter, *supra* note 27, at 293–95 (discussing how the point of copyrighting is to compensate the creators when their works are exploited by others and how this needs to be translated into a method for compensating creators of fine art); see also EDS: *Also Filed General; Guard Against Duplication (Record in Progress)*, CANADIAN PRESS NEWSWIRE, Dec. 3, 2003, at D 3'03 (opining that creative people should be compensated for their work). See generally Susan A. Russell, *The Struggle Over Webcasting—Where Is the Stream Carrying Us?*, 1 OKLA. J.L. & TECH. 13, 14 (2004) (revealing that artists deserve compensation for works they create).
  129. See Damich, *supra* note 1, at 405 (stressing that there is no federal resale royalty law in the United States); see also Horowitz, *supra* note 51, at 171–73 (noting that in the United States there is no general common law equivalent of the *droit de suite*); Frazier, *supra* note 4, at 338 (stating that the United States has no federal *droit de suite*).
  130. See Dan Skolnik, *Private Use Out of Control: Disintermediation in the Music Business, While the Bands Play On*, 5 NO. 2 INTELL. PROP. L. BULL. 13, 16 (2000) (commenting that copyright owners have the right to obtain royalties for the use of their works); see also Sky, *supra* note 110, at 316 (declaring that when a writer or musician receives a royalty for his or her creation, it is not for the actual object created but for the use of that creation). See generally Gretchen McCord Hoffmann, *Recent Developments in Copyright Law*, 12 TEX. INTELL. PROP. L.J. 111, 212 (2003) (outlining how societies have been formed to act on behalf of copyright owners in granting use licenses for the owners' works).
  131. See Stephen M. McJohn, *Fair Use and Privatization in Copyright*, 25 SAN DIEGO L. REV. 61, 71–72 (1998) (affirming that the owner of a painting has the right to display that painting); see also Sky, *supra* note 110, at 316 (asserting that when a painting is sold, the artist receives payment, a portion of which is for the intended use of viewing the painting). See generally Lovern, *supra* note 59, at 115 (proclaiming that because works of art are unique, the true value comes from the complete artistic enjoyment of the piece, which can be obtained only from the original).
  132. See Sky, *supra* note 110, at 316 (indicating that when a unique work of art is resold, it is viewed by a different audience, so the artist should receive another royalty); see also Schechter, *supra* note 35, at 26 (illustrating how the California Resale Royalties Act provides that for the resale of a work of fine art, the seller must retain five percent of the sales price to be paid to the artist). See generally Liemer, *supra* note 13, at 55 (explaining how resale royalties could be applied to individual works of visual arts so that each time such a work sold, some profits would go to the artist).

A resale royalty right is similar to the underlying principle of copyright law as with other economic rights because an author should participate adequately in the commercial exploitation of his or her work.<sup>133</sup> In this way artists would be able to benefit to the same degree as authors of written works.<sup>134</sup>

There is currently no federal remedy available in the United States that would provide artists with the right to participate in future increases in the value of their artwork.<sup>135</sup> The lack of adequate protection for artists amidst the patchwork of federal and state laws and the complete absence of a resale royalty right demonstrate the need for Congress to enact legislation specifically granting artists resale rights.<sup>136</sup>

### 3. Incentive for Creation

Incentive for creation is yet another reason supporters of the resale royalty right believe it should be adopted in the United States.<sup>137</sup> Copyright law is intended to motivate and encour-

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133. See Gary M. McLaughlin, *Digital Killed the Radio Star: The Future of the Sound Recording Performance Right*, 19 CARDOZO ARTS & ENT. L.J. 225, 226 (2001) (noting that copyright owners should be able to participate in commercial exploitation of their works after the initial sale); see also Reddy, *supra* note 1, at 516 (stating that the *droit de suite* gave artists the right to participate in the public sale of their works of art); Rowe, *supra* note 36, at 406–07 (expressing how the Copyright Act does not compensate visual artists adequately because once a work is sold, it cannot be reproduced, so the artist receives no residual interest from his or her work).

134. See Michelle Brownlee, *Safeguarding Style: What Protection Is Afforded to Visual Artists by the Copyright and Trademark Laws?*, 93 COLUM. L. REV. 1157, 1157 (1993) (noting that, in general, visual artists are protected less than authors or composers by copyright laws); see also Hansmann & Santilli, *supra* note 7, at 117 (alleging that if display rights were given to visual artists, they would then have similar control over their works that authors currently have over their writings).

135. See Horowitz, *supra* note 51, at 182 (stating that there is currently no provision in the remedies available to artists for resale royalty rights); see also Johnson, *supra* note 4, at 503 (claiming that if the United States were to accept “moral rights,” then it would not be hard to accept artists retaining the rights to future royalties after the first sale); Karp & Perloff, *supra* note 79, at 163 (clarifying that in other countries and in California, artists receive resale royalties, but that Congress has repeatedly debated this same issue and never passed a comparable bill).

136. See Horowitz, *supra* note 51, at 180–83 (finding that both the United States’ failure to address the *droit de suite* and the inadequacy of other substitute theories show how there is a need for legislative action regarding artists’ moral rights); see also Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 575 (1940) (demonstrating the need for further judicial action, considering the confusion created by the application of current doctrines).

137. See James M. Mastroianni, *The Work Made for Hire Exception to the Visual Artists Rights Act of 1990 (VARA): Carter v. Helmsley-Spear, Inc.*, 4 VILL. SPORTS & ENT. L.J. 417, 417 n.4 (1997) (rationalizing that the framers of the Constitution intended the rights granted to authors to be an incentive for creation); see also Miller, *supra* note 17, at 222 (explaining that the 1976 Copyright Act is evidence that exploitative rights were intended to provide incentive for creation through compensation to the creators). But see Wu, *supra* note 89, at 538 (arguing that the resale right is a weak encouragement to artistic creation).



age creativity.<sup>138</sup> Supporters believe a resale royalty will provide this intended motivation and encouragement for artists.<sup>139</sup>

Supporters of the right argue that the increased revenue would certainly encourage an artist's productivity, especially since the costs of producing art are continually increasing.<sup>140</sup> Alma Robinson, executive director of California Lawyers for the Arts, stated that the possibility of a resale royalty would provide an important incentive for artists to continue their work.<sup>141</sup> Although opponents of the right state that resale royalties are too remote and uncertain to provide an incentive to create,<sup>142</sup> the promise of future revenue cannot reasonably be seen as a disincentive to creativity.<sup>143</sup>

At the hearing in San Francisco, Richard Mayer, a sculptor and vice president of National Artist Equity Association, testified that the artist Robert Rauschenberg told him that when his works were in the resale market, he became interested in a conceptual art line, but he had to abandon it in order to support his family.<sup>144</sup> Rauschenberg further stated that if he had been receiving royalties at the time, he would have been able to pursue that line of art.<sup>145</sup>

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138. See U.S. CONST. art. I, § 8, cl. 8 (demonstrating that "Congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries"); see also Jay Dratler, Jr., *Distilling the Witches' Brew of Fair Use in Copyright Law*, 43 U. MIAMI L. REV. 233, 321 (1988) (noting that the fundamental goal of copyright law is to encourage creativity through the securing of financial rewards); Sky, *supra* note 110, at 321 (reiterating that copyright law is intended to encourage and motivate creativity)
  139. See Kreitsinger, *supra* note 18, at 971 (examining whether resale royalties will in fact affect creativity through providing incentives); see also Sky, *supra* note 110, at 321 (suggesting that the potential for resale royalties will motivate and encourage creativity). See generally Mayer, *supra* note 33, at 985 (acknowledging that although some cannot bear the idea of artists making money, others support sharing the wealth in order to encourage artists).
  140. See ARTIST'S RESALE ROYALTY, *supra* note 9, at 99–100 (explaining that as the cost of production increases a resale royalty would provide additional revenue and encourage production); but see *Apple Computer v. Microsoft Corp.*, 799 F. Supp. 1006, 1021 (N.D. Cal. 1992) (stating that copyright protection can sometimes increase the cost of production). See generally Gerstenblith, *supra* note 10, (discussing the copyright system in the United States).
  141. See ARTIST'S RESALE ROYALTY, *supra* note 9, at 100 (presenting Alma Robinson's view on the impact of resale royalties on young artists); see also Reddy, *supra* note 1, at 524 (comparing the incentive for artists provided by a resale royalty to the motivational effect of the public performance right for composers); Pfeffer, *supra* note 2, at 558–59 (asserting that a resale royalty provides an incentive to artists to create additional work).
  142. See ARTIST'S RESALE ROYALTY, *supra* note 9, at 100 (suggesting that resale royalties do not motivate artists to create, as they are too uncertain and remote); see also Johnson, *supra* note 4, at 501 (citing the apparent failure of the resale royalty to stimulate creativity for artists in California); Frazier, *supra* note 4, at 340 (criticizing the supposed incentive of a resale royalty as being too remote to actually motivate an artist).
  143. See ARTIST'S RESALE ROYALTY, *supra* note 9, at 100 (proposing that being able to collect revenue in the future cannot be considered a disincentive to creating art). But see Carleton, *supra* note 49, at 534–35 (noting that some artists are motivated by nonmonetary means, which the royalty right cannot reach); Pfeffer, *supra* note 2, at 545 (pointing out that a resale royalty may create a disincentive for art buyers to purchase works in jurisdictions that apply the right).
  144. See ARTIST'S RESALE ROYALTY, *supra* note 9, at 64 (crediting an infamous public dispute between Robert Rauschenberg and art collector Robert Scull as the force behind legislating for the resale royalty); see also Reddy, *supra* note 1, at 521 (explaining how the public became aware of the resale royalties issue in the wake of the Rauschenberg-Scull incident). See generally Yonover, *supra* note 73, at 91–92 (identifying Robert Rauschenberg as one of the artists responsible for turning the United States into a significant art center with international recognition).
  145. See ARTIST'S RESALE ROYALTY, *supra* note 9, at 64 (describing Rauschenberg's push for resale royalties); see also Frazier, *supra* note 4, at 340 (comparing visual artists' need for a resale royalty to the copyright protections afforded authors). But see Merryman, *supra* note 32, at 256–57 (pointing out that although the resale royalty would benefit an established artist like Rauschenberg, it would have the opposite effect for an unknown artist).

If this was true for Rauschenberg, then how many more artists also have to give up creating art in order to support themselves or their families? A resale royalty right would allow artists to create at will without the inhibition of economic constraints.<sup>146</sup>

## B. Arguments Against Adoption

Some opponents of the resale royalty right state that the right is ineffective because it cannot be perfectly enforced, there is a risk of noncompliance, and there is an uneven distribution among artists.<sup>147</sup> Others state that a resale royalty right would damage the art market for two reasons: (1) the primary art market would experience a sharp decline in price due to the resale royalty, and (2) the market would move to jurisdictions that are not implementing the right.<sup>148</sup> Still other opponents believe that the resale royalty is just an additional tax or an excuse for profit sharing.<sup>149</sup> Policy and statistics show that these arguments are unpersuasive.

### 1. The Resale Royalty Right Is Ineffective

Opponents state that the resale royalty right would be ineffective because it could not be perfectly enforced.<sup>150</sup> The Copyright Office Report also indicates that a resale royalty may not be worth the effort because only a very small percentage of artists benefit from it.<sup>151</sup> Evidence

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146. See Perlmutter, *supra* note 27, at 305 (noting that for a starving artist, a small amount gained from a resale royalty, such as 50 dollars, can make the difference between creating a new piece of art or finding a new job); see also Pfeffer, *supra* note 2, at 533 (stating that the purpose of the resale royalty is to meet the needs of starving artists and allow them to profit from a resale of their work once their reputation has grown). But see Johnson, *supra* note 4, at 504–05 (attacking the theory of a starving artist as an outdated concept).
  147. See Merryman, *supra* note 32, at 253–58 (criticizing the resale royalty on two main grounds: (1) that it cannot be implemented and (2) even if it could be put into practice, it is not a good idea, as it would actually harm the interests of artists); see also Perlmutter, *supra* note 27, at 303–06 (citing an insufficient benefit to and an uneven distribution among artists as two chief arguments against the resale royalty). But see Goetzl, *supra* note 119, at 255–58 (responding to those who argue against the resale royalty).
  148. See Alderman, *supra* note 103, at 277–79 (asserting that the presence of resale royalties has harmed the art markets in California and France, whereas the market in England, a country without such a right, has remained healthy); see also Merryman, *supra* note 32, at 254–58 (citing the decision by Sotheby's to cease holding art auctions in California in the aftermath of that state passing a version of a resale royalty as evidence of the harm done to the art market). But see Perlmutter, *supra* note 27, at 295–99 (rebutting the claim that the resale right has an adverse effect on art markets as a speculative theory that lacks any real evidence). See generally STEPHEN E. WEIL, BEAUTY AND THE BEASTS: ON ART, ON MUSEUMS, ART, THE LAW, AND THE MARKET 216–22 (1983) (describing the damage to both the primary and secondary market that a resale royalty would create).
  149. See WEIL, *supra* note 148, at 216–22 (explaining how a resale royalty amounts to a tax that would drive potential investors of contemporary art to invest in other instruments that are free from a tax); see also Gilbert S. Edelson, *The Case Against an American Droit de Suite*, 7 CARDOZO ARTS & ENT. L.J. 260, 261–67 (1989) (alleging that the term "resale royalty" is a misnomer and a substitute for compulsory profit sharing); Merryman, *supra* note 32, at 254–60 (labeling the resale royalty as a tax on resale transactions).
  150. See Carleton, *supra* note 49, at 532 (criticizing California's attempt to create a resale royalty as being unenforceable and ineffective); see also Goetzl, *supra* note 119, at 256 (conceding to opponents of the resale royalty that the right cannot be perfectly enforced); Pfeffer, *supra* note 2, at 556–57 (discussing problems of enforcing the resale royalty in the United Kingdom).
  151. See ARTIST'S RESELL ROYALTY, *supra* note 9, at 103–06 (citing various studies to conclude that only one percent of living artists in the country qualify for a resale auction in the art market); see also Johnson, *supra* note 4, at 506 (describing how the resale royalty harms the unknown artist); Perlmutter, *supra* note 27, at 303–04 (admitting that only a few artists enjoy the benefit from the resale royalty, as not all artists command a resale market).

exists that among the twenty-nine jurisdictions that apply a form of a resale royalty right for artists, twenty-four of them “apply it little or not at all.”<sup>152</sup> This is reportedly because of the complexity of the collection process, which makes the right ineffective.<sup>153</sup>

However, very few laws, if any, can be perfectly enforced.<sup>154</sup> One reason is because of the obvious fact that law enforcement officials cannot provide absolute enforcement of the law. They cannot monitor every person at all times to ensure they are abiding by every single law. Not being able to enforce a law perfectly is no defense to claiming the law would thus be ineffective.<sup>155</sup>

The Copyright Office Report states that the collection of royalties would be too great a challenge to enforce and that there would be a risk of noncompliance.<sup>156</sup> For example, some dealers might feel they can get away without paying the royalty,<sup>157</sup> and there is some evidence of sham sales made outside jurisdictions that implement the right.<sup>158</sup> Again, this risk of noncompliance exists with every law and is no excuse for not enacting a resale royalty right.<sup>159</sup> Even

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152. See Merryman, *supra* note 32, at 253 (stating: “Among the 29 jurisdictions, including the State of California, that recognize the right in their domestic legislation, 24 apply it little or not at all” (quoting DE PIERREDON-FAWCETT, *supra* note 22, at 106) and noting the resale royalty works in Germany, France, Spain, Hungary and Belgium); see also Pfeffer, *supra* note 2, at 558–59 (focusing on the resale royalty as it exists in California, one of the 29 jurisdictions mentioned).
  153. See CAL. CIV. CODE § 986 (West 2005) (illustrating the complexity of the resale royalty as applied to only resales with a profit of more than \$1,000 in California); see also Merryman, *supra* note 32, at 253–54 (faulting the complexity of the collection process as one reason the resale royalty does not function effectively (citing DE PIERREDON-FAWCETT, *supra* note 22, at 106)).
  154. See Goetzl, *supra* note 119, at 256 (“[S]ome may fail to comply with the law hardly proves the law is ineffective, as some critics have charged; it merely shows that it cannot be perfectly enforced. However, few, if any, laws can be.”); see also Hansmann & Kraakman, *supra* note 12, at 373 (suggesting the creation of a public art registry to improve the enforceability of resale royalties); Perlmutter, *supra* note 27, at 303–04 (arguing that despite the ineffective application of the resale royalty, the resulting benefits are worth it).
  155. See Goetzl, *supra* note 119, at 256 (maintaining that the failure of some to comply with California’s resale royalty demonstrates that the law is hard to enforce, but not that is ineffective); see also Reddy, *supra* note 1, at 530 (arguing that every law faces a risk of noncompliance, so the resale royalty should not be rejected on that basis); Sky, *supra* note 110, at 321 (asserting that the risk of noncompliance creates the need for a law).
  156. See ARTIST’S REALE ROYALTY, *supra* note 9, at 146–48 (outlining the attempts of enforcing resale royalties in various jurisdictions and pointing out the inadequacies of each method); see also Carleton, *supra* note 49, at 532 (citing one dealer’s observation that there have been no suits filed under the California resale royalty law); Frazier, *supra* note 4, at 340 (asserting that the California resale royalty law requires that an artist take on the costly process of litigation and risk future alienation from art dealers).
  157. See ARTIST’S REALE ROYALTY, *supra* note 9, at 100 (citing Peter H. Karlen’s observation that art dealers refuse to comply with California’s resale royalty law because they believe they can get away with it); see also Carleton, *supra* note 49, at 532 (noting that the resale royalty has largely been ignored by dealers in California); Pfeffer, *supra* note 2, at 545 (stating that the California resale royalty has been ignored).
  158. ARTIST’S REALE ROYALTY, *supra* note 9, at 148; see also Tonia Pever, Comment, *The Transfer of Media to Digital Form: Redefining the Copyright Infringement Test to Include Commercial Use as a Solution to Digital Copyright Infringement*, 31 CAP. U. L. REV. 109, 136 (2003) (implying the existence of a problem of noncompliance outside the jurisdiction). See generally Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT’L L. 75, 79 n.10 (2000) (uncovering the existence of copyright infringements abroad).
  159. See Sky, *supra* note 110, at 316, 321 (stating the risk of noncompliance does not justify the failure to enact a resale royalty right); see also Reddy, *supra* note 1, at 530 (arguing that challenges in enforcement should not serve as an objection to a *droit de suite*).

today, copyright infringements can be difficult to detect and enforce, and legislative solutions rarely provide complete relief.<sup>160</sup> Laws are not always perfect, but sometimes it is better to have imperfect solutions than none at all.<sup>161</sup>

Opponents also state that the resale royalty right would be ineffective because it fails to provide money for poor artists.<sup>162</sup> Only the wealthy, popular artists would benefit from such a right because only their work is ever resold for a profit.<sup>163</sup> This argument, however, is misdirected because the resale royalty right is not intended as welfare legislation.<sup>164</sup>

The resale royalty right for an artist is similar to royalty rights for an author under copyright law. Those royalties are not meant to help poor, unpublished authors but to reward the successful ones and create an incentive for less successful authors.<sup>165</sup> Just as with any fair market that provides more rewards to those who achieve greater popularity, it is inevitable that artists who are more successful will benefit more from a resale royalty.<sup>166</sup>

This, however, is no reason for all artists to forfeit a potentially lucrative reward just because some artists will benefit more from it. Even small resale royalties can be beneficial to less successful artists.<sup>167</sup> Royalties are an economic right to which authors are entitled under copyright law. The resale royalty is also an economic right to which artists should be entitled.<sup>168</sup>

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160. Perlmutter, *supra* note 27, at 307; *see also* Pever, *supra* note 158, at 136 (noting the difficulty in enforcing copyright infringement because of jurisdictional difficulties). *See generally* Michael J. Meurer, *Too Many Markets or Too Few? Copyright Policy Toward Shared Works*, 77 S. CAL. L. REV. 903, n.289 (2004) (showing difficulties in one specific form of copyright enforcement).

