

DETAINEE RIGHTS AND STATE OBLIGATIONS;
CHARTING THE SHOALS FACING
THE ROYAL CANADIAN NAVY

by

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DEDICATION PAGE

This thesis is first dedicated to all the Canadian Officers and Sailors of the Royal Canadian Navy, past present and future. By volunteering to sail into harm's way, braving the dangers of the seas and the violence of the enemy, you serve Canada and Canadian interests around the world with pride and honour. I wish you fair winds and following seas.

This work is also dedicated to the families of our Canadian Officers and Sailors, holding down the home front while their loved ones do their duty, and most especially to my own wife Bonnie and my children Victoria, Kathryn and Alex. Yours is the hardest job of all.

TABLE OF CONTENTS

| | |
|---|-----|
| ABSTRACT..... | vi |
| LIST OF ABBREVIATIONS USED..... | vii |
| ACKNOWLEDGEMENTS..... | ix |
| Chapter 1: Introduction..... | 1 |
| Chapter 2: Introduction to Contemporary Naval Operations..... | 6 |
| 2.1 Support to Other Government Departments..... | 7 |
| 2.1.1 Support to Domestic Criminal Law Enforcement..... | 8 |
| 2.1.2 Support to the Department of Fisheries..... | 11 |
| 2.1.3 The RCN as Lead Agency in Domestic Operations..... | 14 |
| 2.1.4 Conclusion: CAF Support Operations to OGDs..... | 14 |
| 2.2 Contemporary Counter-Narcotics Operations – OP CARIBBE..... | 15 |
| 2.3 Contemporary Counter-Piracy Operations..... | 16 |
| 2.4 Stages in Maritime Operations..... | 19 |
| 2.4.1 Right of Approach - Hailing and Information Gathering..... | 20 |
| 2.4.2 Visit and Search..... | 21 |
| 2.5 Summary..... | 23 |
| Chapter 3: International Law and High Seas Detainees..... | 25 |
| 3.1 Sources of International Law..... | 25 |
| 3.1.1 Treaty Law..... | 27 |
| 3.1.2 Customary International Law and <i>Jus Cogens</i> | 28 |
| 3.1.3 General Principles of International Law..... | 31 |
| 3.1.4 Subsidiary Means of Determining International Rules of Law..... | 32 |
| 3.2 Legal Regime of the Maritime Operational Area..... | 34 |
| 3.2.1 Coastal State Jurisdiction - Internal waters and Baselines..... | 35 |
| 3.2.2 Territorial Sea and Innocent Passage..... | 36 |
| 3.2.3 Straits used for International Navigation..... | 37 |
| 3.2.4 Archipelagic Straits..... | 38 |
| 3.2.5 Contiguous Zone..... | 39 |
| 3.2.6 Exclusive Economic Zone..... | 40 |
| 3.2.7 The Continental Shelf..... | 41 |

| | |
|--|-----|
| 3.2.8 The High Seas and Law of the Flag State..... | 43 |
| 3.3 Jurisdiction | 45 |
| 3.3.1 Customary Rules of Extra-territorial Jurisdiction..... | 48 |
| 3.3.2 Extra-territorial Jurisdiction and Security Council Resolutions | 55 |
| 3.3.3 Jurisdiction in Counter-Narcotics Missions – OP CARIBBE | 59 |
| 3.3.4 Jurisdiction in Counter-piracy Operations | 65 |
| 3.3.5 Jurisdiction and Lawfully Detaining Ships at Sea | 73 |
| 3.4 Detainee Rights and State Obligations under IHRL | 77 |
| 3.4.1 Charter of the United Nations and Security Council Resolutions | 79 |
| 3.4.2 Convention Relating to the Status of Refugees | 80 |
| 3.4.3 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment..... | 81 |
| 3.4.4 International Covenant on Civil and Political Rights | 83 |
| 3.4.5 Refoulement of Detainees..... | 86 |
| 3.4.6 Effect of UN Security Council Resolutions on IHRL | 89 |
| 3.4.7 Conclusion | 91 |
| 3.5 State Obligations under IHRL and Detainee Rights to Remedies | 91 |
| 3.5.1 State Responsibility for Wrongful Detentions..... | 94 |
| 3.5.2 Breach of IHRL Standard of Treatment..... | 96 |
| 3.6 Conclusion..... | 99 |
| Chapter 4: Canadian Law and High Seas Detainees..... | 101 |
| 4.1 Incorporating International Law into Canadian Domestic Law..... | 102 |
| 4.2 The Crown Prerogative and Military Deployments Outside of Canada | 103 |
| 4.3 <i>Canadian Charter of Rights and Freedoms</i> | 110 |
| 4.3.1 <i>Charter</i> Protections in Detentions | 111 |
| 4.3.2 Extra-territorial Application of the <i>Charter</i> | 113 |
| 4.4 Canadian Legislative Authorities Impacting on Extra-Territorial Detentions..... | 125 |
| 4.4.1 The Criminal Code..... | 126 |
| 4.4.2 Immigration and Refugee Protection Act | 127 |
| 4.4.3 Other Canadian Acts | 130 |
| 4.5 Breaches of Detainee Rights and Remedies..... | 133 |
| 4.5.1 Crown and Agent Civil Liability for Breaches of Detainee Rights | 134 |
| 4.5.2 Crown and Agent Criminal Liability for Breaches of Detainee Rights..... | 135 |

| | |
|---|-----|
| 4.6 Conclusion..... | 137 |
| Chapter 5: Analysis of the Legal Waters Surrounding Contemporary Operations | 139 |
| 5.1 What Determines Canadian Jurisdiction over Maritime Detainees? | 140 |
| 5.1.1 Human Rights Obligations towards those onboard HMC Ships | 143 |
| 5.1.2 Human Rights Obligations towards those not onboard HMC Ships | 145 |
| 5.1.3 Re-Conceptualizing Naval Operations through Frontiers and Borders | 147 |
| 5.2 Attribution Within Coalition Operations | 153 |
| 5.3 The Canadian Maritime Frontier Zone, Attribution and Contemporary RCN Operations | 161 |
| 5.3.1 Support to OGD | 161 |
| 5.3.2 Counter-Piracy Operations..... | 163 |
| 5.3.3 Counter Drug Trafficking Operations - Op CARIBBE | 172 |
| Chapter 6: Conclusion | 175 |
| BIBLIOGRAPHY..... | 181 |

ABSTRACT

This thesis examines the question of Canadian domestic, and international, rights and obligations owed to individuals detained by Ships of the Royal Canadian Navy in a selection of contemporary naval operations. The thesis discusses the underlying lawful authority for these operations as well as the international law affecting the maritime environment. Next the thesis reviews extra-territorial extension of a State's jurisdiction and the rights and international and Canadian State obligations triggered when an individual is detained together with issues arising from breaches of these rights and obligations. Legal issues found in maritime operations are then analyzed in contrast to the robust legal discussion surrounding land operations involving detention of individuals and attendant human right's concerns. The thesis concludes by re-conceptualizing naval operations in light of State border and frontier zone legal principles and concludes by setting out general principles that can be applied to these, and other, naval operations.

LIST OF ABBREVIATIONS USED

| | |
|----------|---|
| ATALANTA | European Union Naval Operation off the coast of Somalia to deter and disrupt maritime piracy |
| AP I | Additional Protocol I to the Geneva Convention, 1949 |
| AP II | Additional Protocol II to the Geneva Convention, 1949 |
| CAT | Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment |
| CHOP | Change in Operational Control |
| CTF 150 | Combined Task Force 150 (Counter Terrorism) |
| CTF 151 | Combined Task Force 151 (Counter Piracy) |
| DFO | Department of Fisheries and Oceans |
| ECHR | European Convention for the Protection of Human Rights and Fundamental Freedoms |
| ECtHR | European Court of Human Rights |
| EEZ | Exclusive Economic Zone |
| EUNAVFOR | European Union on Military Operation to Contribute to the Deterrence, Prevention and Repression of Acts of Piracy and Armed Robbery off the Somali Coast [2008] OJ L 301/33 |
| GC III | Geneva Convention relative to the Treatment of Prisoners of War |
| ICC | International Criminal Court |
| ICCPR | International Covenant on Civil and Political Rights |
| ICJ | International Court of Justice |
| ICTY | International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 |
| ILC | International Law Commission |
| IHL | International Humanitarian Law |
| IHRL | International Human Rights Law (synonymous with LOAC) |
| IO | International Organization |
| IRPA | <i>Immigration and Refugee Protection Act</i> , S.C. 2001, C. 27 |
| IUU | Illegal, Unreported or Unregulated (fishing) |
| HMC | Her Majesty's Canadian |
| HRA | <i>Human Rights Act</i> 1998, c42 (U.K. Legislation) |
| LOAC | Law of Armed Conflict (synonymous with IHRL) |

| | |
|--------|---|
| MNF | Multi-National Force |
| NATO | North Atlantic Treaty Organization |
| NBT | Naval Boarding Team |
| NDA | <i>National Defence Act</i> , R.S.C., 1985, c. N-5 |
| NGO | Non-Governmental Organization |
| NM | Nautical Mile |
| OGD | Other Government Department |
| POW | Prisoner of War |
| RCN | Royal Canadian Navy |
| RCMP | Royal Canadian Mounted Police |
| RMFO | Regional Fisheries Management Organization |
| SOFA | Status of Forces Agreement |
| SUA | Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation |
| USCG | United States Coast Guard |
| UNCLOS | United Nations Convention on the Law of the Sea |
| U.K. | United Kingdom |
| UNSCR | United Nations Security Council Resolution |

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CHAPTER 1: INTRODUCTION

Canada has the longest coastline in the world¹ and is actively engaged in the maritime environment.² As one of the community of nations using the world's oceans, Canada maintains the Royal Canadian Navy (the "RCN"), both for self-defence and to conduct foreign and domestic missions in the national interest. This spectrum of missions extends to deployments into international and even foreign State waters as part of Canada's contribution to United Nations-sanctioned actions, working with allies to combat transnational crimes,³ and crests in missions involving international armed conflict.

Throughout the spectrum of RCN operations Her Majesty's Canadian ("HMC") Ships may be required to stop other vessels, and potentially seize and detain individuals. What then are the legal issues faced in this eventuality, and in particular what rights and obligations are triggered for Canada and the individuals involved? Are these rights and obligations simply elements of Canadian domestic law arising from the *Charter*⁴ and set out within Canadian statute and common law, or are they imposed by international law, or both? Further, to what extent do domestic or international laws engage state

¹ Hugh Kindred & Phillip Saunders, eds., *International Law: Chiefly as Interpreted and Applied in Canada*, 7th ed. (Toronto: Emond Montgomery, 2006) at 921.

² R.R. Churchill & A.V. Lowe, *The Law of the Sea*, 3d ed. (Manchester: Manchester University Press, 1999) at 178 (Table 1, Leading EEZ Beneficiaries. Canada ranked ninth in the world for the size of her EEZ in 1992), at 280 (Table 4, Catches of the twenty leading fishing States. Canada is 20th in average annual catch in the 1993-5 period).

³ Robert J. Currie, *International and Transnational Criminal Law*, (Toronto: Irwin Law Inc., 2010) at 15 where he cites Neil Boister's description of transnational criminal law as encompassing "the indirect suppression by international law through domestic penal law of criminal activities that have actual or potential trans-boundary effects".

⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11. (the "*Charter*").

responsibility, individual liability of State agents, or both, with regard to any failure to safeguard the rights owed to detainees or to observe obligations imposed on States in these situations?

These questions frame this thesis, set against the complex legal reality of the maritime environment and within the context of a select number of contemporary operations currently conducted by the RCN. Unlike the rest of the Westphalian world,⁵ divided into Nations entitled to almost exclusive legal jurisdiction within their territorial borders, the legal seascape of the world's oceans is vastly different. Away from the shores of every coastal State the domestic law of that State begins to erode, moving from the relatively narrow expanse of maximum coastal State jurisdiction within internal waters to the Territorial Sea, through the Contiguous and Exclusive Economic Zones and then the Continental Shelf – all ending at the legally complex environment of the High Seas or *Mare Liberum*, where States exercise limited jurisdiction.⁶ Within the context of contemporary RCN operations, such questions, involving the interplay of domestic law and international human rights law, have not yet been addressed by Canadian courts and jurists, unlike other jurisdictions, including the U.K. and Denmark⁷. These questions are

⁵ *Supra* note 2 at 4, describing the evolution of international law through the lens of European State relations and commonly attributed to the 1648 Treaty of Westphalia, which marked the end of 140 years of cyclical, religiously fueled conflicts that had plagued Europe and paved the way for the modern creation and acceptance of sovereign nation-States.

⁶ *Ibid* at 4-5 describing the evolution of the law of the sea based upon the concept of *Mare Liberum* as proposed by Hugo Grotius in a pamphlet published in 1609.

⁷ Douglas Guilfoyle, "Counter-piracy law enforcement and human rights" (2010) I.C.L.Q., 59(1), 141-169. At 141-142 he describes the HMS CUMBERLAND who on 12 November 2008 boarded a suspected pirate vessel to discover Yemeni fishermen being held by the Somali pirates. Rather than simply release the pirates they were transferred to Kenya for prosecution, raising questions of international human rights not only in the approach, hailing, boarding and detention actions by the warship but also the subsequent transfer. The issue of transfer was also described in the 2008 incident involving the Danish warship ABSALON who was compelled to free suspected pirates following unsuccessful efforts to prosecute them in Danish domestic courts.

also distinct from those raised during operations conducted during international armed conflicts, which involves International Humanitarian Law, largely codified in the 1949 Geneva Conventions and particularly Geneva Convention III with regards to POWs,⁸ Geneva Convention IV protecting civilians in time of war,⁹ and the Additional Protocols I and II (AP II focusing on protections for victims in non-international armed conflicts).¹⁰

This thesis will examine the various rights and obligations triggered upon the detention of individuals in a selection of contemporary operations conducted by the RCN, and their likely operational consequences. I will show that this particular issue imports considerations not previously examined by Canadian courts and as a result differs from the approach that has been taken towards similar situations in the context of Canadian land combat operations or law enforcement actions occurring within the territory of other nations. As a result, a blended approach borrowing from recognized principles, international tribunals and Canadian jurisprudence is suggested, which would provide both a measure of certainty for Canadian naval commanders and sailors as well as safeguard the rights of detainees.

This examination will commence in Chapter One, with a description of those contemporary RCN missions that will form the focus of this study. The missions examined will be limited to a select number which share a number of common themes.

⁸ *Geneva Convention Relative to the Treatment of Prisoners of War*, August 12, 1949, 6 U.S.T. 3316, 75U.N.T.S. 135 (“*Geneva Convention III*”).

⁹ *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, August 12, 1949, 6 U.S.T. 3316, 5U.N.T.S. 127 (“*Geneva Convention IV*”).

¹⁰ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, 1125 U.N.T.S. 3 (“AP I”); and *Protocol Additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* 8 June 1977, 1125 U.N.T.S. 609 (“AP II”).

First, they all involve missions outside of those involving international or non-international armed conflict and thus governed by International Humanitarian Law.¹¹ Second, the missions highlighted are all commonly engaged in by the RCN, although they have received little judicial or academic scrutiny.

Chapter Two will briefly discuss the international law engaged by this examination. This will begin with a general review of the sources of international law followed by the international law governing jurisdiction over the maritime environment. Next I will canvass the international law specifically engaged by the contemporary operations under review and in particular those laws pertaining to detention of individuals, followed by consideration of rights owed to detainees, and other obligations imposed upon the detaining States. Lastly I will cover legal remedies available at international law to aggrieved individuals and States where obligations are breached.

Chapter Three will focus on the relevant Canadian legal landscape, first by examining how international law and corresponding obligations are imported into Canadian domestic law. Next I will review the legal authority that supports the conduct of maritime operations, as well as the Canadian *Charter* and its impact on this question, together with the domestic law permitting the detention of individuals in the first place. I will then review Canadian federal legislation that could impact upon the question of detainee rights, followed by a discussion of the potential liabilities, both civil and criminal, that could arise should detainee rights not be adequately observed.

¹¹ Leslie Green, *The Contemporary Law of Armed Conflict* 2nd ed. (Manchester University Press, 2000) at 30 where he outlines a series of national codes, and within the writings of acknowledged international law authorities, as comprising the customary international law of armed conflict (“LOAC”, also known as international humanitarian law or “IHL”).

Chapter Four will provide a more detailed analysis, based upon the previous three chapters, of applicable Canadian and International Human Rights Law as informed by the naval operations contemplated within this thesis and will propose a way to view these rights and obligations in the maritime environment by analogy to a State's frontier zones. Lastly, in Chapter Five I will conclude by outlining a number of proposed approaches applicable to contemporary RCN operations, based on Canadian and international law and my foregoing analysis.

Ultimately I hope to provide a "fix on the chart" based on these naval operations together with a recommended "course to steer" in order to avoid the hazards of detaining individuals without a proper look-out for their rights and the corresponding obligations imposed on Canada and RCN personnel. I will also demonstrate that concerns for maritime detainee rights and corresponding obligations should be more fully examined and recognized, at the same time illuminating the practical issues which should be considered. This proactive approach is suggested in order to avoid any potential "chilling effect"¹² on Canada's desire to participate in contemporary naval operations should detainee rights not be observed. It is hoped that the outcome of this work will assist in guiding the RCN, and HMC Ship's commanders and sailors, into safe waters while conducting these important maritime operations.

¹² John Bellinger, Vijay Padmanabhan, "Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and other Existing Law" (2011) 105 Am.J.Int'l L. 201 at p.201, citing Jakob Kellenberger, Official Statement of the ICRC: Strengthening Legal Protection for Victims of Armed Conflicts (21 September 2010).

CHAPTER 2: INTRODUCTION TO CONTEMPORARY NAVAL OPERATIONS

Current operations of the RCN range across a wide spectrum, the most benign involving “flag waving” visits to foreign States and exercising with foreign allies. RCN Ships are also active in sailing in support of other governmental departments (“OGD”), assisting them to achieve their mandates. These missions are most commonly in support of those OGDs who lead the mission, but RCN support missions for OGDs could be conducted under distinct legal authority provided within the *National Defence Act* itself.¹³ Within the context of contemporary operations, however, RCN Ships are most commonly deployed on international operations, normally in support of and under the authority of United Nations Security Council Resolutions (“UNSCR”s) or other bilateral or multilateral agreements, as a part of international coalitions.¹⁴

This chapter examines a number of specific contemporary missions short of armed conflict, together with their underlying legal authorities. This review will begin with missions in support of OGDs, and conducted under a variety of domestic legal authorities. Next I will examine contemporary counter-narcotics operations, which draw their legal authority from both domestic and international law, followed by an outline of counter-piracy operations, which again find their basis in both Canadian and international law. Lastly, I will describe those elements common to all three of these types of

¹³ *National Defence Act* (R.S.C., 1985, c. N-5) at Art. 273.6(2), Assistance to Law Enforcement Agencies is one such example.

¹⁴ Chris Madsen, *Military Law and Operations*, loose-leaf (consulted on 24 July 2013), (Toronto: Thomson Reuters Canada Ltd., 2013) vol 1, ch 5 at 12-13 discussing sovereignty missions, 13-14 continental defence, 16-17 evacuation of nationals, 17-18 humanitarian relief, 18-20 Peace keeping, and 20-29 military intervention operations potentially involving the Laws of Armed Conflict.

maritime operations, a categorization which will be subsequently used in the analysis of international and domestic human rights and obligations engaged. While these missions are not at the core of the RCN's mandate to defend Canada and Canadian sovereignty they do form the bulk of operations conducted by the RCN in the current era, and both by their prevalence and the importance of the human rights issues engaged, demand that such an analysis be conducted.

2.1 Support to Other Government Departments

Through the *Canada First Defence Strategy* the Canadian Government has given the Canadian Armed Forces ("CAF"), including the RCN, the primary goals of defending Canada and North America, and contributing to international peace and security – with the additional requirement to support OGDs exercising leadership responsibilities within their own spheres.¹⁵ This provision of assistance to OGDs normally involves military elements taking a support role by providing manpower, equipment and expertise, but acting under the overall leadership – and statutory authority – of the lead OGD.¹⁶ These RCN ships are acting largely pursuant to domestic statutory authorities, and it is in this capacity that they can expect to be most frequently employed. Such operations see RCN ships used as "taxis" for OGDs to enable them to operate on the high seas or within Canadian internal waters and territorial zones, over extended distances and for extended periods, or possibly providing the OGDs with the support of military technology and

¹⁵ *Canada First Defence Strategy* (Online: http://www.forces.gc.ca/site/pri/first-premier/June18_0910_CFDS_english_low-res.pdf). The *Canada First Defence Strategy* is a government issued platform outlining the modernization of the CAF and sets out a strategy based on future requirements, risks and threats facing Canada.

¹⁶ *Ibid*, at p. 7.

expertise not otherwise available.¹⁷ On rare occasions the RCN could be tasked to act as the lead agency in such a request,¹⁸ but this is a relatively infrequent possibility for the RCN. I will therefore begin by discussing contemporary operations in direct support of OGDs, followed by an overview of possible domestic operations involving the RCN as the lead agency.

2.1.1 Support to Domestic Criminal Law Enforcement Constitutional authority for Canadian criminal law flows from subsection 91(27) of the *Constitution Act, 1867*¹⁹ as a responsibility reserved for the federal government, and has been legislated primarily within the *Criminal Code*.²⁰ While enforcement of Canadian criminal law is to a large extent constitutionally assigned to provincial jurisdiction,²¹ the Royal Canadian Mounted Police (“RCMP”)²² as a federal department is authorized to enforce Canadian federal laws and, where an arrangement to provide these services exist, provincial laws.²³ Enforcement of Canada’s criminal law is normally limited to Canadian territory,²⁴

¹⁷ *Supra* note 14 vol 1, ch 5 at 2.

¹⁸ *Supra* note 13.

¹⁹ *Supra* note 21 at s.91(27).

²⁰ *Criminal Code*, R.S.C., 1985, c. C-46. While not exhaustive, additional criminal offences are also set out within the *Controlled Drugs and Substances Act*, (S.C. 1996, c. 19), the *Fisheries Act*, R.S.C., 1985, c. F-14, the *Oceans Act* (S.C. 1996, c. 31) and the *Crimes Against Humanity and War Crimes Act*, (S.C. 2000, c. 24).

²¹ *Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c.3. at s.92(14).

²² *Royal Canadian Mounted Police Act* (R.S.C., 1985, c. R-10) at art. 3 and 4.

²³ *Ibid* at art 18 and 20.

²⁴ *Supra* note 20 (*Criminal Code*) s.6.2, providing that no person shall be convicted of an offence committed “outside Canada”. This is mirrored in the *Interpretation Act*, R.S.C. 1985, c. I-21 at s.8(1) which states “Every enactment applies to the whole of Canada, unless a contrary intention is expressed in the enactment”.

legislatively defined to include Canada's internal waters and territorial sea.²⁵ Additional powers of arrest and seizure exist in the contiguous zone but are specific to customs, fiscal, immigration or sanitary law where the offence occurred in or is reasonably believed will occur in Canada.²⁶ As well, prescriptive and enforcement jurisdictional authority over some criminal acts is provided out to the limits of Canada's Exclusive Economic Zone ("EEZ") and continental shelf for offences related to those areas.²⁷ Despite this, law enforcement operations have been conducted beyond this limit and on the high seas,²⁸ and could conceivably involve the domestic prosecution of pirates²⁹ in a

²⁵ *Ibid* (*Interpretation Act*) s.35 referring to *Oceans Act supra* note 20 at art. 4 -7 where the territorial sea is defined as the waters off Canada measured from the low water line or baseline, as will be further described in this paper.

²⁶ *Supra* note 20 (*Oceans Act*) art 11-12, thus providing preventative criminal law enforcement powers throughout the contiguous zone, which extends from the territorial sea out to a distance of 24 miles.

²⁷ *Ibid* (*Criminal Code*) at art 477.1 extending criminal jurisdiction over offences committed within and in relation to the Canadian EEZ by a Canadian citizen or permanent resident; above and in relation to the Canadian continental shelf; on board or via a Canadian flagged vessel; outside Canada and in relation to hot pursuit; or outside the territory of any State by a Canadian citizen. Criminal jurisdiction is extended for offences on or under a marine installation attached/anchored on the continental shelf at art 477.1(b) and the *Oceans Act, ibid*, art 20.

²⁸ Once such operation, OP CHABANEL, occurred in April and May of 2006 and saw HMCS FREDERICTON support an RCMP counter-drug operation to "buy" drugs on the high seas off the coast of Africa. FREDERICTON then shadowed the transiting ship to Canada for protection of the RCMP involved. As a federal law enforcement task, such a request could have been made pursuant to *supra* note 13 s.273.6(2) as in the national interest and the matter could not be effectively dealt with except with the assistance of the CAF. The RCMP remained the lead agency in this law enforcement operation, and as such retained primary responsibility for the lawfulness of the seizure and detention of the suspected smugglers, drugs and the vessel involved. See Darlene Blakeley, Royal Canadian Navy Operations & Exercises, Domestic Operations: Successful counter-drug operation nets prestigious award (29 October 2007) (Online: http://www.navy.forces.gc.ca/cms/4/4-a_eng.asp?id=632). Additional jurisdiction is provided with relation to offences committed beyond Canada but onboard a Canadian ship [477.1(c)], in the course of hot pursuit [477.2], and committed outside any State by a Canadian [477.1(e)],

²⁹ *Supra* note 20 (*Criminal Code*) at s.74-75, prohibiting piracy defined as "any act that, by the law of nations, is piracy" committed in or out of Canada and piratical acts while in or out of Canada but in relation to a Canadian ship. Given the definition of piracy found within UNCLOS as a codification of customary international law, it is likely that this is the definition referentially adopted into the Canadian prohibition.

Canadian exercise of universal jurisdiction, as will be described later. Throughout many of these legislated authorities additional requirements also exist, such as the requirement for the Attorney General of Canada's consent within eight days of commencement of proceedings.³⁰ These additional requirements are beyond the scope of this paper, but do underscore the complicated nature of enforcing Canadian domestic law outside of Canada's territorial limits.

The CAF do not have a law enforcement mandate, but a number of domestic legal authorities do permit the CAF to provide support to Canadian law enforcement efforts. Under the *Emergencies Act*,³¹ the Governor in Council has the authority to direct "any person or a class of persons" in the event of a spectrum of emergencies, which could include law enforcement activities and the CAF as a "class of persons". The *National Defence Act* ("NDA")³² also provides a number of mechanisms for CAF law enforcement assistance, including at part VI dealing with "Aid of the Civil Power", which requires the Chief of Defence Staff to call out such part of the CAF as necessary at the request of a provincial Attorney General to deal with riots or disturbances of the peace beyond the

³⁰ *Ibid* (*Criminal Code*) at s. 477.1 where offences are alleged within the EEZ, against marine installations attached or anchored to the continental shelf, onboard or by means of a Canadian registered ship, with regards to hot pursuit or outside of any State territory by a Canadian citizen. S. 477.2 describes the need for consent of the Attorney General within eight days after proceedings are commenced.

³¹ *Emergencies Act*, R.S.C. 1985, c. 22. Public welfare emergencies (of a natural disaster nature) are defined and authority to provide direction are found at part I; public order emergencies (involving threats to national security) are found at part II; international emergencies (involving Canada and one or more other countries, involving force or threat of force amounting to a national emergency) are found at part III; war emergency (war or armed conflict involving Canada or an allied nation) is found at part IV.

³² *Supra* note 13.

capability of civil authorities to adequately address.³³ Assistance to law enforcement is further authorized by the *NDA*³⁴ and provided for in a number of additional instruments including orders in council³⁵ and memoranda of understanding (“MOU”)³⁶ in instances where requested support is done on a regular, or not infrequent, basis.³⁷

2.1.2 Support to the Department of Fisheries Canada supports a robust fishing industry, making use of the right to exclusively regulate this living resource out to a limit set under international and domestic law, which will be more fully discussed in subsequent chapters. Canada is also a member of a number of regional fisheries management organizations (RFMOs), organized “to co-operate in managing the high-seas fishery for certain stocks in a defined area”.³⁸ Maintaining watch over these fisheries

³³ *Ibid*, at part VI. The CDS “shall” call out such part of the CAF as he considers necessary, with consultation of the attorney general and direction from the Minister of National Defence, based upon the provincial assessment for which no authority is provided to dispute. Examples of use include the FLQ crisis in 1970 and Oka crisis in 1990 (*supra* note 14 at vol 1, ch 5 at 11 – 12).

³⁴ *Ibid* at s.273.6(2) for assistance to law enforcement when in the national interest and beyond civil means to control. Canadian Forces Armed Assistance Directions, P.C. 1993-624.

³⁵ P.C. 1996-833, *Canadian Forces Assistance to Provincial Police Forces Directions* (June 4, 1996) for military assistance to provincial and territorial law enforcement, and P.C. 1993-624 *Canadian Forces Armed Assistance Directions* (30 March 1993) for military assistance to the RCMP where required in the national interest and follows a graduated scale of support ranging from the loan of personnel and / or non-operational equipment to supporting through operational equipment and personnel where a disturbance of the peace is beyond civilian capacity to address.

³⁶ Defence Administrative Orders and Directives (“DAOD”) 7014-0 Memoranda of Understanding (MoU), for example *Memorandum of Understanding between the Canadian Forces and Royal Canadian Mounted Police Concerning Drug Law Enforcement* (January 20, 2005).

³⁷ *Supra* note 14 at vol 1, ch 5 p. 5. MoU set out the “terms and procedures by which the [CF] provides support outside its normal range of activities, including such things as an allocated number of days for the use of military platforms such as warships and aircraft, the rates and ceilings for recoverable costs, and precedence in operational matters”.

³⁸ *United Nations Convention on the Law of the Sea*, 10 December 1982, 1883 U.N.T.S. 397 [hereinafter UNCLOS] at art. 117 and 118, and the *United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, 34 ILM 1542 (1995); 2167 UNTS 88 (UN Fish Stocks Agreement) at art 8-13 set out the basis for RFMOs, and requires States to take measures or cooperate with others in conservation of high seas living resources. RFMOs to which Canada is a member include the Northwest Atlantic Fisheries

areas is the responsibility of the Department of Fisheries and Oceans (“DFO”)³⁹ and is frequently accomplished in partnership with elements of the CAF and in particular the RCN.⁴⁰ Ongoing operations such as Op DRIFTNET⁴¹ see the close collaboration between the DFO and RCN to combat ‘illegal, unreported or unregulated’ (“IUU”)⁴² fishing, and create the possibility that during any such operation a person may be detained within Canada’s EEZ. Actions taken under these authorities are permitted under both domestic and international law⁴³ and normally will be limited to boarding and inspection of ship documents, with more restrictive detentions taken in only the most serious cases. Such patrols are normally conducted with Canadian fisheries officers

Organization (NAFO), the Inter-American Tropical Tuna Commission (IATTC), the International Commission for the Conservation of Atlantic Tunas (ICCAT), the North Atlantic Salmon Conservation Organization (NASCO), the North Pacific Anadromous Fish Commission (NPAFC) and the Western and Central Pacific Fisheries Commission (WCPFC).

³⁹ *Department of Fisheries and Oceans Act*, (R.S.C., 1985, c.F-15) art. 4 and *Supra* note 20 (*Oceans Act*) at art. 40.

⁴⁰ *Memorandum of Understanding between the Department of Fisheries and Oceans and the Canadian Forces Respecting Surface Ship Patrols and Aerial Fisheries Surveillance* (May 13, 1994).

⁴¹ Op DRIFTNET is the Canadian contribution as a member of the North Pacific Anadromous Fish Commission, the Western and Central Pacific Fisheries Commission and the North Pacific Coast Guard Forum, and involves RCAF aircraft patrolling for illegal fishing activities using driftnets prohibited under the UN global moratorium on high seas driftnet use. (Online: <http://www.dfo-mpo.gc.ca/media/npres-communique/2010/hq-ac53-eng.htm>).

⁴² W. Edeson, “The international plan of action on illegal unreported and unregulated fishing: the legal context of a non-legally binding instrument” (2001) 16 *IJMCL* 603 at 605.