161. *See* Perlmutter, *supra* note 27, at 307 ("Imperfect solutions are better than none. Many more artists will see some benefit from the increase in value of their works than they would without a *droit de suite*.").

162. *See* Goetzl, *supra* note 119, at 258 (noting critics' argument that the resale royalty right will not benefit most artists); *see also* Carleton, *supra* note 49, at 534 (observing that California's resale royalty statute will actually hurt poor artists while helping those who are already wealthy). *See generally* Frazier, *supra* note 4, at 339 (describing generally the inability of artists to collect royalties under California's resale royalty statute).

163. *See* Wu, *supra* note 89, at 550 (observing that artists whose work is resold for profit are usually already successful); *see also* Goetzl, *supra* note 119, at 258 (criticizing resale royalty rights as ineffective at helping struggling artists). *See generally* Perlmutter, *supra* note 27, at 307 (discussing the pros and cons of resale royalty rights).

164. *See* Goetzl, *supra* note 119, at 258 (arguing that royalty rights, like patents, are not intended to guarantee profit to their owners); *see also* Rowe, *supra* note 36, at 405–06 (opining that resale royalties are similar to copyright or patent rights and should not be regarded as artist welfare). *See generally* Jane C. Ginsburg, *Surveying the Borders of Copyright*, 41 J. COPYRIGHT SOC'Y U.S.A. 322, 333 (1994) (implying that royalty rights should not be viewed as domestic social welfare legislation).

165. *See* Goetzl, *supra* note 119, at 258 (acknowledging that successful artists will benefit more from a resale royalty right than unsuccessful ones); *see also* Perlmutter, *supra* note 27, at 305–06 (noting that in a capitalist system, some artists invariably will reap more benefits from resale royalties than others). *See generally* Ralph S. Brown, Symposium, *The Semiconductor Chip Protection Act of 1984 and Its Lessons: Eligibility for Copyright Protection: A Search for Principled Standards*, 70 MINN. L. REV. 579, 587–88 (1985) (discussing the process by which artists receive a realized appreciation in the artist's work through resale royalties).

166. Reddy, *supra* note 1, at 531 (stating that lesser-known artists will still reap significant benefits from resale royalties).

167. *Id.*; *see also* Perlmutter, *supra* note 27, at 305 (arguing that even small royalties can enable artists to focus on creating, rather than on mere survival). *See generally* Pfeffer, *supra* note 2, at 533 (noting some benefits of the resale royalty program).

168. *See* Goetzl, *supra* note 119, at 257 (arguing that artists should benefit from the resale of their work, however small the profit); *see also* Liemer, *supra* note 13, at 55 (identifying the resale royalty as an economic right). *See generally* Reddy, *supra* note 1, at 534 (stating that resale royalty rights are grounded in copyright and economic principles).

The Copyright Office Report indicates, however, that the analogy between authors and artists may not hold up.<sup>169</sup> Opponents believe that resale royalties for artists and royalties for authors and composers are not the same thing.<sup>170</sup> For example, a book is sold at a relatively small price in thousands of copies to large groups of customers, while a work of art is usually sold at a higher price to one or a limited number of customers.<sup>171</sup> In this way, artists have greater control over the distribution of their work.<sup>172</sup> A more suitable comparison with the resale of a work of art would be the resale of an author's first-edition book, for which he or she normally would not receive a royalty.<sup>173</sup>

Opponents state that the proposed resale royalty right is a new and different kind of right than the royalties received by authors and composers.<sup>174</sup> This new right interferes with the first-sale doctrine<sup>175</sup> and does not help artists in the way proponents desire.<sup>176</sup>

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169. See ARTIST'S RESALE ROYALTY, *supra* note 9, at 144; see also Frazier, *supra* note 4, at 340 (uncovering several differences between authors and artists with respect to copyright issues). *But see* John T. Cross, *Giving Credit Where Credit is Due: Revisiting the Doctrine of Reverse Passing Off in Trademark Law*, 72 WASH. L. REV. 709, 712 (1997) (noting similar legal implications for both artist and author).
  170. See WEIL, *supra* note 148, at 211–13 (distinguishing between ordinary royalties and resale royalties); see also Alderman, *supra* note 103, at 277–79 (describing the difference between royalties for authors and composers, and resale royalties). See generally Frazier, *supra* note 4, at 340 (uncovering differences in royalties between visual artists and others).
  171. ARTIST'S RESALE ROYALTY, *supra* note 9, at 144; see also Alderman, *supra* note 103, at 277–79 (noting that resale royalties usually apply to works of art that are one-of-a-kind). See generally Nancy Perkins Spyke, *The Promotion and Preservation of Culture as Part of Environmental Policy*, 20 WM. & MARY ENVTL. L. & POL'Y REV. 243, 255 n.94 (1996) (stating that art, in history, has often been sold in limited numbers through commissioned works).
  172. See Schechter, *supra* note 35, at 23 (showing how the artist maintains control by limiting sales of her work). *But see* Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1, n.265 (1997) (claiming the first-sale doctrine interferes with the artist's control over her work).
  173. See ARTIST'S RESALE ROYALTY, *supra* note 9, at 144; see also Alderman, *supra* note 103, at 277–79 (discussing generally how authors, artists and composers receive royalties).
  174. See WEIL, *supra* note 148, at 211–13 (noting that resale royalties do not involve reproductions or mass circulations of the original work of art); see also Rowe, *supra* note 36, at 405–06 (stating many differences for resale royalty rights). See generally Horowitz, *supra* note 51, at 157 n.25 (noting differences between types of royalty rights).
  175. See Alderman, *supra* note 103, at 279 (inquiring: "[D]oes Congress want to eliminate, or even qualify, the First Sale doctrine, and abandon well-settled principles of free alienability in Anglo-American property jurisprudence?"); see also Platkin, *supra* note 17, at 521 (stating that the *droit de suite* concept runs counter to the principles of the first-sale doctrine). *But see* Chatterjee, *supra* note 54, at 411 (noting that California courts rejected the idea that the first-sale doctrine and resale royalties act are mutually exclusive).
  176. See WEIL, *supra* note 148, at 219–22 (opining that alternatives to the resale royalty would likely benefit artists more, such as tax incentives for purchasing art or an art bank similar to the one in Canada); see also Carleton, *supra* note 49, at 534 (proclaiming that the California Resale Royalties Act may divert resources from less famous artists to wealthier artists); John M. Kernochan, *The Distribution Right in the United States of America: Review and Reflections*, 42 VAND. L. REV. 1407, 1434 (1989) (addressing the argument that resale royalties may fail to help poor artists and benefit only those artists who are already wealthy).

## 2. A Resale Royalty Will Damage the Primary Art Market

Other opponents state that the primary art market will experience a sharp decline in price due to the resale royalty right.<sup>177</sup> The primary market consists of the first sales of artwork, while the secondary market consists of all the resales.<sup>178</sup> Opponents of the resale royalty state that buyers will take into account a possible future royalty fee and therefore pay less for the art in the primary market. In this way, more artists would be negatively affected by the resale royalty because most of their income comes from the first sale.<sup>179</sup>

Research indicates, however, that just the opposite is true. France, Germany and Belgium, which have had a *droit de suite* longer than any other country and therefore have the most experience with resale royalties, have reported a steady increase in resale royalties and no decrease in the price of first sales due to the resale royalty.<sup>180</sup> France also declared that its market share remains comparable to those countries that do not have a resale right.<sup>181</sup>

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177. See WEIL, *supra* note 148, at 118 (noting that opponents of resale royalty rights cite the argument that such rights will decrease primary art market sale prices); see also JOHN HENRY MERRYMAN & ALBERT ELSSEN, LAW, ETHICS AND THE VISUAL ARTS 496 (4th ed. 2002) (explaining the effect resale royalty rights would have on the price of initial art sales); Carleton, *supra* note 49, at 534 (speculating that resale royalty legislation will decrease primary art sale prices); Johnson, *supra* note 4, at 506 (admitting that art collectors may offer artists less money for initial purchases because of the possibility of future royalty payments).

178. See Daniel J. Gifford, *Innovation and Creativity in the Fine Arts: The Relevance and Irrelevance of Copyright*, 18 CARDOZO ARTS & ENT. L.J. 569, 590 (2000) (analyzing the separation of the art market into a primary sector for the sale of new works and a secondary sector for the sale of older works); see also Merryman, *supra* note 32, at 243 (defining the primary art market as the market made up of artists' first sales and the secondary market as the resale market); Pfeffer, *supra* note 2, at 540 (asserting that the primary art market implicates transactions between artists and buyers, whereas the secondary art market deals mainly with resale of works of art).

179. See ARTIST'S RESELL ROYALTY, *supra* note 9, at 148 (explaining how resale royalty rights may reduce sale prices in the primary art market); see also Stephen S. Ashley, *A Critical Comment on California's Droit de Suite*, *Civil Code Section 986*, 29 HASTINGS L.J. 249, 252 (1977) (recognizing that artists in states that have resale royalty statutes must decrease primary market prices to compete with prices in jurisdictions that do not have similar statutes); Ben W. Bolch et al., *An Economic Analysis of the California Art Royalty Statute*, 10 CONN. L. REV. 689, 696 (1978) (indicating that a resale royalty negatively affects artists because only a small number of artists have a resale market, and 99 percent of all artwork depreciates in value).

180. See Frazier, *supra* note 4, at 338 (recounting the institution of France's resale royalty rights program in 1920); see also Sky, *supra* note 110, at 319 (providing that France, Germany and Belgium have all experienced increased resale royalties without a decrease in first-sale prices); Alex Pitt, *When the Profits Are Drawn, Don't Cut the Artist Out of the Picture—Musicians and Writers Can Make a Fortune from the Resale of Their Works, So Why Should Artists Not Benefit When Their Works Escalate in Price? Our Reporter Makes the Case for Droit de Suite*, OBSERVER (London), May 23, 1999, at 68 (remarking that France, in 1920, was the first country to institute a resale royalty law).

181. See Sky, *supra* note 110, at 319 (informing that since France instituted resale royalty rights, it has remained competitive with non-resale royalty right countries and has not suffered a drop in its market share). But see Charles Bremner, *Boost for Britain in Art Levy Row*, TIMES (London), Dec. 15, 1999, at 17 (proclaiming that reports commissioned by the French government conclude that resale royalty laws are causing damage to the art market in France). See generally Phil McLeod, Comment, *California's Resale Royalties Act*, 2 COMM/ENT 733, 734 (1980) (characterizing the French resale rights law as being successful and one of the most effective systems of resale royalty rights).

Ted Feder, the head of Artists Rights Society,<sup>182</sup> also maintained that the predicted drop in sale price of the primary art market has not been known to happen in any *droit de suite* country.<sup>183</sup> It seems that the resale royalty has little, if any, effect on the original sale price of artwork, as opponents have supposed.<sup>184</sup>

Even locally, similar results have been found. In 1986, the California Bay Area Lawyers for the Arts conducted a study of the California art market in which all the responding art dealers said the resale royalty had not significantly affected their sales.<sup>185</sup> At the hearing in New York, John Weber, an art dealer, testified that in the 1970s many of the artists he represented successfully used contracts with resale royalty provisions and that those provisions were never a factor in the price of the artwork.<sup>186</sup> He said the price of the artwork was not lowered because of the resale royalty provisions.<sup>187</sup>

The most likely result of resale royalties is that they will be absorbed by the art market without significant effect, similar to other costs associated with art transactions that have been

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182. See Greg Allen, *When Fans of Pricey Video Art Can Get It Free*, N.Y. TIMES, Aug. 17, 2003, at 25 (stating that Ted Feder is the president of the Artists Rights Society, an organization that represents several major European artists' rights groups).

183. See ARTIST'S REALE ROYALTY, *supra* note 9, at 384 app. (allowing that predicted price decreases for primary art sales has not occurred in countries providing resale royalty rights); see also Vickers, *supra* note 25, at 440 (detailing that resale royalty rights legislation has been successful in France and has caused no reduction in auction sales); Anne L. Straw, Note, *A Proposal for National Uniform Art-Proceeds Legislation*, 53 IND. L.J. 129, 132 (1978) (arguing that resale royalty legislation does not harm art markets because such legislation has only a small economic effect on art prices and would not be enough to deter art lovers from purchasing art).

184. See Reddy, *supra* note 1, at 528–29 (citing the fact that resale royalty rights have not affected art prices in any country that has implemented such legislation); see also McLeod, *supra* note 181, at 735 (commenting that the resale royalty legislation has not depressed art prices because art lovers still purchase art regardless of prices). But see SCOTT HODES, WHAT EVERY ARTIST AND COLLECTOR SHOULD KNOW ABOUT THE LAW 71 (1974) (maintaining that resale royalty rights result in a reduction of prices paid for initial purchases of artwork).

185. See ARTIST'S REALE ROYALTY, *supra* note 9, at 69–70 (recounting the findings of the California Bay Area Lawyers for the Arts, which found that the California Resale Royalty Act had no effect on art sales in that state); see also John E. McInerney III, *California Resale Royalties Act: Private Sector Enforcement*, 19 U.S.F. L. REV. 1, 11 (1984) (reiterating that neither the French nor the California art market suffered any detrimental effect from implementation of resale royalty legislation). But see MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 319–20 (3d ed. 1999) (suggesting that the California Resale Royalty Act has harmed the art community in that state by provoking sellers to make sales in other states).

186. See ARTIST'S REALE ROYALTY, *supra* note 9, at app. 364–65 (chronicling the testimony of John Weber, an art dealer, who explained the successful use of private contracts with resale royalty provisions); see also FRANKLIN FELDMAN ET AL., ART LAW: RIGHTS AND LIABILITIES OF CREATORS AND COLLECTORS 53 (1986) (explaining the use of private agreements by artists to protect resale royalties rights in the absence of legislation); Lewis D. Solomon & Linda V. Gill, *Federal and State Resale Royalty Legislation: "What Hath Art Wrought?"*, 26 UCLA L. REV. 322, 327 (1978) (demonstrating that for many years artists in the United States have made private contractual agreements protecting resale royalty rights).

187. See ARTIST'S REALE ROYALTY, *supra* note 9, at app. 364–65 (concluding that the price of artwork was not lowered because of resale royalty legislation); see also Johnson, *supra* note 4, at 503 (recounting the history of private contractual agreements by artists to provide for resale royalties). But see Kernochan, *supra* note 176, at 1433 (contending that private contractual agreements by artists to receive resale royalty rights were not often used or accepted by dealers, collectors or museums). See generally Roberta Smith, *When Artists Seek Royalties on Their Resales*, N.Y. TIMES, May 31, 1987, at B29 (illustrating the success of private contractual agreements in the collection of resale royalty rights).

absorbed.<sup>188</sup> The market has, after all, successfully absorbed dealer commissions and auction fees that far exceed rates being considered for resale royalties.<sup>189</sup> Along with auction houses' commission fees, which are 10 to 20 percent of the sale price, most have a buyer's premium, which is usually 10 percent of each sale.<sup>190</sup> In fact, Christie's raised its buyer's premium from 10 percent to 15 percent in 1993.<sup>191</sup> Given that all these added commissions did not depress the art market, a resale royalty of a considerably less amount likely would not depress the market.

### 3. A Resale Royalty Will Cause the Art Market to Move Jurisdictions

The other reason opponents state that the resale royalty will damage the art market is that the market will move to jurisdictions that are not implementing the right.<sup>192</sup> California experienced an immediate downturn in the local art market after the California Resale Royalty Act became effective in 1977.<sup>193</sup> Other cities, such as Paris, which was once the center of the world

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188. See ARTIST'S RESELL ROYALTY, *supra* note 9, at 142 (hypothesizing that resale royalty costs will be absorbed by the art market); see also Goetzl, *supra* note 119, at 258–59 (arguing that a resale royalty is not going to drive collectors away from the purchase of art); Grace Glueck, *Royalties on Art Resales Are Far from Universal*, N.Y. TIMES, Nov. 12, 1980, at C25 (reviewing the arguments in favor of resale royalty rights by artists who believe the legislation would better their lives and provide financial security).
189. See Perlmutter, *supra* note 27, at 298 (stating that the market has successfully absorbed dealer commissions and auction fees, both of which exceed the amount that would be charged for resale royalties); see also *A Fair Go at Last for Artists When Their Works Are Resold*, CANBERRA TIMES (Australia), Sept. 20, 2003, at B9 (mentioning that resale royalty costs are similar to the costs paid for buyer's premiums and commissions at an auction); Artquest, *Droit de Suite 1996* (1996), available at <http://www.artquest.org.uk/artlaw/droitdesuite/droitdesuite1996.htm> (last visited Feb. 24, 2005).
190. See Sky, *supra* note 110, at 316 (reporting that auction houses added a ten percent "buyer premium" to purchases, which amounted to little more than an additional commission on the sale); see also Luisa Kroll, *Before You Bid*, FORBES, Dec. 8, 2003, at 236 (explaining that a buyer's commission at an auction can range from four to ten percent); Leslie Trilling, *At Auction; Going, Going . . . ; Whether It's a Rare Antique or a Modern Collectible, It's Likely Being Auctioned Somewhere. To Nab It: Know How to Work the System*, L.A. TIMES, Mar. 18, 2004, at F9 (indicating that auctions usually charge a commission of 10 to 15 percent, known as a buyer's premium).
191. See Sky, *supra* note 110, at 316–17 (mentioning that Christie's auction house raised its commission by five percent in 1993); see also *Christie's to Raise Charge*, S. CHINA MORNING POST (Hong Kong), Jan. 1, 1993, at 2 (declaring that Christie's auction house would be raising its buyer's premium from 10 percent to 15 percent); *Tradition Under the Hammer*, ECONOMIST, June 26, 1993, at 93 (announcing that the buyer's premium at both Christie's and Sotheby's increased from 10 percent to 15 percent).
192. See KENNETH P. NORWICK & JERRY SIMON CHASEN, *THE RIGHTS OF AUTHORS, ARTISTS, AND OTHER CREATIVE PEOPLE* 48 (2d ed. 1992) (opining that if New York instituted a resale royalty statute, dealers and collectors would make sales outside of New York to avoid royalty payments); see also Perlmutter, *supra* note 27, at 296 (denouncing the idea that resale royalty statutes cause investors to make purchases in jurisdictions that do not offer such legislation to avoid costs); *Let the Bad Times Roll*, ECONOMIST, Jan. 26, 2002 (noting that London art dealers campaigned resale royalty laws because they would shift business to markets where such laws did not apply).
193. See MERRYMAN & ELSEN, *supra* note 177, at 477 (establishing that in 1977, Sotheby's auction house in Los Angeles suspended sales of contemporary art once the California Resale Royalty Act went into effect); see also Richard Lacayo, *The "Moral Rights" of Artists: Who May Say What Becomes of Works of Art After They Are Sold?*, TIME, Mar. 14, 1988 (claiming that the California Resale Royalty Act has driven the art business out of state or off the books); *Boon or Bane to Living Artists*, N.Y. TIMES, Nov. 16, 1980, at D7 (quoting Gilbert Edelson of the Art Dealers Association, who characterized the California resale royalty legislation as "suicide" for young artists).



art market, have also lost their standing in the art market.<sup>194</sup> Currently, in fact, the most vital art markets are located in countries such as the United States, where no resale royalty exists.<sup>195</sup> It is apparent that the resale royalty damages the art market in some countries because of jurisdictional movement.<sup>196</sup> It is therefore important to establish uniformity throughout the art market in order to benefit the artist.<sup>197</sup>

Because the United States and the European Union are major players in the art world, establishing federal law in the United States similar to that of the European Union could have a big impact on uniformity in the art world.<sup>198</sup> If this uniformity existed throughout the art

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194. See Edelson, *supra* note 149, at 266 (pointing out that Paris, once the center of the world art market, has lost its standing; however, there is no evidence that the decline was a result of the *droit de suite*); see also Barbara J. Tyler, *The Stolen Museum: Have United States Art Museums Become Inadvertent Fences for Stolen Art Works Looted by the Nazis in World War II?*, 30 RUTGERS L.J. 441, 449 (1999) (explaining that when World War II broke out in 1939, Paris was the center of the art world); C. Franklin Sayre, Comment, *Cultural Property Laws in India and Japan*, 33 UCLA L. REV. 851, 887 n.156 (1986) (stating that London and New York are the two most important art centers in the world).
195. See Edelson, *supra* note 149, at 266 (noting that the most vital art markets are in the United States and England where the *droit de suite* has not been enacted); see also Rowe, *supra* note 36, at 405 (asserting that the most vital art markets today, the United States and England, do not have resale royalty provisions); Pfeffer, *supra* note 2, at 545 (positing that the *droit de suite* would raise prices, thus buyers would go to New York where prices are lower because there is no *droit de suite*).
196. See Gordon P. Katz, *Copyright Preemption Under the Copyright Act of 1976: The Case of Droit de Suite*, 47 GEO. WASH. L. REV. 200, 221 (1978) (arguing that any state adopting a *droit de suite* may inadvertently force its art galleries to move to other states that do not require resale royalty payments); see also Kernochan, *supra* note 176, at 1434 (noting that individual nations may be unwilling to adopt a resale right for fear of losing art sales to nations that do not impose such a tax on transfers); Lovern, *supra* note 59, at 116 (asserting that the specter of a flight of trade is often raised to argue against the adoption of a resale royalty).
197. Cf. Alexandre A. Montagu, *Recent Cases on the Recovery of Stolen Art—The Tug of War Between Owners and Good Faith Purchasers Continues*, 18 COLUM.-VLA J.L. & ARTS 75, 76 (1993) (arguing that with the art and antiquities market commanding increasingly higher prices, the time has arrived for the adoption of a more uniform approach in the United States with respect to stolen art cases); cf. Steven F. Grover, Note, *The Need for Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study*, 70 TEX. L. REV. 1431, 1445 (averaging that a chorus of observers has concluded that the lack of uniformity among various nations' laws on the transferability of title to chattels sold by a thief facilitates the laundering of stolen art); cf. Michele Kunitz, Comment, *Switzerland and the International Trade in Art and Antiquities*, 21 NW. J. INT'L L. & BUS. 519, 541 (2001) (reasoning that it is incumbent upon the Swiss to take action and lead the other European nations and the United States toward a cooperative and uniform regime to protect cultural property and art).
198. See Joseph F. Edwards, *Major Global Treaties for the Protection and Enjoyment of Art and Cultural Objects*, 22 U. TOL. L. REV. 919, 923 (1991) (asserting that the United States has been a major market in the international art trade); see also Kevin F. Jowers, Comment, *International and National Legal Efforts to Protect Cultural Property: The 1970 UNESCO Convention, the United States, and Mexico*, 38 TEX. INT'L L.J. 145, 148 (2003) (explaining that the United States is a wealthy country with a major market for the purchase of art and cultural objects); Monique Olivier, Comment, *The UNIDROIT Convention: Attempting to Regulate International Trade and Traffic of Cultural Property*, 26 GOLDEN GATE U. L. REV. 627, 641–42 (1996) (pointing out that the United States, England, France, Germany and Switzerland are major art market nations).

world, then conflicts such as forum shopping would disappear, and the artist would be able to benefit more fully from the sale of his or her work.<sup>199</sup>

Currently California is the only state that has enacted such a law.<sup>200</sup> Because of this, if art-work is sold anywhere outside of California, the artists will not be entitled to a resale royalty unless they managed to have such a clause in their sale contract.<sup>201</sup> Even though some contracts have been successful in the past, as noted, contracts can also be a problem.<sup>202</sup> Contracts are self-controlled and as time goes by, it can become more difficult for artists to physically keep track of where their works are and to collect royalties accordingly.<sup>203</sup> Furthermore, younger artists do not have the same bargaining power while making contracts as more well-established artists might.<sup>204</sup> To resolve this problem and to help with uniformity, Congress should enact legislation for artists' resale rights.

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199. See Perlmutter, *supra* note 27, at 298 (reasoning that insofar as art buyers have been able to avoid the California royalty by purchasing art in Nevada, a federal statute would prevent such domestic forum-shopping); cf. Jessica L. Furey, Note, *Painting a Dark Picture: The Need for Reform of IRS Practices and Procedures Relating to Fine Art Appraisals*, 9 CARDOZO ARTS & ENT. L.J. 177, 199 (1990) (propounding that greater consistency and fairness can be achieved through legislation that clarifies the definition of *fair market value* in the Treasury Regulation, provides more uniform requirements in the appraisal industry and limits the role of the art panel in the valuation process). See generally Eric M. Brooks, Comment, "Tilted" Justice: Site-Specific Art and Moral Rights After U.S. Adherence to the Berne Convention, 77 CAL. L. REV. 1431, 1474 (1989) (asserting that a federally recognized moral right for visual artists would protect the personalty interests that are inadequately safeguarded by disingenuous and inelegant makeshift substitutes; further, uniform legislation would recognize that the art market is national and would remove conflicts among varying state laws).
200. See Prater, *supra* note 7, at 117 (averring that, currently, California is the only state with a resale royalty statute for visual works of art); see also Gimbel, *supra* note 37, at 1681 (asserting that efforts to enact a *droit de suite* have succeeded only in California). But see Nancy Kremers, *Speaking with a Forked Tongue in the Global Debate on Traditional Knowledge and Genetic Resources: Are U.S. Intellectual Property Law and Policy Really Aimed at Meaningful Protection for Native American Cultures?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 118 (2004) (reporting that South Dakota is the only state other than California that has enacted resale royalties legislation).
201. See CAL. CIVIL CODE § 986(a) (West 1990) (stating: "Whenever a work of fine art is sold and the seller resides in . . . or the sale takes place in California, the seller . . . shall pay to the artist . . . five percent of the amount of such sale"); see also Ashley, *supra* note 179, at 258 (specifying that the California legislature limited the application of section 986 to transactions in which the seller resides in California or the sale takes place in California); Horowitz, *supra* note 51, at 183 (asserting that "the current situation, whereby some courts protect artists' rights of integrity . . . and others refuse to do so . . . , results in a complete lack of uniformity").
202. See Frazier, *supra* note 4, at 339 (maintaining that artists must privately and independently challenge any violations of the California resale royalty statute; further, to enforce their rights, artists would need to undertake costly litigation amidst fears that unhappy dealers would boycott their works); see also Straw, *supra* note 183, at 134 (asserting that an art contract is not responsive to the problem of an artist's often weak economic bargaining position; further, there is no guarantee that subsequent purchasers will send the transfer form to the artist upon resale or that they will not falsify the values thereon).
203. See ARTIST'S RESELL ROYALTY, *supra* note 9, at app. 365 (statement of John Weber); see also McNerney, *supra* note 185, at 13 (advancing the theory that because California's resale royalty law does not require the seller to notify the artist when a work is resold, the seller can avoid paying a royalty simply by keeping the sale secret); Kathryn L. Boe, Comment, *The Droit de Suite Has Arrived: Can It Thrive in California as It Has in Calais?*, 11 CREIGHTON L. REV. 529, 536-37 (1977) (reasoning that although the artist must enforce his right to a royalty, he will have no way of checking how many times his art has changed hands or what the selling prices have been).
204. See ARTIST'S RESELL ROYALTY, *supra* note 9, at 374-75; see also McNerney, *supra* note 185, at 15 (explaining that only well-known artists are in a position to successfully negotiate royalty rights and that prospective buyers simply will not purchase the work of an unknown artist who tries to impose resale royalty obligations); Perlmutter, *supra* note 27, at 415 (contending that art galleries may be less willing to incur the cost of mounting an exhibition for an inexperienced artist since their offsetting profits from established artists will be lower).

#### 4. A Resale Royalty Is Just an Added Tax or Excuse for Profit Sharing

Opponents of the resale royalty right also believe that it is just an additional tax or an excuse for profit sharing. Collectors and museums are among those that see the resale royalty as a tax.<sup>205</sup> Economists have also done studies in which they call the resale royalty a “bad tax.”<sup>206</sup> According to Asimow, a lawyer-economist, “It interferes seriously with the market, produces negligible revenue, is costly to administer, and is poorly accepted by the market.”<sup>207</sup>

Opponents believe the resale royalty is a way of sharing profit without risking loss, which is “inherently unjust.”<sup>208</sup> They consider compulsory profit sharing as a discriminatory tax.<sup>209</sup> In most cases, however, authors are treated in the same way.<sup>210</sup> They typically assign publishing rights to a company, which invests in the publishing, copying and advertising of the work while

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205. See Karp & Perloff, *supra* note 79, at 171 (proclaiming that a positive resale royalty rate is analogous to a tax on the art gallery in its role as a speculator); see also Mathews, *supra* note 65, at 142 n.13 (asserting that a resale royalty system would place a virtual “tax” on the art resale market); Merryman, *supra* note 32, at 254 (declaring that collectors and museums see the resale royalty right as a tax).
206. See Karp & Perloff, *supra* note 79, at 170 (analogizing a resale royalty to a resale tax); see also Merryman, *supra* note 32, at 256 (pointing out that Asimow, a lawyer-economist, has called the resale royalty right a “bad tax”). See generally Bolch, *supra* note 179, at 699 (professing that the resale royalty law will result in a small economic gain to a few and an economic loss to many).
207. See Merryman, *supra* note 32, at 256 (quoting Asimow). See generally Karp & Perloff, *supra* note 79, at 164 (maintaining that if resale royalties are an issue only for a handful of extremely successful artists, a complex artist registration system would not be cost-effective, and private contracts would be more sensible); Price, *supra* note 24, at 1366 (reasoning that in terms of its articulated goals, the *droit de suite* rewards the wrong painters with probably inconsequential amounts of money at the wrong time in their lives).
208. See ARTIST’S RESEAL ROYALTY, *supra* note 9, at 135 (asserting that there is something inherently unjust about permitting an artist to benefit from increased value without also having to share the risk of loss); see also Alderman, *supra* note 103, at 282 (arguing that a resale royalty ignores the inequity of sharing profit without risking loss); Reddy, *supra* note 1, at 532 (quoting the Copyright Office Report, which stated that “there is something inherently unjust . . . in permitting an artist to benefit from increases [in the value of his work upon resale], without having to share the risk of loss”).
209. See Edelson, *supra* note 149, at 264 (propounding that, in essence, compulsory profit sharing is a discriminatory tax); see also Kreitsinger, *supra* note 18, at 971 (pointing out that opponents of a *droit de suite* have argued that a resale royalty would hurt an already weak art market and would not have its desired effect, because the royalties would go only to successful artists). See generally Goetzl, *supra* note 118, at 902–03 (explaining that opponents of a resale royalty persist in implicitly characterizing the royalty as no more than an attempt to provide financial assistance to artists in general).
210. See Donald A. Hughes, Jr., *Jurisprudential Vertigo: The Supreme Court’s View of “Rear Window” is for the Birds*, 60 MISS. L.J. 239, 271 (1990) (explaining that book publishers contribute a great deal themselves to the success of a work and assume considerable economic risks and losses which the author does not); see also Megan M. Gillespie, Note, *To Whom Does a New Use Belong?: An Analysis of the New Use Doctrine and the Protection It Affords After Random House v. RosettaBooks*, 11 WM. & MARY BILL RTS. J. 809, 820 (2003) (declaring that although both the author and the publisher clearly benefit from the license to publish, the publisher bears most, if not all, of the risk); Tim Naprawa, Comment, *Secondary Use of Articles in Online Databases Under U.K. Law*, 9 TRANSNAT’L LAW. 331, 354 (1996) (reasoning that the employer pays the author for the individual article and also bears the risk of loss should an article or edition not be well received; therefore, the publisher deserves to reap any gains from such work).

the author benefits from up-front payments and royalties without sharing in the risk of loss.<sup>211</sup> There is no reason artists cannot also benefit from royalties the same as authors.<sup>212</sup>

Opponents strongly believe that compulsory profit sharing is a real disincentive for collectors to purchase works of art by artists who are still living because of this added tax.<sup>213</sup> This would in turn harm the artists because their works would be harder to sell.<sup>214</sup> It is unlikely, however, that collectors would be turned away by a mere five percent royalty when they have become accustomed to paying considerably higher percentages for commissions and buyer's premiums.<sup>215</sup>

According to opponents, the added resale royalty tax would also harm dealers and galleries, which would then again harm the artists themselves.<sup>216</sup> For example, a resale royalty tax reduces the dealer's finances and the ability to support and promote the artists' work.<sup>217</sup> Galleries have

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211. See Perlmutter, *supra* note 27, at 307 (asserting that authors do not normally exploit their own work but rather assign it to a publishing, recording or production company to bring the work to the public); see also Reddy, *supra* note 1, at 532 (stating that authors typically assign the publishing rights to a company and benefit from up-front payments and royalties without being expected to share in the risk of loss). See generally Maureen A. O'Rourke, *A Brief History of Author-Publisher Relations and the Outlook for the 21st Century*, 50 J. COPYRIGHT SOC'Y U.S.A. 425, 433-35 (2003) (demonstrating the fluctuation of contractual relationships between authors and publishers, with contracts ranging from lump-sum payouts to specified royalties, and noting that publishers bear all the risk of loss).
  212. See Alderman, *supra* note 103, at 268-69 (showing that artists should benefit from the increased value of their work); see also Siegel, *supra* note 32, at 8-9 (asserting that visual artists contribute to the quality of American life in the same way as authors or composers do and should benefit from the royalties). See generally Reddy, *supra* note 1, at 532-33 (illustrating that artists do not profit from their work in the same way that authors and composers do and that this is an inequity in the American copyright system).
  213. See Edelson, *supra* note 149, at 261-67 (stating that compulsory profit sharing is a disincentive to collectors and potential collectors to purchase art by living artists). See generally Lovern, *supra* note 59, at 113 (demonstrating the arguments against a resale royalty tax in the United States and the fear that the added tax would depress the art market); Rowe, *supra* note 36, at 405 (expressing that the added tax deters collectors from purchasing artwork that will impose future obligations).
  214. See Edelson, *supra* note 149, at 262 (stating that an "overwhelming majority of artists would be harmed by legislation which gives them nothing and makes their work more difficult to sell"); see also Johnson, *supra* note 4, at 500 (expressing that artists' works would be harder to sell through dealers because the dealers would then have to share in the profits with the artists). See generally Karp & Perloff, *supra* note 79, at 172-73 (demonstrating that the royalty resale tax would make artists' works harder to sell).
  215. See Sky, *supra* note 110, at 316-17 (stating that commissions range anywhere from 35 to 50 percent of the sale price and buyer's premiums 10 to 20 percent). But see Gordon H. Marsh & Meryl S. Justin, *New York's Multi-print Legislation and Other Recent Developments in State Legislation on the Fine Arts*, 254 PLI/PAT 743, 767-69 (1988) (demonstrating that the five percent tax will deter dealers from dealing in fine art and will lead to an exodus of the art market from California). See generally Goetzl, *supra* note 118, at 903-04 (illustrating that increases in other taxes assessed for the sale of art are much higher than the resale royalty and are without opposition).
  216. See Merryman, *supra* note 32, at 256 (indicating that if the resale royalty tax impairs collectors and dealers, it will in turn impair the artists themselves). See generally Alderman, *supra* note 103, at 278 (asserting that resale royalties would hurt galleries' profits and therefore galleries would spend less on advertising for its artists); Kara Swisher, *Debating a Royalties Rewrite*, WASH. POST, Dec. 7, 1987, at D7 (showing that a resale tax may harm dealers and galleries because it would discourage the buying of art).
  217. See Karp & Perloff, *supra* note 79, at 171-72 (illustrating that the added tax would harm galleries and dealers, thereby reducing the amount of money spent to promote the artists); see also Merryman, *supra* note 32, at 256 (showing that resale royalties impair the dealer's financial ability to support and promote his artists' work). See generally Frazier, *supra* note 4, at 342 n.227 (stating that the resale royalty tax would hurt dealers and lead to fewer exhibits to promote artists).

to pay rent, insurance and salaries, so any additional taxes reduce the amount spent for promoting the artists.<sup>218</sup>

When promoting artists, galleries spend equal amounts for both well-known artists and the ones just starting out.<sup>219</sup> Works of art by lesser known artists need to be subsidized by the more successful artists because their works are not as profitable but still need to be promoted.<sup>220</sup> If galleries had to pay an additional tax on the resale of works, then the number of exhibitions of lesser known artists would be reduced.<sup>221</sup> John H. Merryman, a professor of law, stated, "Among artists, the benefits it confers on a few are out-weighted by the costs to the majority of artists. If we add in the costs to collectors, museums and the art trade, the cost-benefit equation becomes heavily lop-sided."<sup>222</sup>

It is unlikely, however, that cutbacks in promoting lesser known artists would be due solely to the five percent resale royalty.<sup>223</sup> When galleries go into business, they must take into

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218. See ARTIST'S RESALE ROYALTY, *supra* note 9, at 247–48 (asserting that additional taxes galleries have to pay will reduce the amount spent on promotional activities for its artists); see also Merryman, *supra* note 32, at 256 (recognizing that dealers who maintain galleries pay rent, insurance and salaries and, therefore, the loss of income from the resale tax will reduce the dealers' effectiveness in promoting its artists); Rowe, *supra* note 36, at 405 (illustrating that the royalty resale tax will cause art dealers to spend less on promoting their artists).