⁴³ Canadian domestic jurisdiction to prosecute offences within the EEZ is provided at *supra* note 20 (*Criminal Code*) s. 477.1(1) over every person committing an act or omission that if committed in Canada would be contrary to a federal law, in relation to exploring or exploiting, conserving or managing the natural resources, whether living or non-living. As well, various instruments permitted under RFMO agreements (see *supra* note 38) such as the *NAFO Conservation and Enforcement Measures*, NAFO FC Doc. 13/1 Serial No. N6131 provide for inspection and limited enforcement actions, normally achieved through the fishing vessel’s flag State or contracting party.

embarked, who exercise DFO jurisdiction to conduct the required boarding, search and, if required, seizure for violations.⁴⁴

One such example of this synergistic RCN support to a DFO operation was Operation OCEAN VIGILANCE, conducted from 1995 – 1997.⁴⁵ This operation saw up to five RCN ships take part in what became known as the “Turbot Dispute” between Canada and the European Union over alleged over-fishing of the turbot species by Spanish fishing ships.⁴⁶ The operation culminated in the much publicized boarding and seizure of the “ESTAI”, a Spanish deep-sea fishing trawler allegedly engaged in IUU fishing⁴⁷ within the Northwest Atlantic Fisheries Organization (“NAFO”) Regulatory Area.⁴⁸ Although no RCN Ships were directly involved in any boarding or seizure activity on that occasion, the possibility existed that such action could have been taken.⁴⁹

⁴⁴ See for example National Defence and the Canadian Forces, “DFO recognizes HMCS Summerside for stellar role providing CF support to fisheries patrols” (16 May 2012) (Online: <http://www.cjoc-coic.forces.gc.ca/fs-ev/2012/05/20120516-eng.asp>). Boarding and evidence gathering are provided for at international law in *supra* note 38 (UN Fish Stocks Agreement) art 21-22.

⁴⁵ Operations & Exercises, Background Summaries: Summary: Operation OCEAN VIGILANCE (1995-1997) (Online: http://www.navy.forces.gc.ca/cms/4/4-a_eng.asp?id=508).

⁴⁶ *Ibid.*

⁴⁷ *Pereira v. Canada (Attorney General)*, 2005 FC 1011 (CanLII) (“*Pereira v. Canada*”) paras 1-17.

⁴⁸ *Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries*, 1135 UNTS 369; 34 ILM 1452 (1995).

⁴⁹ In *Fisheries Jurisdiction (Spain v. Canada)*, 1998 I.C.J. 432 (Dec. 4) Canada was taken to the International Court of Justice (ICJ) by Spain over this matter for serious infringement of a right deriving from its sovereign status, namely exclusive jurisdiction over vessels flying its flag on the high seas (para 10), while Canada raised the issue of fishing, conservation and management of fisheries resources within the NAFO Regulatory Area and denied the ICJ had no jurisdiction over the matter (para 12). In a majority decision the ICJ held it was without jurisdiction to hear the matter (para 88). Within Canadian jurisprudence, allegations of *Charter* rights violations were made in *Jose Pereira E Hijos, S.A. v. Canada (Attorney General)*, 1996 CanLII 4098 (FC), [1997] 2 FC 84 including s.10(b) the right to counsel without delay and s.15 equality. All claims for *Charter* breaches were subsequently dropped or ruled against (see *Pereira v. Canada (Attorney General)*, 2005 FC 1011 (CanLII) and *Canada (Procureur général) v. Hijos*, 2007 FCA 20 (CanLII)); however the court left open for another day the possibility that such *Charter* rights breaches could be successfully found in similar circumstances.

2.1.3 The RCN as Lead Agency in Domestic Operations A number of provisions are found within the *NDA*⁵⁰ authorizing elements of the CAF to assume lead responsibility for domestic roles in support of and at the request of Canadian civilian authorities.⁵¹ These CAF domestic deployments arise where civilian authorities deem a situation beyond the capability of OGDs to adequately deal with, as was the case in the Oka crisis of 1990.⁵² To date there has been no instance of HMC Ships called out in such circumstances and therefore this issue will not be further explored.

2.1.4 Conclusion: CAF Support Operations to OGDs From the foregoing descriptions of typical RCN operations in support of OGDs, a number of conclusions can be drawn. The lead OGD, whether DFO in the case of fisheries patrols or RCMP for Canadian criminal law enforcement support, will assume primary responsibility for detainees and observance of any detainee rights. In the rare case the CAF has been called out in a lead role domestically, the CAF will retain these responsibilities in conducting

⁵⁰ *Supra* note 13 at s.2 (g)(ii) definition of “Peace Officer”, and *Queen’s Regulations And Orders for the Canadian Forces* (“QR&O”) art. 22.01. In the event an RCN warship is called out to provide assistance under one of these authorities, and if necessitated by the nature of the duties being performed, members of the CAF may also be designated “peace officers” and could potentially be required to detain persons under this authority. In such situations, and depending upon the authority used and location / circumstances of the detention, deployed elements of the RCN might face both domestic and international legal considerations regarding detainees.

⁵¹ *Ibid* at s.273.6 regarding Public Service, and Part VI Aid of the Civil Power. Armed assistance to Canadian law enforcement is also permitted under the *Canadian Forces Armed Assistance Directions*, P.C. 1993-624 and the *Canadian Forces Assistance to Provincial Police Force Directions*, P.C. 1996-833; *Canadian Forces Assistance to Federal Penitentiaries*, P.C. 1975-131; while arguably the *Emergencies Act*, R.S.C. 1985, c. 22(4th Supp.) provides authority for the Governor in Council to order CAF involvement in matters of a Public Welfare Emergency at Part I, and a Public Order Emergency at Part II, and an International Emergency at Part III.

⁵² P. Whitney Lackenbauer, “Carrying the Burden of Peace: The Mohawks, The Canadian Forces, and the Oka Crisis”, *Journal of Military and Strategic Studies*, Vol. 10 Issue 2 (Winter 2008) (Online: jmss.synergiesprairies.ca/jmss/index.php/jmss/article/download/89/99). Another well known instance of the CAF assuming control as the lead agency occurred during the Quebec FLQ crisis of 1970, however that instance involved the invocation of the War Measures Act – see Sean Maloney, “A ‘Mere Rustle of Leaves’: Canadian Strategy and the 1970 FLQ Crisis” (Summer 2000), *Canadian Military Journal* pp. 71-84 (Online: <http://www.journal.dnd.ca/vo1/no2/doc/71-84-eng.pdf>).

whatever mission was assigned. Rights and obligations while conducting these operations and owed to detainees may encompass rights under the *Charter*⁵³ and therefore CAF personnel engaged in such missions must be educated and trained to act in a manner respectful of this possibility. Also, it must be recognized that while the RCN may not be primarily responsible for observing and enforcing detainee rights in all domestic operations, HMC Ships and crews would remain generally responsible under Canadian domestic law for observing human rights obligations in their treatment of those detained.

2.2 Contemporary Counter-Narcotics Operations – OP CARIBBE

Ships of the RCN, together with RCAF aircraft, have for over seven years supported Operation CARIBBE, Canada's contribution to the American, European and Western Hemisphere counter-narcotics Operation MARTILLO.⁵⁴ Op CARIBBE is “a joint interagency and multinational collaborative effort among Western Hemisphere and European nations to counter illicit drug-trafficking in the Caribbean Basin”.⁵⁵ Together with maritime forces from France, the Netherlands, Spain and the U.K., Canadian naval and air forces work with US Navy (“USN”) and Coast Guard (“USCG”) forces to stem the flow of illicit drugs being transported by sea in the eastern Pacific Ocean and

⁵³ *Supra* note 4.

⁵⁴ Online: United States Southern Command, Operation Martillo [www.southcom.mil/newsroom/Pages/Operation -Martillo.aspx](http://www.southcom.mil/newsroom/Pages/Operation-Martillo.aspx), visited 2 Aug 2012.

⁵⁵ CF deploys RCN ships on Op CARIBBE to support joint interagency multinational counter-trafficking operation, National Defence and the Canadian Forces (24 April 2012, last modified 28 January 2013) (Online: <http://www.cjoc-coic.forces.gc.ca/fs-ev/2012/04/20120424-eng.asp>).

Caribbean basin.⁵⁶ Previously operating in a purely support role, RCN ships did “not board or search vessels of interest, and they [were] not mandated to detain or arrest anyone or seize any drugs. They provide[d] direct support to the United States Coast Guard”.⁵⁷ This support role has evolved however, with the deployment onboard HMCS TORONTO in February 2011 of a USCG Law Enforcement Detachment (“LEDET”) in direct support of Op CARIBBE.⁵⁸ RCN Ships continue to sail in support of Op CARIBBE, and the legal basis for these deployments will be discussed further in subsequent chapters.

2.3 Contemporary Counter-Piracy Operations

Piracy enjoys a special place within international law as the starting point of the universal jurisdiction principle, being one of the first crimes proscribed by international law to permit the extra-territorial enforcement of a State’s criminal laws.⁵⁹ Occurring wherever seafarers were to be found,⁶⁰ the phenomenon of piracy enjoys a long and varied history and State efforts to deal with this threat included the formation of the

⁵⁶ Leslie Craig, “Op CARIBBE”, *The Maple Leaf* vol 14, No. 3 (19 Jan 2011) (Online: <http://www.forces.gc.ca/site/commun/ml-fe/article-eng.asp?id=6685>).

⁵⁷ *Ibid.*

⁵⁸ Backgrounder The Canada-United States Military –to-Military Relationship, BG-12.005 (24 January, 2012) (Online: <http://www.forces.gc.ca/site/news-nouvelles/news-nouvelles-eng.asp?id=4073>).

⁵⁹ Robin Geiss and Anna Petrig, *Piracy and armed robbery at sea: The legal framework for counter-piracy operations in Somalia and the Gulf of Aden* (Oxford; Oxford University Press, 2011) at 72.

⁶⁰ Douglas Johnston, et al., *The Historical Foundations of World Order: The Tower and the Arena* (Netherlands: Martinus Nijhoff, 2007) at 366-368. Many cultures including the Vikings, ancient Chinese, Japanese and North Africans have been noted for their prowess at piracy, while history records Julius Caesar having been captured and released by pirates, later to return and seek vengeance on his former captors.

United States Coast Guard.⁶¹ Pirate activities span from hostage taking to murder, plundering of cargos and the interference with navigation,⁶² and are described by some as the world's first "international crime"⁶³ in that it is a crime prohibited within State domestic law but for which universal enforcement jurisdiction exists. Piracy has continued to present times and has recently become the topic of international concern, action and cooperation.⁶⁴

After the fall of Siad Barre's national Somali government in 1991, piracy re-emerged in the public eye as a threat to international shipping⁶⁵ and the Canadian Navy's first contemporary involvement in counter-piracy operations occurred in 1995.⁶⁶ The piracy threat grew such that following the Somali pirate attack on the French yacht *Le*

⁶¹ Mr. C. Havern, "To Break Up the Haunts of Pirates" (Spring 2012), *The Coast Guard Proceedings* vol 69, No. 1 at 6-11. Following the end of the Revolutionary War and dissolution of the US Navy, the US Congress approved establishment of "Customs House Boats" in 1790 which later became the US Coast Guard. Their mission was to be "sentinels of the laws" within the maritime environment.

⁶² Jane Dalton, J. Roach, John Daley, "Introductory Note to United Nations Security Council: Piracy and Armed Robbery at Sea-Resolutions 1816, 1846 & 1851" (2009) 48 *I.L.M.* 129.

⁶³ *Supra* note 60 at 368.

⁶⁴ United Nations General Assembly, *Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea A/63/174*, (08-44003 25 July 2008). A wide variety of measures were called upon for action by the international community, including cooperative suppression, information sharing, apprehension and domestic prosecution efforts.

⁶⁵ C. Alessi, "Combating Maritime Piracy", Council on Foreign Relations (23 March 2012)(Online: <http://www.cfr.org/france/combating-maritime-piracy/p18376>). See Lucas Bento, "Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish", (2011) 29 *Berkeley J. Int'l L.* 399 at 400 where it is pointed out that piracy is not confined to Somalia, as "maritime piracy is a global crime impacting a number of areas around the world, such as South East Asia, the Far East, and the Americas"

⁶⁶ On 5 April, 1995 HMCS FREDERICTON responded to the distress calls of the sailing yacht *Longo Barda* while participating in OP PROMENADE, a Canadian Trade mission to the Middle East. *Longo Barda* was under attack by pirates operating off the coast of Africa, and the FREDERICTON, as well as the commercial vessel *Mersk Antwerp*, together thwarted the piracy attempt. (Online: <http://www.cmp-cpm.forces.gc.ca/dhh-dhp/od-bdo/di-ri-eng.asp?IntlOpId=200&CdnOpId=240>, last visited 28 Mar 2013).

Ponant in 2008⁶⁷ a coalition of navies deployed to the Gulf of Aden to suppress the piracy threat.⁶⁸ This action has seen some success, as in April 2009 when the American flagged *Maersk Alabama* was attacked and seized by four pirates while transiting the Gulf of Aden.⁶⁹ Following attempts at negotiations, and fearing for the safety of an American captive being held by the pirates, U.S. Navy SEALs shot and killed three of the pirates,⁷⁰ while a fourth was captured and subsequently prosecuted in a U.S. court. Such prosecutions by western States remain rare however,⁷¹ underscoring a greater need to understand the legal dynamics involved.

The fact that Somalia proved unable to adequately deal with acts of piracy staged from its territory⁷² first emerged in 1991 but only much later arose as an issue for the international community, propelling a novel international response. Canada, along with many other countries, deployed naval forces in 2008 to the waters off Somalia at the

⁶⁷ D. Guifoyle, "Counter-Piracy Law Enforcement and Human Rights" (2010) I.C.L.Q. 59(1),141-169 at 146. Following this, France called upon the UN for a counter-piracy mandate to address the issue. A Panossian, 'L'Affaire du Ponant et le renouveau de la lutte internationale contre la piraterie' (2008) 112 *Revue Générale de Droit International Public* 661, 662.

⁶⁸ *Supra* note 65. CTF-151 is an international counter-piracy task force operating under the Combined Maritime Forces and in accordance with S.C. Res 1816, U.N. Doc. S/RES/1816 (June 2, 2008), S.C. Res 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008); S.C. Res 1851, U.N. Doc. S/RES/1851 (Dec 16, 2008) directing action to address acts of "piracy and armed robbery at sea" off of the coast of Somalia, and S.C. Res 1897, U.N. Doc.S/RES/1897 (Nov. 30, 2009), S.C. Res 1950, U.N. Doc.S/RES/1950 (Nov. 23, 2010), S.C. Res 2036, U.N. Doc.S/RES/2036 (Feb. 22, 2012). The CTF-151 mission is to disrupt piracy and armed robbery at sea in cooperation with regional and other partners (Online: <http://combinedmaritimeforces.com/ctf-151-counter-piracy/>).

⁶⁹ Erin Durkin, *Captain Richard Phillips Heard Shots and Ducked When Rescued from Pirates*, Daily News Staff Writer, NY Daily News (27 April 2009) (Online: <http://www.nydailynews.com/news/world/captain-richard-phillips-heard-shots-ducked-rescued-pirates-article-1.363368>).

⁷⁰ *Ibid.*

⁷¹ "Navy must still 'catch and release' Somali pirates", CP 24 January 2012 (Online: www.cbc.ca/news/politics/story/2012/01/24/pol-cp-pirates-prisoners.html).

⁷² Mario Silva, "Somalia: State Failure, Piracy, and the Challenge to International Law" (2009-2010) 50 *Va. J. Int'l L.* 553 at 565-57070. Such activities would more accurately be termed "armed robbery".

request of and under the authority of the UN Security Council.⁷³ The RCN has operated alternately with Combined Task Force 150 (CTF 150), a coalition of naval forces responsible for maritime interdiction operations associated with Operation Enduring Freedom in Afghanistan, and CTF 151, charged in 2009 with an exclusively counter-piracy mandate.⁷⁴ UN Security Council authorization to conduct and continue these operations has since maintained and expanded the initial grant of authority,⁷⁵ permitting third party States and international organizations (“IO”s), including Canada and NATO, to take proactive measures within Somali territory to combat piracy in this region.⁷⁶

2.4 Stages in Maritime Operations

Regardless of the RCN mission contemplated, the specific point at which rights and obligations under domestic or international legal protections arise is largely context -

⁷³ *Supra* note 68. Counter-piracy UNSCRs began with UNSCR 1816, then UNSCR 1846 and UNSCR 1851 which directed action to address acts of “piracy and armed robbery at sea” off of the coast of Somalia. UNSCRs 1816, 1846 and 1851 provided UN Chapter VII authority to use ‘all necessary means’ to counter-piracy, first within Somali territorial seas at UNSCRs 1816 and 1846, but with further authorization to conduct operations ashore in Somalia at UNSCR 1851. UNSCR 1838 was concerned with actions on the high seas.

⁷⁴ Combined Maritime Forces (Online: <http://combinedmaritimeforces.com/ctf-151-counter-piracy/>; last visited 02/04/2013).

⁷⁵ *Supra* note 68 (UNSCR 1816). Authority was first granted at UNSCR 1816 for a period of six months, allowing States cooperating with the Somali Transitional Federal Government to enter Somali waters to repress piracy and armed robbery at sea, requiring only that participating States act in a manner consistent with similar actions permitted on the high seas and consistent with international law (para 7). The follow-on resolution, UNSCR 1846, further extended this authorization for 12 months, and at UNSCR 1851 this authority was expanded to allow for land-based counter-piracy and armed robbery actions to supplement measures being taken at sea (Detainee issues related to the authorized land-based counter-piracy operations are beyond the scope of this paper, and will not be further explored). Resolutions UNSCR 1897, 1950 and most recently 2036 were subsequently authorized, reaffirming UNSCR 1950 and its implicit extending of authority, providing for subsequent 12 month extensions of the authorizations previously granted at UNSCR 1846.

⁷⁶ *Ibid*, authorizing “States, regional and international organizations” to operate within the region in suppression of the prohibited acts.

and situation - driven. While all maritime operations examined here involve sea-going and crewed vessels, the actions that may be taken by Canadian warships vary widely. If positioned along a sliding-scale of possible actions, at one end would be the simple hailing of vessels (either by radio, signal light / flags or simply shouted over the side), while at the opposite extreme of the scale would lay the act of physically detaining individuals onboard the RCN Ship. This section will describe the various stages of maritime operations that will be the subject of the subsequent analysis, divided between hailing vessels, “stopping, boarding and searching the vessel for evidence of the prohibited conduct (‘boarding’), and the subsequent phase following discovery of evidence indicating prohibited conduct involving “the arrest of persons aboard and/or seizure of the vessel or cargo (‘seizure’)”.⁷⁷ These conceptual divisions will then further be divided between the situation of seizure involving the detained sailors retained onboard their own vessel, and the situation whereby detained sailors are brought onboard the RCN Ship.

2.4.1 Right of Approach - Hailing and Information Gathering The hailing and questioning of a ‘vessel of interest’ is normally accomplished via marine radio but could also involve the use of flashing-light (‘Morse code’), flag hoists or loud-hailer. Such exchanges are routinely conducted between ships for reasons of safety and collision avoidance in accordance with the “Rules of the Road”,⁷⁸ in order to gain information on the vessel’s course and speed, maneuvering intentions and other information to permit the safe passing of the vessels concerned. These standard navigational exchanges are not

⁷⁷ D. Guifoyle, *Shipping Interdiction and the Law of the Sea*, (Cambridge University Press, 2009) at 9.

⁷⁸ *Convention on the International Regulations for Preventing Collisions at Sea, 1972* (COLREGs) 20 October 1972, 1050 U.N.T.S. 16.

part of this analysis. International law also recognizes, however, the right of warships and other authorized State vessels and aircraft to approach any vessel sailing in international waters for the purpose of verifying its nationality.⁷⁹ Additional information gathered may also include the vessel's cargo, port of departure and destination, and crew manifest.⁸⁰ Ultimately the approach and hail may involve the warship directing the target vessel to take specific actions; but throughout this approach and hailing process no physical contact is made between the warship and the target vessel.

2.4.2 Visit and Search The next action that a warship could take along the spectrum would involve the insertion of a Naval Boarding Team ("NBT") onboard the target vessel for a visit and search; always requiring domestic authority but if taking place beyond the warship's seas possibly also requiring international legal authority.⁸¹ Where the boarded vessel is Canadian flagged there is no requirement for international authority, but the visit and search of foreign flagged vessels will normally require further international authorization which could take the form of prior flag State authorization pursuant to bi- or multi- lateral agreement, or UN Security Council resolutions.⁸² Consent in such circumstances may also be provided by the target vessel's master; however, the RCN

⁷⁹ J. Ashley Roach and Robert W. Smith, *Excessive Maritime Claims* (3rd ed., Koninklijke Brill NV, Leiden, The Netherlands (2012) at 565, citing UNCLOS art. 110 (2) which describes that a warship may send a boat for the purposes of verifying the ship's flag status by reviewing its documents.

⁸⁰ *Ibid* at 564-565.

⁸¹ As previously discussed, ships of the RCN require domestic authority to act regardless of international legal authorities.

⁸² *Supra* note 79 at 566.

considers a master's consent to be insufficient basis by itself and thus consent from the vessel's owner, flag State, or some other international legal authority, is still required.⁸³

A general grant of international authority to conduct a visit and search is also found under UNCLOS itself, in cases where a reasonable basis exists to believe the target vessel shares the same nationality as the boarding warship, or where it is believed the vessel is engaged in piracy, the slave trade or unauthorized broadcasting.⁸⁴ These last categories of vessels are considered to be Stateless vessels, or those not legitimately registered in any one State, and thus they do not enjoy the protection of any flag State and are "subject to the jurisdiction of all States".⁸⁵ Stateless vessels also include those that have been denied the right to sail under a State's flag,⁸⁶ and in the case of the United States, vessels suspected to be engaged in drug trafficking.⁸⁷

⁸³ *Ibid.* Consent can be provided on a case by case basis, or through the use of international agreements providing for 'pre-approved' consent in the event stated conditions are met, as was discussed in 2.2 Contemporary Counter-Narcotics Operations – OP CARIBBE. UNSCRs invoking the authority at Chapter VII and authorizing "all necessary means" have been used in an apparent exercise of the previously discussed principal *Lex Specialis derogate legi generali*, in that the applicable UNSCR is seen as authority to pierce the immunity normally enjoyed by flagged non-governmental ships.

⁸⁴ *Ibid* at 565, citing UNCLOS art. 110(1) and (2) which requires reasonable basis to believe the vessel is engaged in piracy, the slave trade, unauthorized broadcasting, is without nationality or is the same nationality as the warship.

⁸⁵ *Ibid* and as provided for at UNCLOS art. 110(1)(d). Stateless vessels may be boarded in any waters beyond territorial waters. *Supra* note 2 at 214 further discusses that while being a Stateless vessel does not entitle every State to assert jurisdiction over them, rather it denies any single State from complaining of a violation of international law by another State asserting jurisdiction over that vessel.

⁸⁶ *Ibid* at 565-566, citing UNCLOS art. 92(2) and *supra* note 2 at 213-214, citing as an example Taiwan revoking flag State status of ships violating domestic laws with regards to drift-net fishing.

⁸⁷ *Supra* note 2 at 214, citing the American claim based on the trafficking of drugs as a grave threat pursuant to the 46 USC Chapter 705 *Maritime Drug Law Enforcement Act* which will be further discussed in Chapter 3. The US considers the right to visit and search these vessels implicit as US authorities considered them Stateless.

A visit and search boarding is conducted to inspect the target ship's and crew's documents, confirm navigational information including past and planned movements, and to inspect cargo manifests and, if provided for in the international agreement or applicable Security Council resolution, it could involve further law-enforcement actions including arrest and seizure.⁸⁸

2.5 Summary

The vast majority of contemporary RCN operations are centered on support to OGDs and international multinational operations, and as a result engage critical legal issues related to those detained.⁸⁹ These modern operational experiences include support to OGDs, counter-narcotic operations under Op CARIBBE and counter-piracy operations as part of an international coalition. While obviously diverse in aim these mission sets are all similar in that they engage a juxtaposition of international law rules, and human rights obligations, with Canadian domestic law. It is this common theme that will be explored next.

Having described a set of missions in which detentions could arise, outside of armed conflict but still focused beyond Canadian waters, I will next examine the two legal systems which are engaged by these actions. This will begin with an examination of international law, starting with the sources of international law and followed by the international legal regime of the maritime operational area. I will then detail those areas of international law specifically engaged by contemporary naval operations, including

⁸⁸ *Supra* note 79 at 566-567.

⁸⁹ Michael Wood, "Detention During International Military Operations: Article 103 of the UN Charter and the Al-Jedda Case" (2008) 47 *Mil. L. & L. War Rev.* 139, where he highlights the complex relationship between international humanitarian law ("IHL"), international human rights law ("IHRL") and the law of the United Nations Charter.

jurisdiction to conduct such missions and the engagement of human rights recognized at international law, the latter to include protections and the co-existent obligations resting on the detaining State. This will be followed by a similar discussion focused on applicable Canadian domestic law, commencing with the implementation of international law in Canadian law and then canvassing domestic authority to conduct these missions, issues of jurisdiction and Canadian human rights legislation applicable to these operations. This discussion will conclude with an examination of potential liability of the Crown and for individuals where breaches of these rights are found.

Lastly, building on the analysis of applicable international and Canadian domestic law, I will analyze the specific questions arising from detaining ships and individuals during the conduct of select RCN operations. It is from this analysis that a number of conclusions will be drawn regarding the likely rights and obligations engaged in these operations, marking the legal chart with known and anticipated hazards.

CHAPTER 3: INTERNATIONAL LAW AND HIGH SEAS DETAINEES

This chapter begins by canvassing the various sources of international law applicable to my examination. International law as set out by treaty and custom will be discussed first, as well as various principles and subsidiary means of determining international law. Next I will examine the complex legal seas upon which RCN operations are conducted, engaging both customary and conventional international law. Following this I will address the critical issue of jurisdiction, focusing on when and how jurisdiction to conduct relevant operations is found at international law. I will next focus on International Human Rights Law (“IHRL”), and the rights and obligations created thereby. Any discussion regarding the rights of those detained under IHRL must also look at the issue as one of obligations owed by detaining States, and therefore I will also consider the issue of State responsibility for breaches of obligations as well as any associated rights of redress and remedies available. Throughout this examination of the international legal seascape it will become apparent that many of the issues remain in flux, and neither States nor international tribunals have conclusively resolved these questions.

3.1 Sources of International Law

International law is that body of law governing relations between sovereign States and, to a limited extent, between States and internationally recognized bodies such as intergovernmental organizations, drawn from both customary and conventional law as

described by the Permanent Court of International Justice (“ICJ”) in *The Steamship Lotus*.⁹⁰ This seminal case involved a collision on the high seas between the French ship LOTUS and Turkish ship BOZ-KOURT, and the Turkish prosecution of the French captain when he subsequently arrived in Turkey. In rejecting France’s claim against Turkish jurisdiction the ICJ found that restrictions on the actions of States grounded in international law cannot be presumed but must themselves be found within international law:

The rules of law binding upon States, therefore, emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these coexisting independent communities or with a view to the achievement of common aims.⁹¹

This positivist statement of international law can be understood to mean that States have the lawful authority to act in any way, unless a constraint is found at international law prohibiting or regulating this action. Based upon this foundational concept, and as expressed in the *Statute of the International Court of Justice*,⁹² sources of international law arise from: (1) international conventions (Treaties) establishing rules expressly recognized by the States involved (either general or specific); (2) international custom evidencing general practices accepted as law; and (3) general principles of law recognized by civilized nations. Also noted as a means of determining or interpreting international law are ‘subsidiary means’, including judicial decisions and teachings of the

⁹⁰ *The Steamship Lotus (France v. Turkey)* (1927), P.C.I.J. (Ser. A) No. 10 (“*The Steamship Lotus*”).

⁹¹ *Ibid*, at 18.

⁹² United Nations, *Statute of the International Court of Justice*, 18 April 1946 (Online: <http://www.refworld.org/docid/3deb4b9c0.html> accessed 25 May 2013) at art 38.

most highly qualified publicists.⁹³ Each of these sources or means is separate and distinct, deserving of further review here.

3.1.1 Treaty Law International conventions (hereinafter referred to as treaties)⁹⁴ are “the clearest expression of legal undertakings made by States”.⁹⁵ As required under the *Vienna Convention on the Law of Treaties*,⁹⁶ which is broadly reflective of customary law in this regard, treaties require two or more States, and to be valid must incorporate three elements: all parties must be subject to international law, all parties must intend to create obligations binding under international law, and the resulting agreement must itself be governed by international law.⁹⁷ Within the Canadian context treaty negotiation and ratification is an executive function⁹⁸ and must follow a number of formal steps prior to taking effect, including the formal conclusion of the treaty, ratification (where required by the nature of the treaty) and subsequent registration.⁹⁹ The treaty will then enter into

⁹³ *Ibid.*

⁹⁴ J. Currie, C. Forcese & V. Oosterveld, *International Law Doctrine, Practice, and Theory* (Toronto: Irwin Law Inc, 2007) at 40, describing treaties as in one sense “international ‘contracts’ between States and/or certain international organizations, setting out rules that bind, as a matter of international law, the parties to them in their relations with one another.” Treaties between two parties are – ‘bilateral’; or multiple parties – ‘multilateral’ and synonyms for treaty include covenant, protocol, agreement, process-verbal, exchange of notes / letters, joint communiqué, charter, statute and convention. For ease of convenience, within this thesis the term treaty will be used exclusively.

⁹⁵ *Supra* note 2 at 6.

⁹⁶ *Vienna Convention on the Law of Treaties*, U.N.T.S. vol. 1155, p. 331 (Online: <http://www.refworld.org/docid/3ae6b3a10.html> accessed 25 May 2013).

⁹⁷ *Supra* note 2 at 6.

⁹⁸ Having been negotiated and ratified by the executive, the treaty must then be implemented through legislation; see Ruth Sullivan, *Driedger on the Construction of Statutes* 3d ed. (Butterworths, Markham, 1994) at 396-397, describing the two techniques used to implement treaties: for those affecting the rights of subjects, having a financial impact or requiring changes to existing law by implementing legislation whereby the legislature interprets and decides how much of the treaty should be implemented; or by incorporating the treaty by reference directly into legislation without further legislative change to the language found within the treaty.

force. Throughout this process but prior to formal conclusion a State party can at any point make “reservations” which may in some circumstances serve to exclude or modify provision(s) of the treaty and their legal effect on that State party.¹⁰⁰ Treaties are, by their very nature, generally binding only upon those State parties who have agreed to be so bound as discussed above. Treaties to which Canada considers herself bound are interpreted based upon principles of public international law – even where incorporated in a domestic statute¹⁰¹ – a factor that will be considered in my analysis and conclusions.

3.1.2 Customary International Law and *Jus Cogens* The next source of international law is customary international law, and requires two elements: consistent practice generally adopted by States; and the belief that the practice is required by customary international law, or concerns a matter subject to legal regulation and is consistent with international law (also known as *opinio juris*).¹⁰² The point at which practice is sufficient to support a rule of customary international law was addressed in both *The Steamship Lotus*¹⁰³ above, and the *North Sea Continental Shelf Cases*,¹⁰⁴ and requires extensive and

⁹⁹ *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, (online: <http://www.unhcr.org/refworld/docid/3ae6b3930.html> [accessed 3 April 2013]) at art. 102, and *supra* note 96 at art. 80. Registration with the United Nations is conducted through the UN Secretariat and is expressly required [art 102(2)] before “any organ of the United Nations” would be permitted to rely on the treaty in proceedings before the ICJ – this an effort to deter ‘secret’ treaties and alliances which could destabilize international order (*supra* note 94 at 60-61). Canadian treaties are registered domestically via the Canada Treaty Register, see Canada Treaty Information; Policy on Tabling of Treaties in Parliament (3 March 2011) (Online: <http://www.treaty-accord.gc.ca/procedures.aspx>) [accessed 23 July 2013].

¹⁰⁰ Further discussion regarding the process of reservations is beyond the scope of this thesis, however is very usefully discussed at *supra* note 98 at 124-129.

¹⁰¹ *Ibid* (Sullivan) at 397.

¹⁰² *Supra* note 2 at 7.

¹⁰³ *Supra* note 90.

¹⁰⁴ *North Sea Continental Shelf Cases: Federal Republic of Germany v. Denmark and v. Netherlands* [1969] I.C.J. Rep. 3 (“*Continental Shelf Cases*”). These ICJ cases involved conflicting North Sea

uniform State practice (particularly States whose interests are specifically affected) showing general recognition that a rule of law or legal obligation is involved.¹⁰⁵ State practice alone, absent evidence of an underlying rule of law or *opinio juris* compelling this practice, is insufficient.¹⁰⁶

A unique feature of customary international law is that once the above elements are met, any right or obligation created through the customary international law is presumed to universally bind all States, even those which have not expressed acceptance of the obligation.¹⁰⁷ This is in contrast to treaty law, which as explained above relies upon agreement and consent of the parties to the treaty and creates legal obligations only between those same parties. Even the acquiescence by a State to an international norm of general practice and *opinio juris* can be seen as evidence of the lawful nature of the practice.¹⁰⁸ The exception to this rule of universal application is only found in the case of ‘persistent objectors’ – referring to those States who protest particular practices consistently, beginning with the creation or genesis of that practice and continuing on in a

continental shelf claims by Germany, Denmark and the Netherlands and interpretation whether art. 6 of the Geneva Convention was expressive of customary international law. The ICJ rejected that customary law had been crystallized at art. 6, and further rejected that the Geneva Convention had established customary international law as the partial result of its own existence (paras 61-64).