219. See Alderman, *supra* note 103, at 278 (stating that galleries spend equal amounts promoting their artists whether they are experienced or not). See generally Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1568 n.174 (1989) (illustrating the business relationship between a dealer and artist and the degree of responsibility a dealer has to market the artist); Richard L. Harrison, *Finding the Right Price for Your Artwork*, AM. ARTIST, June 1, 1995, at 20 (demonstrating that a formula is used to determine the amount of money that is paid to the gallery to promote the artist's work, depending on the value of the work).

220. See Alderman, *supra* note 103, at 278 (asserting that the works of young artists are not profitable and need to be subsidized by more established artists); see also Casey, *supra* note 49, at 102 (demonstrating that the sale of works by known artists helps to subsidize promotional exhibits for lesser known artists); Johnson, *supra* note 4, at 500 (stating that the art market would be depressed with the added royalty tax because it would mean less profit, and art dealers would be less likely to subsidize lesser known artists).

221. See Alderman, *supra* note 103, at 278 (expressing that the resale royalty tax would reduce the number of promotional exhibitions for younger artists); see also Michael Kernan, *The Great Debate Over Artists' Rights; Facing the Tough Question of Who Really Controls a Work of Art*, WASH. POST, May 22, 1988, at F1 (stating that if the galleries had to pay royalties on the resale of artists' work, there would be less to spend on the younger, unknown artists). But see Siegel, *supra* note 32, at 12 (asserting that most galleries profit from the sales of established artists, and the small royalty tax would not likely change the amount galleries spend on exhibits).

222. See Merryman, *supra* note 32, at 263 (remarking that the resale royalty tax benefits few compared to the heavier burden it places on collectors, museums and dealers). But see Kreitsinger, *supra* note 18, at 971 (expressing that a minority oppose the royalty resale tax, and the majority believe the tax would provide more equitable treatment for artists). See generally Battle, *supra* note 53, at 442 (stating that the royalty resale tax is one way in which artists' rights are being expanded).

223. See Sky, *supra* note 110, at 316–17 (expressing that a small five percent royalty would not be a key reason to depress the art market). But see Clar Ni Chonghaile, *Taxes Worry London Art Market*, CHI. TRIB., Aug. 8, 1999, at 13 (demonstrating that the resale royalty could potentially cause millions of dollars of loss for the art industry and leave dealers with less money for promotional activities); *The EU's Art Levy Is a Poor Piece of Work*, WALL ST. J. EUR., Feb. 18, 2000, at 8 (asserting that the resale royalty tax hurts the art market as a whole and has received much opposition).

account taxes, salaries, rents and so forth.<sup>224</sup> A five percent resale royalty would simply be an additional expense that galleries and dealers would have to consider in running their businesses.<sup>225</sup> The royalty would be no different than the 10 to 20 percent buyer's premium attached to artwork sold at an auction or the 35 to 50 percent commission on a piece that is resold by a gallery.<sup>226</sup> The resale royalty would simply be a part of business, and the artist would be able to benefit from it.

## VI. Conclusion

Now that the European Union is harmonizing its law among member states on the artists' resale royalty right, it is more important for the United States to do so as well.<sup>227</sup> Because the United States and the European Union are both major players in the art world, establishing similar laws will be beneficial to everybody involved in the art market.<sup>228</sup> As stated above, there are many reasons Congress should enact an artists' resale royalty right in the United States.

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224. See Merryman, *supra* note 32, at 256; see also Cristina M. Offenberg, *Art Gallery Consignment Contracts in Rhode Island*, 44-APR R.I. B.J. 13, 13 (1996) (stating that relevant issues of gallery owners that are taken into account include but are not limited to payroll, rent, advertising and so forth). See generally Hayley Kaufman, *Where Art and Nightlife Thrive*, BOSTON GLOBE, Mar. 18, 2001, at M2 (suggesting that galleries are very expensive to maintain and run).
225. See Ingram, *supra* note 92, at 38 (showing that public enthusiasm at art auctions has not abated over the years with the implementation of buyer's premium taxes and sales tax; therefore, another five percent royalty tax should not be a problem). See generally Offenberg, *supra* note 224, at 14 (expressing that royalty rates are a common term taken into account in artist-dealer agreements); Smith, *supra* note 187, at 229 (illustrating that the resale tax is detrimental to sales of artwork and is seldom followed).
226. See Sky, *supra* note 110, at 316-17 (showing that commissions have been imposed on sellers of artwork that are much higher than the resale royalty tax and that the higher commissions did not depress the market). See generally Mark A. Reutter, *Artists, Galleries and the Market: Historical, Economic and Legal Aspects of Artist-Dealer Relationships*, 8 VILL. SPORTS & ENT. L.J. 99, 131-32 (1999) (stating that artists may receive between 35 and 75 percent of the market price credited toward them and the rest goes to commissions); John G. Steinkamp, *Fair Market Value, Blockage, and the Valuation of Art*, 71 DENV. U. L. REV. 335, 402-03 (1994) (expressing that the buyer's premium is the seller's cost of the sale and ranges from about 10 to 20 percent).
227. See Damich, *supra* note 1, at 405 (stating that the European Union may include resale royalties in its harmonization process, and the United States may feel obligated to follow suit). See generally JOHN GLADSTONE MILLS et al., *Patent Law Fundamentals*, 2 PAT. L. FUNDAMENTALS § 6:125 (2d ed. 2004) (showing that only in a few countries do artists receive royalties for the resale of their works, known as the *droit de suite* system, and presently the United States does not recognize this system); Ralph Oman, *Global Trademark and Copyright 1996: Management and Protection*, 455 PLI/PAT 233, 252 (1996) (demonstrating that it may be important for the United States to follow the European Union with respect to resale royalty rights because it is a two-way street).
228. See Shira Perlmutter, *Participation in the International Copyright System as a Means to Promote the Progress of Science and Useful Arts*, 36 LOY. L.A. L. REV. 323, 334 (2002) (illustrating that the United States follows the European Union's lead in many areas but not in others, such as artists' resale royalties); see also *Adopt or Improve Resale Royalty Right*, *supra* note 3, at 4 (asserting that artists who are not members of the European Union are able to receive royalties if their countries allow for payment of royalties; therefore, it is for the benefit of artists in the United States for the resale royalty tax to be implemented). See generally LERNER & BRESLER, *supra* note 2, at 1064-65 (stating that the European Union may impress a *droit de suite* system on art dealers, and this may be enough justification to extend it to the United States).

Even though it is unknown exactly what effect a federal statute for a resale royalty would have on the art market in the United States, all creative authors should be afforded fundamental fairness and the opportunity to participate in the exploitation of their work. Because copyright law does not provide a resale royalty right for fine artists, as it does for other creative authors, Congress should enact such a right to address this unfair treatment of artists under the copyright law.

***Nuevo Mundo Holdings v. Pricewaterhouse Coopers, LLP***

2004 U.S. Dist. LEXIS 24900 (S.D.N.Y. Dec. 8, 2004)

**United States courts lack subject-matter jurisdiction where no material conduct, substantial effects or intended, reprehended conduct on imports or exports occurs in the United States. The United States also lacks personal jurisdiction where a defendant has no minimum contacts with the forum state and where it is unreasonable to assert jurisdiction over the foreign defendant.**

**I. Holding**

In *Nuevo Mundo Holdings v. Pricewaterhouse Coopers LLP*,<sup>1</sup> the U.S. District Court for the Southern District of New York granted the defendant's motion to dismiss for lack of subject-matter jurisdiction and for lack of personal jurisdiction.<sup>2</sup> The defendant asserted that the Racketeer Influenced and Corrupt Organizations Act<sup>3</sup> (RICO) did not apply in this case, because the plaintiffs' claims involved only foreign parties on foreign soil, thereby not subjecting the defendant to subject-matter jurisdiction in the United States.<sup>4</sup>

The court held that plaintiffs provided insufficient evidence to justify extraterritorial application of the U.S. statute and, therefore, RICO did not apply to the defendant.<sup>5</sup> Given the purely foreign nature of the transactions in question, the matter was not one for U.S. review, and the motion to dismiss for lack of subject-matter jurisdiction was granted.<sup>6</sup>

Upon the defendant's Rule 12(b) motion to dismiss for lack of personal jurisdiction, the court found a deficiency of minimal contacts between the defendant and the United States

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1. 2004 U.S. Dist. LEXIS 24900 (S.D.N.Y. Dec. 8, 2004) [hereinafter *Nuevo Mundo II*].

2. *Id.* at \*22.

3. 18 U.S.C.A. §§ 1961–1968, specifically §§ 1964 and 1965.

4. *Nuevo Mundo II*, 2004 U.S. Dist. LEXIS 24900, at \*4; see also *Nuevo Mundo v. Pricewaterhouse Coopers LLP*, 2004 U.S. Dist. LEXIS 780, at 3 (S.D.N.Y. Jan. 22, 2004) [hereinafter *Nuevo Mundo I*] (stating the facts applicable to the current December decision). “The events central to the plaintiff's claims all occurred in Peru.” The defendant, residing in Peru, made inspections of Nuevo Mundo in Peru. Two Peruvian accounting firms—one affiliated with Pricewaterhouse Coopers and the other with Authur Andersen—were retained by Nuevo Mundo and the Superintendency of Banking and Insurance of Peru (SBS) to be its auditors and to conduct financial inspections. All the activities by these parties were completed in Peru.

5. *Nuevo Mundo II*, 2004 U.S. Dist. LEXIS 24900, at \*4. The RICO statute is silent as to any extraterritorial application, so plaintiffs bear the burden to prove to the court that they have proper subject-matter jurisdiction and personal jurisdiction over the defendant. See *Scelsa v. City Univ. of New York*, 76 F.3d 37, 40 (2d Cir. 1996) (discussing the plaintiff's burden to demonstrate that there is subject-matter jurisdiction); *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 566 (2d Cir. 1996) (stating that the plaintiff bears the burden of establishing that the court has personal jurisdiction over the defendant).

6. *Nuevo Mundo II*, 2004 U.S. Dist. LEXIS 24900, at \*6. The court looks to case law precedent and congressional history when deciding whether to apply RICO extraterritorially. The Second Circuit has stated that “the ultimate inquiry is . . . whether Congress would have wished the precious resources of the [U.S.] courts . . . to be devoted to [foreign transactions] rather than leave the problem to foreign countries.” *North South Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1052 (2d Cir. 1996).



under New York's long-arm statute<sup>7</sup> and a lack of reasonableness to exert jurisdiction over the defendant, violating the defendant's right of due process.<sup>8</sup> The court also held that section 1965 of RICO was insufficient to confer personal jurisdiction over the defendant<sup>9</sup> because he does not reside or transact his business affairs in New York—the state in which the plaintiffs claimed the harmful effects of the defendant's transactions occurred.<sup>10</sup>

## II. Facts and Procedural Posture

Plaintiffs are the Peruvian shareholders and directors of Banco Nuevo Mundo S.A. ("Nuevo Mundo"), which is organized under the laws of Panama.<sup>11</sup> Defendant Luis Cortavarria Checkley ("Checkley"), former Peruvian superintendent of banking and insurance, is the only remaining defendant against whom the plaintiffs bring claims under common law of breach of contract and violation of RICO.<sup>12</sup>

On December 5, 2000, the Superintendency of Banking and Insurance of Peru (SBS) ordered Nuevo Mundo into administration, after an inspection by the SBS found that Nuevo Mundo was in poor financial condition and presented "the highest risk of liquidity due to withdrawals of" cash deposits.<sup>13</sup> The Peruvian government advised plaintiffs that Nuevo Mundo would be sold and that the investors would lose their entire investment.<sup>14</sup> Plaintiffs alleged that defendants Pricewaterhouse Coopers LLP (PWC), Arthur Andersen LLP ("Andersen") and Checkley conspired, by fraudulently changing accounting and financial report documents, to seize control of Nuevo Mundo.<sup>15</sup> The court previously dismissed the suit against defendants

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7. *Nuevo Mundo II*, 2004 U.S. Dist. LEXIS 24900, at \*15. N.Y. C.P.L.R. 302(a). New York's long-arm statute provides for jurisdiction over a nondomiciliary who satisfies at least one of the four listed requirements. *See infra* note 43.

8. *Nuevo Mundo II*, 2004 U.S. Dist. LEXIS 24900, at \*18. Even if minimum contacts are proved, the court may still find it unreasonable to hale the defendant into court. The court must analyze the facts under the five-factor test laid out in *Asahi Metals Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987).

9. *Nuevo Mundo II*, 2004 U.S. Dist. LEXIS 24900, at \*20; *see also* A. Darby Dickerson, *Curtailing Civil RICO's Long Reach: Establishing New Boundaries for Venue and Personal Jurisdiction Under 18 U.S.C. 1965*, 75 NEB. L. REV. 476, 481 (1996). Section 1965(b) allows a plaintiff to sue defendants in a foreign forum "when the ends of justice [so] require" or to summon a nonresident person, no matter where he or she may be located, as a defendant to appear in the action. However, plaintiff did not provide adequate reasons why this section should apply to the defendant.

10. *Nuevo Mundo II*, 2004 U.S. Dist. LEXIS 24900, at \*20; *see* 18 U.S.C. § 1965(a), (b).

11. *Nuevo Mundo II*, 2004 U.S. Dist. LEXIS 24900, at \*2.

12. *Id.*; *see also* *Nuevo Mundo v. Pricewaterhouse Coopers LLP*, 2004 U.S. Dist. LEXIS 780 (S.D.N.Y. Jan. 22, 2004) (dismissing the claims brought against the defendants, PWC and Andersen, for lack of subject-matter jurisdiction and lack of personal jurisdiction).

13. *Nuevo Mundo I*, 2004 U.S. Dist. LEXIS 780, at \*3.

14. *Id.*

15. *Id.* at \*4. Plaintiffs allege that in April 2001, after CDSA, an accounting firm associated with PWC, submitted an audit report regarding Nuevo Mundo's financial status, SBS "wrongfully required and demanded that [CDSA] make several changes in the said draft audit report, including devaluing [Nuevo Mundo's] loan portfolio, and make other changes so as to revalue [Nuevo Mundo's] asset balance so that it would become a negative instead of a positive amount." Plaintiffs allege these actions were taken so that the defendants could fraudulently take control of Nuevo Mundo.

PWC and Andersen on the grounds of lack of subject-matter jurisdiction and lack of personal jurisdiction.<sup>16</sup>

### III. The Court's Analysis

#### A. Two Tests to Determine Extraterritorial Application of RICO

On October 15, 1970, the Organized Crime Control Act of 1970 was signed by President Nixon.<sup>17</sup> Title IX of this act was named Racketeer Influenced and Corrupt Organizations (RICO),<sup>18</sup> and 18 U.S.C. § 1965 was enacted in 1970 as part of RICO.<sup>19</sup> RICO is the sole basis for the plaintiffs' claim of subject-matter jurisdiction.<sup>20</sup> This claim stems from the alleged cooperation of Checkley with the dismissed defendants in participating in a number of racketeering activities and corrupt practices.<sup>21</sup>

To bring their claims, the plaintiffs first bear the burden of demonstrating the presence of subject-matter jurisdiction.<sup>22</sup> Unfortunately, the RICO statute does not give instruction in matters of extraterritorial application.<sup>23</sup> There is much ambiguity recognized by the Second Circuit between "the character and amount of activity in the United States that will justify RICO subject matter jurisdiction over a foreign entity."<sup>24</sup> Because of this ambiguity, the Second Circuit has looked to precedents in securities and antitrust cases, where the courts have applied two

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16. *Nuevo Mundo I*, 2004 U.S. Dist. LEXIS 780, at \*4. *Nuevo Mundo* failed to sufficiently allege a theory of vicarious liability either under a theory of agency, alter-ego or partnership and, therefore, could not factually support any tort or contractual claims against defendants PWC and Andersen, nor any claim under RICO. Defendants' motion to dismiss the complaint in its entirety was granted.

17. Dickerson, *supra* note 9, at 483. This act was put into force to "launch a total war against organized crime."

18. *Id.* at 484. Under RICO, a defendant can be held liable if the government or a private plaintiff establishes that the defendant, through his actions, conspired to engage in racketeering activity, or received income from, acquired control of or operated an enterprise through a pattern of racketeering activity.

19. *Id.* at 494; *see also* 18 U.S.C. § 1965(b). This section contains RICO's venue, jurisdictional and service of process provisions.

20. *Nuevo Mundo I*, 2004 U.S. Dist. LEXIS 780, at \*4.

21. *Id.* *See supra* note 15 and accompanying text.

22. *Nuevo Mundo I*, 2004 U.S. Dist. LEXIS 780, at \*5. *See* Scelsa v. City Univ. of New York, 76 F.3d 37, 40 (2d Cir. 1996) (stating that a "plaintiff, who is seeking to invoke the subject matter jurisdiction of the district court, bears the burden of showing that he was properly before that court"); *see also* McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936) (discussing that the burden of proof falls on the plaintiff); United Food & Commercial Workers Union, Local 919 v. CenterMark Props. Meriden Square, Inc., 30 F.3d 298, 301 (2d Cir. 1994) (summarizing that the party who seeks to invoke subject-matter jurisdiction bears the burden of proving it).

23. *Nuevo Mundo I*, 2004 U.S. Dist. LEXIS 780, at \*5. *See* North South Fin. Corp. v. Al-Turki, 100 F.3d 1046, 1051 (2d Cir. 1996).

24. *North South Fin. Corp.*, 100 F.3d at 1052 (citing *Alfadda v. Fenn*, 935 F.2d 475, 479 (2d Cir. 1991)). Both *North South Financial* and *Alfadda* acknowledged the dearth of case law in the Second Circuit regarding the extraterritorial application of RICO, but recognized guidance furnished by precedents concerning subject-matter jurisdiction for international securities transactions and antitrust matters.

alternative tests.<sup>25</sup> Plaintiffs must satisfy one of these tests in order for RICO to be applied appropriately here.<sup>26</sup>

### 1. Conduct Test

Under the conduct test, the conduct that was essential to perpetrate the fraud must have occurred in the United States.<sup>27</sup> This test is based on the principle of foreign relations law, stipulating that a country can assert jurisdiction over significant conduct within its territory.<sup>28</sup> Checkley's activities do not pass this test. All of Checkley's conduct occurred while he was superintendent of SBS in Peru.<sup>29</sup> The negative events that Nuevo Mundo claims intentionally affected its operation occurred solely in Peru.<sup>30</sup> The only allegations of any activity in the United States were made against the original, now dismissed, defendants, PWC and Andersen.<sup>31</sup>

### 2. Effects Test

The effects test is applied in two ways: one deriving from securities cases and the other from antitrust cases.<sup>32</sup> In the first, jurisdiction will exist over an extraterritorial entity if "the entity's activities have substantial effects within the United States."<sup>33</sup> Indirect and remote effects do not qualify as substantial, and the effects must also be foreseeable.<sup>34</sup> Checkley's actions allegedly affected some of the notes payable to U.S. citizens residing in New York, but Nuevo Mundo

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25. *Id.*; see also Jill E. Fisch, *Imprudent Power: Reconsidering U.S. Regulation of Foreign Tender Offers*, 87 NW. U.L. REV. 523, 541–44 (1993) (discussing the precedent antitrust and securities case law that the Second Circuit follows when reviewing the judicial tests for extraterritorial application of RICO).