¹⁰⁵ *Ibid* at paras 73- 74. The ICJ also acknowledged that widespread and representative participation in [a] convention might also suffice provided it included that of States whose interests were specially affected. In dissenting opinions Judge Tanaka stressed that, with regards to a treaty as expressive of customary international law, the number of ratifications or accessions must be considered in context, and courts should be wary of seeking evidence of subjective motives but rather should rely upon objective acts as sufficient. (pp. 175-176), a holding agreed to by Judge Lachs at p. 227 and 231 stressing the importance of consensus and negotiation.

¹⁰⁶ *Ibid* at paras 76-77.

¹⁰⁷ *Supra* note 2 at 8-9.

¹⁰⁸ *Ibid*.

public, consistent manner.¹⁰⁹ In such a case the State may not be bound by this customary law and its otherwise universal application.¹¹⁰

One particular aspect of customary international law deserving of special notice and consideration is that of *jus cogens*, rules “accepted and recognized by the international community of States” which can be “modified only by a subsequent norm of general international law having the same character”.¹¹¹ So powerful is the principle of *jus cogens* that any such modification, or emergence of a new peremptory norm of general international law, would then automatically void or terminate any existing treaty found in conflict with the new norm.¹¹² *Jus cogens* therefore has been described as being constitutional in character, providing as it does a series of “rules to limit the ability of States to develop, maintain or change other rules, or to prevent them from violating fundamental rules of international public policy”.¹¹³ Rules that are widely acknowledged as *jus cogens* include the prohibition against use of force in aggression or genocide, and prohibitions against slavery, torture and apartheid.¹¹⁴ In Canada, and as will be further explored, the Supreme Court of Canada has examined the impact of *jus cogens* on the interpretation of Canadian domestic law regarding refoulement of a person to a State

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid* at 78-79, in describing the persistent objection of the U.K. to other coastal States claim's of maritime jurisdictional in excess of 3 NM from their coast. Through the application of persistent objection, these wider claims were not 'opposable' towards the U.K., meaning they could not be imposed upon the U.K..

¹¹¹ *Supra* note 96 at art. 53.

¹¹² *Ibid* at art. 64.

¹¹³ Michael Byers, “Conceptualizing the Relationship between *Jus Cogens* and *Erga Omnes* Rules” (1997) 66 *Nordic J. Int'l L.* 211 at 220.

¹¹⁴ *Ibid* at 119.

where they faced the risk of torture.¹¹⁵ While not authoritatively pronouncing on the acceptance of the proposed norm against refoulement as *jus cogens* domestically, the court did accept *jus cogens* as a peremptory norm necessary for the international legal system.¹¹⁶

3.1.3 General Principles of International Law There is no universal agreement as to the meaning and composition of this source of international law, other than as a means for the International Court of Justice (“ICJ”) to gap-fill treaty and customary international law by applying legal principles common in major legal systems.¹¹⁷ General principles are accorded “a particular and fundamental importance”, and therefore serve “as a residual presumption for the resolution of doubtful claims”.¹¹⁸ Thus general principles do not import “private law institutions ‘lock, stock and barrel’, ready-made and fully equipped with a set of rules”, but rather “regard any features or terminology which are reminiscent of the rules of private law as an indication of policy and principles” useful to the development or understanding of international legal disputes.¹¹⁹ As a rule of interpretation then,¹²⁰ general principles may assist in the understanding of international law, but do not directly form international law.

¹¹⁵ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2000] 2 FC 592, 2000 CanLII 17101 (FCA), examining if the prohibition against torture is part of customary international law and a principle of *jus cogens*, and if so whether this altered the interpretation of domestic legislation with regards to deporting a person to a risk of torture.

¹¹⁶ *Ibid* at paras 30-31.

¹¹⁷ *Supra* note 2 at 12.

¹¹⁸ *Ibid*.

¹¹⁹ *International Status of South West Africa Case*, Adv. Op. [1950] I.C.J. Rep. 128 at 148.

¹²⁰ In Canadian jurisprudence, rules of interpretation with regards to international treaties were discussed in considerable detail in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, 1998 CanLII 778 (SCC) at paras 51 – 64.

3.1.4 Subsidiary Means of Determining International Rules of Law Comprised of judicial decisions and the writings of publicists, “subsidiary means” is an umbrella concept that describes recognized sources used to determine, but not create, rules of international law. The first such source concerns the role of judges and jurists in identifying rules created by States (who make law through treaty, customary rules and general principles of law).¹²¹ The weight given to a judicial pronouncement depends upon the court’s standing as well as the completeness of their research on the point in question.¹²² The second subsidiary source is the “teachings of the most highly qualified publicists”,¹²³ recognizing the complexity of international law and the value of collecting and analyzing State practice(s) together with articulating the underlying legal rules applicable.¹²⁴ Subsidiary means therefore do not directly make international law, but only assist in its understanding.

In addition to judicial decisions and legal commentaries, another subsidiary means of determining international law is found through international organizations such as the United Nations.¹²⁵ Resolutions made by the General Assembly are generally non-

¹²¹ *Supra* note 2 at 13. This is emphasized at *supra* note 92 art. 59 which states that decisions by the court are not binding except between the parties and their particular case.

¹²² *Ibid.*

¹²³ *Supra* note 92.

¹²⁴ *Supra* note 2 at 13, where these rules are “sometimes described as general principles of law, in the sense that in the absence of clear proof of, for example, a right under treaty for a State other than the flag State to exercise jurisdiction over ships on the high seas, no such right will exist.” In this regard the general principles functions “as a residual presumption for the resolution of doubtful claims”, such as if a non-flag State tried to assert a right over a ship on the high seas absent clear proof of, for example, a right under treaty.

¹²⁵ *Ibid.*, at 22-24.

binding¹²⁶ but may be somewhat persuasive in determining international law on the topic due to their varied purpose, content and underlying support.¹²⁷ In contrast, UN Security Council resolutions are binding in the specific case engaged but not as a general source of international law,¹²⁸ and the degree to which such UN Security Council Resolutions (“UNSCRs”) may be relied upon will be further discussed.

Two concepts related to, but distinct from, the topic of subsidiary means are the processes of codification and progressive development.¹²⁹ Codification may be thought of as “the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine”.¹³⁰ Conversely, progressive development initiates the development of new law.¹³¹ While theoretically distinct from codification, the latter retrospectively looking backwards at developments in the law with the former prospectively looking forward at future directions the law will likely move, the distinction may be difficult to appreciate as “the

¹²⁶ *Supra* note 99 at art. 17, 21 and 22, other than with regards to the UN budget, general administration of the General Assembly and other subsidiary organs established under that authority. Non-binding resolutions are authorized at art. 10-16.

¹²⁷ *Legality of the Threat or Use of Nuclear Weapons Case* [1996] I.C.J. Rep. 226. (*Nuclear Weapons Case*) para 70 where the ICJ opined that resolutions of the UN General Assembly can have normative value, in certain circumstances providing “evidence important for establishing the existence of a rule or the emergence of an *opinio juris*” however to make this determination the resolution must be examined “[for] its content and the conditions of its adoption; Whether an *opinio juris* exists as to its normative character... [acknowledging that] a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.

¹²⁸ *Supra* note 99 art 25 which provides that “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”.

¹²⁹ *Supra* note 2 at 13-22.

¹³⁰ *Statute of the International Law Commission* (21 November 1947), U.N.G.A. res 174(II) as amended by res 485 (V) (12 December 1950), res 984 (X) and 985 (X) (3 December 1955), and res 36/39 (18 November 1981), art. 15.

¹³¹ Johathan Charney, “International Agreements and the Development of Customary International Law” (1986) 61 Wash. L. Rev. 971 citing *supra* note 104 at 37-38.

two notions tend in practice to overlap or to leave between them an intermediate area in which it is not possible to indicate precisely where codification ends and progressive development begins”.¹³²

3.2 Legal Regime of the Maritime Operational Area

Detentions by the RCN as contemplated in this paper occur in the maritime environment, subject to the law of the sea, and therefore I propose to quickly canvas this ancient, and still evolving, area of international law. The law of the sea is focused on issues of jurisdictional entitlements and the rights and duties of States, and is rooted both in customary international law and international conventions.¹³³ Chief among the international conventions is the 1982 U.N. Convention on the Law of the Sea (UNCLOS),¹³⁴ an ambitious effort originally involving approximately 150 States and with the goal of codifying this contentious subject.¹³⁵ As of 23 January 2013, 165 States have ratified UNCLOS¹³⁶ and despite the notable absence of the United States, it is in large part seen as either codifying existing customary international law or as progressively developing customary international law.¹³⁷ While UNCLOS occupies a central role in any discussion of this area of international law, customary international

¹³² *Supra* note 104(*Continental Shelf Cases*) at paras 242-43.

¹³³ *Supra* note 2 at 25.

¹³⁴ *Supra* note 38 (UNCLOS) and *supra* note 2 at 15-22.

¹³⁵ *Ibid* (Churchil & Lowe) at 15-20.

¹³⁶ The United Nations, Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea (“DOALOS”) online: www.un.org/Depts/los/reference_files/chonological_list_of_ratifications.htm.

¹³⁷ *Supra* note 2 at 19. Codification of the universal prohibition of piracy may be seen as an example of codifying previous customary international law, while the establishment of an Exclusive Economic Zone has become recognized as customary international law.

law continues to remain an important source of the law of the sea. I will therefore briefly discuss the law of the sea as set out within UNCLOS and customary international law, first with regard to maritime zones, and then with regard to the nature of flag State jurisdiction on the high seas.

3.2.1 Coastal State Jurisdiction - Internal waters and Baselines The concept of State jurisdiction is inextricably linked to the defined territory of that State, and any examination of a coastal State's jurisdiction must begin with the concept of baselines.¹³⁸ The normal baseline is a reference line normally found at the low-water line¹³⁹ and, where waters are enclosed establishes the extent of a coastal State's internal waters within which full sovereignty is exercised.¹⁴⁰ A great many States also employ 'straight baselines', wherein a series of straight lines are drawn connecting the outermost parts of coasts "deeply indented or fringed with islands".¹⁴¹ Of particular interest to Canada is the issue of historic bays, which although largely unaddressed in UNCLOS are generally found where historically a coastal State has "for a considerable period of time claimed the bay as internal waters and has effectively, openly and continuously exercised its authority therein, and that during this time the claim has received the acquiescence of other States".¹⁴² Such a determination could see a closing line drawn across the mouth of the

¹³⁸ *Ibid* at 31.

¹³⁹ *Supra* note 38 (UNCLOS) at art. 5, further detailed as appearing on large-scale charts recognized by the coastal State. Baseline determination, as further detailed at UNCLOS Articles 7- 16, encompasses such geographical issues as mouths of rivers, bays ports and roadsteads, as well as permissible use of straight baselines where geographical features permit.

¹⁴⁰ *Supra* note 2 at 33, 61.

¹⁴¹ *Ibid* at 33, *supra* note 38 (UNCLOS) at art. 7.

¹⁴² *Ibid* (Churchill & Lowe) at 43-45, noting that the UN Secretariat published a study in 1962 'Historic Bays', First UN Conference on the Law of the Sea, *Official Records*, Vol. I, pp. 1-38, 'Juridical regime of historic waters including historic bays', *ILC Yearbook*, 1962, Vol. 2, pp. 1-26.

bay, thereby forming a baseline and creating internal waters. With few exceptions, no foreign State may exercise the right of innocent passage within these internal waters;¹⁴³ rather coastal State permission is required to enter.¹⁴⁴ Coastal States enjoy the right to enforce all domestic laws within internal waters, with the exception of vessels present by reason of distress and foreign warships, the latter being subject to sovereign immunity.¹⁴⁵

3.2.2 Territorial Sea and Innocent Passage Seaward from the coastal State's baseline is the territorial sea, a belt of water extending to a maximum limit of 12 NM.¹⁴⁶ A coastal State enjoys sovereignty over the seabed, subsoil and the super-adjacent airspace within its territorial sea,¹⁴⁷ and may enact and enforce domestic legislation within this area with only few limitations, particularly with regard to enforcement of domestic criminal and shipping-related laws.¹⁴⁸ Unlike internal waters the coastal State may not bar the transit of any other nation's vessels through its territorial sea provided the ship is exercising the right of innocent passage.¹⁴⁹ This right extends to all ships, including warships,

¹⁴³ *Ibid*, noting that areas included within internal waters as the result of the imposition of straight baselines, that were not previously considered internal waters, were preserved as areas within which innocent passage exists- *Supra* note 38 (UNCLOS) art 8(2).

¹⁴⁴ *Ibid* at 61-63, noting that a customary right to enter internal waters for ships in distress continues to exist.

¹⁴⁵ Natalie Klein, "Maritime Security and the Law of the Sea" (Oxford: Oxford University Press, 2011) at 68, and *Supra* note 38 (UNCLOS) art 25(2).

¹⁴⁶ *Ibid* (UNCLOS) at section 1 and 2 of Part II.

¹⁴⁷ *Ibid* art 2(2).

¹⁴⁸ *Supra* note 145 at 74-76 and *ibid* (UNCLOS) at art 21 and 27, which combined enumerates those laws and regulations which may be enacted by coastal States with regards to ships exercising innocent passage, and provides that coastal State criminal jurisdiction "should not be exercised" with regards to crimes committed onboard transiting foreign ships unless the (a) consequences of the crime extend to the coastal State; (b) the crime interferes with the coastal States peace or good order of the territorial sea; (c) a request is received from the ship's master or the ship's flag State; and (d) if necessary to suppress illicit traffic in narcotic drugs or psychotropic substances.

¹⁴⁹ *Ibid* at art. 17.

regardless of cargo and requires neither prior notification nor authorization. To meet this definition and benefit from these rights, the passage must be continuous, expeditious and for the purpose of either traversing that territorial sea without entering internal waters (or other State facilities outside of internal waters), or to proceed to or from internal waters or such other State facilities.¹⁵⁰ In order to be found “innocent”, the passage must not be “prejudicial to the peace, good order or security of the coastal State”,¹⁵¹ and must be made in conformity with additional requirements set out in UNCLOS.¹⁵² Failure to abide by these requirements in the case of civilian vessels can result in the coastal State taking regulatory enforcement action against these ships, while warships retain immunity from coastal State action excepting that they may be ordered out of the territorial waters.¹⁵³

3.2.3 Straits used for International Navigation In the maritime context an international strait refers to a “narrow natural passage or arm of water connecting two larger bodies of water”,¹⁵⁴ used by international shipping for “international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.”¹⁵⁵ Under UNCLOS, all ships and aircraft also enjoy the right of “transit passage” in straits used for international navigation, which is defined as “the exercise [in accordance with this part of UNCLOS] of freedom of

¹⁵⁰ *Ibid* at art. 18.

¹⁵¹ *Ibid* at art. 19. Prohibited activities are further enumerated at arts. 19(2) and 20 and generally deny any activity that may interfere with the sovereignty, territorial integrity or political independence of the coastal State. In particular, warships are restricted from any weapons exercise or practice, launching or recovering aircraft or other military devices. See also *supra* note 2 at 81-86.

¹⁵² *Ibid*, at arts 21-23 and 25.

¹⁵³ *Ibid* at art. 28 – 32, and *supra* note 2 at 87-91.

¹⁵⁴ *Supra* note 2 at 102.

¹⁵⁵ *Supra* note 38 (UNCLOS) art. 37.

navigation and over flight solely for the continuous and expeditious transit of the strait between one are of high seas or economic zone and another”¹⁵⁶. As a rule of customary international law, this right of transit passage through an international strait may not be suspended¹⁵⁷ and warships may sail in their normal mode of continuous and expeditious transit but must refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State.¹⁵⁸ Where international conventions pre-exist UNCLOS,¹⁵⁹ special regimes can exist for particular straits and these regimes may affect the general right of transit passage. The most detailed example of such a convention is the *Montreux Convention*,¹⁶⁰ which acknowledges Turkish control over the Dardanelles and Bosphorus Straits connecting the Black Sea to the Mediterranean Sea, and has for many years imposed restrictions on transit hours, numbers and tonnage of warships.¹⁶¹

3.2.4 Archipelagic Straits Archipelagic States are comprised wholly of one or more archipelagos (and may include other islands) recognized as a:

group of islands including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and

¹⁵⁶ *Ibid* art. 38, which goes on to state that notwithstanding this, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State. See also *supra* note 145 at 106-107, ships are not required to adhere to innocent passage constraints, however must refrain from threat or use of force – not as a condition of transit passage but as an ancillary obligation.

¹⁵⁷ *Corfu Channel Case (Merits) (U.K. v. Albania)*, [1949] I.C.J. Rep. 4 at 28, and *supra* note 2 at 103-104.

¹⁵⁸ *Supra* note 38 (UNCLOS) art 39. Warships may therefore launch and recover aircraft, stream military devices and otherwise maintain a normal operational posture, likewise submarines may remain submerged. See also *supra* note 2 at 109.

¹⁵⁹ *Ibid* art 35.

¹⁶⁰ *Convention regarding the Regime of the Straits, Montreux*, 20 July 1936. 173 LNTS 213.

¹⁶¹ *Supra* note 2 at 115.

other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.¹⁶²

Archipelagic States are permitted to “draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago”¹⁶³ and the waters within the baselines created are considered archipelagic waters, over which the archipelagic State exercises sovereignty with respect to the bed, subsoil and super adjacent air,¹⁶⁴ but which are neither internal waters nor territorial sea.¹⁶⁵ Innocent passage similar to that enjoyed within territorial seas may be exercised¹⁶⁶ while the archipelagic State is permitted to designate sea-lanes, with rights that resemble in many respects transit passage through international straits.¹⁶⁷ Given the virtually universal conformity, acceptance by other States and within treaties, these rules under UNCLOS may in fact have attained the status of customary international law although they are still the source of debate by some States.¹⁶⁸

3.2.5 Contiguous Zone The contiguous zone is that belt of water adjacent to and seaward of the territorial sea extending up to 24 NM from the coastal State’s baseline, and within which coastal States have limited preventative and enforcement jurisdiction

¹⁶² *Supra* note 38 (UNCLOS) art 46.

¹⁶³ *Ibid* art 47(1), although with some restrictions at art 47(2)-(7).

¹⁶⁴ *Ibid* art 49.

¹⁶⁵ *Supra* note 2 at 125.

¹⁶⁶ *Supra* note 38 (UNCLOS) art 52(1), although this right may be temporarily suspended for security reasons at art. 52(2).

¹⁶⁷ *Ibid* art. 53. Archipelagic sea lane passage closely resembles transit passage through straits. Should the archipelagic State not designate sea lanes, right of archipelagic sea lanes passage is still permitted (art. 53(12)).

¹⁶⁸ *Supra* note 2.

against activities which may be considered a threat to maritime security,¹⁶⁹ in particular customs, fiscal, immigration and sanitary laws.¹⁷⁰ Close examination of this provision in UNCLOS suggests that the first limb of Article 33 “applies to inward-bound ships and is anticipatory or preventative in character; the second limb, applying to outward-bound ships, gives more extensive power, and is analogous to the doctrine of hot pursuit”.¹⁷¹ Coastal States are not obliged to claim a contiguous zone¹⁷² and those that do exercise control, not sovereignty or sovereign rights or jurisdiction in the zone, and are limited to preventative or repression measures such as inspections and warnings.¹⁷³ These powers of arrest or to forcibly take ships into the coastal States’ ports are not universally accepted and rights of coastal States are strictly interpreted in this zone, such that any claims by coastal States not expressly provided for within UNCLOS are resolved on an equitable basis, weighing the respective importance of the interests of all parties involved.¹⁷⁴ Thus coastal States may exercise prescriptive and enforcement jurisdiction within the contiguous zone *ratione materiae*.¹⁷⁵

3.2.6 Exclusive Economic Zone The EEZ is a band of water that a coastal State may (but not must) claim, adjacent to and seaward of its territorial sea and extending no more

¹⁶⁹ *Supra* note 145 at 87.

¹⁷⁰ *Supra* note 38 (UNCLOS) at art. 33. Coastal States are permitted to exercise necessary control to prevent infringement of customs, fiscal, immigration or sanitation laws and regulations within its territory or territorial seas, and to punish infringements of these laws and regulations.

¹⁷¹ *Supra* note 145 at 87.

¹⁷² *Supra* note 2 at 136.

¹⁷³ *Supra* note 145 at 88.

¹⁷⁴ *Supra* note 2 at 139.

¹⁷⁵ *Ibid.* *Ratione materiae*, or by reason of the mater involved

than 200 NM from the baseline.¹⁷⁶ Coastal States enjoy sovereign rights related to the management, conservation, exploration and exploitation of living and non-living natural resources within the EEZ.¹⁷⁷ The legal status of the EEZ is *sui generis*, neither territorial sea nor high seas,¹⁷⁸ and certain law enforcement powers exist but are limited to the extent they are not incompatible with the EEZ regime,¹⁷⁹ including the right of visit found on the high seas. Other States therefore enjoy freedom of navigation and over-flight, and may lay and maintain submarine cables and pipelines in these zones provided these activities don't interfere with the coastal State's rights set out above. Should a vessel be found violating any of these coastal State rights, the coastal State's enforcement jurisdiction is restricted to the seizure of the offending vessel(s).¹⁸⁰

3.2.7 The Continental Shelf The juridical continental shelf of a coastal State is physically the seabed and subsoil extending beyond the territorial sea as a natural prolongation of its land territory, out to the edge of the continental margin to a maximum

¹⁷⁶ *Supra* note 38 (UNCLOS) at Part V, arts. 55 – 75. See also *Supra* note 2 at 161, 163-165 describing how coastal State islands can claim EEZ around the island provided they are capable of human habitation or economic life of their own [art 121(3)]; with regards to implementation of the rights for non-independent territories, and excluding all claims that would infringe on Antarctica (areas 60 degrees South).

¹⁷⁷ *Ibid*, (UNCLOS) at art. 56. Also provided for are coastal State jurisdictional rights with regard to establishing and use of artificial islands, installations and structures, marine scientific research and the protection/preservation of the marine environment.

¹⁷⁸ *Supra* note 2 at 166- 176. Coastal States enjoy sovereign rights and duties related to living, non-living and economic resource management and exploitation, and jurisdictional rights regarding artificial islands and installations, marine scientific research and pollution control. Non-coastal States enjoy rights of over-flight and navigation that are not incompatible with coastal States EEZ rights, remain subject to coastal State pollution control and must not interfere with artificial islands and installations. All States are free to lay submarine cables and pipelines subject to the interests of other States and the coastal State's EEZ rights.

¹⁷⁹ *Supra* note 38 (UNCLOS) at art 58(2).

¹⁸⁰ *Ibid* at art 73, 220(6) and 226(1)(c). See also *supra* note 145 at 88-89, and *supra* note 2 at 165-166 where it is pointed out that UNCLOS Articles 55 and 86 clearly establish the EEZ does not enjoy a residual high seas nor territorial sea character thus displacing any presumption that activity outside of clearly defined non-coastal State rights would come under coastal State jurisdiction.

distance of 350 NM from the baseline, or in some circumstances beyond this distance.¹⁸¹ Coastal States enjoy sovereign rights over the natural resources of their continental shelves¹⁸² for purposes of exploring and exploiting these natural resources, including jurisdiction over artificial islands or installations and structures erected to exploit those resources.¹⁸³ Coastal State law enforcement powers are therefore drawn from these sovereign rights combined with specific activities related to both the continental shelf itself and the EEZ.¹⁸⁴ These sovereign rights are made up of “all rights necessary for and connected with the exploitation of the continental shelf... [and] include jurisdiction in connection with the prevention and punishment of violations of the law”.¹⁸⁵ Coastal States may therefore lawfully take law enforcement actions related to unauthorized activities directed against these sovereign rights, provided these actions do not

¹⁸¹ *Ibid* (UNCLOS) at art 76, where additional restrictions are provided for with relation to straight baselines and submarine ridges and where the Commission on the Limits of the Continental Shelf – a body established under the authority of the UN to facilitate UNCLOS with regards to establishing continental shelf outer limits beyond 200 NM from coastal State’s baselines- are set out. See Division for Ocean Affairs and the Law of the Sea, (Online: <http://www.un.org/depts/los/index.htm>). See also *supra* note 2 at 141 where the continental margin is described as actually being comprised of three sections; the continental shelf proper, the continental margin and the continental rise, and at 148-149 where the “Irish Formula” to determine the outer extent of the continental shelf is described as a limit “either a line connecting points not more than sixty miles apart, at each of which points the thickness of sedimentary rocks is at least one per cent of the shortest distance from such point to the foot of the continental slope, or a line connecting points not more than sixty miles apart, which points are not more than sixty miles from the foot of the slope. In each case the points referred to are subject to a maximum seaward limit: they must be either within 350 miles of the baseline or within 100 miles of the 2,500-metre isobath”.

¹⁸² *Ibid* at 151-156. The continental shelf is not part of the coastal States territory, rather the State enjoys sovereign rights in relation to the natural resources only (thus wrecks are excluded).

¹⁸³ *Supra* note 38 (UNCLOS) at art 77, 60 and 80.

¹⁸⁴ *Ibid* at art 77 and 56. See also *Supra* note 2 at 144-145, describing the basis for these rights as arising from both customary international law and as the result of the evolution of a classical doctrine of the continental shelf.

¹⁸⁵ *Yearbook of the International Law Commission* (1956) Vol 2, 253, 297.

unjustifiably interfere with or infringe navigation and other rights and freedoms enjoyed by other States.¹⁸⁶

3.2.8 The High Seas and Law of the Flag State The last remaining area to be examined is that of the high seas. By definition the high seas comprise all parts of the sea that are not included within any coastal State's jurisdiction, including waters above the continental shelf beyond 200 miles, although high seas navigational rights do exist in the EEZ.¹⁸⁷ Freedoms exercised on the high seas include freedom of navigation and over-flight,¹⁸⁸ but must be exercised with 'due' or 'reasonable' regard for others exercising freedom of the high seas as well as all States' UNCLOS rights under the seabed regime.¹⁸⁹ This requirement for 'due regard' appears to favour established uses in contrast to new uses and seeks to have resolved differences between States through negotiation.¹⁹⁰ Jurisdiction on the high seas is almost exclusively exercised by the 'flag State', that State granting to a ship the right to sail under its flag and therefore enjoying exclusive legislative and enforcement jurisdiction over this ship on the high seas.¹⁹¹

¹⁸⁶ *Supra* note 145 at 99.

¹⁸⁷ *Supra* note 2 at 203, describing that the doctrine prohibiting any State from validly extend its sovereignty to the high seas is considered customary international law, codified within the conventions prepared by UNCLOS I and III; *supra* note 38 (UNCLOS) at art. 86 which also excludes archipelagic waters of archipelagic States from the definition of high seas. At art. 58 all freedoms of the high seas, including those set out at arts. 88 – 115 are reserved for those vessels within a coastal States EEZ, provided they are not incompatible with the rights specifically reserved for coastal States within their own EEZ. In limited circumstances these waters may be considered analogous to the high seas.

¹⁸⁸ *Ibid* (UNCLOS) at art. 87.

¹⁸⁹ *Supra* note 2 at 206.

¹⁹⁰ *Ibid*.

¹⁹¹ *Ibid*, at 208 and *Supra* note 38 (UNCLOS) at art 92.

In order for a ship to fly the flag of a State - its 'flag State' - the ship must first meet conditions set by that state, and as a consequence the ship and its equipment, persons onboard and its cargo will be subject (with rare exception) to the exclusive legislative and enforcement jurisdiction of that State while on the high seas.¹⁹² The rare exceptions to the otherwise exclusive flag State jurisdiction include provisions for those ships engaged in piracy, slavery and unauthorized broadcasting from the high seas, as well as those of uncertain nationality or Stateless vessels.¹⁹³ Stateless vessels are simply not validly flagged (registered) in a State, but this does not mean they are open to jurisdictional claims by all other States – instead, these “ships enjoy the protection of no State and therefore if jurisdiction were asserted by another State, no State could be competent to complain of a violation of international law”.¹⁹⁴ Other restrictions of freedom of the high seas can include UN Security Council authorized actions¹⁹⁵ and States exercising the customary law right of hot pursuit and constructive presence.¹⁹⁶

Having reviewed the basis of international law found in custom and treaty together with the tools used to assist in the interpretation of international law, and the legal seascape of international law applicable to the maritime operational area, the

¹⁹² *Ibid* (UNCLOS) at arts. 91 – 92. See also *supra* note 2 at 208, describing that the flag State enjoys exclusive legislative and enforcement jurisdiction over its flagged vessels.

¹⁹³ *Ibid* at arts 92, 99-107, 109-110.

¹⁹⁴ *Ibid* at 214, noting that the right to visit and board Stateless ships was expressly provided within UNCLOS at art. 110.

¹⁹⁵ *Ibid* at 423-425.

¹⁹⁶ *Ibid* at 214-215. Hot pursuit, recognized at UNCLOS art 111 permits the pursuit, boarding and seizure of vessels violating a coastal States laws and originally found within its internal waters or territorial seas provided (among other requirements) such action is taken before the vessel enters the territorial seas of another State, while constructive presence refers to the use of 'mother ships' hovering outside of territorial waters while sending boats into those waters to commit crimes.

foundational concept of jurisdiction will now be discussed. As will be seen, jurisdiction is a legal concept with many meanings and is central to all questions of international (and domestic) law, including the critical issue of when rights and obligations accrue.

3.3 Jurisdiction

Jurisdiction has been described as “an aspect of sovereignty [referring] to judicial, legislative and administrative competence,” and where all of these competencies are enjoyed by a State to the exclusion of all other States they are termed ‘sovereign’.¹⁹⁷ As an element arising from State sovereignty “there is a domestic law *of* jurisdiction and there is international law *about* jurisdiction”.¹⁹⁸ All sovereign States have or create laws to govern their respective State authorities and prescribe the powers of those authorities – in Canada this commences with the *Constitution Act 1867*.¹⁹⁹ It is the *Constitution* that sets out the limits and responsibilities of Canadian federal and provincial competency, competencies of the courts, and other limitations set by subject matter, geography and other factors,²⁰⁰ and upon which Canada has structured her laws creating and limiting federal and provincial agencies of government and enforcement.

When reviewing a State’s exercise of jurisdiction, three divisions are most commonly used to describe the extent of State competencies. The first is legislative or prescriptive jurisdiction, which refers to a State’s competency to make laws regarding matters, whether wholly domestic or touching outside a State’s territory. Second is

¹⁹⁷ *Supra* note 94 at 281.

¹⁹⁸ Teresa Scassa and Robert J. Currie, “New First Principles? Assessing the Internet’s Challenges to Jurisdiction” (2010-2011) 42 *Geo. J. Int’l L.* 1017 at 1020.

¹⁹⁹ *Supra* note 21

²⁰⁰ *Ibid*, with division of federal and provincial powers at ss 91 and 92 respectively.

enforcement or executive jurisdiction and is the State's ability to give effect to its laws, including investigative authority of police and other State actors such as the military. The last division of jurisdiction is judicial or adjudicative, which is found in the competency of a State's courts to adjudicate cases.²⁰¹ Any exercise of State jurisdiction, whether domestically or with extra-territorial effect, must therefore flow from one or more of these sources.

As an umbrella concept the term 'jurisdiction' remains unsettled in public international law, resting on States' 'normative parameters' to regulate matters that are not strictly domestic in nature and may be conceived as existing within the gaps between individual State's competencies.²⁰² In the international legal sense jurisdiction is primarily a creation of customary international law, and the purpose of the rules around jurisdiction "is to safeguard the international community against overreaching by individual nations".²⁰³ Jurisdictional is therefore reflective of the principles of State sovereignty, the equality of States and "respect for independence and dignity of foreign States".²⁰⁴ International jurisdiction originally arose from criminal law concepts²⁰⁵ and conceptually begins with territoriality, widely accepted as the "bedrock rule, the default or starting point".²⁰⁶ Territoriality provides that a State enjoys exclusive jurisdiction and

²⁰¹ *Supra* note 198 at 1022. See also Roger O'Keefe "Universal Jurisdiction Clarifying the Basic Concept" (2004), J.I.C.J. 2, 735-760 at 735-737 and Christopher L. Blakesley "United States Jurisdiction over Extraterritorial Crime" (1982) 73 J. Crim. L. & Criminology 1109 at 1109.

²⁰² *Supra* note 198 at 1020-1021.

²⁰³ Hannah L. Buxbaum, "Transnational Regulatory Litigation", (2006) 46 Va J. Int'l L. 251, at 304.

²⁰⁴ Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2001) at 90-91.

²⁰⁵ *Supra* note 198 at 1022.

²⁰⁶ *Supra* note 3 at 61.

control over every person and thing within its territory as a function of its sovereignty,²⁰⁷ and as a result each State must be mindful of acts that might infringe upon matters outside of its own borders that may tread upon another State's sovereignty.²⁰⁸

Once beyond the boundaries of a State's territory other principles underpinning extra-territorial State assertion of jurisdiction have evolved, which include the nationality principle,²⁰⁹ the protective principle²¹⁰ and the passive personality principle.²¹¹ Of particular importance to this examination however is the universal principle, which permits State prescriptive and enforcement jurisdiction over certain individuals (normally citizens), things (such as flagged vessels) or matters (such as acts of piracy). The principle of universal jurisdiction is based in either customary or treaty-based criminal prohibitions, jurisdictional entitlements, or both.²¹² Universal jurisdiction provides the

²⁰⁷ Subject to the concept of sovereign immunity, described at I. Sinclair, "The Law of Sovereign Immunity: Recent Developments" (1980) 167 *Recueil des cours* 113 as an international law concept that is an exception to the overarching principle of territorial jurisdiction, and is found where a State refrains from exercising its jurisdiction over a foreign State, normally in order to protect that foreign State's sovereign rights while it is present or operating within the territory of the first State.