26. *Nuevo Mundo II*, 2004 U.S. Dist. LEXIS 24900, at \*6.

27. *Id.* See *North South Fin.*, 100 F.3d at 1052 (discussing the criteria of the conduct test); Fisch, *supra* note 25, at 542 (asserting that if sufficient conduct occurred in the United States, then there would be jurisdiction over the defendant).

28. Kun Young Chang, *Multinational Enforcement of U.S. Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction*, 9 FORDHAM J. CORP. & FIN. L. 89, 96 (2003) (examining application of the conduct test by the Second Circuit and how the location of the events is the most significant evidence analyzed when deciding whether the court will exert extraterritorial jurisdiction over the foreign defendant).

29. *Nuevo Mundo II*, 2004 U.S. Dist. LEXIS 24900, at \*8. The fact that Checkley's conduct occurred in Peru and not New York is extremely important because, under the conduct test, he will not be subject to U.S. jurisdiction.

30. *Nuevo Mundo II*, 2004 U.S. Dist. LEXIS 24900, at \*3. Plaintiffs allege that Checkley, in his role as superintendent of SBS, conspired with Peruvian affiliates of defendants PWC and Andersen to seize control of Nuevo Mundo. See also *supra* note 15 and accompanying text.

31. *Nuevo Mundo II*, 2004 U.S. Dist. LEXIS 24900, at \*10.

32. *Id.* at \*8. See *North South Fin.*, 100 F.3d at 1052 (explaining the two types of effects tests applied by the Second Circuit).

33. The effects test is based on securities cases which make it clear that transactions with only remote and indirect effects in the United States are not substantial enough to impose subject-matter jurisdiction. "The effect must be a direct and foreseeable result of the conduct alleged." *Consol. Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 261–62 (2d Cir. 1989); see also Fisch, *supra* note 25, at 542 (reviewing *Consolidated Gold Fields* as the leading case on the application of U.S. law to a foreign tender offer, under securities law). *Nuevo Mundo II*, 2004 U.S. Dist. LEXIS 24900, at \*8. See *North South Fin.*, 100 F.3d at 1052.

34. *Nuevo Mundo II*, 2004 U.S. Dist. LEXIS 24900, at \*8. See *North South Fin.*, 100 F.3d at 1052.

did not provide any further specific data regarding the number of investors who lost their investments.<sup>35</sup> Therefore, under the first test, no substantial effects occurred in the United States.

Under the second version of the test, if the foreign conduct was “intended to and actually does have an effect on the United States imports or exports which the state reprehends,” then foreign liability will result.<sup>36</sup> Here, not only did the plaintiffs lack proof of actual harm, but there were no allegations that Checkley had intended to harm the U.S. investors in any way.<sup>37</sup> Lack of intention coupled with the lack of actual harm removes Checkley from RICO’s reach. Further, the exclusively foreign nature of these transactions alone should remove Checkley from U.S. federal jurisdiction.<sup>38</sup>

### B. Proof of Personal Jurisdiction over a Nondomiciliary Defendant

Plaintiff has the burden, upon a Rule 12(b) motion to dismiss,<sup>39</sup> of proving that the court has personal jurisdiction over the defendant.<sup>40</sup> Nuevo Mundo alleges the court has two sufficient grounds for asserting personal jurisdiction over the defendant: the New York State long-arm statute<sup>41</sup> and the civil RICO statute.<sup>42</sup> The long-arm statute sets out four requirements for estab-

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35. *Nuevo Mundo II*, 2004 U.S. Dist. LEXIS 24900, at \*11.

36. *Id.* at \*8; *see also North South Fin.*, 100 F.3d at 1052 (citing *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443–44 (2d Cir. 1945)).

37. *Nuevo Mundo II*, 2004 U.S. Dist. LEXIS 24900, at \*12. The plaintiffs tried to insist that U.S. investors were harmed, but they failed to make specific factual allegations regarding the number of U.S. investors or the amount of monetary loss incurred.

38. *Id.* “The foreign nature of the transactions is not a matter which U.S. resources should be devoted to.” *See Nasser v. Anderson Worldwide Societe Corp.*, 2003 U.S. Dist. LEXIS 16710, at \*18–19 (S.D.N.Y. Sept. 23, 2003) (holding that plaintiffs failed both the conducts and effects tests and that U.S. resources would be wasted in adjudicating the case).

39. FED. R. CIV. P. 12(b). Motion to dismiss for lack of personal jurisdiction.

40. *Nuevo Mundo II*, 2004 U.S. Dist. LEXIS 24900, at \*13; *see also Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 566 (2d Cir. 1996) (citing the plaintiff’s duty to establish that the court has personal jurisdiction over the defendant).

41. *Nuevo Mundo II*, 2004 U.S. Dist. LEXIS 24900, at \*14. *See* N.Y. C.P.L.R. 302 (long-arm statute).

42. 18 U.S.C. § 1965.

lishing minimal contacts between the defendant and the forum state.<sup>43</sup> One of these requirements must be met in order for a court to have personal jurisdiction over the defendant.<sup>44</sup>

### 1. New York Long-Arm Statute

The New York long-arm statute establishes the minimal contact requirements needed to subject Checkley to U.S. federal law.<sup>45</sup> The plaintiffs fail to satisfy any of the requirements laid out in the statute.<sup>46</sup> Checkley did not “purposefully avail” himself of the privileges of conducting his business transactions in New York because he conducted all his business in Peru.<sup>47</sup> He therefore never invoked the protections of New York laws and never subjected himself to personal jurisdiction under section 302(a)(1).<sup>48</sup> Checkley is also not subject to personal jurisdiction under section 302(a)(2), (3) or (4). Checkley committed no tortious act in New York,<sup>49</sup> had no regular business dealings within New York<sup>50</sup> and did not own or use any real property in New York.<sup>51</sup>

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43. N.Y. C.P.L.R. 302(a) states:

Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
  - (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
  - (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
4. owns, uses or possesses any real property situated within the state.

44. *Nuevo Mundo II*, 2004 U.S. Dist. LEXIS 24900, at \*15.

45. See Ronald A. Brand, *Due Process, Jurisdiction and a Hague Judgments Convention*, 60 U. PITT. L. REV. 661, 664 (1999) (discussing the history of the Due Process Clause and how most grants of judicial authority in U.S. courts come from state long-arm statutes which set forth the specific bases of jurisdiction).

46. See *Nuevo Mundo II*, 2004 U.S. Dist. LEXIS 24900, at \*15.

47. *Id.*; see also *CutCo Indus., Inc. v. Naughton*, 806 F.2d 361, 365 (2d Cir. 1986) (stating that “a non-domiciliary transacts business under CPL 302(a)(1) only if he ‘purposefully avails [himself] of the privilege of conducting activities within [New York],’ thus invoking the benefits and protections of its law”).

48. See Brand, *supra* note 45, at 664.

49. N.Y. C.P.L.R. 302(a)(2). See *supra* note 43.

50. N.Y. C.P.L.R. 302(a)(3). See *supra* note 43.

51. N.Y. C.P.L.R. 302(a)(4). See *supra* note 43.

## 2. Due Process and Reasonableness

The assertion of personal jurisdiction over an individual must be consistent with his due process rights.<sup>52</sup> The court must consider “notions of fair play and substantial justice” to determine whether personal jurisdiction will be reasonable.<sup>53</sup> There is a five-factor test to determine the reasonableness of personal jurisdiction.<sup>54</sup> In light of this test, Checkley’s due process rights would be violated if personal jurisdiction were compelled, even if minimum contacts were established.<sup>55</sup>

It would be a tremendous burden for Checkley to defend himself in New York because he has no contacts with the state,<sup>56</sup> and New York has no special interest in adjudicating this case. New York would neither be a convenient forum nor provide effective relief for the plaintiffs, which plaintiffs have not contested through proof of any relevant facts.<sup>57</sup> Furthermore, the plaintiffs have not claimed any reasons why adjudicating this case in New York would further any state concerns.<sup>58</sup> For the reasons stated above, the plaintiffs failed to demonstrate that the assertion of jurisdiction would be reasonable under the five-factor test and, therefore, personal jurisdiction was lacking.

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52. See *Chew v. Dietrich*, 143 F.3d 24, 28 (2d Cir. 1998). The Due Process Clause of the Fourteenth Amendment permits a state to exercise personal jurisdiction over a nonresident if minimum contacts with that state have been maintained and, under the circumstances, subjecting the defendant to jurisdiction in that state would be reasonable.
  53. See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (discussing that the defendant must have an established “presence” in the state in order for there to be personal jurisdiction); *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 566 (2d Cir. 1996) (asserting that, even if minimum contacts are established, if the exercise of jurisdiction over the defendant would be “neither fair nor reasonable,” then personal jurisdiction cannot stand); see also Michael Goldsmith & Vicki Rinne, *Civil RICO, Foreign Defendants, and “ET,”* 73 MINN. L. REV. 1023, 1053–54 (1989) (discussing the courts’ obligation to establish a defendant’s presence in the forum and noting that the extraterritorial jurisdiction must be reasonable and fair).
  54. *Nuevo Mundo II*, 2004 U.S. Dist. LEXIS 24900, at \*18; see also *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (considering the importance of the five factors); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (reviewing the reasonableness factors aside from establishing minimum contacts). The five factors are (1) the burden that the exercise of the jurisdiction will impose on the defendant, (2) the interests of the forum state in adjudicating the case, (3) the plaintiff’s interest in obtaining convenient and effective relief, (4) the most efficient resolution of the controversy and (5) the interests of the state in furthering substantive social policies.
  55. *Nuevo Mundo II*, 2004 U.S. Dist. LEXIS 24900, at \*18; see also *Soltex Polymer Corp. v. Fortex Indus., Inc.*, 832 F.2d 1325 (2d Cir. 1987), *aff’d* 590 F. Supp. 1453 (E.D.N.Y. June 20, 1984) (holding that RICO claim will be dismissed against foreign counterclaim defendants who are beyond the reach of a state long-arm statute because of insufficient contacts).
  56. *Nuevo Mundo II*, 2004 U.S. Dist. LEXIS 24900, at \*18. Even though Checkley currently lives in Maryland, it would still be an undue burden for him to be tried in New York, because his previous contacts (PWC and Andersen) are no longer part of the suit and have been dismissed. Furthermore, because of the lack of injury in the state of New York, there is very little interest to adjudicate the suit in this forum.
  57. *Nuevo Mundo II*, 2004 U.S. Dist. LEXIS 24900, at \*18. There was no proof offered by the plaintiffs that New York is the most effective forum to acquire relief, nor was there any proof offered that this was the most convenient forum.
  58. *Nuevo Mundo II*, 2004 U.S. Dist. LEXIS 24900, at \*18.

### C. Personal Jurisdiction Under RICO's Statutory Service Provision

As a final attempt to secure personal jurisdiction, the plaintiffs argued that the service provision of RICO would properly subject Checkley to adjudication in New York.<sup>59</sup> Section 1965(a) does not apply to Checkley because he does not reside in New York or transact any of his business there.<sup>60</sup> Section 1965(b) provides that nationwide service will apply to all co-defendants, even if they do not satisfy the requirements of 1965(a), if the defendants are subject to jurisdiction.<sup>61</sup> However, because of PWC's and Andersen's previous dismissal, Checkley cannot satisfy this requirement because he has no co-defendants who are subject to jurisdiction in New York.<sup>62</sup> RICO does not provide for nationwide personal jurisdiction in every case, regardless of where the defendant is found. However, personal jurisdiction will be available if otherwise the entire RICO claim cannot be tried in one civil action.<sup>63</sup> This does not apply here because one trial is not impossible.<sup>64</sup>

## IV. Conclusion

The U.S. District Court for the Southern District of New York concluded that RICO could not be applied to the defendant in order to establish personal or subject-matter jurisdiction. Not only is the defendant foreign, but the transactions, activities and material injuries all occurred in foreign territory. The plaintiffs did not satisfy their burden of proof for either subject-matter or personal jurisdiction and, therefore, the court properly dismissed the case for lack of both these material elements. Once PWC and Andersen were dismissed as defendants, Checkley possessed no more contacts with the United States, and the effect of his conduct within the United States was not significant enough to merit U.S. federal concern and resources.

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59. *Id.* at \*19. 18 U.S.C. § 1965(a), (b).

60. 18 U.S.C. § 1965(a) states: "Any civil action . . . under this chapter . . . may be instituted in the district court . . . for any district in which such person resides, is found, has an agent, or transacts his affairs."

61. 18 U.S.C. § 1965(b) states:

In any action under § 1964 of this chapter . . . in any district court . . . in which it is shown that the ends of justice require that other parties residing in any other district be brought before this court, the court may cause such parties to be summoned . . . and process . . . may be served in any judicial district.

*See also* PT United Can Co. v. Crown Cork & Seal Co., 138 F.3d 65, 71 (2d Cir. 1998) (explaining that "a civil RICO action can only be brought in a district court where personal jurisdiction based on minimum contacts is established as to at least one defendant")

62. *Nuevo Mundo II*, 2004 U.S. Dist. LEXIS 24900, at \*20.

63. *Id.* at \*21; *see also* PT United Can Co. v. Crown Cork & Seal Co., 1997 U.S. Dist. LEXIS 692, at \*8 (S.D.N.Y. Jan. 28, 1997).

64. *See* Butcher's Union Local No. 498 v. SDC Invest., Inc., 788 F.2d 535, 539 (9th Cir. 1986) (holding that Congress intended the "ends of justice" provision under 18 U.S.C.S. § 1965 to enable plaintiffs to bring all members of a nationwide RICO conspiracy before court in single trial; however, for nationwide service to be imposed under § 1965(b), the court must have personal jurisdiction over at least one participant in an alleged multidistrict conspiracy, and plaintiff must show that there is no other district in which the court will have personal jurisdiction over all alleged co-conspirators; this standard does not create jurisdictional gaps because it does not prevent plaintiffs from pursuing separate suits against nonresident RICO defendants who did not participate in the single racketeering enterprise).

The Fourteenth Amendment assures every individual the right to due process before being subject to adjudication by the U.S. court system. If the preliminary hurdles of establishing minimum contacts and reasonableness are not met, then a foreign entity will not and should not be exposed to U.S. jurisdiction. The opinion of the court recognized and applied these tests correctly and dismissed Checkley properly. The plaintiffs did not adequately back their allegations with sufficient facts, including specific information about the injuries claimed to be sustained by the New York investors. Regardless of the truth of these alleged injuries, it was not enough to subject a foreign defendant to U.S. jurisdiction. The defendant was working in Peru, the plaintiffs were Peruvian and the events that brought about this suit all happened in Peru. The court was correct in dismissing the case for lack of subject-matter and personal jurisdiction.

**Christina Gardner**





*Gitter v. Gitter*

396 F.3d 124 (2d Cir. 2005)

The Second Circuit adopts a new standard for determining “habitual residence” under the Hague Convention on the Civil Aspects of International Child Abduction.<sup>1</sup> A court should inquire into (1) the shared intent of the parties entitled to fix the child’s residence, usually the parents, at the latest time their intent was shared, and (2) whether the facts unequivocally show that the child has acclimated to the new location and thus has acquired a new habitual residence.

**I. Holding**

In *Gitter v. Gitter*,<sup>2</sup> the Second Circuit analyzed the phrase *habitually resident*<sup>3</sup> within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction<sup>4</sup> (“Child Abduction Convention” or “Convention”) and adopted a new standard for determining the habitual residence of a child.<sup>5</sup> In coming to the new standard, the court considered various factors: decisions by other circuit courts that have considered this issue, opinions of other signatories of the Convention, decisions of foreign tribunals and the history of and commentary on the Convention.<sup>6</sup> The standard that should be applied requires, first, that the court look into the “shared intent of those entitled to fix the child’s residence at the latest time that their intent was shared” and second, that it determine whether the facts point to the conclusion that the child “has acclimated to the new location and thus has acquired a new habitual residence.”<sup>7</sup>

**II. Facts**

Yossi Gitter and his wife, Miriam Gitter, were born in Israel.<sup>8</sup> Unlike Mr. Gitter, who lived in Israel until 1995, Mrs. Gitter emigrated to the United States when she was three months old and maintains both citizenships.<sup>9</sup> They met in New York and were married in May 1999.<sup>10</sup> The following year, the couple had a son, Eden.<sup>11</sup> Shortly after, Mr. Gitter proposed to his wife that the family move to Israel because the move would allow them to save money and develop family bonds by living with Mr. Gitter’s mother.<sup>12</sup> Mrs. Gitter was not interested in that

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1. Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, *reprinted in* 51 Fed. Reg. 10,494 (Mar. 26, 1986), implemented by the International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§ 11601 et seq. (2000).

2. 396 F.3d 124 (2d Cir. 2005).

3. *Id.* at 124 (providing a two-part analysis to determine a child’s habitual residence).

4. Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, *reprinted in* 51 Fed. Reg. 10,494 (Mar. 26, 1986).

5. *Gitter*, 396 F.3d at 130–31.

6. *Id.* at 131.

7. *Id.* at 134.

8. *Id.* at 128.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

move,<sup>13</sup> but eventually her husband was able to persuade her and the family moved to Israel in March 2001.<sup>14</sup>

The Gitters closed their bank accounts, sold their cars and placed their furniture in storage for a few months.<sup>15</sup> Once in Israel, Mr. Gitter gave the items in storage to Mrs. Gitter's sister, and Eden was enrolled in day care.<sup>16</sup> In February 2002, the family took a trip to the United States to visit Mrs. Gitter's sister.<sup>17</sup> While in New York, Mrs. Gitter reiterated her desire to remain in the United States, but eventually Mr. Gitter convinced his wife and the family returned to Israel.<sup>18</sup> Mr. Gitter promised his wife that, if she was still unhappy in six months, she could return to the United States.<sup>19</sup> Four months later, Mrs. Gitter returned to the United States with Eden, on the pretext of taking a vacation, but neither she nor Eden returned to Israel.<sup>20</sup>

### III. Procedural Posture

In July 2003, Mr. Gitter filed a petition in the U.S. District Court for the Eastern District of New York seeking his son's return under the Child Abduction Convention.<sup>21</sup> His petition was denied based on the court's finding that Eden's habitual residence was the United States, despite his time in Israel.<sup>22</sup> Mr. Gitter appealed.