²⁰⁸ *Supra* note 198 at 1025. Geographic delineations of territorial sovereignty will be discussed in further detail within this paper.

²⁰⁹ *Ibid* at 1027, this principle states that jurisdiction over the acts of a State's nationals may be exercised regardless of where the underlying act occurred. This generally accepted principle is more commonly relied upon by countries employing the civil law system than the common law system as found in Canada.

²¹⁰ *Ibid*, which states that the protective principle extends jurisdiction over acts committed beyond the territory of a coastal State but which are prejudicial to the security, territorial integrity and political independence of the State, and would include acts of treason and espionage.

²¹¹ *Ibid* at 1027, the passive personality principle is used by a State to claim jurisdiction over an act (by another State or alien person) that caused injury to a national of that State, regardless of the location of the act or perpetrator. This principle is acknowledged as a controversial basis for jurisdictional claims by a State however it has been more widely accepted within the context of terrorist violence.

²¹² *Ibid*, describing this as the assertion of jurisdiction by States for criminal acts deemed offensive to the international community at large and for which some treaties have been adopted that require member States apprehending persons accused of relevant crimes to either prosecute or extradite the individual to a State willing to prosecute ("*aut dedare, aut judicare*").

basis for criminal enforcement of international crimes²¹³ including genocide, crimes against humanity and war crimes,²¹⁴ but also extends to crimes of piracy and the slave trade.²¹⁵ States can exercise legislative universal jurisdiction narrowly (or conditionally), whereby the State enforces, prosecutes or even punishes offenders who are found present within the State. States can also exercise this jurisdiction broadly (or absolutely) which involves a State acting against an accused regardless of where that person's prohibited acts occurred or even if they are present in the State's territory – such as in the case of piracy outside of another State's territorial seas. Bearing in mind these various principles of jurisdiction, a broader test for the extra-territorial exercise of legislative jurisdiction has more recently been proposed that would use these principles as criteria to satisfy the larger question of “whether there is a substantial and *bona fide* connection between the subject-matter and the source of the jurisdiction”.²¹⁶

3.3.1 Customary Rules of Extra-territorial Jurisdiction The question of a State's extra-territorial jurisdictional competency, and by extension an individual's right to claim the application of domestic laws and State IHL obligations extra-territorially, has been the subject of a number of recent decisions by national and international tribunals. These decisions have themselves been cited in Canadian and therefore it is instructive to review them beginning with the decision of the Grand Chamber of the European Court of Human

²¹³ M. Madden, “Trading the Shield of Sovereignty for the Scales of Justice: A Proposal for Reform of International Sea Piracy Laws” (2008-2009) U.S.F. Mar L. J. Vol. 21 No. 2, at 156-157.

²¹⁴ *Rome Statute of the International Criminal Court*, art. 5, U.N. Doc. A/CONF. 183/9 (July 17, 1998) (“*Rome Statute*”). The crime of aggression is also provided for however is as yet undefined in accordance with art. 121 and 123. War crimes are defined at art. 8(2) and the International Criminal Court is given jurisdiction over these offences at art. 8(1). Individual liability for crimes committed within the Courts jurisdiction at art. 25.

²¹⁵ *Supra* note 38 arts 99-100

²¹⁶ Ian Brownlie, *Principles of Public International Law* 6th ed.(Oxford University Press, 2003) at 309.

Rights (“ECtHR”) in *Banković*,²¹⁷ followed by subsequent decisions from the House of Lords in *Al Skeini*²¹⁸ and *R (Al-Saadoon)*.²¹⁹ Both of these last decisions are of some additional interest, as each was subsequently revisited by the ECtHR, first in 2010 as *Al-Saadoon*²²⁰ followed by *Al-Skeini and Others* in 2011,²²¹ where the Grand Chamber used similar reasoning as the House of Lords to come to a different conclusion.

The Grand Chamber decision in *Banković* is generally seen as the modern benchmark for the question of extra-territorial jurisdiction, as the Chamber examined the jurisdictional limits of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (“ECHR”) in the context of military operations conducted by NATO, and whether claimants were properly within ECHR jurisdiction.²²² In a unanimous decision the Grand Chamber reasoned that the special character of the ECHR was not intended to confer extra-territorial effect and therefore it was confined to act as a multilateral treaty within a regional, “legal space (*espace juridique*) of the contracting States”.²²³ Possible exceptions to this extra-territorial jurisdictional limit included “when

²¹⁷ *Banković v. Belgium and others* (2001) ECHR 2001-XII, [2001] ECHR 890, 11 BHRC 435.

²¹⁸ *Al-Skeini (Respondents) v. Secretary of State for Defence (Appellant)*, [2007] UKHL 26 (“*Al Skeini*”).

²¹⁹ *R (Al-Saadoon and Another) v. Secretary of State for Defence* [2009] EWCA Civ 7, 147 ILR 538 (“*R(Al-Saadoon)*”).

²²⁰ *Al-Saadoon and Mufdhi v. United Kingdom* [2010]147 ILR 1(2) (“*Al-Saadoon*”).

²²¹ *Al-Skeini and Others v. The United Kingdom* [2011] ECHR 55721/07 (“*Al-Skeini and Others*”).

²²² *Supra* note 217. This case inquired into whether citizens of the Federal Republic of Yugoslavia (FRY) who were injured or killed when a building was bombed by a NATO air-strike within FRY territory were, in the circumstances, within the jurisdiction of the ECHR. The Grand Chamber rejected the claimants’ argument that the victims were absorbed within the respondent NATO States’ jurisdiction by the air strike itself as a manifestation of sufficient control over the deceased, holding the ECHR was intended as a “constitutional instrument of European Order” and at para 80 concluded that in the circumstances no jurisdictional link existed between the respondent States and the victims, and the victims were therefore not within those States jurisdiction

²²³ *Ibid*, at para 80 where the Grand Chamber acknowledged that the objectives of the ECHR were themselves not contrary to extra-territorial effect, the nature of the multilateral treaty confined it to regional application with few exceptions as the “Convention was not designed to be applied throughout the world, even in respect of the contracting States.”

as a consequence of military action (lawful or unlawful) [a contracting State] exercised effective control of an area outside its national territory”, and “cases involving the activities of its diplomatic or consular agents abroad or onboard craft and vessels registered in, or flying the flag of, that State”.²²⁴ With this ruling the Grand Chamber set up what has become a lightning rod for supporters and critics alike of extra-territorial jurisdiction, which has been alternately broadened and narrowed in subsequent national, and international, tribunal decisions.

The limit to extra-territorial jurisdiction was subsequently re-visited by the U.K. House of Lords in *Al Skeini*²²⁵ and their review of the extra-territorial application of the U.K. *Human Rights Act*.²²⁶ Departing from *Banković*'s much criticized adherence to principles of territoriality, the House of Lords partially adopted reasoning previously used in the case of *Issa v. Turkey*,²²⁷ which held that the *ECHR* could not be interpreted so as to permit violations by a party to the convention so long as they were perpetrated in another State's territory.²²⁸ Instead the Lords adopted the more nuanced approach of asking first if those affected “were under the authority and/or effective control, and

²²⁴ *Ibid*, at paras 70 and 72.

²²⁵ *Supra*, note 218. This case involved six Iraqi civilians killed at the hands of British soldiers in Iraq; five as the result of troops operating within the country and the sixth after being detained by British forces and subsequently beaten to death by British troops. Families of the deceased sought to compel an independent inquiry into the circumstances of, and possible liability for, these deaths in breach of the *ECHR* as annexed within the U.K. *HRA*.

²²⁶ *Human Rights Act 1998*, c42 (“*HRA*”), incorporating into U.K. legislation the *ECHR*.

²²⁷ *Issa v. Turkey* (2004) 41 EHRR 567. This matter involved Turkish denial of jurisdiction over an incident involving a number of Iraqi shepherds allegedly killed by Turkish troops operating in Northern Iraq, and whose families sought human rights protections under the *ECHR*.

²²⁸ *Supra*, note 218 at para 71, where Lord Rodger stated for the court that “... a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State... Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.”

therefore within the jurisdiction, of the respondent State”.²²⁹ This refinement on *Banković* was tempered, however, as the Lords ultimately held that the *ECHR* was still only intended to operate regionally within the territory of member States, and thus applied “only in the case of territory which would normally be covered by the Convention”.²³⁰ It was further stressed that extra-territorial jurisdictional obligations must be rationally based and not subject to the vagaries of individual situations,²³¹ and that *Banković*’s exceptions to extra-territorial jurisdiction based on effective control over an area and diplomatic agents embarked in ships or aircraft were not sufficiently “clear-cut”.²³² Lastly, the majority of the Lords rejected *Issa*’s ‘authority and control’ test in favour of a more restrictive ‘effective control’ test, requiring that *de facto* and *de jure* control by State agents extra-territorially be sufficient to secure all of the rights in dispute.²³³ Thus mere lawful physical control extra-territorially is by itself insufficient;

²²⁹ *Ibid* at para 72 and 74, requiring first a “sufficient factual basis for holding that, at the relevant time, the victims were within that specified area”

²³⁰ *Ibid* at paras 77-78, where Lord Rodger noted that justification could be found, as acknowledged in para 80 of *Banković*, to fill a “gap or vacuum” but that the Convention was intended to operate regionally and not throughout the world, “even in respect of the conduct of contracting States”, and that “jurisdiction based on effective control only in the case of territory. If it went further, the court would run the risk not only of colliding with the jurisdiction of other human rights bodies but of being accused of human rights imperialism”.

²³¹ *Ibid* at para 79, where Lord Rodger adopted the reasoning in *Banković* that a jurisdictional obligation was unable to be “divided and tailored in accordance with the particular circumstances of the extra-territorial act in question. In other words, the whole package of rights applies and must be secured where a contracting State has jurisdiction”, and thus jurisdiction arises “only where the contracting State has such effective control of the territory of another State that it could secure to everyone in the territory all the rights and freedoms” associated. At para 91 Baroness Hale agreed with this approach, stating that “The Strasbourg case law is quite plain that liability for acts taking effect or taking place outside the territory of a member State is exceptional and requires special justification”, a position also supported by Lord Carswell at para 97.

²³² *Ibid* at paras 30 and 33, where Lord Bingham examined the question of military forces exercising “effective control of an area outside its national territory” and cases involving diplomatic or consular agents abroad and on board craft and vessels registered or flagged by that State.

²³³ *Ibid*, at para 127 where Lord Brown stated “It is one thing to recognize as exceptional the specific narrow categories of cases I have sought to summarize above; it would be quite another to accept

any previously existing laws governing the space in question must be displaced (or, it could be reasoned based upon the principle of complementarity, not be contrary to the extra-territorial application of the displacing law).²³⁴

The issue of extra-territorial jurisdiction was subsequently revisited, first by the Supreme Court of the United Kingdom²³⁵ in *R (Al-Saadoon)*²³⁶ and then on appeal by the

that whenever a contracting State acts (militarily or otherwise) through its agents abroad, those affected by such activities fall within its Article 1 jurisdiction. Such a contention would prove altogether too much. It would make a nonsense of much that was said in *Banković*, not least as to the Convention being “a constitutional instrument of European public order”, operating “in an essentially regional context”, “not designed to be applied throughout the world, even in respect of the conduct of contracting States” (para 80). It would, indeed, make redundant the principle of effective control of an area: what need for that if jurisdiction arises in any event under a general principle of “authority and control” irrespective of whether the area is (a) effectively controlled or (b) within the Council of Europe?” Lord Brown continued at para 129 to rationalize that “except where a State really does have effective control of territory, it cannot hope to secure Convention rights within that territory and, unless it is within the area of the Council of Europe, it is unlikely in any event to find certain of the Convention rights it is bound to secure reconcilable with the customs of the resident population. Indeed it goes further than that. During the period in question here it is common ground that the U.K. was an occupying power in Southern Iraq and bound as such by Geneva IV and by the Hague Regulations. Article 43 of the Hague Regulations provides that the occupant “shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country”. The appellants argue that occupation within the meaning of the Hague Regulations necessarily involves the occupant having effective control of the area and so being responsible for securing there all Convention rights and freedoms. So far as this being the case, however, the occupants' obligation is to respect “the laws in force”, not to introduce laws and the means to enforce them (for example, courts and a justice system) such as to satisfy the requirements of the Convention. Often (for example where Sharia law is in force) Convention rights would clearly be incompatible with the laws of the territory occupied”

²³⁴ *Ibid* at para 33.

²³⁵ On 1 October 2009 the Supreme Court of the United Kingdom assumed all judicial functions of the previous British House of Lords in their role as the court of appeal under the authority of the *Constitution Reform Act 2005* (c.4).

²³⁶ *Supra* note 219, this case involved claims advanced by Iraqi citizens who were detained by British forces operating in Iraq. The British government agreed to an Iraqi request to transfer these prisoners to stand trial for alleged war crimes, which could have resulted in the imposition of the death penalty if convicted. At the time of the prisoners capture, British forces were in Iraq as part of the coalition that displaced the former Iraqi government, and had declared themselves an occupying power as part of the Multi-National Force (“MNF”) which was endorsed by UN Security Council Resolutions 1483 and 1511 at para 13. Subsequent S.C. Res 1546, U.N. Doc S/RES/1546 (8 June 2004) at para 10 permitted the troops forming the MNF, following the end of this occupation but remaining at the request of the Iraqi government, to contribute to the stabilization of Iraq and authorized them to “take all necessary measures to contribute to the maintenance of security and stability in Iraq”. The prisoners sought judicial review of this transfer decision, arguing that once

Strasbourg Court in *Al-Saadoon*.²³⁷ Looking first at the unanimous Supreme Court decision, four propositions were set out;²³⁸

(1) It is an *exceptional* jurisdiction,

(2) determined *in harmony* with other applicable norms of international law. Together these propositions require the lawful exercise of sovereign legal authority, and not merely *de facto* power, extra-territorially, and further that as a condition precedent this authority must be capable of operation without opposing the alien State's political philosophy;²³⁹ and

(3) it reflects the *regional* nature of Convention rights,

(4) and the *indivisible* nature of Convention rights. Still recognized was the concept of the State parties *espace juridique*, and that this legal space must be capable of near-

detained they were within U.K. jurisdiction for the purpose of section 1 of the ECHR, and thus should benefit from the rights provided for there including the right not to be deprived of life at Article 2.

²³⁷ *Supra* note 220.

²³⁸ *Supra* note 219 at paras 37-39 where Laws LJ stated for the court "It is not easy to identify precisely the scope of the Article 1 jurisdiction where it is said to be exercised outside the territory of the impugned State party, because the learning makes it clear that its scope has no sharp edge; it has to be ascertained from a combination of key ideas which are strategic rather than lexical"

²³⁹ *Ibid*, stating this extra-territorial application of jurisdiction "is of itself an exceptional state of affairs, though well recognized in some instances such as that of an embassy. The power must be given by law, since if it were given only by chance or strength its exercise would by no means be harmonious with material norms of international law, but offensive to them; and there would be no principled basis on which the power could be said to be limited, and thus exceptional. ... It is impossible to reconcile a test of mere factual control with the limiting effect of the first two propositions ... These first two propositions, ... condition the others." He went on to state that "If a State party is to exercise Article 1 jurisdiction outside its own territory, the regional and indivisible nature of the Convention rights requires the existence of a regime in which that State enjoys legal powers wide enough to allow its vindication, consistently with its obligations under international law, of the panoply of Convention rights—rights which may however, in the territory in question, represent an alien political philosophy."

replication in the extra-territorial environment to a level comparable with what the sending State executive enjoys within its own territory.²⁴⁰

A few years after *R (Al-Saadoon)* and *Al-Skeini* were decided in the U.K. the matters were referred to the Strasbourg Court as *Al-Saadoon and Al-Skeini and Others* where the court employed much of the same reasoning as the Supreme Court yet came to opposite conclusions on their finding of the facts. On the issue of jurisdiction the court again noted the limited, “notably territorial” jurisdictional reach permitted by Article 1, recognizing the need for contracting States to secure protected rights and freedoms to those within its own jurisdiction while not imposing these standards upon the States within which this extra-territorial jurisdiction was being exercised.²⁴¹ The court then further acknowledged that customary international law and treaties do recognize the extra-territorial exercise of a State’s jurisdiction, again citing examples of diplomatic or consular agents abroad and on board aircraft and vessels registered in or flying their State’s flag.²⁴² Using similar reasoning as the U.K. Supreme Court, the Strasbourg Court disagreed in the result and concluded that the circumstances showed both *de facto* and *de jure* control and therefore the detainees were within U.K. jurisdiction and entitled to

²⁴⁰ *Ibid*, stating that “The Convention’s natural setting is the *espace juridique* of the States parties; if, exceptionally, its writ is to run elsewhere, this *espace juridique* must in considerable measure be replicated. In short the State party must have the legal power to fulfill substantial governmental functions as a sovereign State. It may do so within a narrow scope, as in an embassy, consulate, military base or prison; it may, in order to do so, depend on the host State’s consent or the mandate of the United Nations; but however precisely exemplified, this is the kind of legal power the State must possess: it must enjoy the discretion to decide questions of a kind which ordinarily fall to a State’s executive government. If the Article 1 jurisdiction is held to run in other circumstances, the limiting conditions imposed by the four propositions I have set out will be undermined.”

²⁴¹ *Supra* note 220 at para 84, and *supra* note 221 at paras 131-150.

²⁴² *Ibid* at para 85 and *supra* note 220 at para 135.

protections of the *ECHR*.²⁴³ In the end these two courts, despite coming to different results, agreed upon the principles governing the exercise of extra-territorial State jurisdiction.

3.3.2 Extra-territorial Jurisdiction and Security Council Resolutions As can be seen from these decisions, an overriding concern regarding State extra-territorial actions remains the degree of infringement one State may impose upon the sovereign jurisdiction of another State. At this point it becomes important to also recognize the potential effect of the UN Charter and its goal of maintaining international peace and security.²⁴⁴ In achieving this goal, the UN Charter balances the interests of international human rights²⁴⁵ with respect for the independence and equality of States,²⁴⁶ and in the context of international jurisdiction it is the work of the UN Security Council, through its resolutions (UNSCRs), that will have the most effect in achieving this balance.

²⁴³ *Ibid* at para 87 where the Strasbourg Court stressed that the detainees were taken prisoner and the deaths occurred while the U.K. was essentially an occupying power and then retained while the U.K. remained to assist in stabilizing Iraqi security – during which time a Multi National Force order stated that “all premises currently used by the MNF should be inviolable and subject to the exclusive control and authority of the MNF”. The Strasbourg Court went on at para 88 to hold this result was consistent with their own dicta in *Al-Skeini*, citing *supra* note 218 at para 62. Also followed in *supra* note 220 at paras 149-150 where the Court held that in the exceptional circumstances of coalition forces removing the Iraqi government from power and until the accession of the interim government, the UK “exercised authority and control over individuals killed in the course of security operations”, thus establishing a jurisdictional link.

²⁴⁴ *Supra* note 99, *supra* note 1 at 35, discussing the recognition at art. 1 of the UN Charter of the interdependence of political, social, cultural, humanitarian and economic problems internationally, and the role the UN is expected to play in addressing these human problems together with a number of idealistic, rather than normative, objectives that balance the interests of States against those of peoples (individuals).

²⁴⁵ *Supra* note 99 (*UN Charter*), preamble “We the Peoples of the United Nations determined ... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom”.

²⁴⁶ *Ibid*, at art. 1,

The UN Security Council enjoys the authority to “determine the existence of any threat to the peace, breach of the peace, or act of aggression” and to take such measures as required to “maintain or restore international peace and security”,²⁴⁷ all the while acting “in accordance with the Purposes and Principles of the United Nations”.²⁴⁸ In order to give effect to this responsibility, all member States must accept the implementation of Chapter VI and VII measures,²⁴⁹ alongside the requirement imposed by Article 103 that “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.”²⁵⁰ Thus any discussion of international jurisdiction must acknowledge the power of the UN Security Council, which through its resolutions can cross all principles of State jurisdiction, and even sovereignty, and sanction at international law an otherwise unlawful act (such as by authorizing the use of force against a State).

The question of the extent to which UNSCRs can qualify other international law was reviewed by the British House of Lords in *Al-Jedda*²⁵¹ where Articles 25²⁵² and

²⁴⁷ *Ibid*, at art. 39.

²⁴⁸ *Ibid*, at art. 24(2).

²⁴⁹ *Ibid*, at art 25 “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”.

²⁵⁰ *Ibid*, at art. 103.

²⁵¹ *R (on the application of Al-Jedda) v. Secretary of State for Defence* [2007] UKHL 58, [2008] 3 All ER 28 (*Al-Jedda*). Specifically the question raised was whether the U.K. had sufficient authority to detain individuals for security reasons while operating in Iraq as part of a UNSCR authorized multinational force.

²⁵² Article 25 states ““The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”

103²⁵³ of the *UN Charter* were examined to see if they qualified U.K. obligations under Article 5(1) of the *ECHR*.²⁵⁴ The majority decisions reconciled the competing commitments of the UN Charter and UNSCR 1546 (2004)²⁵⁵ with those of the *ECHR* by qualifying, rather than displacing, *ECHR* Article 5(1) with UN Charter obligations.²⁵⁶ Reconciling practical realities of ground operations with the desire to observe detainee rights to the greatest extent possible,²⁵⁷ the decision held that the UN Charter had primacy over *ECHR* obligations, and only by qualifying the *ECHR* right under Article

²⁵³ Article 103 reads “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.”

²⁵⁴ *Human Rights Act* 1998, c. 42, incorporating into U.K. law the *ECHR*. See *Supra* note 251 at paras 151-152.

²⁵⁵ *Supra* note 236 (UNSCR 1546) at para 10. This authorization was similar to that granted for ISAF forces authorized under S.C. Res 1386 (2001), U.N. Doc. S/RES/1386 (20 December 2001) para 3, and S.C. Res 1510 (2003), U.N. Doc. S/RES/1510 (13 October 2003) para 4 which authorized ISAF to “take all necessary measures to fulfill its mandate” to maintain security throughout Afghanistan to allow Afghan Authorities, UN personnel and international civilians engaged in reconstruction and humanitarian efforts to operate in a secure environment).

²⁵⁶ *Supra* note 89 at 144, *supra* note 251 at paras 3, 26-39 (Lord Bingham), paras. 115-118 (Lord Rodger), paras. 125-129 (Baroness Hale), paras 131-136 (Lord Carswell), and paras 151-152 (Lord Brown). Lord Bingham noted the text of the UNSCR which said in part that “the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution”. Among these annexed letters was that from US Secretary of State Colin Powell, which provided at paragraph 14 that as part of its combat operations “the MNF stands ready to continue to undertake a broad range of tasks to contribute to the maintenance of security and to ensure force protection. These include activities necessary to counter ongoing security threats posed by forces seeking to influence Iraq’s political future through violence. This will include combat operations against members of these groups, internment where this is necessary for imperative reasons of security...” (emphasis added).

²⁵⁷ *Ibid* at para. 34, 39 where Lord Bingham held that U.K. forces were “bound to exercise its powers of detention where this was necessary for imperative reasons of security”, but “must ensure that the detainee’s rights under Article 5 [of the Convention] are not infringed to any greater extent than is inherent in such a detention”.

5(1) to the minimum extent required or authorized by the UNSCR, could the competing commitments be reconciled.²⁵⁸

From the reasoning in *Al-Jedda*, Articles 25 and 103 of the UN Charter combine to mean “the [UN Security] Council has the authority to make legally binding decisions with which States must comply in all circumstances”, because absent this broad authority the UN Security Council and Chapter VII actions would be ineffective.²⁵⁹ It therefore follows that, when examining other international obligations, including those involving human rights (with the possible exception of *jus cogens* norms), these competing obligations may be qualified by applicable Security Council resolutions. This is not to say that conflicting obligations are always to be invalidated in favour of Council authorizations; rather infringement of these rights is to be no greater than required in meeting the Security Council mandate.²⁶⁰ The effect of this reasoning is evident in the contemporary practice of summarily disposing of equipment, arms and ships suspected of being used or intended for use in piracy – a power not provided for under UNCLOS or any other international law.²⁶¹

²⁵⁸ *Supra* note 89 at 157, citing *ibid* at para. 125, 126 where Baroness Hale expressed that “some way has to be found of reconciling our competing commitments under the (*UN Charter*) and the European Convention”, and held that “the only way is by adopting such a qualification of the Convention rights” such that the right was not “displaced. ... the right is qualified only to the extent required or authorized by the resolution. What remains of it thereafter must be observed”.

²⁵⁹ *Supra* note 89 at 146, citing S. Ratner, “The Security Council and International Law, in D. Malone (ed.), *The UN Security Council: from the Cold War to the 21st Century* (Boulder, Rienner, 2004), 34.

²⁶⁰ *Ibid* at 157, 159-161.

²⁶¹ *Supra* note 67 at 146-147. At *supra* note 68 (UNSCR 1846 para 9; UNSCR 1851 para 2; UNSCR 1897 para 3), novel authority is arguably provided when ‘States, regional and international organizations’ are called upon ‘to take part actively in the fight against piracy’, including by ‘seizure and disposition of boats, vessels, arms and other related equipment used [or where there are grounds for suspecting such use] in .. piracy ... off the coast of Somalia’

It is with all of this in mind that my examination of the international legal bases for operations will proceed, as the RCN's extra-territorial actions will necessarily engage one or more of the above principles. I will therefore next outline the legal basis at international law for jurisdiction over counter-narcotics trafficking, and then counter-piracy operations, after which I will discuss the jurisdiction required to lawfully detain ships (and their occupants) at sea, and the rights and obligations engaged under IHRL when persons are detained, as well as potential remedies for any breaches.

3.3.3 Jurisdiction in Counter-Narcotics Missions – OP CARIBBE The international legal basis for Op CARIBBE can be traced first to Article 108 of UNCLOS, which requires all States to co-operate in suppressing illicit high-seas drug trafficking.²⁶² Article 108 goes on, however, to restrict this requirement to situations where a State believes on reasonable grounds that its own flagged ship is engaged in illicit trafficking, and provides that the State may request co-operation from another State.²⁶³ Subsequently, the *UN Narcotics Convention* was adopted, which again permitted third party requests to board and search another State's flagged vessels where 'reasonable grounds' existed to suspect they were engaged in illicit trafficking while exercising 'freedom of navigation' and, where illicit narcotics are found, to take appropriate action.²⁶⁴ This authority contemplated such actions anywhere outside of territorial waters,²⁶⁵ but again relied upon consent from the flag State to take action. As with UNCLOS, then, the enforcement

²⁶² *Supra* note 38 (UNCLOS) at art 108(1).

²⁶³ *Ibid* at art. 108(2).

²⁶⁴ *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 20 December 1988, U.N.T.S. 1582, p. 95. ("UN Narcotics Convention") at art 17(3) and (4).

²⁶⁵ *Supra* note 77 at 83.

jurisdiction provided through this treaty contained a gap by requiring flag-State consent prior to taking investigative or enforcement action.

Through a series of multilateral and bilateral treaties, themselves encouraged by the *UN Narcotics Convention*,²⁶⁶ a number of affected States entered into agreements that have formed a web of ‘advance’ permissions to interdict suspected traffic.²⁶⁷ These permissive agreements all contain ‘preferential jurisdiction’ clauses, retaining exclusive flag State jurisdiction over their flagged vessels,²⁶⁸ but the agreements then vary in their functional approach to boarding and detentions by the other signatory State. The Spanish-Italian agreement, for example, provides that each party gives to the other the “right to intervene [aboard] as its agent”,²⁶⁹ while the Council of Europe Agreement (“1995 European Agreement”) provides that arrested suspects may be “surrendered”²⁷⁰ rather than extradited, “reflect(ing) some States’ view that the boarding States’ enforcement jurisdiction is essentially one loaned by the flag State”.²⁷¹ Thus European

²⁶⁶ *Supra* note 264 at art. 17(7).

²⁶⁷ *Supra* note 77 at 85 – 96 citing the *Treaty between the Kingdom of Spain and the Italian Republic to combat Illicit Drug Trafficking at Sea*, 1776 UNTS 229 (“1990 Spanish-Italian Treaty”), the *Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, ETS no. 156 (31 January 1995) (“1995 European Agreement”), and 24 bilateral agreements between the United States and States in the Caribbean basin, Central and South America and the United Kingdom.

²⁶⁸ *Ibid* at 85 citing the 1990 Spanish-Italian treaty, art. 4(2) and 6; at p. 86 with reference to 1995 European Agreement.

²⁶⁹ *Ibid*, at 85 citing *R v. Dean and Bolden* [1998] 2 Cr. App. R. 171, 173-5.

²⁷⁰The term ‘surrender’ has been held to be synonymous with ‘transfer’, this implying the forced movement of the prisoner without recourse to the full rights normally engaged in an extradition – within the European context this has been described as “at most, ... a simplified form of extradition involving a judicial process and a degree of human rights scrutiny” (*Ibid*, at 87 citing N. Vennemann, ‘The European arrest warrant and its human rights implications’, (2003) 63 *ZaöRV* 103 at 109, 112-19.

²⁷¹ *Supra* note 77 at 86 citing *supra* note 267 (1995 European Agreement) arts. 14, 15 and W. Gilmore, ‘Narcotics interdiction at sea: the 1995 Council of Europe Agreement’ (1996) 20 *Marine Policy* 3 at 11.

nations²⁷² have moved beyond the encouragement found in the *UN Narcotics Convention* to create a proactive and multilateral approach to stemming the flow of narcotics, permitting an expeditious application of UNCLOS and *UN Narcotics Convention* enforcement spirit.

Of greater concern to contemporary RCN operations are the extensive series of bilateral treaties entered into between the United States and affected Caribbean basin States, providing for “consensual boardings in international waters and enforcement (seizure) jurisdiction over vessels, their cargo or crew”.²⁷³ These agreements typically provide for “either actual or presumed consent to boarding flag vessels”,²⁷⁴ requiring a request for consent from the intervening State, but then providing “[i]f there is no response [within a set time limit] the requesting Party will be deemed to have been authorized to board the suspect vessel for the purpose of inspecting ... to determine if [the suspect vessel] is engaged in illicit traffic”.²⁷⁵ The time requirement ranges from automatic consent (no time requirement),²⁷⁶ to two²⁷⁷ and three hours.²⁷⁸ These treaties

²⁷² *Ibid* (1995 European Agreement). In 2007, seven European countries (France, Ireland, Italy, Netherlands, Portugal, Spain and the U.K.) concluded an agreement to co-operate through the Maritime Analysis and Operations Centre (Narcotics) (MAOC (N)) for the suppression of illicit drug trafficking by sea and air within an operational area of the Atlantic (Europe to West Africa) and into the Western Mediterranean basin. Canada and the US hold observer status.

²⁷³ *Supra* note 77 at 89.

²⁷⁴ *Ibid*.

²⁷⁵ *Ibid* citing the *Agreement between the United States and Guatemala Concerning Cooperation to Suppress Illicit Traffic in Narcotic Drugs and Psychotropic Substances by Sea and Air* (2003) (“Guatemala agreement”) at art. 7(3)(c) and (d).

²⁷⁶ *Ibid* at 90 citing the *Agreement between the US and Haiti concerning cooperation to suppress illicit maritime traffic*, KAV 6079 (1997) (“Haiti Agreement”) and *Agreement between the US and Costa Rica Concerning Cooperation to Suppress Illicit Traffic*, TIAS 13005 (19 November 1998, amended 2 July 1999) (“Costa Rica Agreement”).

²⁷⁷ *Ibid* at 89-90 citing agreements with *supra* note 275 (“Guatemala Agreement”), *Agreement between the US and the Republic of Honduras concerning Cooperation for the suppression of illicit*

then further provide direction on authority for subsequent legal proceedings, should illegal activity be revealed following a boarding – again covering a range of constraints and permissions to seek instructions from the flag State²⁷⁹ prior to taking law enforcement actions. Because these agreements are binding only upon those States party to the agreements, it can be seen that care must be taken to understand, early in the boarding and search phase of a naval operation, precisely which flag a particular target vessel flies.

Next, looking to the practice of LEDETs, operating as law enforcement authorities from one State embarked on another State’s government vessels and boarding ships for law enforcement purposes, it may be observed that this approach is neither uncommon nor novel. The use of ‘ship-riders’, or law enforcement officials embarked onboard another State’s governmental vessels, is specifically contemplated and

maritime traffic in narcotic drugs and psychotropic substances, TIAS, 2000 U.S.T. LEXIS 159 (“Honduras Agreement”), *Agreement between the US and the Government of Nicaragua concerning cooperation to suppress illicit traffic by sea and air*, TIAS, 2001 U.S.T. LEXIS 63 (“Nicaragua Agreement”), *Arrangement between the Government of the US and the Government of Panama for Support and Assistance from the U.S. Coast Guard for the National Maritime service for the Ministry of Government and Justice*, TIAS 11833, U.S.T. LEXIS 51 and supplementary arrangement (“Panama Agreement”), and the *Agreement between the US and Venezuela to suppress Illicit Traffic in Narcotic Drugs and Psychotropic Substances by Sea*, TIAS 11827 (1991) (“Venezuela Agreement”).

²⁷⁸ *Ibid*, at 90 citing agreements the *Agreement between the US and Colombia to Suppress Illicit Traffic by Sea*, KAV 4867 (1997) (“Colombia Agreement”), the *Agreement between Barbados and the US Concerning Cooperation in Suppressing Illicit Maritime Drug Trafficking*, KAV 5337 (1998) (“Barbados Agreement”), and the *Agreement between the Government of the USA and the Government of Jamaica concerning cooperation in suppressing illicit maritime drug trafficking*, TIAS, 1977 U.S.T. LEXIS 21 amended TIAS, 2004 U.S.T. LEXIS 1 (“Jamaica Agreement”).

²⁷⁹ *Ibid* at 90-91. Agreements between the US and *supra* note 276 (Haiti Agreement) at art. 16, Costa Rica Agreement at art. 6, *supra* note 277 (Honduras Agreement) at art. 7(1) and *ibid* (Barbados Agreement) at art. 15 are cited as typical, providing that flag States retain primary jurisdictional rights on their vessels, which may be waived on request from the US. In contrast, *ibid* (Columbian Agreement) permits situations of US law enforcement primacy to the exclusion of Columbian criminal law at art. 16, while the agreement at *supra* note 277 (Venezuelan Agreement) only permits “an expeditious ‘decision by the flag State as to which Party is to exercise enforcement jurisdiction”” at art. 8.

authorized within one multilateral convention²⁸⁰ and seven US bilateral treaties.²⁸¹ The intent of these agreements is to permit States (normally non-US) to retain formal control over interdictions involving their own flag vessels²⁸² and for all vessels within their own territorial waters,²⁸³ likely in situations where those States did not have the naval capabilities to exercise such operations themselves. The US Coast Guard use of LEDETS then evolved in a parallel fashion, first to deploy on USN “‘ships of opportunity’, transiting or operating in areas frequently used by illegal drug traffickers” as a means of working around the American *posse comitatus* doctrine prohibiting US military personnel from directly engaging in law enforcement activities.²⁸⁴

Under the LEDET paradigm, a USN vessel interdicting suspected drug smugglers would “‘shift its tactical control to the [US] Coast Guard, hoist the Coast Guard ensign to signify its law enforcement authority as a temporary [US] Coast Guard unit, and then deploy its LEDET to carry out the law enforcement boarding’”.²⁸⁵ This process is also

²⁸⁰ *Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area*, 10 April 2003, TS 2003-82 at art. 8-10. (Online: <http://www.minbuza.nl/en/key-topics/treaties/search-the-treatydatabase/2003/4/010467.html>)

²⁸¹ *Supra* note 77 at 91 citing *supra* note 278 (Barbados Agreement) at art. 3-4; Costa Rica Agreement at art. 4; *supra* note 276 (Haiti Agreement) at art. 4-10; *supra* note 277 (Honduras Agreement) at art. 4; and Nicaragua Agreement at art. 4-5); and *supra* note 278 (Jamaica Agreement) art. 7-9.

²⁸² *Ibid.*

²⁸³ Juliana Gonzalez-Pinto, “Interdiction of Narcotics in International Waters”, (2007-2008) 15 U. Miami Int’l & Comp. L. Rev. at 454.

²⁸⁴ Coast Guard Law Enforcement Detachments (LEDETs): A History (Online: http://www.uscg.mil/history/articles/LEDET_History.asp last modified 26 January 2012), Michael Cunningham “Military’s Involvement in Law Enforcement: The Threat is Not What You Think”, 26 Seattle U. L. Rev. 699 (2002-2003) 703-705.

²⁸⁵ Douglas Daniels, “How to Allocate Responsibilities between the Navy and Coast Guard in Maritime Counterterrorism Operations” (2006-2007) 61 U. Miami L. Rev 467, at p. 483. See also Joseph Kramek, “Bilateral Maritime Counter-Drug and Immigrant Interdiction Agreements: Is This the World of the Future” (2000) 31 U. Miami Inter-Am. L. Rev. 121 at 129

known as CHOPing, or a ‘Change in Operational Control’.²⁸⁶ Those detained by the LEDETs are then prosecuted within the American judicial system for contraventions of the United States *Maritime Drug Law Enforcement Act*²⁸⁷, an extra-territorial application of US domestic law that American courts have held “can be applied against Stateless vessels on the high seas irrespective of any direct nexus between the conduct and the United States”.²⁸⁸ This broad interpretation of lawfulness relies in part on US judicial interpretation of UNCLOS by reasoning that stateless vessels are subject to all states’ prescriptive jurisdiction, as by sailing without a flag state they were seeking to avoid any nation’s authority.²⁸⁹

This system of embarking LEDETs was subsequently expanded beyond the use of USN vessels to include Dutch, British and French government ships²⁹⁰ as part of what is referred to as the ‘West Indies Guard Ships’ (WIGS),²⁹¹ frequently through the use of existing or amended bilateral agreements that specifically contemplated the use of these foreign warships.²⁹² Persons and suspects detained by the LEDETs deployed onboard

²⁸⁶ *Ibid* (J. Kramek) at 139.

²⁸⁷ *Supra* note 87.

²⁸⁸ *Supra* note 77 at 81.

²⁸⁹ Allyson Bennett, “That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act” (2012) 37 *Yale J. Int’l L.* 433 at 443, citing *United States v. Caicedo*, 47 F.3d 370, 372 (9th Cir. 1995)

²⁹⁰ *Supra* note 285 at 139-140, citing U.S. Coast Guard Memorandum from Commandant of Coast Guard, 272353Z, on LEDET Embarkation Aboard WIGS (May 1993) and the U.S. Coast Guard Memorandum from American Embassy in Caracas, 101753Z, on U.S./V.E. Maritime Counter-Drug Shipboarding Agreement-Protocol Initialed Covering U.S. Coast Guard boardings from U.K., Dutch and French Warships (July 1997).

²⁹¹ *Ibid*.

²⁹² *Ibid* at 140 citing a diplomatic note made on 2 July, 1997 to *supra* note 277 (Venezuela Agreement).

these foreign warships then continue to be prosecuted by US courts, the foreign warships exercising no claim of jurisdiction in the matter.²⁹³

As can be seen, Canada would be engaging in what has become a well accepted practice by entering into bilateral or multilateral agreements with other affected States to determine issues of jurisdictional claim over vessels and their crews suspected of trafficking on the high seas, or within territorial waters if so provided. Likewise, by embarking USCG LEDETs onboard RCN Ships,²⁹⁴ Canada would be following in the wake of other affected States who have chosen to work with American law enforcement. Either course of action will bring about further issues of extra-territorial jurisdiction, as will be discussed in subsequent chapters.

3.3.4 Jurisdiction in Counter-piracy Operations To begin to understand the contemporary issue of piracy it is first necessary to review what piracy is, not only in customary and treaty law but also domestic laws and contemporary international practices. The most widely accepted definition of piracy at international law is found in UNCLOS²⁹⁵ at Article 101, which states that piracy consists of:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

²⁹³ No instance of claims under any European law was found – which accords with anecdotal statements made by USCG officials working at the Joint Interagency Task Force South in July 2007 that should such a claim arise, the agreed course of action was to simply ‘release’ the individual (having seized the narcotics) rather than see any chilling effect to this fragile international agreement and cooperative action created by human rights litigation.

²⁹⁴ One bilateral treaty contemplating such an arrangement is the *Framework Agreement on Integrated Cross-Border Maritime Law Enforcement Operations Between The Government of Canada and The Government of the United States of America*, Can TS 2012 No 25 (entered into force 11 October 2012).

²⁹⁵ *Supra* note 38 (UNCLOS).

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).²⁹⁶

At international law therefore an act of piracy is one that first incorporates an illegal act of violence, detention or depredation.²⁹⁷ Next, this illegal action must be committed for private ends – this excludes individuals acting on behalf of a State.²⁹⁸ This definition of piracy also excludes piracy-type acts taken for political motives, including terrorism.²⁹⁹ The third requirement is that it must be a private vessel used to commit the acts of piracy – again, unless a State vessel’s crew mutinies and then converts the vessel to a pirate vessel, State vessels (either warships or government ships) will not meet this requirement. Lastly, and as will be seen critical to this discussion, to fit within the

²⁹⁶ *Ibid*, art 101.

²⁹⁷ Alfred Rubin, *The Law of Piracy*, 2d ed. (Irvington-on-Hudson, NY: Transnational, 1998) c.1 at 366-367. Rubin points out that the question of by whom, and under what law are these acts found “illegal”, was left unstated. In Canada little clarity is also found in criminal law as within the *Criminal Code*, *supra* note 20 at art. 74, piracy is simply defined as “(1) Every one commits piracy who does any act that, by the law of nations, is piracy.”

²⁹⁸ *Supra* note 3 at 284. The private ends requirement was first incorporated into an international treaty in the *United Nations Convention on the High Seas*, 29 April 1958, 450 U.N.T.S. 82 at art. 15. Reasons for the persistent inclusion of this requirement are uncertain, however *supra* note 212 at 144-145 speculated this was done for reasons of drafting expediency and not out of a considered decision.

²⁹⁹ Michael Passman, “Protections Afforded to Captured Pirates Under the Law of War and International Law”, 33 *Tul.Mar. L.J.* 1 2008-2009 at 12. As Passman points out however, such acts are captured under the *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* 1678 U.N.T.S. 221, 27 I.L.M. 668 (1988), entered into force March 1, 1992. (“SUA”).

definition of piracy for the purposes of international law the impugned act must occur beyond any coastal State's territorial sea and thus outside of the territorial jurisdiction of any particular coastal State.³⁰⁰ A fourth requirement known as the "two ship" rule is also commonly cited, namely that a pirate act cannot occur on a single vessel but must involve two or more vessels or aircraft.³⁰¹

Having defined what constitutes piracy, Article 110 of UNCLOS then authorizes State warships to board suspected pirate vessels on the high seas, other than those enjoying complete immunity, where it is reasonably suspected the vessel is:³⁰²

- (a) engaged in piracy;
- (b) engaged in the slave trade;
- (c) engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under Article 109;
- (d) is without nationality; or
- (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

³⁰⁰ The High Seas are defined in *Supra* note 38 (UNCLOS) art 69 and 86 to comprise all parts of the sea that are not included in the EEZ, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This exclusion of the EEZ from the high seas is not universally held as accurate, by operation of article 58(2) which provides that Articles "88 to 115 and other pertinent rules of International Law apply to the exclusive economic zone in so far as they are not incompatible with this Part", thus permitting that provisions applicable to the high seas, including piracy, apply to the EEZ provided they are not in conflict with UNCLOS provisions respecting the EEZ; see Douglas Guifoyle, *Treaty Jurisdiction over Pirates: A Compilation of Legal Texts with Introductory Notes*, prepared for the 3rd Meeting of Working Group 2 on Legal Issues of the Contact Group off the Coast of Somalia, Copenhagen, 26 – 27 August 2009 at 4, available at http://www.academia.edu/195470/Treaty_Jurisdiction_over_Pirates_A_Compilation_of_Legal_Texts_with_Introductory_Notes. This requirement that international piracy only be found outside the limits of territorial sovereignty can be traced to State desires to maintain control over illegal acts occurring within their sovereign waters; *ibid* at 146.

³⁰¹ *Supra* note 213 at 147-148 where the author traces this "two vessel" requirement to a States desire to maintain sole jurisdiction over incidents occurring solely onboard their own flagged vessels. The author opined that by limiting the definition of piracy to exclude incidents, however violent, that did not involve another States flagged vessels the community of nations signaled that it was not concerned with otherwise criminal conduct whose effect did not spread beyond the hull of the concerned vessel.

³⁰² *Ibid* (UNCLOS) at art 110.

Where the warship reasonably suspects any of these infractions, verification by boarding, inspection of the ship's documents and further investigation are permitted under Article 110, but must be completed "with all possible consideration".³⁰³ Complementary authority is provided at UNCLOS Article 105, which authorizes every "State, on the high seas or in any other place outside the jurisdiction of any State, to seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board."³⁰⁴

Gaps in the restrictive UNCLOS definition of piracy, including the private ends requirement and the exclusion of incidents occurring within States' territorial waters, were dramatically exposed on 7 October 1985 when the Italian cruise liner ACHILLE LAURO was hijacked by Palestinian terrorists.³⁰⁵ Demanding that Israel release fifty jailed Palestinians, including convicted terrorists, the terrorist hijackers held ACHILLE LAURO for 48 hours and killed a single American citizen.³⁰⁶ Although publically decried as piracy, this incident failed to meet the legal definition at international law for a number of reasons, including the political basis of the act (terrorism), the lack of a "second vessel", and that the hijacking arguably occurred within Egyptian territorial waters. Largely in response to this criticism, the *Convention for the Suppression of*

³⁰³ *Ibid.* As will be further discussed, this universal enforcement jurisdiction is exercised by the flag State of the warship. Therefore, naval commanders continue to require domestic legal authority, either standing or situational based, to conduct such actions.

³⁰⁴ *Ibid* at art. 105.

³⁰⁵ The President of the UN Security Council, writing for the Council, condemned "this unjustifiable and criminal hijacking as well as other acts of terrorism, including hostage-taking." United Nations Security Council Statement, 24 I.L.M. 1565 1985, S/17554.

³⁰⁶ Helmut Tuerk, "Combating Terrorism at Sea-The Suppression of Unlawful Acts against the Safety of Maritime Navigation", 15 U. Miami Int'l & Comp. L. Rev. 339 (2007-2008) at 338-339 describing the death of Leon Kinghoffer.

*Unlawful Acts Against the Safety of Maritime Navigation*³⁰⁷ (SUA) was negotiated and concluded.³⁰⁸

The SUA addresses violent acts carried out onboard seagoing vessels which amount to threats against the safety of navigation, and prohibits the use of force to seize ships, acts of violence against persons onboard or destruction of vessels or cargo likely to endanger the safe navigation of the ship, and the placing of devices onboard ships which are likely to damage or destroy the vessel.³⁰⁹ By addressing piracy-required elements found in UNCLOS such as the oft quoted “two-ship rule”,³¹⁰ “private ends requirement”,³¹¹ and the “high-seas rule”,³¹² the SUA provides for arguably broader enforcement jurisdiction – requiring States party to criminalize those specific acts within their domestic legislation and thus achieving the jurisdictional nexus between the act and the prosecuting State.³¹³ The SUA also obliges contracting States to either prosecute or extradite alleged offenders,³¹⁴ and to settle any disputes via arbitration or referral to the

³⁰⁷ *Supra* note 299 (SUA).

³⁰⁸ Eugene Kontorovich, “A Guantanamo on the Sea: The Difficulty of Prosecuting Pirates and Terrorists”, *Northwestern Law, Public Law and Legal Theory Series No. 09-10*, at 254 citing Malvina Halberstam “Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety”, 82 *Am. J. Int’l L.* 269, 270-72 (1988).

³⁰⁹ *Supra* note 299 (SUA) at art. 3.

³¹⁰ *Ibid* at arts. 1(7) and 3. See also *supra* note 59 at 42.

³¹¹ *Ibid* (SUA) at art 3. See also R. Beckman *Lloyd’s MIU Handbook of Maritime Security*, “Tools to Combat Piracy, Armed Robbery, and Maritime Terrorism”, (2008, Auerbach Publications) at 192.

³¹² *Ibid* at art 4. See also *supra* note 59.

³¹³ *Ibid* (SUA) at art 6. SUA currently has 158 contracting States / parties comprising 94.66% of the world’s shipping tonnage while the SUA Protocol 1988 boasts 146 contracting signatures. (IMO, Status of Conventions Summary, Online: <http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx>)

³¹⁴ *Ibid* at art 10.

ICJ.³¹⁵ While certainly broader in terms of the ‘piracy - like’ acts prohibited, the SUA is at the same time jurisdictionally more restrictive than UNCLOS, specifically by limiting its jurisdictional reach to those bases found in Article 6.³¹⁶ The SUA therefore seeks to address, through treaty law, gaps found within the UNCLOS and customary international law prohibition on piracy.³¹⁷

Adding further complexity to this issue, counter-piracy operations conducted under UNCLOS or SUA authorities alone exercise universal enforcement jurisdiction but with significant limitations.³¹⁸ These limitations are partially the result of definitions, seizure and investigative authorities provided by customary international law and at UNCLOS³¹⁹ which define but do not prohibit or prescribe punishment for transgression, and therefore leave the burden of prosecuting and punishing piracy as a State concern.³²⁰ The application of universal jurisdiction over the crime of piracy is also somewhat limited, as it applies “only to the definition of piracy *jure gentium*”.³²¹ As a result, a State’s prosecution of this crime under its municipal laws cannot exceed the crime of

³¹⁵ *Ibid* at art. 16.

³¹⁶ *Ibid* at art 6. Section 1 requires states “shall take measures as may be necessary to establish its jurisdiction over the offence set forth in Article 3 when the offence is committed: (1) against or on board a ship flying the flag of the State at the time the offence is committed; or (2) in a territory of that State, including its territorial sea; or (3) by a national of that State”. Section 2 further provides that “A State party may also establish its jurisdiction over any such offence when: (a) it is committed by a Stateless person whose habitual residence is in that State; or (b) during its commission a national of that State is seized, threatened, injured or killed; or (c) it is committed in an attempt to compel that State to do or abstain from doing any act”.

³¹⁷ In Canada the SUA is incorporated into criminal law at *supra* note 20, section 78.1.

³¹⁸ *Supra* note 59 at 141.

³¹⁹ Specifically Articles 101, 103, 105 and 110.

³²⁰ *Supra* note 38 (UNCLOS) at art. 101.

³²¹ Piracy as defined by the law of nations, *supra* note 1 at 958, citing *supra* note 95.

piracy as defined at international law.³²² From this it has been proposed that piracy, while jurisdictionally a universal crime at international law, is the narrowest of international crimes³²³ as it requires municipal prosecutorial authority.³²⁴ In a similar vein to piracy, operations in support of the SUA must also rely upon a State's exercise of extra-territorial jurisdiction.³²⁵ This is in contrast to other recognized international crimes such as genocide³²⁶ or war crimes,³²⁷ which provide both definitions of prohibited acts as well as requiring those found guilty to be punished by the respective tribunal.

From this, counter-piracy type operations conducted simply pursuant to UNCLOS, SUA or customary international legal authorities carry with them the requirement that States have enacted required domestic legal authorities. As has been

³²² Such an act would go beyond the universal jurisdiction provided by the international definition. This is why States are normally barred from arresting, and typically refrain from criminally proscribing, those suspected of acts of piracy occurring within another State's territorial waters – even if that other State is unable or unwilling to take action itself. In Canada, piracy is defined at *supra* note 20 at s. 74(1) as “Every one commits piracy who does any act that, by the law of nations, is piracy”, and is punished at s. 74(2) with “Everyone who commits piracy while in or out of Canada is guilty of an indictable offence and liable to imprisonment for life.”

³²³ *Supra* note 59 at 139-140.

³²⁴ *Ibid*, at 139, and is reflected in United Kingdom's domestic law *Merchant Shipping and Maritime Security Act 1997* (c.28) 1997 which prohibits and prescribes punishment for piracy based in part upon the definition found at *Supra* note 38 (UNCLOS), or Kenyan law which largely incorporates the text of Article 101 UNCLOS into its domestic criminal legislation without specifically referring to UNCLOS in the *Kenyan Merchant Shipping Act, 2009*, section 369.

³²⁵ Ryan Kelley, “UNCLOS, but No Cigar: Overcoming Obstacles to the Prosecution of Maritime Piracy, 95 Minn. L. Rev (2011) 2285, 2293 (2011). This is due to the SUA not providing universal jurisdiction, as explained by Eugene Kontorovich, “The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation” (2004) 45 Harv. Int’L L.J. 183, 188.

³²⁶ *Convention on the Prevention and Repression of the Crime of Genocide*, 78 U.N.T.S. 277 (9 December 1948) (“Genocide Convention”), art. 2 defines genocide much as defined at *supra* note 38 (UNCLOS) art. 101 defines piracy. Art. 1 of the Genocide Convention confirms that contracting parties recognize genocide as a crime under international law which they will undertake to prevent and punish, while art. 3 sets out which acts will be punishable and art. 4 states that those committing these prohibited acts will be punished.

³²⁷ *Supra* note 214 (*Rome Statute*) defines war crimes at art. 8(2) and provides to the International Criminal Court jurisdiction over these offences at art. 8(1), and establishes individual liability for crimes committed within the Courts jurisdiction at art. 25.

described, however, such missions do not form a significant portion of the contemporary operations of the RCN, in contrast to counter-piracy missions underpinned by UN Security Council Resolutions. Attention must be turned, then, to the effect of the UN Charter and Security Council resolutions on the conduct of counter piracy operations as recently conducted off the coast of Somalia.

In a recent international response to acts of piracy the UN Security Council arguably combined the authorities found within customary international law, UNCLOS, and the SUA through a series of UN Security Council resolutions to address acts of piracy.³²⁸ These resolutions have been described as example of “extreme universal jurisdiction”, or universal jurisdiction to enforce laws against piracy with effect even within the sovereign territory of another State.³²⁹ These UNSCRs permit previously unheard of authority for foreign States and IOs to operate not only within Somali territorial waters, but also in the territory and internal waters of Somalia itself. As of 22 February 2012, over 20 States had or were engaged in prosecuting 1,063 alleged Somali pirates, of which over 900 had been prosecuted within 11 regional States including Somalia (Puntland and Somaliland semi-autonomous regions), Yemen,³³⁰ Kenya,

³²⁸ *Ibid* (S.C. Res 1816, 1846, 1851) directing action to address acts of “piracy and armed robbery at sea” off of the coast of Somalia.

³²⁹ *Supra* note 213 at 160-164, where Madden does not go so far as to opine that this new practice is in any way creating an unqualified right under customary international law to enter another State’s territorial waters to capture suspected pirates. He does however point to this as a single instance where the international community has recognized that in some instances a coastal State cannot, or will not, effectively police this activity in their own waters.

³³⁰ Glenn Ross, “Prosecuting Somali Pirates: Challenges for the Prisons”, in Selected Briefing Papers, Conference on Global Challenge, Regional Responses: Forging a Common Approach to Maritime Piracy (April 18-19, 2011 Dubai, United Arab Emirates), at 111(citing UNDOC Counter-piracy Programme Report, 21 January 2011).

Mauritius and the United Republic of Tanzania.³³¹ Without this expanded jurisdiction, another State's enforcement against crimes of piracy and "armed robbery at sea"³³² that occur within Somali territorial waters would be barred, as they would not meet the UNCLOS³³³ definition of piracy and would constitute an impermissible intrusion into another State's territorial jurisdiction. Likewise, international prohibitions against piracy would not be enforceable by third party States against pirates hiding within Somalia or Somali territorial or internal waters, nor would SUA based prosecutions be permitted as Somalia is not a contracting State.³³⁴ While of limited applicability given the reality that most Somali-based pirates are operating well outside of Somali territorial waters, this modern application of extreme universal jurisdiction³³⁵ demonstrates the flexibility of international law where the nations of the world deem such action necessary.³³⁶

3.3.5 Jurisdiction and Lawfully Detaining Ships at Sea A number of international treaties include provisions authorizing the detention of ships in specified circumstances.

³³¹ *Human Cost of Piracy off Somalia Coast 'Incalculable', Full Range of Legal, Preventative Measures Needed to Thwart Attacks, Security Council Told*, Security Council, 6719th Meeting (AM) 22 February 2012.

³³² *Supra* note 68 (S.C. Res 1816, 1846, 1851).

³³³ *Supra* note 38 (UNCLOS) at art. 101.

³³⁴ *Supra* note 313.

³³⁵ *Supra* note 213, for Madden's discussion of "extreme universal jurisdiction".

³³⁶ S.C. Res 1836, U.N. Doc.S/RES/1836 (Oct. 7 2008) at para 3 permits use of 'necessary means, in conformity with international law, as reflected in [UNCLOS]' to repress piracy'. While 'necessary means' has ordinarily been interpreted to authorize military force, in the context of these UNSCRs 'means' is restricted to actions conforming to international law with regards to piracy, and no more – see *supra* note 67 at 147 discussing the preambles for UNSCRs 1848, 1851 (2008) and 1897 (2009) which all reaffirm 'that international law, as reflected in [UNCLOS], sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities'. At *supra* note 68 (UNSCR 1950) para 12, all states with "relevant jurisdiction under international law and national legislation" were called upon to cooperate in determining jurisdiction, and in the investigation and prosecution of all persons responsible for acts of piracy and armed robbery off the coast of Somalia consistent with applicable international law including international human rights law", thus arguably providing international authority for domestic enforcement of acts of piracy.

Of particular application to this paper are the authorizations under UNCLOS in the case of offences committed within a coastal State's territorial sea and EEZ, piracy and hot pursuit,³³⁷ under the SUA for any of the prohibited acts endangering the safety of a vessel, persons onboard or navigation,³³⁸ and under the 1995 *European Agreement*³³⁹ and as encouraged by the *UN Narcotics Convention*³⁴⁰ for trafficking in prohibited substances. As also previously discussed, at international law States are competent to prescribe law of domestic and limited extra-territorial effect, and to then in limited circumstances enforce those laws. From this, lawful authority to detain ships is an expression of enforcement jurisdiction and must therefore first flow from a valid prescriptive jurisdiction.³⁴¹ Enforcement actions can range from “surveillance, stopping and boarding vessels, search or inspection, reporting, arrest or seizure of persons and vessels, detention, and formal application of law by judicial or other process, including imposition of sanctions”.³⁴²

The question of the sufficiency of an authority to detain a ship (and by extension those onboard the ship) at international law alone has not been examined within the Canadian context, thus reference to international jurisprudence is required. In *Medvedyev v France*³⁴³ the Grand Chamber of the ECtHR examined this question in the context of

³³⁷ *Supra* note 38 at art. 27 (Territorial sea), 73 (EEZ), 105 (piracy), 111.

³³⁸ *Supra* note 299 (SUA) at art 3, 7, 9.

³³⁹ *Supra* note 267 at art 9, 10

³⁴⁰ *Supra* note 264 at art 3, 4 and 17.

³⁴¹ *Supra* note 145 at 63.

³⁴² *Ibid*, citing William Burke, *The New International Law of Fisheries: UNCLOS 1982 and Beyond* (Clarendon Press, Oxford 1994) 303.

³⁴³ *Medvedyev v France*, ECtHR, Application No 3394/03 (Judgment) 29 March 2010 (“*Medvedyev*”)

international co-operation on the high seas when a French warship stopped and boarded the Cambodian flagged vessel *Winner*, with the consent of Cambodia, as part of a counter-drug smuggling operation. At the time of the boarding and detention only France had incorporated international legal prohibitions into their domestic legislation³⁴⁴ and therefore the boarding was conducted pursuant to a diplomatic note between Cambodia and France.³⁴⁵ Once boarded, all of those embarked in *Winner* were detained onboard their own ship while it was sailed to a French port under the escort of a French warship. As will be explained, the Grand Chamber ultimately held that international legal authority to detain, by itself, is insufficient lawful authority without supporting domestic authority.

In a portion of its ruling the majority of the Grand Chamber very strictly interpreted the diplomatic note between Cambodia and France as viewed through the lens of *ECHR* art 5(1)³⁴⁶ and held that the detention was “arbitrary”. While diplomatic notes were recognized as valid international legal authority in general, within the specific circumstances of this case the note was narrowly interpreted and deemed insufficiently

³⁴⁴ *Ibid* at para 22, noting Cambodia was not signatory to any international instruments regarding the transportation of narcotics. At paras 34-37 the Grand Chamber noted France was party to the *United Nations Single Convention on Narcotic Drugs*, 30 March 1961, 520 U.N.T.S. 204; *Supra* note 38 (UNCLOS); and the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 20 December 1988, 1582 U.N.T.S. 95. (the “*Vienna Convention*”)

³⁴⁵ *Ibid* at para 54. The note authorized “the stopping of the ship and all ‘its consequences’ ” and was granted “without restrictions or reservations by the Government of Cambodia for the planned interception and all its consequences”.

³⁴⁶ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 213 UNTS 221 (“*ECHR*”) states at art. 5.1(c) “the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so”.

clear in its grant of authority to detain the vessel's crew.³⁴⁷ The Grand Chamber further held that lawful authority to detain a person on the high seas must flow from the detaining State's domestic law, stating:

[A]s Cambodia was not a party to the conventions transposed into [French] domestic law, and as the *Winner* was not flying the French flag and none of its crew members were French nationals – even assuming that the nationality of the crew members could be pleaded as an alternative to the principle of the flag State –, there were no grounds for French law to be applied.³⁴⁸

From this decision it can be surmised that within the context of an RCN detention made upon the high seas, authority must be found under Canadian domestic law and, in some circumstances, also under international law. Absent these dual sources of lawful authority, the detention itself will likely be held unlawful and further legal action against those detained will be complicated, if not barred completely. The lawfulness of the detention then becomes further complicated by the question of what rights are owed to those detained and the corresponding State obligations triggered in such situations. This question is the subject of the next section, beginning with an overview of International Human Rights Law.

³⁴⁷ *Supra* note 343 at paras 22 and 96 stating “diplomatic notes are a source of international law comparable to a treaty or an agreement when they formalize an agreement between the authorities concerned”. At para 99 the majority held that the text of the note, which referred to the “ship *Winner*, flying the Cambodian flag”, contemplated the vessel alone and did not encompass those persons onboard and therefore “the fate of the crew was not covered sufficiently clearly by the note and so it is not established that their deprivation of liberty was the subject of an agreement between the two States that could be considered to represent a “clearly defined law” within the meaning of the Court's case-law”.

³⁴⁸ *Ibid* at para 90.

3.4 Detainee Rights and State Obligations under IHRL

Once an individual has been detained, International Human Rights Law (“IHRL”) can become engaged. IHRL has traditionally been the main source of international law applicable to State actions affecting detained individuals occurring outside of situations of armed conflict, and is that body of international law that binds States and “explicitly governs the relationship between a State and person(s) on its territory and/or subject to its jurisdiction (an essentially ‘vertical’ relationship), laying out the obligations of States *vis à vis* individuals across a wide spectrum of conduct.”³⁴⁹ Broadly stated, the goal of IHRL is the protection of lives, health and dignity of individuals,³⁵⁰ and as will be seen it engages both individual rights and State obligations.

IHRL is grounded in international treaty law, beginning with protection of minorities within a State’s own borders, and from this has evolved to the current web of normative IHRL agreements governing State treatment of all individuals.³⁵¹ Before examining the current international framework, a number of principles should be borne in mind. The first principle is that of *complementarity* which acts to resolve conflict between different bodies of law by interpreting rules of general application in light of relevant laws of specific application, and *vice versa* – provided there is no conflict

³⁴⁹ *International Humanitarian Law and the challenges of contemporary armed conflicts*, 31IC/11/5.1.2 for the 31st International Conference of the Red Cross and Red Crescent, Geneva, Switzerland 28 November-1 December 2011 (“ICRC Report”) at 14.

³⁵⁰ *Ibid.*

³⁵¹ *Supra* note 94 at 538, citing protections of religious minorities found within the Westphalia treaties, at 539-544 regarding protection towards foreign nationals, and 545-8 discussing international labour law.

between the two bodies of law.³⁵² Where a conflict between competing sources of international law is found, the principle of *lex specialis derogate legi generali* then applies.³⁵³ *Lex specialis* holds that within any particular situation, rules of general application are to be interpreted with reference to rules of specific application. For example, this concept was applied by the International Court of Justice in the *Nuclear Weapons* advisory opinion, where the court held that the arbitrary deprivation of life, normally an IHRL non-derogable right protected under the ICCPR, was properly determined through the lens of IHL applicable during times of armed conflict.³⁵⁴

With these principles in mind I will now review a number of contemporary treaties to which Canada is party, and which may affect those detained in the RCN operations being discussed. The first of these treaties is the Charter of the United Nations,³⁵⁵ which although not generally considered a specific IHRL instrument itself is credited as the origin of modern IHRL³⁵⁶ and does have a significant impact upon other IHRL instruments. The next treaty that will be discussed is the Refugee Convention,³⁵⁷ followed by the Convention against Torture ('CAT')³⁵⁸ and the International Covenant

³⁵² *Supra* note 12 at 236.

³⁵³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 135 at para. 106.

³⁵⁴ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep. 240 at para 25.

³⁵⁵ *Supra* note 99 (UN Charter).