The Court of Appeals for the Second Circuit reviewed the interpretation of the Convention de novo.<sup>23</sup> Under this standard of review, "the interpretation and application of treaty language is reviewed de novo, but the underlying factual findings are reviewed for clear error."<sup>24</sup>

### IV. Hague Convention

Congress implemented the Child Abduction Convention when it passed ICARA.<sup>25</sup> The Convention has two goals: (1) "to secure the prompt return of children wrongfully removed to or retained in any Contracting State," and (2) "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting

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13. *Id.* Feeling disconnected from the culture, because she had spent very little time in Israel, Mrs. Gitter did not want to make the move.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 129.

20. *Id.* There is uncertainty as to when Mr. Gitter became aware of his wife's intentions.

21. *Id.*

22. *Id.*

23. *Id.* at 2.

24. See *Blondin v. DuBois*, 238 F.3d 153, 158 (2d Cir. 2001).

25. 42 U.S.C. §§ 11601 et seq. (2000).

States.”<sup>26</sup> The Convention protects children from “wrongful removal or retention” from their “habitual residence.”<sup>27</sup>

Article 3 of the Convention establishes that for a petitioner’s claim to prevail, the petitioner must show (1) the child was habitually resident in one state and has been removed to or retained in another state; (2) the removal or retention breached the petitioner’s custody rights; and (3) petitioner was exercising those rights at the time of the removal or retention.<sup>28</sup> These three elements must be established by a preponderance of the evidence.<sup>29</sup> However, the text of the Convention directs courts to focus on one point in time when determining habitual residence—the point in time “immediately before the removal or retention.”<sup>30</sup>

## V. Second Circuit’s Analysis

The court recognized that *habitual residence* is not defined in the language of the Convention or ICARA.<sup>31</sup> Thus, it focused on interpreting *habitually resident*.<sup>32</sup> The court began its analysis by reviewing the opinions of other circuits that have addressed the issue.<sup>33</sup> In addition, it considered opinions from other signatories<sup>34</sup> and foreign tribunals.<sup>35</sup> Most important, the

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26. Silverman v. Silverman, 338 F.3d 886, 897 (8th Cir. 2003).

27. *Id.* The removal or retention of a child is to be considered wrongful when

a) it is in breach of rights of custody attributed to a person . . . under the law of the State in which the child was habitually resident immediately before the removal or retention; and  
b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

28. *Gitter*, 396 F.3d at 130–131.

29. 42 U.S.C.S. § 11603(e) (2005) (providing that a petitioner in an action brought under subsection (b) shall establish by a preponderance of the evidence that “the child has been wrongfully removed or retained within the meaning of the Convention”).

30. Article 3 of the Convention states:

The removal or the retention of a child is to be considered wrongful where . . . it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the *State in which the child was habitually resident* immediately before the removal or retention.

31. *Gitter*, 396 F.3d at 131.

32. *Id.*

33. *Id.* See, e.g., Silverman, 338 F.3d at 898 (habitual residence to be determined by focusing on the settled purpose from the child’s perspective and parental intent); Miller v. Miller, 240 F.3d 392, 400 (4th Cir. 2001) (habitual residence to be determined on a “case-by-case basis” after “a fact specific inquiry”); Mozes v. Mozes, 239 F.3d 1067, 1073–81 (9th Cir. 2001) (habitual residence to be determined by examining intentions of those entitled to fix child’s residence and evidence of the child’s acclimatization); Feder v. Evans-Feder, 63 F.3d 217, 224 (3d Cir. 1995) (“Habitual residence is the place where [the child] has been physically present for an amount of time sufficient for acclimatization and which has a ‘degree of settled purpose’ from the child’s perspective”); Friedrich v. Friedrich, 983 F.2d 1396, 1401–02 (6th Cir. 1993) (habitual residence to be determined by reference to customary residence prior to removal and requires a change in geography and passage of time).

34. *Gitter*, 396 F.3d at 131. Air France v. Saks, 470 U.S. 392 (1985).

35. *Gitter*, 396 F.3d at 131 (recognizing Congress’s interest in maintaining uniformity with international interpretation of the Convention).

court found the Ninth Circuit's opinion in *Mozes v. Mozes*<sup>36</sup> insightful and valuable for its recognition of the importance of the parents' shared intent as to the place that constitutes the child's habitual residence.<sup>37</sup>

The court pointed out that, although the Convention is interested in the habitual residence of the child only, it is not very reliable to depend on the child's intentions because a child will generally "lack the material and psychological wherewithal to decide where they will reside."<sup>38</sup> Consequently, the court focused on the intentions of the parents as of "the last time their intentions were shared."<sup>39</sup> Because this determination is very fact specific, the Second Circuit deferred to the district court and, accordingly, will review those findings only for clear error.<sup>40</sup>

The court acknowledged that in almost all cases brought under the Convention, the parents have not agreed as to the place of the child's habitual residence.<sup>41</sup> When the parents have mutually intended the child to have a new habitual residence, the child has then acquired a new habitual residence.<sup>42</sup> On the other hand, if there is no such agreement between the parents, then the courts conclude that the child has not acquired a new habitual residence.<sup>43</sup> Following this rationale, the court concluded that it is appropriate to presume that a child's habitual residence is consistent with the parents' intentions at the time those intentions were last mutually shared.<sup>44</sup>

Although the court established parental intent as the first step in determining the habitual residence of a child,<sup>45</sup> it clarified that this intent would not be the sole determinant of a child's residence under the Convention.<sup>46</sup> In addition, courts must consider (1) any actual change in geography, and (2) whether there is *unequivocal* evidence that the child has become acclimatized to his new surroundings. The court recognized that, for a child living away from his "habitual residence" for a certain period of time, it may be unreasonable to think the child has not acquired a new habitual residence.<sup>47</sup> At the same time, it cautioned courts not to be too quick to let a child's acclimatization trump the parents' shared intent.<sup>48</sup>

After considering relevant case law, international applications of the Convention and statutory interpretation and history, the court concluded by providing the test the lower court is to

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36. 239 F.3d 1067 (Kozinski, J.).

37. *Gitter*, 396 F.3d at 132 (quoting Judge Kozinski's explanation in *Mozes*).

38. *Id.* at 132 (quoting *Mozes*).

39. *Id.* at 133.

40. *Id.* The court will review interpretation issues de novo and factual determinations for clear error.

41. *Id.* at 133.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 132 ("[T]he first step toward acquiring a new habitual residence is forming a settled intention to abandon the one left behind").

46. *Id.* at 133.

47. *Id.* at 133.

48. *Id.* at 134 (stating that permitting such evidence to fully determine the outcome of this inquiry can lead to manipulation of the child by one of the parents).

follow on remand.<sup>49</sup> In determining a child's habitual residence, a court should first inquire into the shared intent of the parents (or those entitled to fix the child's residence) at the latest time their intent was shared.<sup>50</sup> Second, the court should inquire whether the facts unequivocally point to the conclusion that the child has acclimatized to his new surroundings, hence acquiring a new residence, despite the parent's latest shared intent.<sup>51</sup>

The Second Circuit found that the district court's conclusion as to parental intent could not be held "clearly erroneous."<sup>52</sup> The evidence indicated that the move was intended to be permanent for Mr. Gitter but that Mrs. Gitter intended only to move conditionally.<sup>53</sup> The facts clearly showed that Mr. Gitter was thinking the move could be of indefinite duration. He closed their bank accounts and opened new accounts in Israel, he sold the cars in New York and leased a car in Israel, he gave away their furniture and purchased new furniture in Israel, and he spent a considerable amount of money to renovate his mother's house in Israel.<sup>54</sup> Mr. Gitter proceeded with the move while reaffirming to his wife that she could move back to New York if she chose to do so after the trial period. The court was unable to conclude that these actions demonstrated Mrs. Gitter's intentions or the parties' shared intent.<sup>55</sup>

The Second Circuit expressed no opinion as to whether the possible acclimatization of Eden during his time in Israel established the child's new residence or whether his parents' last shared intent should control that determination.<sup>56</sup> It remanded the case to the district court to allow the lower court to consider the facts in light of the legal standard its opinion provided.

## VI. Conclusion

The Court of Appeals for the Second Circuit held that the evidence failed to conclusively establish the existence of mutual agreement between Mr. and Mrs. Gitter as to the length of time the family was to live in Israel and their intent to select a new habitual residence for Eden. In order for Mr. Gitter to prevail, he will have to show that the removal of Eden breached his custodial rights, that he was exercising those rights at the time Eden was taken to New York and, most important, that Eden was habitually resident in Israel. That determination can now be made by the district court under the analysis provided by the Second Circuit.

The two-pronged test outlined by the Second Circuit provides an objective way to determine the proper jurisdiction that should address the custody dispute that may affect a child. By focusing on the child's well-being and by considering the extent of the child's acclimatization to his new surroundings, and not solely the parents' intent, the test provides a comprehensive analysis of the situation that often exists in abduction cases. In complex custody situations, par-

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49. *Id.* at 135.

50. *Id.* The court is permitted to consider actions and declarations when determining intent.

51. *Id.* The second prong of the test works as an exception or defense to the respondent parent.

52. *Id.* at 135.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

ents often lose sight of how their decision will affect their child's life; by providing a quick means of restoring the status quo, the Convention and its "habitually resident" consideration allow for a more sensible and just custody determination.

**Andrea Rodriguez**

*Phoenix Aktiengesellschaft v. Ecoplas, Inc.*

391 F.3d 433 (2d Cir. 2004)

**Defense that the foreign arbitration provision did not provide for consent to judicial confirmation pursuant to section 9 of the Federal Arbitration Act was rejected. Section 207 of the N.Y. Constitution, which preempts section 9, does away with the consent requirement for confirmation under the Convention on Recognition and Enforcement of Foreign Arbitral Awards.**

**I. Holding**

In *Phoenix Aktiengesellschaft v. Ecoplas, Inc.*, the U.S. Court of Appeals for the Second Circuit affirmed the judgment of the U.S. District Court for the Western District of New York granting a motion by German corporation Phoenix Aktiengesellschaft (“Phoenix”) to confirm an arbitration award against American corporation Ecoplas, Inc. (“Ecoplas”).<sup>1</sup> The court rejected Ecoplas’s defense that a licensing agreement that fails to provide for consent to judicial confirmation of an arbitration award cannot be subject to such confirmation pursuant to 9 U.S.C. § 9.<sup>2</sup>

The court held that a conflict exists between section 9 of chapter 1 of the Federal Arbitration Act, requiring consent to arbitration confirmation by a court, and section 207<sup>3</sup> of chapter 2, the Convention on Recognition and Enforcement of Foreign Arbitral Awards,<sup>4</sup> which lacks that requirement.<sup>5</sup> It found that, according to section 208,<sup>6</sup> in case of a conflict, chapter 2 preempts chapter 1, thereby removing the consent requirement.<sup>7</sup> The court also found meritless the claim by Ecoplas under article V(1)(b)<sup>8</sup> of the New York Convention that the arbitrator denied it an opportunity to present its defense.<sup>9</sup> Furthermore, the court refused to consider the argu-

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1. *Phoenix Aktiengesellschaft v. Ecoplas, Inc.*, 391 F.3d 433, 433 (2d Cir. 2004) [hereinafter “*Phoenix*”].
  2. *Id.*; see also 9 U.S.C. § 9 (2005) (providing: “If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made, any party to the arbitration may apply to the court so specified for an order confirming the award”).
  3. See 9 U.S.C. § 207 (2005) (stating that “after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration”).
  4. See Convention on Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, U.S.-U.N., T.I.A.S. No. 6997, 21 U.S.T. 2517 [hereinafter “New York Convention”].
  5. *Phoenix*, 391 F.3d at 436.
  6. See 9 U.S.C. § 208 (2005) (explaining: “Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter”).
  7. *Phoenix*, 391 F.3d at 436.
  8. See New York Convention, *supra* note 4, at art. V(1)(b) (providing that recognition or enforcement of the award may be refused if “[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case”).
  9. *Phoenix*, 391 F.3d at 438 (holding that where records show that the party was allowed to raise a defense and it was rejected on the merits, the claim under article V(1)(b) is meritless).



ment based on article V(1)(e) of the Convention,<sup>10</sup> because the appellant failed to make it in the opening statement.<sup>11</sup>

## II. Background and Procedural Posture

In 1993, Phoenix entered into a licensing agreement with Ecoplas, granting Ecoplas an exclusive license to produce Phoenix polyester-UP-moulding compounds in exchange for a licensing fee.<sup>12</sup> Phoenix also promised to provide Ecoplas with technical knowledge and “know-how relative to the manufacture.”<sup>13</sup> The arbitration clause of that contract provided that, when all diligent efforts to settle amicably failed, the dispute would be subjected to the jurisdiction of the arbitration court of the International Chamber of Commerce in Zurich.<sup>14</sup>

In 1997, a dispute arose over the sale by Phoenix of a business portfolio to Bakelite AG, a German company. In conversation with Ecoplas, Phoenix requested Ecoplas’s consent to a transfer of the licensing contract to Bakelite.<sup>15</sup> Ecoplas refused.<sup>16</sup> Phoenix argued that Ecoplas’s failure to consent to transfer of the licensing agreement to Bakelite did not change its obligations under the original contract. Ecoplas, on the other hand, insisted that the transfer terminated the agreement and refused to pay license fees for 1997 and 1998.<sup>17</sup>

When Phoenix filed a complaint with the International Court of Arbitration of the International Chamber of Commerce (ICC), the arbitrator dismissed the Ecoplas’s allegations that (1) the sale of Phoenix’s business portfolio to another company dissolved the licensing agreement and (2) Phoenix failed to provide adequate technical advice.<sup>18</sup> The arbitrator awarded Phoenix money damages.<sup>19</sup> Ecoplas failed to pay the award, and Phoenix brought an action to confirm that award in the Western District of New York.

Ecoplas challenged the district court’s jurisdiction over this action,<sup>20</sup> claiming that the arbitration clause did not include an agreement to judicial confirmation of the arbitration award, as required by 9 U.S.C. § 9.<sup>21</sup> The court held that section 9<sup>22</sup> of chapter 1 is preempted by sec-

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10. See New York Convention, *supra* note 4, at art. V(1)(e) (stating that enforcement and recognition of the arbitral award shall be refused if “[t]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made”).

11. *Phoenix*, 391 F.3d at 438.

12. *Id.* at 434.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. See *supra* note 2.

22. *Id.*

tion 207<sup>23</sup> of chapter 2, pursuant to 9 U.S.C. § 208.<sup>24</sup> Consequently, the court refused to hear the case de novo, interpreted the arbitration clause as making the arbitration award final and confirmed that award.<sup>25</sup> On appeal, the U.S. Court of Appeals for the Second Circuit affirmed this judgment.<sup>26</sup>

### III. The Court's Analysis

The court emphasized that prior to 1970, when the United States ratified the New York Convention, attempts were made by the Federal Arbitration Act (FAA) to cure the longstanding judicial hostility toward arbitration agreements.<sup>27</sup> The court explained that, although the United States for a long time did not endorse the Convention of 1958, which aimed at encouraging the recognition and enforcement of international arbitration agreements,<sup>28</sup> it enacted chapter 2 of the FAA, modeled after the Convention.<sup>29</sup>

The court also emphasized that chapter 1, which contained more stringent requirements, still applies to the extent that it does not conflict with chapter 2.<sup>30</sup> However, section 208 of chapter 2 provides that when such a conflict arises, chapter 2 shall control.<sup>31</sup> The court provided examples of such conflicts to show that they support the intention of section 208 and the court's proposition that chapter 2 is aimed at lessening the restraints of chapter 1.<sup>32</sup> These examples included provisions by chapter 2 allowing for longer time restraints on filing the application for confirmation and for wider jurisdiction under which those claims can be filed.<sup>33</sup>

The court examined de novo the district court's confirmation of the award and once more rejected Ecoplas's argument that sections 9 and 207 of the Convention were not in conflict with respect to award confirmation, so that section 9 controlled.<sup>34</sup> Chapter 1, section 9, states that if an agreement to arbitrate includes the parties' consent to confirmation of the award and specifies the court, then a party can apply for such confirmation within one year of the award.<sup>35</sup> Chapter 2, section 207, on the other hand, provides that any party can apply for such a confirmation within three years of the award and leaves out the requirement of prior consent and

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23. See *supra* note 3.

24. See *supra* note 6.

25. *Phoenix*, 391 F.3d at 435.

26. *Id.* at 433.

27. *Id.* at 435.

28. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974).

29. *Id.*; see *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 49 (2d Cir. 2004); *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 973 (2d Cir. 1974).

30. *Phoenix*, 391 F.3d at 435.

31. *Id.*; see *supra* note 6.

32. *Phoenix*, 391 F.3d at 436.

33. *Id.* at 437.

34. *Id.* at 436.

35. *Id.*; see *supra* note 2.

specification of the court.<sup>36</sup> The court reasoned that because one section conditions a confirmation on prior consent and the other does not, they are necessarily in conflict.<sup>37</sup>

The court also commented on the district court's dicta expressing the opinion that even if section 9 applied, the arbitration clause satisfied the requirement.<sup>38</sup> The district court reasoned that such consent does not have to be explicit, and it relied on a number of cases to support the proposition that Ecoplas's full participation in the arbitration process and the parties' agreement that the decision by the arbitrators would be final was equivalent to consent.<sup>39</sup> However, the Court of Appeals, without deciding the point, suggested caution in reaching that conclusion.<sup>40</sup> These earlier cases involved consent to the application of federal law, which was in accordance with the goals of the statute to promote affirmative agreement to the application of federal substantive law.<sup>41</sup> In *Phoenix*, however, arbitration was rendered by a foreign arbitral panel applying Swiss law and not by U.S. arbiters applying federal law.<sup>42</sup> Nevertheless, the court refused to make a determination on this issue, stating that section 9 does not apply to this case.<sup>43</sup>

#### IV. Conclusion

A decision contrary to *Phoenix* would seriously impair the judicial recognition of arbitration agreements. Promoting arbitration agreements and enforcing arbitration awards that satisfy the requirements established by the FAA is sound public policy and will result in judicial economy. The court recognized Congress's intention in implementing chapter 2 of the FAA and reached a just and equitable conclusion.

A similar decision by the Fifth Circuit Court of Appeals in *McDermott International, Inc. v. Lloyds Underwriters of London*<sup>44</sup> and the absence of contrary holdings by any other courts of appeals serve as evidence that *Phoenix* is consistent with notions of contemporary international law. It would be contrary to good policy to provide companies, foreign or American, with an escape hatch out of a binding agreement. Companies should be held responsible for upholding their end of the bargain and not look for loopholes, such as the absence of consent to judicial confirmation of the arbitration award. Otherwise, the court will be opening a door to reviewing de novo claims decided by arbitrators and render arbitration decisions useless.

Roman Avshalumov

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36. *Phoenix*, 391 F.3d at 436; see *supra* note 3.

37. *Phoenix*, 391 F.3d at 436.

38. *Id.* at 437 n.2.