³⁵⁶ *Supra* note 94 at 552.

³⁵⁷ *United Nations Convention Relating to the Status of Refugees*, July 28 1951 189 U.N.T.S. 137, [1969] Can. T.S. No. 6 ("Refugee Convention").

³⁵⁸ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 UNTS 85, entered into force 26 June 1987 ('CAT').

on Civil and Political Rights ('ICCPR').³⁵⁹ In reviewing these IHRL treaties I will refer to both Canadian and international treatment, particularly that of the *ECHR*.³⁶⁰

3.4.1 Charter of the United Nations and Security Council Resolutions As an international agreement of constitutional character³⁶¹ with the purpose of supporting fundamental human rights, equality and respect for justice, the UN Charter codifies many customary international law norms including the right of sovereign equality and non-interference in sovereign States, the prohibition on acts of aggression and the inherent right of self defence.³⁶² The UN Charter also qualified, and in some instances limited, the way in which States may do some things such as requiring that inter-State disputes be brought before the Security Council for settlement by peaceful means (peaceful settlement) rather than through the use of international armed conflict.³⁶³ While the obligations imposed by the UN Charter apply directly to States and their conduct vis-à-vis other States, their indirect effect as expressed in the preamble “affirm(ing) faith in fundamental human rights ... establish conditions under which justice and respect for ... treaties and

³⁵⁹ *International Covenant on Civil and Political Rights and the Optional Protocol to the above-mentioned Covenant*, 16 December 1966, 999 U.N.T.S. 171. Can.T.S. 1976 No. 47 (“ICCPR”). The ICCPR entering into force for Canada 19 August, 1976.

³⁶⁰ Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

³⁶¹ Matthias Herdegen, “Constitutionalization of the UN Security System”, 27 Vand. J. Transnat’l L. 135 (1994) at 135, describing the *Charter* as “a kind of constitution for the community of States with the International Court of Justice as the ultimate guardian of its legality vis-a-vis the Council”

³⁶² *Supra* note 99 (*UN Charter*), preamble “We the Peoples of the United Nations determined ... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom”. See also arts 2, 33 and 51.

³⁶³ *Ibid* at Chapter VI.

other sources of international law”³⁶⁴ is to support respect for human rights generally and further to encourage the creation of international agreements directly aimed at human rights. One such example of this is the non-binding Universal Declaration of Human Rights,³⁶⁵ passed by the UN General Assembly to deal with issues including civil and political, cultural, economic and social rights.³⁶⁶

3.4.2 Convention Relating to the Status of Refugees At international law the *Convention Relating to the Status of Refugees*,³⁶⁷ and the Protocol to that Convention,³⁶⁸ were drafted for the purpose of recognizing the social and humanitarian plight of refugees and the international tension created by refugee crises.³⁶⁹ The key protection provided under the Refugee Convention is that from being “expel[led] or return[ed] (“refouler”) in any manner whatsoever to the frontiers of territories where a refugee’s life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or by political opinion”.³⁷⁰ Also provided for within the Refugee Convention is the right of access to courts of law within the host country.³⁷¹

³⁶⁴ *Supra* note 99 (UN Charter) preamble.

³⁶⁵ Universal Declaration of Human Rights, UNGA Res. 217(III), UN GAOR, 3d Sess, Supp. No. 13, UN Doc. A/810 (1948)

³⁶⁶ *Supra* note 94 at 552.

³⁶⁷ *Supra* note 357.

³⁶⁸ UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, 606 U.N.T.S. 267.

³⁶⁹ *Supra* note 357 preamble.

³⁷⁰ *Supra* note 7 at p. 153. In the Note on International Protection (submitted by the High Commissioner) A/AC.96/643 At Article 17 (online: <http://www.unhcr.org/3ae68c040.html> accessed 29 Dec 2012), the High Commissioner stated that the “observance of the principle of non-refoulement is closely related to the determination of refugee status”.

³⁷¹ *Supra* note 357 at art. 16.

While the UN High Commissioner for refugees has expressed that the Refugee Convention applies without geographic restriction³⁷² this is not universally accepted, either in Canada or abroad.³⁷³ The UN's broad interpretation of the *non-refoulement* obligation within the maritime environment has met with resistance by coastal States, in particular those dealing with illegal entry of migrants.³⁷⁴ Douglas Guifoyle has summed up the rationale for this resistance, together with acknowledgement of the international obligation, as:

Maritime interdiction of irregular migrants without providing some form of refugee screening process is strictly incompatible with the Refugee Convention and Protocol. However, as irregular migration by sea increases worldwide there appears a growing perception among 'point of entry' States that they are unable to cope with the numbers arriving and preventative maritime patrols are a legally permissible response.³⁷⁵

3.4.3 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment The CAT was drafted in recognition of the "inherent dignity of the human person" and with a desire to "make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the

³⁷² UN High Commissioner for Refugees, 'Advisory Opinion on the Extra-territorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (26 January 2007) para 26, (online: <http://www.unhcr.org/refworld>) citing that the convention is directed not at where the refugee is sent from but rather where a refugee may not be sent to.

³⁷³ *R (on the application of European Roma Rights Centre and Others) v Immigration Officer at Prague Airport* [2004] UKHL 55 para 15 - 21 per Lord Bingham, where he acknowledges the longstanding sovereign right to deny entry to non-nationals which was never derogated from in the signing of the Refugee Convention. This opinion is supported within Canadian jurisprudence, including *Chiarelli v. Canada (Minister of Employment and Immigration)*, 1992 CanLII 87 (SCC), [1992] 1 S.C.R. 711, at p. 733 where Sopinka J states "[t]he most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country".

³⁷⁴ *Supra* note 145 at 124.

³⁷⁵ *Supra* note 77 at 222-223.

world”.³⁷⁶ In reaching these goals the CAT requires that parties not engage or permit torture, and obliges them not to “expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”.³⁷⁷

The CAT also provides for an international review mechanism by the Committee against Torture for individual and State petitions, as well as investigation of systemic violations and review of periodic reports.³⁷⁸ In a review of those provisions within the CAT that expressly apply to ‘territory under [the State party’s] jurisdiction’, the Committee has opined that these include all areas under *de facto* effective control of the State party, regardless of whether this is maintained by military or civil authorities.³⁷⁹ This opinion was later renewed by the Committee to include all areas where a “State party exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control, in accordance with international law” including State registered ships and aircraft, military bases, detention facilities and other areas over which a State exercises factual or effective control during military occupation or peacekeeping operations.³⁸⁰ While this view of the extra-territorial reach of the CAT has not been examined in

³⁷⁶ *Supra* note 358.

³⁷⁷ *Ibid* at part I, art 1, 3(1).

³⁷⁸ *Supra* note 94 at 658, referring to *ibid* part II. At 663 Canada is noted for receiving just over a dozen allegations of breach of the CAT. However, only one finding against Canada has succeeded to date (*Tahir Hussain Khan v. Canada*, Communication No. 15/1994, U.N. Doc. A/50/44 at 46 (1994).

³⁷⁹ Office of the High Commissioner for Human Rights, ‘Conclusions and Recommendations of the Committee Against Torture (United States of America)(25 July 2006) UN Doc CAT/C/USA/CO/2 (‘Committee Against Torture(USA Recommendations)) at para 15, referring to *ibid* arts. 2, 5, 13-16 and 20, and that that any view to limit these provisions geographically with regards to non-refoulement obligations for detained persons are “regrettable”.

³⁸⁰ Committee Against Torture, General Comment No 2 (24 January 2008) UN Doc CAT/C/GC/2 (‘CAT General Comment No 2’) at para 16 referring to *supra* note358 at arts 5, 11, 12, 13 and 16.

Canada, it was reviewed by the Committee in the case of *P.K. et al v. Spain*³⁸¹ where Spanish maritime forces rescued Asian and African foreign-nationals from their vessel which had floundered in international waters. While processing asylum and other claims over a period of months, those rescued were detained outside Spanish territory and in conditions alleged to amount to torture under the CAT.³⁸² In the course of defending its actions, Spain argued that the detainees lacked competence to advance their claim, as the matter occurred outside of Spanish territory. The Committee disagreed, finding that CAT General Comment No. 2 applied, which stated “the jurisdiction of a State party refers to any territory in which it exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control, in accordance with international law” and in particular “situations where a State party exercises, directly or indirectly, *de facto* or *de jure* control over persons in detention”.³⁸³

3.4.4 International Covenant on Civil and Political Rights The ICCPR and Optional Protocol³⁸⁴ were drafted to recognize the “inherent dignity” of people, and that the “equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”. These ideals hold that civil and political freedom, and freedom from fear and want, are achieved “if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural

³⁸¹ *P.K. et al v. Spain*, Communication No. 323/2007, U.N. Doc. CAT/C/41/D/323/2007 (2008) (online: <http://www1.umn.edu/humanrts/cat/decisions/323-2007.html>)

³⁸² *Ibid* at paras 2.1-2.9.

³⁸³ *Ibid* at para 8.2 – although it should be noted that the Committee cannot make legally binding determinations, but fills an advocacy role only.

³⁸⁴ *Supra* note 359.

rights”.³⁸⁵ In recognizing the desirability of these rights, the ICCPR emphasizes the liberty interests of individuals accused of a crime at the pre-trial stage at Article 9(3) requiring that those arrested or detained for criminal matters must be promptly brought before judicial authorities, be entitled to a trial within a reasonable time, and that pre-trial release be the norm.³⁸⁶

As the interpretation of these pre-trial rights under the ICCPR have not been discussed within the Canadian maritime context I will look for guidance to the ECtHR cases of *Medvedyev*³⁸⁷ and *Rigopolous*³⁸⁸ involving detainees seized by European warships. As in *Medvedyev*, *Rigopolous* involved the boarding and detention of a suspected drug smuggling vessel and its crew on the high seas and in both instances *ECHR* Article 5, worded similarly to the ICCPR in this regard, was interpreted. The period taken to sail the vessels to port was examined, 13 days in *Medvedyev* and 16 days in *Rigopolous*, after which the suspected smugglers were brought before judicial authorities. In both instances the Court held the delays, being as they were practically impossible to avoid, were not in violation of the *ECHR*.³⁸⁹

³⁸⁵ *Ibid* preamble.

³⁸⁶ *Ibid*, at art. 9(3) stating that “Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.” This emphasis on the pre-trial rights of detainees was cited with approval by the SCC at *Mills v. The Queen*, [1986] 1 SCR 863, 1986 CanLII 17 (SCC) at para 143, while examining the nature and purpose of s.11(b) of the *Charter* supra note 4.

³⁸⁷ *Supra* note 343.

³⁸⁸ *Rigopolous v Spain*, ECtHR, Application No 37338/97, 12 January 1999. (“*Rigopolous*”)

³⁸⁹ *Supra* note 343 at paras 127-134 concurring with the result in *Rigopolous*.

Much as with the CAT, the ICCPR also explicitly prohibits the use of torture or “cruel, inhuman or degrading treatment or punishment”.³⁹⁰ Having set these lofty goals and requiring signatory States to recognize detainee liberty interests at the pre-trial stage as well as the right to be free from torture and similar treatment, the ICCPR then limited its jurisdiction over parties at Article 2(1):

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”³⁹¹ (emphasis added)

This apparent territorial requirement can be then contrasted, both with the Second Optional Death Penalty Protocol³⁹² to the ICCPR, which broadened the language of its jurisdictional limit to simply “no one within the jurisdiction of a State Party”, and provided that parties take necessary measures to effect the agreement “within its jurisdiction”,³⁹³ and with interpretations of the treaty that demonstrate a modern trend towards extraterritorial application.³⁹⁴ As with the CAT, the ICCPR provides for a treaty

³⁹⁰ *Ibid* at art 7 which states “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation”

³⁹¹ *Ibid* at art. 2(1).

³⁹² *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, 15 December 1989, 1642 U.N.T.S. 414. Canadian accession 25 November 2005. (ICCPR Second Protocol)

³⁹³ *Ibid* at art. 1

³⁹⁴ Robert J. Currie and Hugh M. Kindred, “Flux and Fragmentation in the International Law of State Jurisdiction: the Synecdochal Example of Canada’s Domestic Court Conflicts Over Accountability for International Human Rights Violations” in O.K. Fauchald and A. Nollkaemper, eds., *The Practice of International and National Courts and the (De-) Fragmentation of International Law* (Oxford: Hart Publishing 2012), 217-243 at 222.

body, through the first Optional Protocol,³⁹⁵ known as the Human Rights Committee, whose purpose is to ensure compliance with treaty obligations. With regards to Canada it can accept periodic reports as well as inter-State and individual complaints.³⁹⁶

3.4.5 Refoulement of Detainees Common to all IHRL instruments discussed is the general requirement that individuals not be subjected to cruel or inhumane treatment, and with some restrictions the Refugee Convention³⁹⁷ and CAT³⁹⁸ further prohibit the transfer of individuals to States where their life or freedom would be threatened as the result of race, religion, nationality, social group membership or political opinion. The modern examination³⁹⁹ of such prohibitions, in the context of EHRL obligations incurred by a State extraditing an individual to another State where they faced risk of such mistreatment, was examined by the ECtHR in *Soering v. United Kingdom* where the court held that decisions to extradite must taken into account basic human rights considerations.⁴⁰⁰ This view was later adopted by the SCC in *United States of America v.*

³⁹⁵ *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 / [1991] ATS 39. Canadian accession 19 May 1976. (ICCPR Optional Protocol)

³⁹⁶ *Supra* note 94 at 658, referring to *ibid* and *supra* note 359.

³⁹⁷ *Supra*, note 357 at art. 1 and art. 32 which states “Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order”, and that any such expulsion “shall be only in pursuance of a decision reached in accordance with due process of law”. This is somewhat tempered at art 33 which states “no Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”, but that this protection may not properly be claimed by a refugee where “there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country”

³⁹⁸ *Supra* note 358 at art 3

³⁹⁹ J. Johnson, “The Risk of Torture as a Basis for Refusing Extradition and the Use of Diplomatic Assurances to Protect against Torture after 9/11”, *International Criminal Law Review*, Vol 11 (Leiden: Martinus Nijhoff 2011) 1-48 at 4.

⁴⁰⁰ *Soering v. United Kingdom*, (1989) E.H.R.R. 439 (“*Soering*”) at para 91.

Burns where the court held “The “responsibility of th[e] State” is certainly engaged under the *Charter* by a ministerial decision to extradite without assurances. While the Canadian government would not itself inflict capital punishment, its decision to extradite without assurances would be a necessary link in the chain of causation to that potential result.”⁴⁰¹

In examining the question of *refoulement* the Grand Chamber of the ECtHR, again in *Saadi v Italy*,⁴⁰² reviewed the applicability of international conventions and whether the giving of assurances to observe international human rights by a receiving State could, by itself, provide sufficient guarantee so as to permit the transfer. In making this decision in *Saadi* the Grand Chamber reviewed a number of Non-Governmental Organizations (NGO) reports regarding prevailing human rights circumstances in Tunisia.⁴⁰³ The Grand Chamber held that that they could properly review applicable inter-State transfer agreements incorporating refoulement guarantees to ensure the guarantees were sufficient,⁴⁰⁴ and that signatory States were prohibited from exposing detainees to torture which included prohibiting them from sending individuals to non-signatory States that might inflict this treatment.⁴⁰⁵ The Grand Chamber further held that “mere words of

⁴⁰¹ *United States of America v. Burns* [2001] 1 S.C.R. 283, para 54.

⁴⁰² *Saadi v Italy*, ECtHR, Application No 37201/06, 28 February 2008

⁴⁰³ *Ibid* at paras 65 – 93 and 128, where it was held that the Court could properly review all material placed before it in determining if substantial grounds have been shown to find a real risk of treatment incompatible with Article 3 of the Convention, and in that case reviewed reports prepared by Amnesty International, Human Rights Watch and the International Committee of the Red Cross to determine the status of Tunisian observations of Human Rights.

⁴⁰⁴ *Ibid* at para 148, stating the court retains the obligation to “examine whether such assurances provided, in their practical application, a sufficient guarantee that [the transferee] would be protected against the risk” of treatment prohibited by the Convention... The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time”.

⁴⁰⁵ *Ibid* at paras 137-138.

assurance are insufficient” and transferring States could still face liability in the event of abuse.⁴⁰⁶

More recently in the case of *UK v. Othman (Abu Qatada)*,⁴⁰⁷ the Grand Chamber examined the proposed refoulement of Mr. Othman from the UK to Jordan. The Grand Chamber acknowledged that while a State which fails to comply with multilateral obligations, here Jordan’s non-compliance with the CAT, it may still enter into bilateral assurances, the extent of non-compliance with its multilateral obligations then becomes a determining factor as to whether the bilateral assurance is sufficient.⁴⁰⁸ In reviewing the evidence of non-compliance in this matter, set against the strong bilateral relationship between the two States and an MOU that was found to be both important to the relationship and “superior in both its detail and its formality to any assurances which the Court has previously examined”,⁴⁰⁹ the Grand Chamber determined that in this instance the MOU was sufficient and refouling the Applicant to Jordan would not be in breach of Article 3 of the CAT.⁴¹⁰

In summary, State practice has established that reliance upon such diplomatic assurances does not run afoul of any emerging customary international law norm,⁴¹¹ and neither Article 3 of the CAT nor Article 7 of the ICCPR have been interpreted to preclude

⁴⁰⁶ *Supra* note 67 at 154.

⁴⁰⁷ *UK v. Othman (Abu Qatada)*, ECtHR, Application No 8139/09, 17 January 2012.

⁴⁰⁸ *Ibid* at para 193.

⁴⁰⁹ *Ibid* at para 194.

⁴¹⁰ *Ibid* at paras 197 – 207.

⁴¹¹ *Supra* note 399 at p. 13.

reliance on these assurances as a condition precedent to such transfers.⁴¹² This apparent acceptance by the international community is not without criticism however, as the UN High Commissioner for Human Rights has consistently advocated against their acceptance on the basis that if a State does not adhere to the lawful requirements of a multilateral treaty, then a bilateral agreement by itself cannot be relied upon.⁴¹³ In support of this criticism, arguments include the insufficiency of post-transfer reviews, inadequacy of post-transfer inspections and legal unenforceability of the agreements.⁴¹⁴ In the end, the making and accepting of such assurances is one of policy choice, reviewable by the courts, and for which failure by the receiving State to abide by its IHRL obligations could implicate the sending State for complicity in the mistreatment.⁴¹⁵

3.4.6 Effect of UN Security Council Resolutions on IHRL Of particular note to international human rights and IHRL instruments are the legal effects of resolutions passed by the UN Security Council. While it has been opined that Security Council resolutions passed under the authority of Chapter VI (Pacific Settlement of Disputes) of the UN Charter are subject to judicial review by the ICJ, those passed pursuant to Chapter VII (Action Taken With Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression) are accorded greater deference and are seen as both binding on all and

⁴¹² *Ibid* at pp. 14-17.

⁴¹³ *Ibid* at pp. 18-20 citing former High Commissioner Louis Arbour and current High Commissioner Navanetham Pillay, as well as the UN Special Rapporteur on Torture.

⁴¹⁴ *Ibid* at pp. 22-25.

⁴¹⁵ *Ibid* at p. 1, citing the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar – Factual Background* (Ottawa: Minister of Public Works and Government Services, 2006)

potentially beyond review even by the ICJ.⁴¹⁶ The legal effect of such a finding has enormous consequence – UNSCRs may have the legal effect of making what would otherwise be a breach of international law lawful,⁴¹⁷ and may also override other international agreements including protections found within IHRL instruments following the application of the principles of *complementarity* or *lex specialis*.⁴¹⁸

UN Security Council resolutions commonly authorize missions under Chapter VII authority, authorizing the use of ‘all necessary’ means or measures but without further qualification.⁴¹⁹ Such authority includes the right to detain either for force-protection and security reasons or as part of normal combat operations inherent in such an authority, although this argument does not enjoy universal acceptance.⁴²⁰ When such language is contained within the applicable UNSCR(s), the argument has been made that this language combined with Article 103 of the UN Charter can displace, or at the least qualify, conflicting treaty-based human rights obligations.⁴²¹ The counter-argument holds that implicit within the language of the authorizing UNSCRs lies an unspoken, but

⁴¹⁶ *Supra* note 361 at 142-145, referring to *ibid*, at art. 39, 24(2) and in particular art. 25 which states “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”.

⁴¹⁷ *Supra* note 94 at 841, stating “A State using force against another State pursuant to [a UNSCR authorizing States to use “all necessary means” or substantially similar wording under art 42] is acting lawfully”.

⁴¹⁸ *Ibid*, at art. 103 which holds that “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”.

⁴¹⁹ See S.C. Res 794 (1992), U.N. Doc. S/RES/794 (3 December 1992) para 10 (Somalia); S.C. Res 678 (1990), U.D. Doc. S/RES/678 (29 November 1990) (Iraq invasion of Kuwait); *supra* note 255 at para 3 (UNSCR 1386) and extended at para 4 (UNSCR 1510 - Afghanistan).

⁴²⁰ Joined Cases C-402/05 P and C-415/05 P [2008] ECJ *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* (Judgment) paras 306, 310-314.

⁴²¹ *Supra* note 67 at 152.

ever present, requirement that ‘applicable’ human rights law applies.⁴²² These nuanced views require that the competing bodies of international law be examined through this lens, and will be further discussed.

3.4.7 Conclusion The application of IHRL where individuals are detained can engage a number of State obligations and detainee rights, and in the context of RCN detentions on the high seas can be found within a limited number of instruments. The Refugee Convention, CAT and ICCPR all speak to protecting individuals within the power of a State, and are largely focused on preserving basic human rights for those individuals by imposing co-existent obligations on States. While the ICCPR provides for pre-trial obligations on detaining States, the Refugee Convention and CAT restrict the ability of States to refole detainees to places where they might reasonably face the risk of torture. Apart from all these protections found in IHRL, the UN Charter also empowers the Security Council to authorize State actions with the effect of potentially limiting, or even displacing entirely, otherwise applicable IHRL. Having outlined these various authorities I will now move on to summarize the obligations imposed on States with regards to the rights of those detained and created by these instruments.

3.5 State Obligations under IHRL and Detainee Rights to Remedies

The concept of sovereign equality includes the principle of State immunity, meaning that no one State can assert jurisdiction over another State, even when that other State acts improperly within its jurisdiction. Customarily, where one State’s actors had committed an allegedly wrongful act within the jurisdiction of another, aggrieved State,

⁴²² *Supra* note 68 (UNSCR 1816 para 11, UNSCR 1846 para 14, UNSCR 1851 para 6).

the aggrieved State would notify the other State of the wrongful act and demand reparations, failure of which would entitle the aggrieved State to ‘self-help’ ranging from economic measures to the use of armed force.⁴²³ There were no codified rules governing what actions an aggrieved State could take in any particular situation; however, the customary law required that any such actions taken by an aggrieved State were only to be done in pursuit of that State’s community interests, and not for any individual’s personal interests.⁴²⁴ From this origin current practices regarding State remedies for international wrongdoings have evolved and taken on a more structured form, recognizing that State responsibility remains a “general set of rules governing the international legal consequences of violations, by States, of their international legal obligations”.⁴²⁵

As discussed, article 33 of the UN Charter further requires States to settle disputes peacefully before resorting to counter-measures and obliges States to take measures in a graduated form, commencing with a request for reparation followed by mediated resolution and lastly, only if resolution is not achieved, the use of counter-measures.⁴²⁶ A foreign State may also be permitted to bring legal action, or consent to have legal action brought on the international plane against it, although there is no power to compel the foreign State to submit to the jurisdiction of another State’s courts.⁴²⁷ In addressing the lack of a single, comprehensive and binding source of international law on the subject of

⁴²³ *Supra* note 204 at 183.

⁴²⁴ *Ibid*, at 185-186.

⁴²⁵ *Ibid* at 761.

⁴²⁶ *Supra* note 204 at 186, citing negotiation, conciliation, arbitration and compulsory settlement mechanisms. It was also noted that these graduated measures do not preclude the use of self-defence either individually or collectively as permitted at art. 51 of the UN Charter. See also *ibid* at 235 discussing the use of compulsory dispute resolution including the referring of matters to the ICJ.

⁴²⁷ Peter Hogg & Patrick Monahan, *Liability of the Crown* 3rd ed. (Scarborough: Carswell, 2001) at 13.2

responsibility, and after many years of development, the International Law Commission (ILC) in 2001 approved the Responsibility of States for Internationally Wrongful Acts⁴²⁸ and in 2011 the Draft Articles on the Responsibility of International Organizations.⁴²⁹ These articles and draft articles, while non-binding as they are not the subject of any international treaty, are however codifications of customary international law. In many respects they deal with issues such as general State responsibility, internationally wrongful acts, the effect of *lex specialis*, and attribution of conduct to a State or international organization.⁴³⁰

Wrongful acts by States fall into two categories; ordinary and aggravated. Ordinary wrongful acts involve a State agent acting contrary to, or omitting to act as required by, international obligations.⁴³¹ Where a State is found to have committed a wrongful act it must cease the wrongdoing, assure the aggrieved State of non-repetition and either provide reparation for the injury or otherwise accede to pacific settlement of the dispute.⁴³² Aggravated State responsibility is found where gross and large-scale human rights violations or other State actions contrary to fundamental values owed to the

⁴²⁸ *Responsibility of States for Internationally Wrongful Acts*, A/56/49(Vol. I)/Corr. 4.

⁴²⁹ *Draft Articles on Responsibility of International Organizations*, 63rd sess, May 4-June 5, July 6-Aug 7, U.N. Doc. A/66/10 para 87 ("Draft Articles"). *Supra* note 204 at 761 described these draft Articles and accompanying commentaries as "useful and reliable restatement of customary international law"

⁴³⁰ *Supra* note 428 at arts 1-3 (wrongful acts), art 55 (*lex specialis*), Chapter II (Attribution of conduct to a State) and *ibid* at art 1 and 2 (wrongful acts), 64 (*lex specialis*), Chapter IV (Responsibility of an international organization in connection with the action of a State or another international organization).

⁴³¹ *Ibid* at 187. This objectively requires that the conduct is inconsistent with international obligations, that material or moral damages to another international subject resulted from the conduct, and that no positive defence in the circumstances is found.

⁴³² *Ibid* at 197-199.

rest of the international community occur.⁴³³ In consequence of an aggravated breach corrective action includes barring other States from assisting the offending State and requiring that they support ending the breach, up to the point of using armed force when so authorized by the international community.⁴³⁴ For individuals accused of such egregious acts, personal criminal liability for serious breaches of international law including war crimes, crimes against humanity and genocide arise from customary international law and are now codified in the *Rome Statute*.⁴³⁵

3.5.1 State Responsibility for Wrongful Detentions As discussed, with few exceptions international customary and treaty law provide that a vessel's flag State exercises exclusive jurisdiction over that vessel, and therefore where a vessel and those onboard are detained without jurisdiction at international law, an ordinary breach may occur. As was seen in the case of *Medvedyev*⁴³⁶ where authority is found at international law, co-existent domestic legal authority is also required. Any detention made without such lawful jurisdiction would form an ordinary breach, and could result in State responsibility both to the flag State of the detained vessel and to the detained individuals onboard that vessel.⁴³⁷ Again, under both international customary and treaty law, only the vessel's

⁴³³ *Ibid* at 200-201. Such breaches must be 'gross or systematic' and entail a violation of a fundamentally important community obligation, and unlike breaches of ordinary responsibility does not require that damage be suffered by another State – such as the case where a State violates human rights of its own nationals.

⁴³⁴ *Ibid*, at 202-204. Corrective action is taken on behalf of the community of nations and not simply a single, aggrieved, State, as also provided for under Chapter VII of the UN Charter.

⁴³⁵ *Supra* note 214.

⁴³⁶ *Supra* note 343.

⁴³⁷ *Ibid* at para 141 where the Grand Chamber awarded financial damages to the detained individuals as the result of the lack of jurisdiction at international law forming an ordinary breach regarding the detention.

flag State or the affected crew member's State of nationality can exercise diplomatic protection on behalf of the detained vessel as individuals lack standing to grieve any interference with freedom of navigation.⁴³⁸

As an example of recognition and codification of potential ordinary breaches, UNCLOS Article 110 authorizes warships to stop and search foreign vessels on the high seas where reasonable belief exists that they are engaged in a prohibited activity such as piracy. Article 110 goes on then to establish that where such action is taken and the allegation is unfounded, the detaining warship's State must pay compensation for any loss or damage sustained.⁴³⁹ Likewise, UNCLOS Article 292 requires that where State authorities have detained a vessel flying another State's flag and have not otherwise complied with UNCLOS provisions regarding prompt release of the vessel or its crew upon posting of a reasonable bond or other financial security, this issue must be submitted to a competent court or tribunal.⁴⁴⁰

⁴³⁸ *Supra* note 289 at 439, citing *supra* note 2 at 257.

⁴³⁹ *Supra* note 38 (UNCLOS) art 110.

⁴⁴⁰ *Ibid*, stating in full:

1. Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree.

2. The application for release may be made only by or on behalf of the flag State of the vessel.

3. The court or tribunal shall deal without delay with the application for release and shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew. The authorities of the detaining State remain competent to release the vessel or its crew at any time.

Where gross violations of IHRL or serious violations of IHL are found, the UN General Assembly has also adopted a series of basic principles and guidelines regarding remedies and reparations for victims.⁴⁴¹ These guidelines, although not themselves binding on States, are again reflective of existing customary international law and emphasize that reparations and even compensation to aggrieved victims should be made available by offending States for physical, mental, emotional and other harms suffered.⁴⁴²

3.5.2 Breach of IHRL Standard of Treatment Where a State is alleged to have committed an ordinary or gross breach of an individual's human rights, depending upon the circumstances, an affected State may bring a number of actions as previously described. In the case of individuals detained at sea, an affected State could be either the flag State of the detained vessel or the State of nationality of the detained crew members. In addition, however, a number of human rights treaties also contain specific mechanisms to redress allegations of breach of the protected rights, although few also provide for international venues within which remedies may be sought.⁴⁴³ The ICCPR requires State parties to ensure an effective remedy overseen by a competent State legal authority is available to those whose rights or freedoms are breached.⁴⁴⁴ Compliance is overseen by a

4. Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew.

⁴⁴¹ *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147, available at: <http://www.refworld.org/docid/4721cb942.html> [accessed 23 July 2014].

⁴⁴² *Ibid* at art. 8 – 23.

⁴⁴³ *Supra* note 94 at 599.

⁴⁴⁴ *Supra* note 359 at art 2(3), and at art ((5) stipulating that victims of unlawful arrest or detention must have an enforceable right to compensation.

specialized international committee, or treaty body, known as the Human Rights Committee, which requires periodic reports from the State in addition to reports on issues of particular concern as required and are made publically available and ultimately submitted to the UN General Assembly.⁴⁴⁵

In the case of the CAT, States are required to criminalize all acts of torture and take necessary measures to establish jurisdiction over such offences carried out in State territory (including State ships), for all State nationals regardless of location and, where appropriate, where the victim is a State national.⁴⁴⁶ Given that provisions of the CAT are incorporated into domestic criminal law, allegations that it has been breached may be proceeded with through the State's criminal process. Another venue for individuals and States⁴⁴⁷ to allege breach of the CAT is through an international treaty body known as the Committee against Torture, responsible for monitoring compliance with the CAT and permitting investigation where systematic violations are alleged.⁴⁴⁸

In seeking redress individual petitions, or 'communications', may be brought before the Human Rights Committee (in the case of the ICCPR) and the Committee against Torture (in the case of the CAT) by victims, family members and NGOs.⁴⁴⁹ Petitions are reviewed for admissibility and then consideration of the merits, and require

⁴⁴⁵ *Supra* note 94 at 657-658, noting also that Canada is subject to the inter-State complaint and review mechanism under the ICCPR.

⁴⁴⁶ *Supra* note 358 at art 4 and 5. States are also required to either prosecute domestically or extradite those alleged to have committed such offences, where the alleged offender is apprehended by the State.

⁴⁴⁷ *Ibid* at art 20 providing for confidential inquiries of a State's alleged activity, and art 21 for inter-State complaints.

⁴⁴⁸ *Supra* note 94 at 658. As a signatory, Canada is subject to investigation for systemic violations of human rights as well as for the CAT inter-State and individual complaint and review mechanism.

⁴⁴⁹ *Supra* note 94 at 662.

a formal submission in order to be considered which is then done in confidence.⁴⁵⁰ Conclusions, or ‘views’, of the body are then provided to the complainant and State, and eventually to the UN General Assembly. These are not binding in any legal sense, but may create sufficient public pressure to encourage States to change practices or redress individual wrongs.⁴⁵¹

Within Canada, domestic criminal prosecutions and civil litigation against individuals and the Canadian government are an available means of seeking redress where the rights of a detainee are alleged to have been breached. Although unsuccessful, in the case of *Amnesty International Canada v. Canada (Chief of the Defence Staff)*, an application for judicial review of CAF detainee transfer practices in Afghanistan was brought against, among others, the Chief of Defence Staff and Minister of National Defence.⁴⁵² Likewise, complaints by and against individuals may be forwarded to the Office of the Prosecutor at the International Criminal Court,⁴⁵³ who is responsible for

⁴⁵⁰ *Ibid* at 662-663 describing that anonymous submissions are typically barred; petitions must be reduced to writing and provide facts occurring after the petition procedure came into force and not have been previously examined by the committee; the committee will only examine issues not before another international procedure, and most importantly the petitioner must have exhausted all available domestic procedures.

⁴⁵¹ *Ibid* at 663-664 citing *Ahani v. Canada* (2002), 58 O.R. (3d) 107 (C.A.) where the Human Rights Committee requested that Canada cease deportation of an individual until it had reviewed his claim that the deportation would violate Canada’s international obligations due to likelihood of torture. At para 32 the court held that by signing the ICCPR Optional Protocol, Canada did not also agree to be bound by the views of the committee, thus their views and interim measures or requests were non-binding.

⁴⁵² *Amnesty International Canada v. Canada (Chief of the Defence Staff)* 2008 FC 336, [2008] 4 FCR 546, affirmed 2008 FCA 401, [2009] 4 FCR 149 (“*Amnesty Canada*”), leave to appeal to S.C.C. refused 2009 CanLII 25563 (SCC). The remedy sought was a halt to such transfers.

⁴⁵³ *Supra* note 14 8:20.40(c) at 8-22, describing the allegations of command responsibility made against the (then) Chief of Defence Staff and Minister of National Defence to the International Criminal Court by Prof. Michael Byers and Prof. William Schabas regarding CAF detainees being transferred to Afghan authorities without adequate safeguards against possible abuse or torture. Art 15 of the *Rome Statute*, *supra* note 214.

investigating allegations (also known as a ‘communication’) to confirm if they meet the ICC jurisdictional requirements.⁴⁵⁴ During the years 2011, 2012 and 2013 the ICC Office of the Prosecutor reported no allegations that crimes had been committed and no investigations were commenced with regards to the actions of any individuals contrary to the *Rome Statute*.⁴⁵⁵

3.6 Conclusion

International law governs the relations between nation States and emanates from the will of States, either through their generally accepted practices and *opinion juris* as customary international law or as expressed through agreements in the form of treaty law. These overlapping sources of law combine to govern international relations and within the maritime environment in particular form a complex legal regime of jurisdictional entitlements and responsibilities. Unlike territorial boundaries found ashore which are easily determined, maritime zones and the activities that are regulated within those zones create a heightened complexity for naval operations, which must be recognized in any discussion of detainee rights and State obligations. Layered onto this complex scheme are various international legal authorities to conduct maritime operations and the resultant

⁴⁵⁴ *Ibid*, permitting preliminary examination of situations initiated by the Prosecutor based on allegations sent by individuals or groups, States, intergovernmental or non-intergovernmental organizations, as well as referrals by State parties or the UN Security Council. The Prosecutor may also act on a declaration under art. 12(3) based on information provided by a State not party to the statute. Identified situations then undergo a preliminary examination pursuant to art. 53(1)(a)-(c) to determine if jurisdiction exists (art. 12), followed by analysis of the alleged gravity and complementarity with national investigations, followed by an examination of the interests of justice. See the Ninth Report of the International Criminal Court, A/68/314 (13 August 2013) [Online: http://www.icc-cpi.int/en_menus/icc/reports%20on%20activities/court%20reports%20and%20statements/Documents/9th-report/N1342653.pdf, viewed 23 July 2014).

⁴⁵⁵ *Ibid*, see also International Criminal Court Report on Preliminary Examination Activities 2011 (31 December 2011, The Office of the Prosecutor)

detainee rights and State obligations arising under international law as the result of detaining ships and individuals during these operations.

At this point it becomes necessary to examine the co-existent Canadian domestic legal authorities engaged during these maritime operations and affecting any resulting detentions. While international law guides the actions of States, with few exceptions it is a State's domestic law that regulates the actions of individuals and therefore the interplay between international and domestic law is important. The implementation of international law in Canadian domestic law will therefore now be examined, while looking at the same questions of jurisdiction, rights, and obligations owed to those detained as discussed above.

CHAPTER 4: CANADIAN LAW AND HIGH SEAS DETAINEES

Having reviewed the international law setting out rights and obligations incurred during a detention by the RCN on the high seas, I will turn now to domestic Canadian law. In order for Canada's international treaty obligations to have effect within Canada and upon Canadian State agents, these treaties must be properly implemented in Canadian law. The reception of international treaties and customary law and how Canadian courts have treated these authorities will therefore be canvassed. I will then move on to the topic of the Crown prerogative, the major underlying source of lawful authority to deploy the RCN on most missions. While legislative authorities may also be brought to bear upon missions, it is the Crown prerogative that most commonly provides the necessary authority to conduct contemporary operational missions.

Next I will turn to Canadian law specifically engaged by these RCN detentions, beginning with the *Canadian Charter of Rights and Freedoms*. This constitutional document guides and constrains, informs and critiques the actions of all branches of the Canadian government and Canadian State actors and is therefore pivotal to any discussion of rights and obligations triggered in detention situations. The *Charter* will therefore be discussed in some depth both with regards to domestic case law but also with respect to its extra-territorial application. Following this discussion of *Canadian Charter* law I will review the various domestic authorities authorizing and engaged by extra-territorial detentions. This legislation will be important to the subsequent analysis, as while many of RCN operations arguably take place under the domestic authority of the Crown prerogative, the exercise of this power is not without limits and can be affected or even displaced by domestic legislation.

Lastly, I will introduce the topic of remedies available domestically to those whose rights have been affected due to an unlawful detention, as well as the corresponding jeopardy facing individual sailors and the command authorities of HMC Ships implicated in such breaches.

4.1 Incorporating International Law into Canadian Domestic Law

Having canvassed what international law is and how it is created, it is necessary to examine the manner in which international law takes domestic effect. The Canadian *application* of international law looks at the domestic *effect* of international law.⁴⁵⁶ Conceptually there are two doctrines in this regards – ‘incorporation’ meaning “the rules of international law are incorporated (into domestic law) automatically and considered to be part of (domestic law) unless they are in conflict with an Act of Parliament”; versus ‘transformation’ meaning “rules of international law are not (incorporated into domestic law) except in so far as they have been already adopted and made part of our law by the decisions of the judges, or by an Act of Parliament, or long established custom.”⁴⁵⁷ In Canada both of these means are used to fold international law into domestic law, as incorporation is used in the case of customary international law⁴⁵⁸ and transformation

⁴⁵⁶ J. Jackson, “Status of Treaties in Domestic Legal Systems: A Policy Analysis”, 86 Am. J. Int’l L. 310 (1992) at 314-316 where the author describes this approach as the “direct applicability” of international law on a State’s domestic law.

⁴⁵⁷ Lord Denning in *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 2 W.L.R. 356, [1977] Q.B. 529 at 364 (C.A.).

⁴⁵⁸ Pierre-Hugues Verdier, “R. v. Hape. 2007 SCC 26”, 102 Am. J. Int’l L. 143 2008 at 146. See also *R. v. Rumbaut*, 1998 CanLII 9798 (NB QB) at p. 25, where the court cites with approval *R. v. Kirchoff*, (1996) 172 N.B.R. (2d) 257 in finding that art. 23 of the 1958 *Convention on the High Seas*, 13 UST 2312 / 450 UNTS 11 and art. 111 of UNCLOS, are both related to this issue, stating “extensive constructive presence are declaratory of existing customary international law and that such a law is part of the Canadian domestic law”.

must occur to give domestic effect to treaty or conventional international law.⁴⁵⁹ In *Baker*, the court examined whether an obligation imposed by Canada's signing of the Convention on the Rights of the Child [1992] Can T.S. No. 3, had any domestic effect. Despite noting the general principle that "courts should interpret all other legislation so as to avoid, if possible, interpretations which would put Canada in breach of its international obligations", the court held that treaties signed by the executive branch of the Canadian government do not have legal effect over rights and obligations within Canada absent implementation by statute, and the general principle stated could not properly be applied to bring about such unconstitutional results. There are exceptions to these doctrines however, as in the narrow range of 'self-executing' treaties. Self-executing treaties include those involving defence or peace, and, although normally requiring transformation through legislation, functionally dispense with this because they affect the conduct of Canadian international relations and not Canadian internal law and thus do not require transformation into Canadian domestic law.⁴⁶⁰

4.2 The Crown Prerogative and Military Deployments Outside of Canada

Elements of the CAF, including the RCN, deploy internationally under the domestic authority of the Crown prerogative – a source of executive power and privilege that refers to the powers of the executive branch of Canadian government.⁴⁶¹ The term "Crown prerogative" has variously been described in the Canadian context as "the residue of discretionary or arbitrary authority, which at any given time is left in the hands

⁴⁵⁹ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1997] 2 FC 127, ("*Baker*").

⁴⁶⁰ *Ibid* at 206-207.

⁴⁶¹ *Supra* note 427 at 1.4(b)

of the Crown”⁴⁶² and also as “the powers and privileges accorded by the common law to the Crown”.⁴⁶³ In either event, the Crown prerogative simply means that the Crown enjoys “certain authority ahead of other entities” in addition to “special *privileges* and *immunities* that are properly classed with that authority”.⁴⁶⁴ The Crown prerogative can be traced from Canada’s English and French legal traditions, whereby the power of the Crown was slowly eroded by legislation and common law decisions, and now is found in part or in full where (in this case federal) legislation does not speak.⁴⁶⁵ This concept of Crown prerogative was retained in section 9 of the *British North America Act, 1867*⁴⁶⁶ and following Canada’s evolution to full statehood exercise of the Crown prerogative shifted from the U.K. to the Canadian executive branch of the government.⁴⁶⁷

Contemporary instances of Crown prerogative include: foreign affairs; war and peace; treaty-making; other acts of State in matters of foreign affairs; and defence and the

⁴⁶² Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1959) at 424.

⁴⁶³ *Black v. Chretien et al.*, (2001), 54 O.R. (3d) 215 (C.A.) (“*Black*”) at 224, and the S.C.C. in *Ross River Dena Council Band v. Canada* (2002), 213 D.L.R. (4th) 193 (“*Ross River*”) at 217, citing Peter W. Hogg, “Constitutional Law of Canada”, Loose-leaf ed. (Scarborough: Thomson Carswell, 1997) at 1.9.

⁴⁶⁴ Major Alexander Bolt, *The Crown Prerogative in Canada and its use in the Context of International Military Deployments* (Office of the Judge Advocate General Strategic Legal Paper Series – Issue 2 (A-LG-007-SLA/AF-002) (4 June 2008) at 2 (Online: <http://www.forces.gc.ca/jag/publications/oplaw-loiop/slap-plsa-2/chap1-2-eng.asp>).

⁴⁶⁵ *Ibid*, citing *Prohibition del Roy*, 77 E.R. 1342 where the ability of the King to administer justice was lost to the courts, followed by the Bill of Rights of 1688 which denied the King the right to suspend or dispense with a law or the ability to tax. See also *supra* note 427 at 1.5(b) stating “The prerogative can also be displaced, abolished or limited by statute, and once a statute has occupied the ground formerly occupied by the prerogative, the Crown must comply with the terms of the statute... however the weight of authority seems to support the view that a statute will only displace the prerogative with respect to powers or matters that the statute deals with expressly or by necessary implication”.

⁴⁶⁶ Now the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3.

⁴⁶⁷ *Ibid*, at s.9 which states “The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen”, and *supra* note 464 at 3.

armed forces.⁴⁶⁸ Within the Canadian context of responsible government these prerogatives, among others, are left to the executive branch of the Canadian government to be exercised⁴⁶⁹ and are in fact exercised by the Cabinet, individual ministers (including the Prime Minister), and Cabinet Committees.⁴⁷⁰ While Parliament is not mandated to play any actual role in exercising the Crown prerogative, consultation is frequently engaged where subsequent parliamentary support is desirable.⁴⁷¹

Because the Crown at law is a legal person and subject to all valid statutory laws,⁴⁷² exercise of the Crown prerogative is reviewable by the courts to determine at the outset if it is justiciable⁴⁷³ and, if so, to confirm it is *Charter*⁴⁷⁴ compliant. If, having first

⁴⁶⁸ *Supra* note 464 at 7, citing Paul Lordon, *Crown Law* (Toronto: Butterworths, 1991) at 75. With regards the armed forces, at 6 the direction on management and control of the CAF as found in *supra* note 13 (NDA) are discussed however it is argued that none of these provisions displace Crown prerogative. Further, at 20 the House of Lords decision *Chandler v. D.P.P.*, [1962] 2 All E.R. 142 at 146 is cited: “the disposition and armament of the armed forces are, and for centuries have been, within the exclusive discretion of the Crown”.

⁴⁶⁹ *Ibid* at 8-14.

⁴⁷⁰ *Ibid*, at 12-15. In actually exercising the Crown prerogative, Cabinet or Cabinet Committees follow a formalized process that can include Orders in Council, Memorandums to Cabinet, a letter from the Minister of National Defence or other means of bringing business, recommendations and draft orders from this recommendation stage to the actual Record of Decision, which is the formal exercise of the associated Crown prerogative

⁴⁷¹ *Ibid*, at 15-16 stating “The government does not have to consult, or even inform, Parliament before exercising prerogative powers. This is convenient, for many matters falling within the prerogative are not suitable for public discussion before the decision is made or the action performed” although such license may be infrequently exercised as “on the other hand, the government must feel assured of parliamentary support [after a Crown prerogative decision is made], especially in a matter like war or where money will be required.”, citing O. Hood Phillips, Paul Jackson, *O. Hood Phillips’ Constitutional and Administrative Law*, 7th ed. (London: Sweet & Maxwell, 1987) at 269.

⁴⁷² *Supra* note 463 (Hogg) at 10.8(a).

⁴⁷³ *Supra* note 464 at 16-18. The doctrine of justiciability within the sphere of judicial review looks at the action taken against a spectrum of reviewability, with non-reviewable decisions of ‘high policy’ such as signing treaties or declaring war on the one hand, and reviewable decisions affecting “rights and legitimate expectations of an individual” such as the “issuance of a passport or an exercise of mercy” on the other.

found a valid Crown prerogative power, the exercise of the prerogative is then examined under the doctrine of justiciability to confirm if its exercise is reviewable by the courts, and if found to be justiciable it is examined against potentially applicable legislation and the *Charter* to determine if the prerogative has been limited or displaced.⁴⁷⁵ This involves a two-step analysis: first, does the statute in question bind the Crown; if yes, does the statute merely limit, or fully displace the Crown prerogative?⁴⁷⁶ Existence of a Crown prerogative is normally presumed at this first stage but the second stage requires additional inquiry.⁴⁷⁷ Legislation may permit some exercise of the Crown Prerogative but within limits,⁴⁷⁸ or completely displace any exercise of this prerogative where the

⁴⁷⁴ *Supra* note 4. In *Operation Dismantle v. The Queen* (1985), 18 D.L.R. (4th) 481 (S.C.C.) the government's decision to permit air-launched cruise missile tests by the American military within Canadian airspace was challenged as a violation of section 7 *Charter* rights. The court accepted that the *Charter* could apply to an exercise of the Crown prerogative, however rejected its application in this case and stressed that such reviews must be restricted to the *Charter* argument alone, and not into the soundness of such a decision by the executive branch of the government.

⁴⁷⁵ *Supra* note 463 (*Black*) at 225 where the SCC majority stated "despite its broad reach, the Crown prerogative can be limited or displaced by statute", based upon the *Parliament of Canada Act*, R.S.C. 1985, c. P-1 at s.4 which confirmed to Canada's Houses of Parliament the same powers and privileges held by the U.K. Commons House in 1867.

⁴⁷⁶ *Supra* note 464, citing the process engaged at *supra* note 463 (*Ross River*) at 217 where LeBel J. termed the process the "interplay of royal prerogative and statute".

⁴⁷⁷ *Ibid*, at 4 citing *supra* note 24 (*Interpretation Act*) s.17, which states "No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment." While words of express intent within a statute will bind the Crown (*supra* note 463 (*Ross River*) at 199 and 217), it is less certain whether a statute without this express intention but which, as a matter of fact implies such an intent (the doctrine of necessary implication), will also bind the Crown. Also discussed are questions of whether simply referencing the Crown in a statute can be held to bind the Crown, and the Canadian Constitutional issue of federalism – both of which are inapplicable to the present investigation and will not be further discussed.

⁴⁷⁸ *Ibid*, citing *supra* note 468 (Paul Lordon) at 67, stating "Parliament may by statute preserve the prerogative but regulate the manner in which it is to be exercised". This question was reviewed in *Vancouver Island Peace Society v. Canada*, [1994] 1 FC 102, 1993 CanLII 2977 (FC); affirmed (1995), 16 C.E.L.R. (N.S.) 24 (Fed. C.A.); leave to appeal dismissed (1995), 17 C.E.L.R. (N.S.) 298 (S.C.C.). Here the Society applied to quash two Orders in Council authorizing nuclear powered and nuclear armed vessels to enter Canadian ports, arguing that the *Canadian Environmental Protection Act*, R.S.C., 1985 (4th Supp.), c.16, the *Atomic Energy Control Act*, R.S.C., 1985, c. A-16 and the *Canada Shipping Act*, R.S.C., 1985, c. S-9 combined to displace Crown prerogative in this area. The application was

clear and unambiguous words of legislation demonstrate that intent. One example of such clear language is found in the federal *Crown Liability and Proceedings Act* which states the Crown “is liable for the damages for which, if it were a person, it would be liable” including “a tort committed by a servant of the Crown”.⁴⁷⁹

Authority for the CAF to engage in international deployments is squarely found to be an exercise of the Crown prerogative.⁴⁸⁰ The nature of contemporary Canadian deployments combined with recent judicial treatment of similar decisions by the Canadian government also indicate that such deployments enjoy a large degree of freedom from judicial scrutiny. Judicial reasoning has consistently followed the ‘subject matter test’ to determine justiciability, which excludes exercises of Crown prerogative related to ‘high policy’ – an area which likely covers military deployments outside of Canada.⁴⁸¹ Bearing this in mind, contemporary operational deployments may still be

dismissed as the court held the Crown prerogative, here exercised “in light of Canada’s international relations, national security and defence interests” was unaffected by these statutes, holding that neither the purpose of the statutes nor Parliaments intent in these legislative acts was directed at regulating the matters at hand (para 45).

⁴⁷⁹ *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 at s.3

⁴⁸⁰ *Supra* note 464 at 21-22. It is noted that several sections of the *NDA*, in particular s. 31(1) which provides the authority for placing CAF on “active service”, and s. 33(1) which requires all regular force elements, units and members to be “liable at all times to perform any lawful duty” do appear to circumscribe this otherwise unfettered discretion of the Crown prerogative. As is explained however, being placed on “active service” merely has as a consequence an expanded level of disciplinary authority by the CAF over the member, and restrictions upon a member’s ability to voluntary release. Regardless, all regular force CAF personnel and all reserve force members serving beyond Canada are on active service by virtue of an Order in Council, P.S. 1989-583 (6 April 1989) which was issued under statutory authority, not Crown prerogative. Likewise, being liable to perform “any lawful duty” would include those duties assigned by exercise of the Crown prerogative.

⁴⁸¹ *Ibid*, at 22-23 citing *supra* note 463 (*Black*) and *Chaisson v. Canada* (2003), 226 D.L.R. (4th) 351 (F.C.A.), a case involving the governments decision regarding issuance of a decoration for bravery for acts taken during WWII. The court found at 356 that in this instance regulations did exist governing “a set of rules which provide criteria for a Court to determine” if the procedure had been followed, and it is these regulations setting out how the Crown prerogative is to be exercised that distinguish this decision from *Black*, where no such regulatory directives exist.

reviewable for *Charter* compliance, limited through this to a review of alleged *Charter* rights violations and not the deployment decision itself.⁴⁸²

Having found that CAF deployments themselves are properly authorized through the use of the Crown prerogative, the lawful underpinning of detentions and seizures made during these deployments is also a consideration. As already proposed, the Grand Chamber of the ECtHR held in *Medvedyev* that international law required concurrent domestic and international authorities to detain.⁴⁸³ While this decision relied upon the *ECHR*, an instrument to which Canada is not a party, Canada has ratified the ICCPR⁴⁸⁴

⁴⁸² *Ibid*, at 23-24, citing Wilson J at p. 518, *supra* note 474 (*Operation Dismantle*) “that is not to say that every governmental action that is purportedly taken in furtherance of national defence would be beyond the reach of s.7. If for example, testing the cruise missile posed a direct threat to some specific segment of the populace – as, for example, if it were being tested with live warheads – I think that might well raise different considerations”.

⁴⁸³ *Supra* note 343 at para 7, stating that “Cambodia’s diplomatic note did not explicitly mention the fate of the ship’s crew... It would not be logical, however, to interpret this note so narrowly as to exclude the possibility for the French authorities to take control of the ship and its crew were the inspection to reveal (as it did) the presence of a consignment of drugs”. See also *supra* note 67 at p. 153, citing B Van Schaak, ‘*Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*’ (2008) 97 *Georgetown Law Journal* 118, 136. D. Guilfoyle opined that “it is erroneous to assume that such treaties (necessarily drafted for implementation in various legal systems) can realistically incorporate detailed human rights guarantees. To assume treaties cannot justify pre-trial detention without express words contemplating criminal penalties risks sweeping away enforcement powers under treaties ‘drafted without the precision we now expect from modern penal codes’. While UNCLOS provisions on piracy do contemplate criminal law sanctions... the UN Narcotics Convention only refers to ‘taking appropriate action’ with flag State consent in cases of maritime drug smuggling. Until *Medvedyev*, such ‘action’ had always been interpreted as encompassing arrest and prosecution where there was flag State consent. While the Strasbourg Court is right to insist on the principle of legality... in national implementation of law enforcement treaties, to apply a principle of strict legality ... to the treaties themselves is to needlessly undermine the enforcement provisions of other treaty regimes. It is erroneous to assume (these principles apply) in the same manner at the international level as at the national level.”

⁴⁸⁴ *Supra* note 359. The ICCPR was adopted on 16 December 1966 and entered into force on 23 March 1976, with Canada acceding to the Covenant 19 May, 1976 and it entering into force for Canada 19 August, 1976 and states at art. 9(1) “No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”. The text of the ECHR found at Art 5 states “No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law”, and goes on to require that all arrests and detentions, regardless of pre or post conviction, for prevention of infectious disease or for minors for the purpose of educational supervision, to be “lawful”.

which has been interpreted similarly to the ECHR and therefore the *Medvedyev* decision provides useful guidance. In short, Canadian warships do not enjoy ‘carte blanche’ authority on the high seas to detain or seize other vessels, much less detain persons onboard, absent both international and domestic authority.

In the operational context this domestic authority is provided in part through “Rules of Engagement” or ROE, which are defined as “Orders issued by competent military authority, which delineate the circumstances and limitations within which force may be applied by the CF to achieve military objectives in furtherance of national policy”.⁴⁸⁵ The Canadian Forces Joint Publication *Canadian Military Doctrine* further expands on this definition, stating that ROE

Delineate the circumstances and limitations under which armed force may be applied throughout the range of military operations. They are formulated as permissions and prohibitions and are considered as lawful orders and not guidelines for interpretation. They must take into account all political, military, physical, and legal constraints ensuring that forces are not left vulnerable to attack or inadvertently harm political or operational imperatives. They must be developed in concert with operational commanders, including coalition commanders, and be neither too restrictive nor too permissive to allow effective and efficient operations and achievement of the aim. ROE must coordinate the use of force appropriate to the mission assigned, ensure compatibility amongst potentially dissimilar partners, and ensure that military operations meet political objectives.⁴⁸⁶

⁴⁸⁵ Law of Armed Conflict at the Operational and Tactical Levels (13 August 2001), Office of the Judge Advocate General B-GJ-005-104/FP-021 at p. GL-17

⁴⁸⁶ Canadian Military Doctrine, Canadian Forces Joint Publication (CFJP 01) B-GJ-005-000/FP-001 (April 2009) at p. 2-16. (Online: <http://www.cfd-cdf.forces.gc.ca/sites/page-eng.asp?page=3391>)

As a partial expression of Crown prerogative,⁴⁸⁷ ROE are issued “under the authority of the Chief of Defence Staff”, generally are mission specific and “are drafted with input from commanders, planners and legal officers using a developed framework and template of numbered authorizations and prohibitions common to land, sea and air”.⁴⁸⁸ From this, any RCN operation contemplating the detention of ships and / or persons as part of the mission must be properly authorized from the executive level through the Crown Prerogative, with corresponding ROE permitting such actions, in order to ensure adequate international and domestic Canadian legal authority is present.

4.3 Canadian Charter of Rights and Freedoms

There is a degree of uncertainty regarding the applicability of the *Canadian Charter of Rights and Freedoms*⁴⁸⁹ to maritime operations and those detained by ships of the RCN. The territorial scope of *Charter* guarantees has been discussed by the Supreme Court in the two leading cases of *R. v. Cook* and *R. v. Hape*.⁴⁹⁰ Starting from a broad interpretation of *Charter* applicability with regards to the conduct of Canadian agents acting abroad in *Cook*, the SCC subsequently has moved towards a far more restricted view of *Charter* application in these circumstances in *Hape*, a view that has been followed by the SCC and lower courts in subsequent decisions.⁴⁹¹ This restricted view of *Charter* applicability has been criticized as being more restrictive than required by

⁴⁸⁷ *Supra* note 14 at p. 8-8, “In Canada, the Chief of the Defence Staff authorizes and signs all ROE, which consequently assume the character of legal orders to be obeyed”.

⁴⁸⁸ *Ibid* at pp. 7-1, 7-8.

⁴⁸⁹ *Supra* note 4.

⁴⁹⁰ *R. v. Hape*, [2007] 2 S.C.R. 292. See also Chimene Keitner, “Rights Beyond Borders” 36 *Yale J. Int’l L.* 55 2011 at 81.

⁴⁹¹ *Ibid* (Keitner) at 81-82.

international law⁴⁹² and is for this reason alone deserving of discussion. I will therefore begin by discussing those *Charter* rights primarily engaged in detention situations and of particular interest to RCN operations. Next I will trace the evolution of the jurisdictional reach of the *Charter*, particularly with regards to extra-territorial application. As will be demonstrated, interpretation of *Charter* rights has both expanded with regards to the actions over which protection will be provided, while at the same time contracted in its scope of extra-territorial application.

4.3.1 *Charter* Protections in Detentions As a constitutional document the *Charter* sets out a number of State obligations and protections for individuals; but within the context of detention situations only a limited number of these are potentially of direct application. Section 7 of the *Charter* sets out the right not to be deprived of “life, liberty and security of the person ... except in accordance with the principles of fundamental justice”.⁴⁹³ This general *Charter* right has been used to determine the government’s power to regulate non-citizens right to enter or remain within Canada⁴⁹⁴ and, as will be discussed

⁴⁹² *Ibid* at 81.

⁴⁹³ *Supra* note 4 at s.7.

⁴⁹⁴ *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711, [1992] 1 R.C.S. (“*Chiarelli*”). at 733-736 stating ““The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country. At common law an alien has no right to enter or remain in the country”, and that the right “to enter, remain in and leave Canada” as guaranteed at s.6(1) of the *Charter* applies to citizens while non-citizens including permanent resident only enjoy a right to move to, take up residence in, and gain a livelihood in any province, as set out at s.6(2) of the *Charter*, and that Parliament was competent to adopt immigration policies and enact legislation setting out conditions under which non-citizens will be permitted to enter and remain in Canada, which it had done through the *Immigration Act*. See also Catherine Dauvergne, “How the Charter has failed non-citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence”, 58 McGill L. J. 663 (2012-2013) at 680-682, discussing that absent valid refugee status or risk of torture claim the right of a State to deport non-citizens is non-challengeable.

further, Canada's obligations towards persons detained by foreign governments with the support and assistance of Canadian agents.⁴⁹⁵

Section 9 of the *Charter* is also potentially of direct application to RCN detention situations, and provides that "Everyone has the right not to be arbitrarily detained or imprisoned".⁴⁹⁶ Following this, Section 10 then entrenches the right to challenge the lawfulness of a person's detention.⁴⁹⁷ It is therefore necessary to further examine the meaning of detention as contemplated by the *Charter*, as this is a critical point at which further legal rights and obligations on the detaining HMC Ship are triggered. The meaning of detention was explored in the 1985 decision of *Therens*⁴⁹⁸ where the court viewed Section 10 as broader than simply applying to a law enforcement "arrest or detention", and included any restrictions imposed by a State agent upon a person's liberty where they may reasonably require legal assistance.⁴⁹⁹ This broad interpretation in

⁴⁹⁵ *Supra* note 490 (Keitner) at 89 referring to *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44 ("*Khadr II*"). This issue was also examined in *Purdy v. Canada (Attorney General)*, 2003 BCCA 447 (CanLII) where a Canadian citizen, living in Canada, was investigated by both RCMP and American authorities for transnational money laundering based primarily on Canadian gained evidence. Mr. Purdy was lured into the United States where he was arrested and charged, thus avoiding the requirement for extradition. The Court of Appeal at para 17 cited *Cook* for the proposition that s.7 of the *Charter* was engaged if "Canada's participation is causally connected to the deprivation of a liberty interest in a foreign state" (emphasis in original), which rejected previous 'territorial application' interpretations as will be discussed in *Hape* and *Terry*.

⁴⁹⁶ *Supra* note 4 at s 9

⁴⁹⁷ *Ibid* at s.10 which states ".everyone has the right on arrest or detention (a) to be informed promptly of the reasons therefore; (b) to retain and instruct counsel without delay and to be informed of that right; and (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful".

⁴⁹⁸ *R. v. Therens*, [1985] 1 SCR 613, 1985 CanLII 29 (SCC) at paras 1 and 5, where the court agreed with Le Dain and Estey JJ (dissenting) in their reasons relating to finding a person to be detained as contemplated within the *Charter*.

⁴⁹⁹ *Ibid* at paras 52-53 stating it comprised "a restraint of liberty other than arrest in which a person may reasonably require the assistance of counsel but might be prevented or impeded from retaining and instructing counsel without delay but for the constitutional guarantee", and could include a situation where an agent of the State "assumes control over the movement of a person by a demand or direction which may have significant legal consequence and which prevents or impedes access to counsel

Therens was subsequently refined in *Grant*⁵⁰⁰ where the SCC ruled that a person was detained only where their liberty was controlled due to “significant physical or psychological restraint”.⁵⁰¹ The court enumerated factors to be considered where psychological compulsion was alleged, including the circumstances of the encounter from the perspective of the person; the nature of the State agent’s actions ranging from presence through general inquiries to focused State attention upon the individual for further inquiry; and the nature of the State agent’s conduct including language used, physical contact, location of the interaction, presence of others and duration of the incident.

These decisions were both made within the context of acts taken within Canadian territory and by Canadian police investigating alleged criminal acts. As a result, the reasoning used by the Court cannot be transposed into the situation of detainees taken by Canadian naval forces operating on the high seas until the question of *Charter* applicability in these situations is examined. Such reasoning is not without precedent, as will be demonstrated when reviewing Canadian court decisions regarding extra-territorial effects of the *Charter*.

4.3.2 Extra-territorial Application of the *Charter* An examination of the extra-territorial reach of the *Charter* begins with Section 32(1), which states that the *Charter* applies both federally and provincially in respect of all matters given to these two heads

⁵⁰⁰ *R. v. Grant*, [2009] S.C.C. 32 where the majority held that section 9 guarantees against arbitrary detention manifested section 7 general principles and therefore “a person’s liberty is not to be curtailed except in accordance with the principles of fundamental justice”, and at para 54 held that Individual liberty is protected by section 9 against unlawful State interference, found where “the law authorizing the detention is itself arbitrary” or the detention itself is not authorized by law

⁵⁰¹ *Ibid* at para 44. This includes where the detained person is lawfully obliged to comply with the restrictive request or demand, or the conduct of the State actors would lead a reasonable person to conclude that they had no other option but to comply.

of government.⁵⁰² As a starting point, the SCC has long held that the *Charter* applies broadly to the actions of Canadian police, and by extension other Canadian government agents, within the territory of Canada.⁵⁰³ Such has also been held true of the protections of the *Charter* in the context of claimants under federal legislation such as the *Immigration and Refugee Protection Act*⁵⁰⁴ (“IRPA”), again long applied only to those making their claim while physically in Canada.⁵⁰⁵ It is with respect to Canadian actors, or others acting on behalf of the Canadian government but outside of Canada, that the question of *Charter* applicability in the context of RCN operations most directly arises.

⁵⁰² *Supra* note 4, stating the *Charter* applies to (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislatures and government of each province in respect of all matters within the authority of the legislature of each province.

⁵⁰³ *R. v. Cook*, [1998] 2 S.C.R. 597 at para 124 where Bastarache J, concurring in the result, observed that: "By its terms, s. 32(1) dictates that the *Charter* applies to the Canadian police by virtue of their identity as part of the Canadian government."