39. See *Kallen v. Dist. 1199, Nat'l Union Hosp. & Health Care Employees*, 574 F.2d 723, 724–26 & n.1 (2d Cir. 1978) (finding consent requirement to be satisfied due to parties' full and willful participation in the arbitration); *I/S Stavborg v. Nat'l Metal Converters, Inc.*, 500 F.2d 424, 426 (2d Cir. 1974) (holding that consent requirement is satisfied because the agreement provided that the arbitration shall be a final decision).

40. *Phoenix*, 391 F.3d at 437 n.2.

41. *Id.*

42. *Id.*

43. *Id.*

44. 120 F.3d 583 (5th Cir. 1997).

***Sosa v. Alvarez-Machain***

124 S. Ct. 2739 (2004)

**The United States Supreme Court eliminated the “headquarters doctrine” from the Federal Tort Claims Act (FTCA) and stated that the Alien Tort Statute (ATS) is not solely jurisdictional. Claims can be brought under it in extremely limited circumstances, for which the Supreme Court did not provide guidance to the District Courts.**

**I. Holding**

In *Sosa v. Alvarez-Machain*,<sup>1</sup> the U.S. Supreme Court held that (1) any potential liability the United States had for Alvarez’s arrest rested on events that occurred in Mexico, so that the United States fell within the “foreign country” exception to the waiver of its sovereign immunity under the Federal Tort Claims Act (FTCA);<sup>2</sup> (2) the “foreign country” exception bars *all* claims against a government based on injury suffered in a foreign country, regardless of whether predicate acts giving rise to the injury occurred on U.S. soil;<sup>3</sup> and (3) Alvarez’s single, one-day detention, followed by prompt arraignment, did not violate any norm of customary international law, as required for liability under the Alien Tort Statute (ATS).<sup>4</sup> The Supreme Court held that Alvarez was not entitled to recover any damages, nor was he entitled to any remedy under either statute.<sup>5</sup> In its opinion, the Supreme Court more fully defined the scope of both the FTCA and the ATS.

**II. Facts and Procedural Posture**

In 1985, Enrique Camarena-Salazar, a U.S. Drug Enforcement Administration (DEA) agent, was captured in Mexico while on assignment.<sup>6</sup> In a house in Guadalajara, Camarena-Salazar was tortured over a two-day period of interrogation and was eventually murdered.<sup>7</sup> Based on eyewitness testimony, the DEA believed that Humberto Alvarez-Machain, a Mexican physician, was present during the interrogation and acted to prolong Camarena-Salazar’s life in order to extend the interrogation and torture.<sup>8</sup> In 1990, Alvarez was indicted by a federal grand jury

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1. 124 S. Ct. 2739 (2004).

2. *Id.* at 2748; *see* Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1), §§ 2671–2680 (1996).

3. *Sosa*, 124 S. Ct. at 2754.

4. *Id.* at 2769; *see* Alien Tort Statute, 28 U.S.C. § 1350 (1948).

5. *Sosa*, 124 S. Ct. at 2746. Justice Souter delivered the opinion of the Court. Part I, the facts, and Part III, the denial of the ATS claim, were both unanimous decisions. Part II, the denial of the FTCA claim, was joined by Chief Justice Rehnquist and Justices Stevens, O’Connor, Scalia, Kennedy and Thomas. Part IV, addressing the limited private actions that might still be tenable under the ATS, was joined by Justices Stevens, O’Connor, Kennedy, Ginsburg and Breyer. Justice Scalia filed an opinion, which concurred in part and concurred in the judgment, joined by Chief Justice Rehnquist and Justice Thomas. Justice Ginsburg filed an opinion, which concurred in part and concurred in the judgment, joined by Justice Breyer. Justice Breyer filed an opinion, which concurred in part and concurred in the judgment.

6. *Sosa*, 124 S. Ct. at 2746.

7. *Id.*

8. *Id.*

for the torture and murder of Camarena-Salazar, and a warrant was issued for his arrest by the District Court for the Central District of California.<sup>9</sup>

The DEA initially sought help from the Mexican government in getting Alvarez to the United States to face the charges, but, when this failed, the DEA approved a plan to hire Mexican nationals to seize and transport Alvarez to the United States for trial.<sup>10</sup> This group of Mexican nationals, which included Jose Francisco Sosa, abducted Alvarez, held him overnight in a motel and then brought him by private plane to El Paso, where he was arrested by federal officers.<sup>11</sup>

In 1992, Alvarez was tried and the district court granted his motion for a judgment of acquittal.<sup>12</sup> In 1993, after returning to Mexico, Alvarez sued Sosa and the United States, among others, claiming that his arrest was arbitrary and violated international law.<sup>13</sup> He sought damages under both the FTCA and the ATS.<sup>14</sup> The district court granted summary judgment to Alvarez on the ATS claim and awarded him \$25,000 in damages but granted the government's motion to dismiss the FTCA claim.<sup>15</sup> The Ninth Circuit, sitting en banc, affirmed the ATS decision and reversed the FTCA decision.<sup>16</sup> The Supreme Court granted certiorari to clarify the scope of both the FTCA and the ATS and reversed both decisions.<sup>17</sup>

### III. The Court's Analysis

#### A. Reversal of Liability Under the FTCA

The FTCA was "designed primarily to remove the sovereign immunity of the United States from suits in tort and, with certain specific exceptions, to render the Government liable in tort as a private individual would be under like circumstances."<sup>18</sup> This act gives federal district courts jurisdiction to hear claims against the United States, through a waiver of its sovereign immunity in cases where injuries caused by a government employee acting within the scope of his duties occur under circumstances in which, if the United States had been acting as a private person, it would have been liable under the law of the jurisdiction where the incident took place.<sup>19</sup> The act also creates an exception to this waiver of sovereign immunity, applicable in this case, for "[a]ny claim arising in a foreign country."<sup>20</sup>

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9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 2747.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* (quoting *Richards v. United States*, 369 U.S. 1, 6 (1962)); *see also* 28 U.S.C. § 2674 (1988).

19. *Sosa*, 124 S. Ct. at 2747.

20. *Id.* at 2747–48 (quoting 28 U.S.C. § 2680(k) (2000)).

In the Ninth Circuit's view, once Alvarez was in the United States, his detention was not tortious, and, therefore, the government's liability rested solely on a false-arrest claim.<sup>21</sup> Alvarez's arrest, however, was said to be false only because it took place and endured in Mexico.<sup>22</sup> Once Alvarez arrived in the United States, where there was a warrant for his arrest, the arrest was no longer tortious.<sup>23</sup> Because the offensive actions took place "in a foreign country," the foreign country exception applied.<sup>24</sup>

However, the Ninth Circuit held that Alvarez's action could continue under the "headquarters doctrine."<sup>25</sup> Claims under this doctrine usually involve contentions of negligence in guidance from a U.S. office to its employees, who subsequently cause damage while in a foreign country, or in control of activities that occur in a foreign country.<sup>26</sup> The Ninth Circuit, following the headquarters doctrine, reasoned that Alvarez's abduction was the result of wrongful acts on the part of the DEA in organizing the abduction, the planning of which took place in the United States.<sup>27</sup> Thus, it held that the headquarters doctrine applied, and Alvarez's claim did not arise in a foreign country.<sup>28</sup> The Supreme Court, in reviewing this analysis, asserted that if the headquarters doctrine were accepted as an exception to the foreign country exception, then the foreign country exception would be swallowed by the headquarters doctrine, because some form of planning, training or organizing will always take place in the United States.<sup>29</sup>

The Supreme Court offered two reasons for its skepticism toward the headquarters doctrine. First, there must be a causal connection between the domestic (or headquarters) breach of duty and the action taking place in the foreign country.<sup>30</sup> This connection is the basis for FTCA liability under 28 U.S.C. § 2675.<sup>31</sup> The Court clarified, however, that this causal connection alone is not enough to bar application of the foreign country exception.<sup>32</sup>

The second reason, and stronger argument, for the Court's skepticism was based on the belief that Congress understood a claim "arising in" a foreign country to be "a claim for injury or harm *occurring in* a foreign country."<sup>33</sup> When the FTCA was passed, the general understanding was that "a cause of action arising in another jurisdiction, which is barred by the laws of that jurisdiction, will [also] be barred in the domestic courts."<sup>34</sup> Further, the Court said, there

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21. *Sosa*, 124 S. Ct. at 2748 (citing to *Alvarez-Machain v. United States*, 331 F.3d 604, 636–37 (2003)).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* (quoting *Cominotto v. United States*, 802 F.2d 1127, 1130 (C.A.9 1986)). The courts that adhere to this doctrine also believe that 28 U.S.C. § 2680(k) does not bar suits of this nature. *Sosa*, 124 S. Ct. at 2748.

27. *Sosa*, 124 S. Ct. at 2748–49 (quoting *Alvarez-Machain*, 331 F.3d at 638).

28. *Id.*

29. *Id.* at 2749.

30. *Id.*

31. *Id.*

32. *Id.* at 2750.

33. *Id.* (citing 28 U.S.C. § 2680(k)) (emphasis added).

34. *Sosa*, 124 S. Ct. at 2750 (quoting 41 A.L.R. 4th 1025, 1029, § 2 (1985)).

is specific reason to believe that “arising in” refers to the place of harm, thus being vital to the purpose of the foreign country exception.<sup>35</sup> In any tort action brought in the United States when the event occurred outside the United States, the courts must decide whose substantive law applies.<sup>36</sup>

At the time of the FTCA’s passage, the general rule was that, in tort cases, courts were to apply the substantive law of the jurisdiction where the harm occurred.<sup>37</sup> It was this application of substantive law foreign to the United States that Congress intended to avoid through the foreign country exception.<sup>38</sup> The Court read Congress’s use of the phrase “arising in a foreign country” to trigger the foreign country exception so as not to hear these claims, the intention of which would be frustrated by the use of the headquarters doctrine.<sup>39</sup>

The Court did acknowledge that some changes have occurred from the traditional choice of substantive tort law, as expressed in the First Restatement of Conflict of Laws, to the more recent approach set out in the Second Restatement.<sup>40</sup> However, these changes do not guarantee that the traditional choice of law will not apply. Thus, under the headquarters doctrine, some courts would apply the very foreign law that the foreign country exception was designed to prevent.<sup>41</sup>

The Court rejected the proposition that the headquarters doctrine could be applied selectively on two grounds. First, it discussed how Congress chose to write the statute insofar as it used “arising in” language, rather than language speaking to choice of law.<sup>42</sup> Second, the Court stated that having inconsistent results between jurisdictions was an implausible interpretation of what Congress intended in adopting the FTCA.<sup>43</sup> For these two reasons, the Court held that the statute’s foreign country exception prohibits *all* claims based on injury suffered in a foreign country, regardless of where the incident occurred.<sup>44</sup>

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35. *Sosa*, 124 S. Ct. at 2750. Justice Ginsburg, in her concurrence, states that she would interpret “arising in” from § 2680(k) to mean “place where the act or omission occurred.” *Id.* at 2777.

36. *Sosa*, 124 S. Ct. at 2750.

37. *Id.*

38. *Id.* at 2751.

39. *Id.* at 2752.

40. *Id.* at 2752–53 (discussing how the First Restatement, RESTATEMENT (FIRST) CONFLICT OF LAWS § 377 (1934), states that the choice of law in tort is to the place of wrong, whereas the Second Restatement, RESTATEMENT (SECOND) CONFLICT OF LAWS § 145 (1971), states there is some flexibility in choice of law such that, although the traditional rule still applies, it may be superseded by some other state law if such law is more applicable for whatever reason).

41. *Id.* at 2753.

42. *Id.* at 2754.

43. *Id.*

44. *Id.* As a result, the Court effectively eliminated the headquarters doctrine from applying in situations arising under the foreign country exception to the FTCA.

## B. No Relief Under the ATS

Alvarez also brought an action against Sosa under the ATS.<sup>45</sup> Sosa argued that the ATS is merely a jurisdictional statute and does not create a distinct cause of action.<sup>46</sup> The Supreme Court agreed that the ATS is jurisdictional in nature, but it noted that when the ATS was enacted, it gave limited ability to the courts to hear the small variety of cases deemed to be violations of the law of nations at that time.<sup>47</sup> The Court further stated that Alvarez's claim did not meet the requirements for jurisdiction under the ATS, because Alvarez did not show an adequate violation of customary international law.<sup>48</sup>

The ATS was passed by the first Congress as part of the Judiciary Act of 1789.<sup>49</sup> Alvarez argued that the ATS creates new causes of action for torts that violate international law, but the Court found this interpretation unpersuasive.<sup>50</sup> The Court held that the ATS "was intended as jurisdictional in the sense of addressing the powers of the courts to entertain cases concerned with a certain subject."<sup>51</sup> Although Sosa claimed that no relief could be granted under the ATS because there was no subsequent statute that expressly authorized specific causes of action, the Court believed that the ATS alone was sufficient, because any tort in violation of the law of nations was also recognized under common law.<sup>52</sup> The congressional history around the time the ATS was passed is limited, but the Court held that this history supports the proposition that the ATS does furnish jurisdiction over a small number of actions that allege violation of the law of nations.<sup>53</sup> The recognized violations of the law of nations at the time the ATS was enacted were (1) offenses against ambassadors, (2) violations of safe conduct and (3) individual actions arising out of piracy.<sup>54</sup>

### 1. First Congress's Intentions

The Supreme Court, in analyzing the intentions of the first Congress in drafting the ATS, held that claims based on the present-day law of nations must "rest on a norm of international character accepted by the civilized world and defined with specificity comparable to the features of the 18th-century paradigms" that were recognized as violations of the law of nations at

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45. *Sosa*, 124 S. Ct. at 2754. The ATS states that "[t]he 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." 28 U.S.C. § 1350.

46. *Sosa*, 124 S. Ct. at 2754.

47. *Id.* A violation of the law of nations is commonly referred to as a violation of customary international law. For purposes of the ATS, these two phrases are used interchangeably and without distinction.

48. *Sosa*, 124 S. Ct. at 2761–62.

49. *Id.* at 2755.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 2758–59.

54. *Id.* at 2759.



the time the ATS was enacted.<sup>55</sup> The Court then went on to discuss five reasons for judicial caution in determining the types of cases that might be heard under the ATS.<sup>56</sup>

First, the current understanding of the common law has changed since the ATS was initially enacted in 1789.<sup>57</sup> At that time, common law was considered an abstract body of law “outside of any particular State but obligatory within it unless and until changed by statute.”<sup>58</sup> Modern courts, rather than just finding or discovering the law, make or create law when asked to formulate a common law principle.<sup>59</sup>

Second, there has been a rethinking of the role of the federal courts in crafting the common law since the decision in *Erie Rail Co. v. Tompkins*.<sup>60</sup> Subsequent to *Erie*, the ability to create substantive common law was denied to federal courts, other than in very limited circumstances when specific authorization from Congress was given.<sup>61</sup> Accordingly, federal courts have looked for legislative guidelines before exercising power over substantive law.<sup>62</sup>

Third, the Court stated that creating a private right of action is a decision that should be made by legislative judgment.<sup>63</sup> The reasoning behind this is that the creation of a private right of action raises issues greater than merely whether or not the conduct itself should be regulated.<sup>64</sup> The likely collateral costs of making international rules privately actionable calls for further judicial care.<sup>65</sup>

Fourth, the aforementioned collateral costs likely to arise in the creation of new private causes of action should make the courts exceptionally cautious of intruding on the discretion of the legislative and executive branches in managing foreign affairs.<sup>66</sup> Because any attempt by federal courts to design remedies for the violation of new norms of international law would have substantial effects on foreign policy, such an attempt should be embarked on, if at all, with great vigilance.<sup>67</sup>

Fifth, there is no congressional mandate to look for and identify new, arguable violations of the law of nations.<sup>68</sup> Furthermore, contemporary suggestions of congressional understanding

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55. *Id.* at 2761–62.

56. *Id.* at 2762.

57. *Id.*

58. *Id.* (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 553 (1928)).

59. *Sosa*, 124 S. Ct. at 2762.

60. *Id.* (citing 304 U.S. 64, 78 (1957), which denied the existence of any general federal common law).

61. *Sosa*, 124 S. Ct. at 2762; see, e.g., *Textile Workers v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957) (interpreting collective-bargaining agreements).

62. *Sosa*, 124 S. Ct. at 2762.

63. *Id.* at 2762–63 (citing *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001)).

64. *Sosa*, 124 S. Ct. at 2763.

65. *Id.*

66. *Id.*

67. *Id.* (citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 813 (C.A.D.C. 1984)).

68. *Sosa*, 124 S. Ct. at 2763.

of the role of the judiciary in this field have not encouraged greater judicial creativity.<sup>69</sup> Although the courts have been given some clear authorization in statutes such as the Torture Victim Protection Act of 1991, these have been confined to very specific subjects.<sup>70</sup> The legislative history of the ATS indicates that it should “remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law,” but the Court noted that Congress has done nothing to promote the expansion of such suits.<sup>71</sup>

The Court stated that these five reasons dictate the use of great care in modifying the law of nations to include private rights.<sup>72</sup> It held that the ATS is merely jurisdictional and that it was “originally understood to be available to enforce a small number of international norms that a federal court could properly recognize as within the common law enforceable without further statutory authority.”<sup>73</sup> Judicial power should be employed on the knowledge that there is a limited class of international norms today that may be recognizable.<sup>74</sup>

Without enunciating which actions may survive judicial scrutiny under the ATS, the Court noted that, whatever the final standard for accepting a cause of action under 28 U.S.C. § 1350, federal courts today should not acknowledge private claims under federal common law for breach of any international law norms where the matter and its recognition among nations is less specific than the historical standard in effect when § 1350 was enacted.<sup>75</sup> Further, the decision as to whether a norm is definite enough to lead to a cause of action must include studying the actual costs of making such a cause of action accessible to complainants in the federal courts.<sup>76</sup>

## 2. Alvarez's ATS Claim

Alvarez pointed to two international instruments in support of his argument that his arbitrary arrest was a violation of customary international law, sufficient to support jurisdiction under the ATS: (1) the Universal Declaration of Human Rights (“Declaration”), and (2) Article 9 of the International Covenant on Civil and Political Rights (“Covenant”).<sup>77</sup> The Court stated

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69. *Id.*

70. *Id.* (discussing the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2000))).

71. *Sosa*, 124 S. Ct. at 2763 (quoting H.R. Rep. No. 102-367, pg. 1, p. 4 (1991)).

72. *Sosa*, 124 S. Ct. at 2764.

73. *Id.*

74. *Id.*

75. *Id.* at 2765.

76. *Id.* at 2766. The Court stated that the “clear definition” requirement is not the only principle limiting the ability to obtain relief in federal courts for the violation of international law and gave other examples of limits on bringing cases, such as the claimant having exhausted any remedies available in domestic courts and international claims tribunals, and case-specific deference to political branches. *Sosa*, 124 S. Ct. at 2766 n.21. Justice Breyer, in his concurrence, would add a further consideration of whether the use of jurisdiction under the ATS would be “consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement.” *Sosa*, 124 S. Ct. at 2782.

77. *Sosa*, 124 S. Ct. at 2767 (citing to Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) and International Covenant on Civil and Political Rights, Art. 9, Dec. 19, 1996, 999 U.N.T.S. 171, 175–76).

that the Declaration does not impose any obligations as a matter of international law.<sup>78</sup> The Covenant, although it binds the United States as a matter of international law, was ratified by the United States with the express understanding that it was not self-executing and did not, by itself, create duties enforceable in federal court.<sup>79</sup>

Thus, the Court found that Alvarez could not prove that either the Declaration or the Covenant created a germane rule of international law, the violation of which would be redressable by the ATS.<sup>80</sup> Despite how the Court views the Declaration as not imposing obligations on it as a matter of law, there is support for Alvarez's contention that the Declaration presents customary international law that binds the Court.<sup>81</sup>

Alvarez then attempted to establish that the prohibition of arbitrary arrest had attained the status of binding customary international law.<sup>82</sup> Alvarez invoked a general proscription of arbitrary detention, which the Court defined as "exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances."<sup>83</sup> Without evaluating the sensibility of Alvarez's point, the Court noted that Alvarez had cited no support for such a broad rule and, further, had cited no justification for this rule being the basis for a federal lawsuit, which would carry significant consequences.<sup>84</sup>

The Court stated that, if it were to accept such a broad rule, then "any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place," would be subject to U.S. federal court jurisdiction in an action by an alien where it was argued that there was a violation of the Fourth Amendment.<sup>85</sup> This would displace the requirements of 42 U.S.C. § 1983 and *Bivens v. Six Unknown Federal Narcotics Agents*,<sup>86</sup> which currently provide remedies

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78. *Sosa*, 124 S. Ct. at 2767 (citing Humphrey, *The UN Charter and the Universal Declaration of Human Rights*, in *THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 39, 50 (E. Luard ed. 1967) (quoting Eleanor Roosevelt as saying that the Declaration is "a statement of principles . . . not a treaty or international agreement . . . impos[ing] legal obligations")). Alvarez also cited various other conventions to which the United States is not a party.

79. *Sosa*, 124 S. Ct. at 2767.

80. *Id.*

81. Scott L. Porter, *The Universal Declaration of Human Rights: Does it Have Enough Force of Law to Hold "States" Party to the War in Bosnia-Herzegovina Legally Accountable in the International Court of Justice?*, 3 *TULSA J. COMP. & INT'L L.* 141, 153-54 (1995) (detailing how the Declaration would be binding on all states if it is established as customary international law and discussing how the Declaration meets the four prerequisites—namely, generality of practice, uniformity of practice, *opinio juris* and duration of development—to be considered customary international law).

82. *Sosa*, 124 S. Ct. at 2768.

83. *Id.*

84. *Id.*

85. *Id.*

86. 403 U.S. 388 (1971).

for comparable violations.<sup>87</sup> It was on these grounds that the Court reversed the judgment of the Ninth Circuit Court of Appeals.<sup>88</sup>

#### IV. Conclusion

The U.S. Supreme Court concluded that the ATS is not solely jurisdictional in nature, but the substantive causes of action available under it are extremely limited in scope. Although the Court stressed that any causes of action available in the future would be closely scrutinized, it did not establish any real guidelines as to exactly what types of actions might be allowed. It will be left up to the district courts to make these determinations on a case-by-case basis, using the *Sosa* decision as a guidepost. Therefore, ATS cases continue to be a threat, as the exact scope of applicable causes of action under the ATS remains unclear.

In *Sosa*, the government recommended that the Court adopt Justice Scalia's reasoning, expressed in his concurrence.<sup>89</sup> Justice Scalia stated that the ATS does not, under any circumstances, provide for causes of action, because this decision must be left to Congress rather than to the courts.<sup>90</sup> In Justice Scalia's view, there was no need for "vigilant doorkeeping" with regard to ATS claims because the door is closed.<sup>91</sup> Had the Court adopted Justice Scalia's view of the ATS, it would have basically eliminated the viability of the ATS, as the only claims available would be those involving violations of international law which were established at the time the ATS was drafted, violations of safe conduct, infringement of the rights of ambassadors and piracy.<sup>92</sup> Although clever plaintiffs' attorneys would no doubt seek ways to fit various causes of action into these three categories of violations, the Court's decision not to limit the ATS in this manner leaves open the question of just how far the ATS will be allowed to stretch in establishing federal jurisdiction over an action brought by an alien.<sup>93</sup>

After sitting virtually dormant for the first 200 years of its existence, the ATS has gained prominence as a number of plaintiffs, such as Alvarez did in the *Sosa* case, attempt to use the ATS as a vehicle to obtain jurisdiction in U.S. courts for actions that have very little, if any,

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87. *Sosa*, 124 S. Ct. at 2768 (citing to 42 U.S.C. § 1983 and 403 U.S. 388 (1971)). The Court further noted that the detention of Alvarez, which was a single instance lasting less than a day, followed by the transfer of custody to lawful authorities and prompt arraignment, was not sufficient to constitute a violation of any norm of customary international law sufficient to create a federal remedy. *Sosa*, 124 S. Ct. at 2769.

88. *Sosa*, 124 S. Ct. at 2769.

89. See Peter Bowman Rutledge & Nicole L. Angarella, *An End of Term Exam: October Term 2003 at the Supreme Court of the United States*, 54 CATH. U.L. REV. 151, 223–24 (2004).

90. *Sosa*, 124 S. Ct. at 2769–76; see also Bowman Rutledge, *supra* note 89, at 223–24.

91. *Sosa*, 124 S. Ct. at 2764. Even under Justice Scalia's narrow view of the ATS, a claim could still potentially lie for violations of a treaty of the United States, in addition to violations of international law as it existed when the ATS was drafted.

92. See BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769).

93. See Bowman Rutledge, *supra* note 89, at 223–24.

connection with the United States.<sup>94</sup> Although no plaintiff has successfully maintained an action under the ATS, the Court has left the door open for the possibility of a successful ATS claim, although it has not enunciated exactly what type of claim would survive scrutiny. There is no doubt that the plaintiffs' bar will continue to push the envelope with respect to where the bounds of the ATS lie, and the Court likely will have to eventually establish a firmer rule than the guideposts it erected in *Sosa*.

In explaining its rationale in *Sosa*, the Court attempted to elucidate on what grounds Alvarez's claim would have been tenable. For such a claim to withstand judicial scrutiny, there must be sufficient specificity; although the Court does not clearly outline what this entails, it cites to *Tel-Oren v. Libyan Arab Republic*, which defines the limits of § 1350 as extending to those actions that violate "definable, universal and obligatory norms."<sup>95</sup> The Court further states that in assessing a potential cause of action, the costs associated with judicial action in such cases must be analyzed. Additionally, the Court stated that if these requirements are met, the claim still might not be justiciable if the claimant has not attempted to bring suit in all other possible courts and political arenas.<sup>96</sup>

The implication for future litigants, based on the holding in *Sosa*, is that it will be difficult to bring successful cases under the ATS because any causes of action will have to fulfill each and every paradigm outlined by the Court above. Although the Court does not foreclose such causes of action, the limitations on viable claims are great. However, as long as there is a sliver of hope, it can be expected that plaintiffs will continue to pursue various tort claims in an attempt to find a forum in the U.S. courts.

Nicola Carpenter

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94. See, e.g., *Flores v. S. Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003) (dismissing claim under ATS alleging lung disease caused by pollution from mining company in Peru); *In re S. African Apartheid Litig.*, 2004 WL 272204 (S.D.N.Y. Nov. 29, 2004) (dismissing claims brought under the ATS by victims of the apartheid against U.S. companies that did business with the apartheid government alleging those companies aided and abetted the apartheid); *Abdullahi v. Pfizer*, No. 01 Civ. 8118 (S.D.N.Y.) (case pending in S.D.N.Y. alleging claims under the ATS against Pfizer related to its use of a non-FDA approved drug in treating an outbreak of bacterial meningitis in Kano, Nigeria).

95. *Sosa*, 124 S. Ct. at 2766 (citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (C.A.D.C. 1984)).

96. It is unclear how the Court will analyze the nature of various foreign legal systems in determining whether a plaintiff has extinguished its possible remedies in the foreign jurisdiction where the harm occurs. In many instances, such an attempt by a plaintiff would be fruitless, and it is unclear what effort the Court will require a plaintiff to endure before allowing a claim.

***Firstland International, Inc. v. INS***

377 F.3d 127 (2d Cir. 2004)

**In *Firstland International, Inc. v. INS*,<sup>1</sup> the U.S. Court of Appeals for the Second Circuit held that approval of a petition for an immigrant visa cannot be revoked if the applicant was already in the United States when the petition was approved.**

**I. Facts and Procedural Posture**

Plaintiff Shao Zeng Chai is the president of Firstland International, Inc., a wholly-owned subsidiary of a China-based company, Yangzhang Shiguang Lighter Co.<sup>2</sup> In March 1997, Chai entered the United States on a nonimmigrant visa seeking to conduct business on behalf of Firstland.<sup>3</sup> Two years later, Firstland filed an immigrant visa petition<sup>4</sup> for Chai so that he could continue his stay in the United States as a “multinational executive or manager.”<sup>5</sup> The INS<sup>6</sup> approved this petition in March 2000.<sup>7</sup>

Shortly after approval of the petition, Chai, a nonimmigrant alien,<sup>8</sup> applied for an adjustment of status to become a permanent resident.<sup>9</sup> While this petition was pending, however, the INS informed Chai that it would revoke approval of his immigrant visa petition on the basis of insufficient evidence to establish his employment status in the United States.<sup>10</sup> Despite additional documentation submitted by Firstland to the INS indicating Chai’s employment status as “primarily managerial or executive,”<sup>11</sup> on January 22, 2001, the INS revoked its approval of Chai’s immigrant visa petition.<sup>12</sup>

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1. 377 F.3d 127 (2d Cir. 2004).

2. *Id.* at 129.

3. *Id.*

4. *Id.* (noting that an immigrant visa petition is also known as an I-140 petition).

5. *Id.*

6. *See generally* Stephen Gardbaum, *Hello, Can I Have My Green Card Back, Please?* DAILY TELEGRAPH, July 6, 2004, at 13 (stating that the INS was changed to the Bureau of Citizenship and Immigration Services in March 2003).

7. *Firstland*, 377 F.3d 127. *See generally* 8 C.F.R. § 2.1 (2003) (delegating authority by the Attorney General to the INS, a division of the Department of Homeland Security); *see also* *INS v. Jong Ha Wang*, 450 U.S. 139, 140 n.2 (1981) (stating that the Attorney General may delegate authority to the INS to consider status adjustment applications).

8. *See generally* 8 U.S.C. §§ 1101(a)(15), 1184(a) (defining and distinguishing between the terms *immigrant* and *nonimmigrant aliens*); *see also* *Elkins v. Moreno*, 435 U.S. 647, 664–65 (1978) (describing the statutorily created classes of aliens).

9. *Firstland*, 377 F.3d at 129.

10. *Id.*

11. 8 U.S.C. § 1153(b)(1)(C).

12. *Firstland*, 377 F.3d at 129–30 (stating that the revocation was affirmed on appeal to the Administrative Appeals Office on June 21, 2002). Shortly thereafter, the INS also denied Chai’s petition for permanent resident status.

Firstland and Chai challenged the INS's revocation of Chai's immigrant visa petition in the U.S. District Court for the Eastern District of New York.<sup>13</sup> That court dismissed the case for lack of subject-matter jurisdiction.<sup>14</sup> The plaintiffs appealed to the Second Circuit.

## II. Discussion

The Second Circuit reviewed de novo the district court's dismissal for lack of subject-matter jurisdiction.<sup>15</sup> The court began its analysis by examining 8 U.S.C. § 1252, which provides that federal courts do not have jurisdiction to review "any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General. . . ."<sup>16</sup> Of particular relevance is 8 U.S.C. § 1155—the disputed statute in this appeal<sup>17</sup>—which permits the attorney general to revoke approval of a visa in limited situations and states the procedure for effecting such revocation:

The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition. *In no case, however, shall such revocation have effect unless there is mailed to the petitioner's last known address a notice of the revocation and unless notice of the revocation is communicated through the Secretary of State to the beneficiary of the petition before such beneficiary commences his journey to the United States.* If notice of revocation is not so given, and the beneficiary applies for admission to the United States, his admissibility shall be determined in the manner provided for by sections 1225 and 1229a of this title [emphasis added].

In determining whether revocation of Chai's visa petition was within the INS's discretion<sup>18</sup> and immune from judicial review, the court found that although the plain meaning of section 1155 confers authority upon the INS to revoke a visa petition for "good and sufficient cause,"<sup>19</sup> this discretionary authority is not without limits.<sup>20</sup> Specifically, the statute provides that a revocation is not effective unless the visa applicant receives notice of such revocation from the secretary of state prior to commencing his trip to the United States.<sup>21</sup> Accordingly, the court affirmed that such notice procedures, subject to judicial review, are mandatory requirements.<sup>22</sup>

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13. *Id.* at 130.

14. *See* 8 U.S.C. § 1252.

15. *Firstland*, 377 F.3d at 130.

16. 8 U.S.C. § 1252(a)(2)(B)(ii).

17. *Firstland*, 377 F.3d at 130.

18. *See* 8 C.F.R. § 2.1 (2003) (delegating the Attorney General's revocation authority under 8 U.S.C. § 1155 to the commissioner of the INS); *see also Firstland*, 377 F.3d at 130 (commenting that the INS's exercise of power to revoke Chai's petition was not in dispute).

19. 8 U.S.C. § 1155.

20. *Firstland*, 377 F.3d at 131.

21. 8 U.S.C. § 1155.

22. *Firstland*, 377 F.3d at 131.

Applying the statute's language to the facts at hand, the court found that the INS's revocation of Chai's petition was ineffective.<sup>23</sup> It was undisputed that Chai was already in the United States on a nonimmigrant visa when he applied for an immigrant visa.<sup>24</sup> Thus, his mere presence in the United States at the time of application meant that he could never receive notice of revocation before commencing his journey to the United States, because that journey occurred five years earlier.<sup>25</sup> The language of section 1155<sup>26</sup> seemingly did not apply to Chai's situation, which prompted the court to analyze section 1155's statutory meaning in the context of the Immigration and Nationality Act.<sup>27</sup>

Relying on the ruling in *In re Vilos*,<sup>28</sup> the INS argued that Congress could not have intended to exempt the class of nonimmigrant aliens living in the United States, like Chai, from the statute in order to render their immigrant visa petitions irrevocable, because there is no statutory basis for giving them beneficial treatment while subjecting aliens living outside the United States to the statutory notice requirements.<sup>29</sup> In other words, the INS asserted that the broad language set forth in the first sentence of section 1155, coupled with the limitation in the third sentence, requires the Attorney General to give prior notice of revocation only to those applicants whose visa applications were approved before they entered the United States.<sup>30</sup> Therefore, the INS maintained that it did not have to give aliens similarly situated as Chai prior notice before deporting them.<sup>31</sup> Moreover, the INS argued that interpreting the statute to limit the Attorney General's revocation power would "unsettle the adjustment of status process" and significantly burden the INS administratively in future cases like Chai's.<sup>32</sup>

The court, however, did not agree with the INS's statutory interpretation.<sup>33</sup> It found that the plain meaning of the statute sufficed to unambiguously require the attorney general to give prior notice both to applicants living abroad and to those inside the United States.<sup>34</sup> In effect, the court held, the notice requirement imposed by section 1155 amounts to a "prerequisite" for valid revocation of an immigrant visa petition.<sup>35</sup> Upon this analysis, then, the court determined that the INS failed to comply with the notice requirement of section 1155, which thereby invalidated revocation of Chai's visa petition.<sup>36</sup>

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23. *Id.*

24. *Id.*

25. *Id.* at 129, 131 (indicating that Chai entered the United States in March 1997).

26. *See* ANA Int'l, Inc. v. Way, 242 F. Supp. 2d 906, 915–16 (D. Or. 2002) (discussing the ambiguity in the language of 8 U.S.C. § 1155).

27. 8 U.S.C.S. § 1101.

28. 12 I & N Dec. 61, 64 (BIA 1967); *see also* *Firstland*, 377 F.3d at 131.

29. *Firstland*, 377 F.3d at 131.

30. *Id.* at 132.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*



It is important to note that the court, in dicta, discussed the fact that approval of an immigrant visa petition does not necessarily entitle one to permanent resident status.<sup>37</sup> In fact, the court noted that such approval is but one step in the overall process toward achieving this status in the United States.<sup>38</sup> Specifically, the court pointed to two statutory provisions—8 U.S.C. §§ 1225 and 1229a, as referenced in the statutory language of section 1155—that provide alternate mechanisms by which previously approved immigrant visa applications of aliens already in transit to the United States may be excluded or removed.<sup>39</sup> Section 1225 provides several procedures for the inspection of aliens at the border,<sup>40</sup> while section 1229a sets forth general procedures to be followed in the removal of aliens.<sup>41</sup> Thus, even if the INS fails to satisfy the notice requirements prescribed by section 1155, it still may be able to rely on these proceedings to block the admission of nonimmigrant aliens.<sup>42</sup>

### III. Conclusion

The outcome of *Firstland International* was a narrow ruling, one based on very clear congressional language, rather than on reason and policy. The Court of Appeals for the Second Circuit correctly interpreted the statute as a clear-cut mandate directing the attorney general *and* the INS to send prior notice of revocation of previously approved immigrant visa petitions to aliens already inside the United States, as well as to aliens who have begun their journey to the United States. The opinion emphasized that the congressional intent underlying the notice requirements prescribed by 8 U.S.C. § 1155 do not favor one group of applicants over other groups. Rather, the court reasoned, the statutory notice requirement applies with equal force to all nonimmigrant aliens who have previously approved immigrant visa petitions.

Moreover, the court affirmed that other statutory provisions may serve as proper avenues for dealing with immigrant visa petitions even if they cannot be revoked under section 1155. Lastly, the court was not convinced its ruling would unduly burden the INS administratively and noted that, if it did, the INS could seek appropriate recourse through amendment of the statute.

Vinny Lee

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37. *Id.*

38. *Id.* at 129; *see also* CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 43.07 (2004) (citing *Firstland*).

39. *Firstland*, 377 F.3d at 132.

40. 8 U.S.C. § 1225(a) provides, *inter alia*: “All aliens (including alien crewmen) who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States shall be inspected by immigration officers,” 8 U.S.C. § 1225(a)(3), and “[a]n applicant for admission may be required to state under oath any information sought by an immigration officer regarding the purposes and intentions of the applicant in seeking admission to the United States, including the applicant’s intended length of stay and whether the applicant intends to remain permanently or become a United States citizen, and whether the applicant is inadmissible,” 8 U.S.C. § 1225(a)(5). *See also Firstland*, 377 F.3d at 132.

41. *See also Firstland*, 377 F.3d at 132.

42. *Id.*

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