⁵⁰⁴ *Immigration and Refugee Protection Act*, S.C. 2001, C. 27 (“IRPA”) at sections 2, 97, 102 and schedule 2(1).

⁵⁰⁵ *Singh v. Minister of Employment and Immigration*, 1985 CanLII 65 (SCC), [1985] 1 SCR 177 at para 35, when Maitland J stated for the court “I am prepared to accept that the term [everyone] includes every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law”. This decision was based on the [then in force] *Immigration Act*, R.S.C., 1985, c. I-2, however in the subsequent decision of *Jallow v. the Minister of Citizenship and Immigration*, Court File IMM-2679-95, November 6, 1996 (unreported) (F.C.T.D.) the court held that

“In reviewing *Singh*, ... it is clear to me that the process which was eventually put in place in Canada is not applicable to claimants outside the country ... [and]... that other consequences which flowed from the decision are only applicable to Refugee claimants within Canada... [*Immigration Act* procedures] ... for the adjudication of the claims of persons claiming refugee status in Canada deny such claimants rights they are entitled to assert under s. 7 of the *Canadian Charter of Rights and Freedoms* ... First, the Court should decide whether refugee claimants physically present in Canada are entitled to the protection of s.7 of the Charter. ... The Act envisages the assertion of a refugee claim under s. 45 in the context of an inquiry, which presupposes that the refugee claimant is physically present in Canada and within the jurisdiction of the Canadian authorities.”

This holding has been subsequently upheld in *Oraha v. Canada (Minister of Citizenship and Immigration)*, 1997 CanLII 5223 (FC) where changes to Canadian immigration law since *Singh* were examined and found to be of no impact on this aspect of determining Convention refugee claims for those persons outside Canada.

The issue of extra-territorial application of the *Charter* can be traced from *Harrer*,⁵⁰⁶ a case that examined the admissibility of statements gathered by U.S. marshals from an accused in the United States, but used in a Canadian prosecution. Although the statements were admitted, the majority carefully noted that this admission should not be “interpreted as giving credence to the view that the ambit of the *Charter* is automatically limited to Canadian territory”, and further noted that “the automatic exclusion of *Charter* application outside Canada might unduly restrict the protection Canadians have a right to expect against the interference with their rights by our governments or their agents”.⁵⁰⁷ This decision was quickly followed in *Terry*, another instance where U.S. authorities gathered evidence in a manner that did not meet the requirements of the *Charter* yet was subsequently used in the Canadian prosecution.⁵⁰⁸ Following on the principles expressed in *Harrer*, the court resolved that foreign State sovereignty was exclusive and the *Charter* would not apply to foreign actors working on the behalf of Canadian authorities.

Of greater relevance to the issues being examined here is the extra-territorial application of the *Charter* when the actions are taken by Canadian State agents

⁵⁰⁶ *R. v. Harrer*, [1995] 3 S.C.R. 562

⁵⁰⁷ *Ibid* at para 10-12 where the majority concluded that either as the U.S. marshals were not acting on behalf of the Canadian government, or that s.32(1) did not apply at all to foreign authorities regardless of whether they acted on behalf of Canadian actors, the *Charter* did not apply to their conduct.

⁵⁰⁸ *R. v. Terry*, [1996] 2 S.C.R. 207 at paras 19-20. The unanimous court held that in keeping with the concept of State sovereignty, the *Charter* did not govern foreign law enforcement officers, even when acting as agents of Canadian police who themselves were bound by the *Charter* as these foreign actors are governed solely by the “exclusivity of the foreign State’s sovereignty” and the “the rules of that country and none other”. Subsequently this reasoning was followed by the SCC in *R. v. Schreiber*, [1998] 1 S.C.R. 841 where at para 27 the majority of the court held that the search of foreign bank institutions by foreign authorities, even at the request of Canadian authorities, did not cause the *Charter* to apply to their actions.

themselves. In the case of *Hape*⁵⁰⁹ the SCC examined the extra-territorial effect of the *Charter* in the context of an RCMP investigation conducted in the territory of another State. There, Canadian investigators working with local police conducted warrantless searches of Mr. Hape's business premises in the Turks and Caicos Islands. Those searches were lawful within that country but not in accordance with Canadian *Charter* requirements. The SCC majority decision outlined a 2 part test necessary to determine whether subsection 32(1) of the *Charter* applied, inquiring first into whether the activity could be attributed to a Canadian actor such that it is within subsection 32(1) of the *Charter*.⁵¹⁰ The court confirmed that s.32(1) of the *Charter* applied only to "Parliament, the government of Canada, the provincial legislatures and provincial governments" – and thus Canadian State agents – and answered this in the affirmative.⁵¹¹

Part two of the test then sought an exception to the customary international law principles of sovereignty and equality of nations⁵¹² to justify the *Charter*'s application to the extra-territorial activities.⁵¹³ Interpreting s.32(1) through the lens of international law and comity, the majority found that most extra-territorial applications of the *Charter* would be barred due to the presumption at international law precluding such action⁵¹⁴

⁵⁰⁹ *Supra* note 490.

⁵¹⁰ *Ibid* at para 103.

⁵¹¹ *Ibid* at para 94.

⁵¹² *Supra* note 204 at 88-91 referring to a State's right to exclusive control over domestic affairs. Sovereignty includes the exercise of authority over all living within the State; the power to use and dispose of State territory; the right to exclude foreign States from State territory; immunity of State representatives for their official acts and State immunity from foreign court jurisdictions; and respect for the lives and property of State nationals and officials abroad.

⁵¹³ *Supra* note 490 at para 113, directed at those "matters within the authority" of the Canadian State government, when acting beyond Canadian territory.

⁵¹⁴ P.H. Verdier, "R.v. Hape", (2008) 102 Am. J. Int'l L. 143 at 144, discussing three reasons provided by the majority in reaching this conclusion. First was the Canadian tradition of adopting customary

absent "an exception to the principle of sovereignty that would justify the application of the *Charter* to the extra-territorial activities of the State actor".⁵¹⁵ The court then examined the specific jurisdiction in question, in this case enforcement jurisdiction,⁵¹⁶ and provided the only exception to this rule was found where host-nation consent was received or in situations involving "clear violations of international law and fundamental human rights".⁵¹⁷

This decision recognized for Canadian courts two key features of international law: respect for sovereignty and the equality of all States. Jurisdiction as a component of State sovereignty was held as a "quintessential feature" of this recognition, with the only imposable limits created through State consent or international law, whether customary or conventional.⁵¹⁸ The court went on to explain that the principle of non-intervention was critical to maintaining this recognition of State sovereignty and equality, and therefore States were bound to refrain from interfering in the affairs of other States. Further, these principles of non-intervention and territorial sovereignty were adopted into Canadian common law⁵¹⁹ and thus informed the limitation of extra-territorial *Charter*

international law, implying that "customary principles of territorial sovereignty and non-intervention are part of Canadian common law". Second was the principle of comity as guidance to the interpretation of Canadian laws impacting on foreign sovereignty. Lastly, IHRL treaties were canvassed as the majority adopted the presumption that interpretation of statutes, and thus the *Constitution*, must conform to international law.

⁵¹⁵ *Supra* note 490 at para 113.

⁵¹⁶ *Supra* note 514 at 144-145.

⁵¹⁷ *Supra* note 490 at para 52.

⁵¹⁸ *Ibid* at paras. 41-46.

⁵¹⁹ *Ibid* at para 37 citing with approval *Bouzari v. Islamic Republic of Iran* (2004), 71 O.R. (3d) 675 at para. 65, leave to appeal refused, [2005] 1 S.C.R., where Justice Goudge explained "customary rules of international law are directly incorporated into Canadian domestic law unless explicitly ousted by contrary legislation. So far as possible, domestic legislation should be interpreted consistently with

application.⁵²⁰ Also recognized by the majority of the court was the interpretative principle of comity or the “desire for States to act courteously towards one another”, critical to issues of State cooperation and deference to sovereignty.⁵²¹ This majority conclusion clearly underscored the SCC’s respect for the principle of comity where an application of the *Charter*, in the territory of another State and as an extension and expression of Canadian sovereignty, was sought.⁵²²

This respect for comity as a bar to the application of *Charter* rights abroad was not shared by the entire court. In a concurring dissent Justice Bastarache prophetically disagreed with the majority approach, stating “that the *Charter*’s reach does not end at the ‘water’s edge’. It is less clear, however, when and how the *Charter* applies abroad”.⁵²³ Bastarache J. rejected the majority’s “co-operation” approach⁵²⁴ in favour of

those obligations.” This doctrine of adoption provides that so long as domestic legislation does not conflict with customary international law, those laws are “absorbed” into our common law.

⁵²⁰ *Ibid* at para 46.

⁵²¹ *Ibid* at para 50 and 52, emphasising that in the modern world where transnational criminal activity and rapid transportation and communication was possible, the principle of comity encourages inter-State cooperation in the investigation of these crimes absent lawful compulsion. Likewise, where such assistance by another State within its own territory was sought or provided the principle of comity would guide States to respect the manner in which this assistance was provided. This deference to the means by which a foreign State assisted the requesting State ended only where “clear violations of international law and fundamental human rights” occurred in the manner of assistance given, and that Canadian courts should interpret “Canadian law, and approach assertions of foreign law” respectful of the spirit of international co-operation and the comity of nations”. Comity has also been described as “the deference and respect due by other States to the actions of a State legitimately taken within its territory” in *Morguard Investments Ltd. V. De Savoye*, [1990] 3 S.C.R. 1077, at p. 1095.

⁵²² *Supra* note 514 at 147.

⁵²³ *Supra* note 490 at paras 125 and 139.

⁵²⁴ *Ibid* at paras 139 - 179. Bastarache J reviewed and rejected this test based on the “factors” approach as vague, the question of who initiated the investigation in question as unprincipled, “foreign control” (would always apply to Canadian officials working in foreign jurisdictions), and imposing Canadian standards until they interfere with foreign sovereign authority as inconsistent. Instead, he stressed that the *Charter* acted to impose principles of behaviour rather than restrictively

a sliding-scale of review, reviewing only substantial differences between the alien State's fundamental human rights laws and Canadian *Charter* protections and potentially justifying differences through the principle of comity and the need to fight transnational crime.⁵²⁵ Justice Binnie also expressed his concern with the majority approach, opining that international legal obligations and specifically IHRL were “weaker and their scope more debatable than *Charter* guarantees”, and thus the majority decision “would substitute Canada's ‘international rights obligations’ as a source of limitation on State power”.⁵²⁶ With this limited guidance Canadian courts have continued to face questions of extra-territorial *Charter* application, with mixed results.

Moving forward from *Hape*, the Federal Court in *Amnesty Canada*⁵²⁷ examined the extra-territorial effect of the *Charter* with respect to CF operations in the Islamic Republic of Afghanistan. *Amnesty Canada* involved a challenge to the lawfulness of CF transfers of detained individuals, most often on the battlefield but in any event as the result of operations in Afghanistan, to the custody of Afghan authorities where it was

or proscriptively (para 166), and thus would seldom interfere with foreign laws as stressed by the majority decision. He felt instead that a principled approach to the application of individual *Charter* rights, such as s.10(b), should be applied and thus *Charter* rights should be observed where they could be, but where such rights would interfere with the conduct of foreign officials acting within the lawful ambit of their jurisdiction these rights gave way (paras 168-179).

⁵²⁵ *Ibid* at para 174. The onus will be on the claimant to demonstrate that the difference between fundamental human rights protection given by the local law and that afforded under the *Charter* is inconsistent with basic Canadian values; the onus will then shift to the government to justify its involvement in the activity. In many cases, differences between protections guaranteed by *Charter* principles and the protections offered by foreign procedures will simply be justified by the need for Canada to be involved in fighting transnational crime and the need to respect the sovereign authority of foreign States. On account of this, courts are permitted to apply a rebuttable presumption of *Charter* compliance where the Canadian officials were acting pursuant to valid foreign laws and procedures. Unless it is shown that those laws or procedures are substantially inconsistent with the fundamental principles emanating from the *Charter*, they will not give rise to the breach of a *Charter* right.

⁵²⁶ *Ibid* at para 186.

⁵²⁷ *Supra* note 452.

alleged the detainees were subjected to mistreatment and even torture. Within a rule 107 motion, the court determined that the two questions to be addressed were:

1. Does the *Canadian Charter of Rights and Freedoms* apply during the armed conflict in Afghanistan to the detention of non-Canadians by the Canadian Forces or their transfer to Afghan authorities to be dealt with by those authorities?
2. If the answer to the above question is “no” then will the *Charter* nonetheless apply if the applicants were ultimately able to establish that the transfer of the detainees in question would expose them to a substantial risk of torture?⁵²⁸

In addressing the first question, the Applicants argued that the *Charter* should apply at all times during the armed conflict in Afghanistan to non-Canadians detained by CF and then transferred to Afghan authorities, using what can be termed the “control of the person” test. Second, if the *Charter* did not always apply, then it should apply in circumstances where the transfer of these detainees subjected them to a substantial risk of torture.⁵²⁹ Following an extensive review of both extra-territorial application of the *Charter* and international law, and in particular IHL, Mactavish J. ultimately disagreed with both of the applicant’s propositions.⁵³⁰

The court recognized that the CF could validly claim a broad discretion to detain Afghan civilians, including those not taking an active role in hostilities,⁵³¹ and then applied the test in *Hape* to determine potential extra-territorial *Charter* application. The first part of the *Hape* test was quickly answered in the affirmative as CF personnel were

⁵²⁸ *Ibid* at para 13.

⁵²⁹ *Ibid*.

⁵³⁰ *Ibid*, at paras 100 – 301, with IHL examined in particular at paras 216 – 266. At para 346 both arguments by the applicant were denied.

⁵³¹ *Ibid*, at para 54 as part of the conduct of military activities within Afghanistan.

not surprisingly found to be “State actors” for the purpose of the *Charter*.⁵³² The next consideration was the “effective military control of the person” argument, suggesting that the *Charter* would apply once the CF exercised complete control of a person in their custody.⁵³³ This argument was also rejected by the court, which adopted the reasoning used by the ECtHR Grand Chamber in *Banković*⁵³⁴ which had held that extra-territorial jurisdiction of a State’s law is exceptional, and is only found where effective control of the territory exists.⁵³⁵ Lastly the court also recognized the practical effects of this test, in that it would impose a “patchwork” of legal norms within the coalition operation.⁵³⁶

Turning then to the second question linking the applicability of the *Charter* to allegations of detainee mistreatment or the reasonable likelihood of mistreatment, the court again cited *Banković* in rejecting this “cause and effect” argument.⁵³⁷ The court rejected this approach as unprincipled, reasoning “that it could not be that it is the nature or quality of the *Charter* breach that creates extra-territorial jurisdiction, where it does not otherwise exist”⁵³⁸ – either the *Charter* would apply or it would not. The court thus

⁵³² *Ibid* at paras 102 – 105, finding s.32(1) of the Charter applied to CF personnel.

⁵³³ *Ibid* at paras 187-298.

⁵³⁴ *Supra* note 217.

⁵³⁵ *Supra* note 490 at 88 where the court cited the SCC’s apparent rejection of a control-based test in *Hape*. See also *supra* note 452 at paras 221 – 235 finding effective control could apply to relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, and where all or some of the public powers normally exercised by the controlling Government are in fact exercised.

⁵³⁶ *Ibid*, at para 274 where the court rejected the “control of the person” test as “the practical effect would be problematic in the context of a multinational military effort such as the one in which Canada is currently involved in Afghanistan. Indeed, it would result in a patchwork of different national legal norms applying in relation to detained Afghan citizens in different parts of Afghanistan, on a purely random-chance basis”.

⁵³⁷ *Ibid*, at paras 309-328.

⁵³⁸ *Ibid* at paras 310-311 stating

accorded great weight to the value of certainty in the application of the *Charter* over Canadian “State actors ‘on the ground’ in foreign countries”,⁵³⁹ while obliging those same actors to act in accordance with Canada’s international human rights obligations – independent of any *Charter* obligations.⁵⁴⁰ Thus Canadian jurisprudence would see Canadian State actors adhere to international human rights norms, but without engaging Canadian State responsibility to extend the protection of the *Charter*.⁵⁴¹

In *Canada (Justice) v. Khadr*⁵⁴² the argument regarding the problematic nature of using the “control of the Person” test was similarly discussed and acknowledged by the SCC. *Khadr* examined the activities of Canadian intelligence agents who interviewed Omar Khadr while he was in American detention, and then shared the information learned with U.S. authorities for the purpose of the American prosecution. The SCC, again citing *Banković*, rejected the “cause and effect” argument and found that the

“Surely Canadian law, including the *Canadian Charter of Rights and Freedoms*, either applies in relation to the detention of individuals by the Canadian Forces in Afghanistan, or it does not. It cannot be that the Charter will not apply where the breach of a detainee’s purported Charter rights is of a minor or technical nature, but will apply where the breach puts the detainee’s fundamental human rights at risk. That is, it cannot be that it is the nature or quality of the Charter breach that creates extra-territorial jurisdiction, where it does not otherwise exist. That would be a completely unprincipled approach to the exercise of extra-territorial jurisdiction.”

⁵³⁹ *Ibid* at para 314.

⁵⁴⁰ *Ibid* at para 316. At para 328 the court went on to deny the application, holding that “the *Charter* would not apply to restrain the conduct of the Canadian Forces in Afghanistan, even if the applicants were ultimately able to establish that the transfer of the detainees in question would expose them to a substantial risk of torture”.

⁵⁴¹ *Supra* note 495 (*Khadr II*) at para 14 where the SCC affirmed that as a general rule Canadians abroad are bound by the law of the country in which they find themselves and cannot avail themselves of their rights under the *Charter*, based on customary international law and the principle of comity of nations which generally prevent *Charter* application to the actions of Canadian officials operating outside of Canada, with the possible exception in the case of Canadian participation in activities of a foreign State or its agents contrary to Canada’s international obligations or fundamental human rights norms.

⁵⁴² *Canada (Justice) v. Khadr*, 2008 SCC 28 (CanLII), [2008] 2 S.C.R. 125; (2008), 293 D.L.R. (4th) 629; 72 Admin. L.R. (4th) 1; 2008 SCC 28 (“*Khadr*”).

presence of IHRL obligations which might constrain Canadian actors does not necessarily imply *Charter* applicability to these same actions.⁵⁴³ The court then applied the same reasoning as seen in *Amnesty International* to invoke the *Hape* human rights exception but with a different result, having noted that Khadr's detention and the proposed means of trial he faced were contrary both to US law and the Geneva Conventions.⁵⁴⁴ The Court then reasoned that Canada too was bound by the Geneva Conventions, and that "if Canada was participating in a process that was violative of Canada's binding obligations under international law, the *Charter* applies to the extent of that participation".⁵⁴⁵ It may be observed though that this decision was careful to state

"it was simply participation in the illegal process that entitled Khadr to a remedy under section 7, and it was not necessary to conclude that handing over the fruits of the interviews in this case to U.S. officials constituted a breach of Mr. Khadr's s.7 rights. It suffices to note that at the time Canada handed over the fruits of the interviews to U.S. officials, it was bound by the Charter, because at that point it became a participant in a process that violated Canada's international obligations."⁵⁴⁶

A second case involving Omar Khadr and the extra-territorial application of the *Charter* was subsequently brought before the SCC when he requested a judicial order compelling the Canadian government to seek his repatriation from U.S. custody back to Canada.⁵⁴⁷ The court found that the actions of Canadian State agents established a

⁵⁴³ *Ibid*, at paras 309-328.

⁵⁴⁴ Currie, Robert J., and Rikhof, Joseph, *International and Transnational Criminal Law*, 2/e, (Toronto, ON, CAN: Irwin Law 2014) at p. 563.

⁵⁴⁵ *Supra* note 490 at 88-89, citing *supra* note 542 at 33.

⁵⁴⁶ *Supra* note 544 at 563, citing *supra* note 490 at para 27.

⁵⁴⁷ *Supra* note 495 ("*Khadr II*").

sufficient connection by contributing to a breach of Mr. Khadr's *Charter* rights.⁵⁴⁸ As with their earlier decision in *Khadr*, the SCC first ruled that Mr. Khadr's claim was based on the facts of that first case and therefore their earlier ruling stood, and the *Charter* applied under the *Hape* "human rights exception".⁵⁴⁹ As a result the Court granted a declaration of infringement, advising the Canadian government of this opinion but refraining from ordering the government to actually remedy the situation.⁵⁵⁰ This line of reasoning by the SCC, that *Charter* infringement will be found where Canadian State agents participate in a process that in whole or part violates Canada's obligations under international law, is potentially applicable to RCN operations.

Canadian jurisprudence regarding the application of the *Charter* to actions by State actors has seen a fundamental shift towards a bright-line approach, barring application of the *Charter* in all but exceptional circumstances.⁵⁵¹ While this approach does provide clarity in most extra-territorial situations, the court's treatment of what constitutes an exceptional circumstance is far less clear and has been inconsistently applied by lower courts.⁵⁵² This focus on a bright-line by Canadian courts has also failed to consider many of the factors present within the maritime environment, and therefore is of limited assistance and application in contemporary RCN operations. In particular, given the lack of judicial scrutiny regarding ships, either flagged or unflagged, and individuals detained by Canadian warships, much less individuals brought onboard HMC

⁵⁴⁸ *Ibid* at paras 30, 48.

⁵⁴⁹ *Supra* note 544 at 564.

⁵⁵⁰ *Supra* note 490 at 90.

⁵⁵¹ *Ibid* at 82.

⁵⁵² *Ibid*.

Ships, the application of the bright-line in these situations is uncertain to say the least. In keeping with the practice of Canadian courts, I will therefore seek guidance from international tribunals that have addressed these unique circumstances, which together with Canadian jurisprudence will inform my subsequent analysis and form the basis of my concluding recommendations.

4.4 Canadian Legislative Authorities Impacting on Extra-Territorial Detentions

Generally speaking, Canadian police agencies and courts have no investigative or adjudicative jurisdiction over any person for offences committed “outside Canada”, defined as Canadian internal waters plus Canada’s territorial sea.⁵⁵³ A relatively modest number of exceptions to this general principle are provided for primarily within two sources of authority, the *Criminal Code*⁵⁵⁴ and the *Oceans Act*.⁵⁵⁵ Beyond this limit Canadian enforcement powers continue to exist but are reduced as one moves further out

⁵⁵³ *Supra* note 20 at s.6(2), which is reflective of the *Interpretation Act*, R.S.C., 1985, c. I-21 at s. 8(1) which states “Every enactment applies to the whole of Canada, unless a contrary intention is expressed in the enactment”. Among the few exceptions to this general rule, the *Criminal Code* art 477.3 proscribes police powers in Canada’s maritime zones but with exceptions, including offences “deemed” to have been committed within Canada such as found at s.465(4) of the *Criminal Code* which establishes “Where a person conspires to commit a crime in Canada, but does the conspiracy outside of Canada, they are deemed to have committed the offence in Canada.” These examples of extra-territorial enforcement jurisdiction through the *Criminal Code* however are beyond the scope of this paper and will not be included in this examination. Canadian territory is defined at s. 35 which is then further defined in *supra* note 25 at s.4 as the Canadian coastal waters extending to 12 nautical miles from the baseline, itself found at the low-water line on the coast. This mirrors *supra* note 38 (UNCLOS) arts 3-16.

⁵⁵⁴ *Ibid.*

⁵⁵⁵ *Supra* note 25 (*Oceans Act*), setting out jurisdiction of Canadian courts with regards to Canadian registered ships, offences by ships outside of Canada in the course of hot pursuit and by Canadian citizens outside the territory of any State. *Criminal Code* arts 477.2 and 477.4 establish limitation s on prosecutions that may be brought under these sections. Art 7(2.1) further sets out jurisdiction over offences in relation to fixed platforms attached to the continental shelf and art 78.1 establishes offences committed in relation to ships or fixed platforms; art 7(3.1) establishes as an offence any hostage-taking activity committed outside Canada on a Canadian registered vessel. This list is a limited review of *Criminal Code* offences in relation to the maritime environment.

from Canadian territory, through the contiguous zone⁵⁵⁶ and EEZ⁵⁵⁷ to the edge of the continental shelf⁵⁵⁸ and onto the high seas.

4.4.1 The Criminal Code The *Criminal Code* does provide for some extraterritorial enforcement jurisdiction with respect to offences specified in the SUA. Section 78.1 of the *Criminal Code* incorporates SUA prohibitions against seizing by force or threat of force, acts of violence against persons on board and damage to (including embarked cargo) ships or fixed platforms; interference with maritime navigational facilities or placing objects onboard ships or fixed platforms likely to cause them damage⁵⁵⁹ into domestic Canadian legislation.⁵⁶⁰ The extra-territorial enforcement jurisdiction over offences under s.78.1 is then established at Section 7(2.2) of the *Criminal Code*, which provides that such offences shall be deemed to have been committed within Canada provided the offender is found within territory of a State, other than the State in which the act or omission was committed, that is party to either the SUA or the *Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf*.⁵⁶¹ While there are select, additional *Criminal Code* provisions that

⁵⁵⁶ Discussed in chapter 2.2.1 Coastal State Jurisdiction – Internal waters and Baselines and chapter 2.2.5 Contiguous Zone.

⁵⁵⁷ Discussed in chapter 2.2.6 Exclusive Economic Zone.

⁵⁵⁸ Discussed in chapter 2.2.7 Continental Shelf.

⁵⁵⁹ *Supra* note 20 at s. 78.1.

⁵⁶⁰ As required at *Supra* note 299 (SUA) art. 8(3), 7, 10(1), requiring signatory States to create criminal offences, establish jurisdiction and accept delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat.

⁵⁶¹ *Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf*, U.N.T.S. 1678, I-29004.

would permit for extra-territorial exercise of Canadian jurisdiction,⁵⁶² many of these offences are beyond the scope of RCN operations being discussed within this paper and will not be further explored.

4.4.2 Immigration and Refugee Protection Act While not of immediate and obvious application to the issue of individuals detained by the RCN in contemporary operations, the Immigration and Refugee Protection Act (“IRPA”) does potentially speak to this area.⁵⁶³ The IRPA has as one of its objectives the transformation of Canadian commitments to international human rights agreements into domestic law⁵⁶⁴ including the Refugee Convention⁵⁶⁵ and the CAT.⁵⁶⁶ Of significance the IRPA adopts the Refugee Convention definition of a “refugee”⁵⁶⁷ and the court in *Li v. Canada* recognized its consolidation of the grounds for extending protection under Article 3 of the CAT to those:

⁵⁶² *Supra*, note 20. For example s. 477.1 sets out Canadian jurisdiction for offences occurring in the Canadian EEZ, on or with regards to marine installations on the Canadian continental shelf, offences onboard Canadian flagged vessels, offences committed in the course of hot pursuit, and offences committed by Canadians anywhere while outside the territory of another State. See also s.7 which extends enforcement jurisdiction over a host of offences related to cultural property, fixed platforms affixed to the continental shelf, aircraft, ships and even onboard space stations.

⁵⁶³ *Supra* note 504. Torture is defined within art 1 of the CAT as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

⁵⁶⁴ Catherine Dauvergne, “International Human Rights in Canadian Immigration Law – The Case of the Immigration and Refugee Board of Canada”, 19 *Ind. J. Global Legal Stud.* 305 (2012), at 310, citing *ibid* at section 3(3)(f) “[t]his act is to be construed and applied in a manner that ... complies with international human rights instruments to which Canada is a signatory.”

⁵⁶⁵ *Supra* note 357.

⁵⁶⁶ *Supra* note 358.

⁵⁶⁷ *Supra* note 504 at para 19

in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment...⁵⁶⁸

Thus while an individual can apply for refugee status from within the territory of Canada,⁵⁶⁹ there is no concurrent right to make such claims extra-territorially.

Once a claim is accepted and in order to determine the likelihood of danger or risk required in order for the IRPA to apply, the court in *Li* referred to jurisprudence interpreting Article 3 of the CAT⁵⁷⁰ finding that the claimant must establish this risk along a balance of probabilities.⁵⁷¹ Based upon this analysis, the court proposed a spectrum extending from “mere possibility” through to “highly probable”⁵⁷² and ultimately held that to benefit from the protection of IRPA the likelihood an individual would be subjected to torture upon return to another State, “The requisite degree of

⁵⁶⁸ *Supra* note 564 at 311-312. See also *Li v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 (CanLII), (“*Li*”) at para 17. Also incorporated into the IRPA is the prohibition against using information reasonably believed to have been obtained as the result of cruel, inhuman or degrading treatment or punishment within the meaning of art. 1 of the CAT.

⁵⁶⁹ *Supra* note 504 at art. 99.

⁵⁷⁰ *Supra* note 568 (*Li*) at para 18, noting that Parliament gave domestic effect to art 3 of the CAT at IRPA art. 97(1)(a). The court further cited at para 20-24 a number of comments made by the UN Committee Against Torture regarding the required standard of proof to establish the application of CAT Article 3, stating at para 27 that “the words in paragraph 97(1)(a) and Article 3 are almost identical and deal with the same subject-matter, they should be interpreted the same way.”

⁵⁷¹ *Ibid* at para 14, following the reasoning set out at *supra* note 459 (*Baker*).

⁵⁷² *Ibid* at para 25.

danger of torture envisaged by the expression ‘believed on substantial grounds to exist’ is that the danger of torture is more likely than not”.⁵⁷³

In Canada, the ability to deny aliens entry into Canadian territory is also governed by the IRPA,⁵⁷⁴ and in the context of an HMC Ship is possibly engaged where individuals are detained onboard. Canadian courts have established that an alien person has no right to enter or remain in Canada except by grant of the Crown.⁵⁷⁵ In *Hagos v. Kirkoyan* the Federal Court examined the IRPA and the meaning of being “lawfully present” with regards to being in Canada, and determined these words should retain their common meaning.⁵⁷⁶ The court further held that the concept of residence is not akin to “lawful residency”, as residency status under the IRPA is not determinative with regards to an individual who has lived in a location for a sufficient period of time so as to “live” in the community – whether long term or temporarily.⁵⁷⁷ The Federal Court then went on to explain that “the requirement for lawful presence is intended to exclude only those situations

⁵⁷³ *Ibid* at para 36, applying this test both to section 97(1)(a) and (b) equally at para 39.

⁵⁷⁴ *Supra* note 504 at art 6, which empowers the Minister of Citizenship and Immigration to designate any person or class of persons as officers generally empowered under the Act. At arts 20.1, 34(2), 35(2) and 37(2)(a) and art. 77(1) general delegation of authority is specifically excluded with regards to designating irregular arrivals or issue a certificate stating that the individual is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, as well as the ability to make determinations of admissibility for those otherwise inadmissible by virtue of possible security, human or international rights violations or organized crime affiliation.

⁵⁷⁵ *Prata v. Minister of Manpower and Immigration*, 1975 CanLII 7 (SCC), [1976] 1 S.C.R. 376. At p. 380 Martland J. for the court held that “The right of aliens to enter and remain in Canada is governed by the *Immigration Act*” and s.5(1) states that “No person, other than a person described in section 4, has a right to come into or remain in Canada”.

⁵⁷⁶ *Hagos v. Kirkoyan*, 2011 FC 1214 (CanLII) at para 79-80 referring to *Prosecutor v. Popovic*, IT-05-88-T, Final Judgment (10 June 2010) (para 900) interpreting the words “lawfully present” as retaining their common meaning and not be equated to any concept of lawful residency, as the prohibition against forcible transfer and deportation is intended to prevent civilians from being uprooted from their homes and to guard against the wholesale destruction of communities.

⁵⁷⁷ *Ibid*.

where the individuals are occupying houses or premises unlawfully or illegally and not to impose a requirement for ‘residency’ to be demonstrated as a legal standard”.⁵⁷⁸

From this it would appear that individuals brought onboard HMC Ships have no concomitant right to remain, nor do they necessarily gain the right to submit a claim of for refugee status and the attendant protections under the IRPA. Should, however, refugee status be sought in this circumstance and granted, any attempt to return the refugee to another State where a risk of torture is claimed would need to examine this claim on a standard of balance of probabilities.

4.4.3 Other Canadian Acts A number of additional Canadian Acts could also play a role in situations where HMC Ships detain individuals at sea. The *Emergencies Act* is one such Act as it partially incorporates into Canadian law the ICCPR, requiring in particular that a number of fundamental rights set out in the ICCPR are not to be limited or abridged even in a national emergency.⁵⁷⁹ Likewise, the *Canadian Multiculturalism Act*⁵⁸⁰ recognizes the ICCPR provision requiring persons of ethnic, religious or linguistic minorities be permitted the right to enjoy their culture, religion and language. In large part the remainder of the ICCPR has been incorporated into Canadian law through the *Charter*, thus the ICCPR may have some impact upon Canadian actions within the international forum.

⁵⁷⁸ *Ibid* at para 80.

⁵⁷⁹ *Emergencies Act*, R.S.C., 1985, c. 22 preamble.

⁵⁸⁰ *Canadian Multiculturalism Act*, R.S.C., 1985, c. 24 preamble stating that “persons belonging to ethnic, religious or linguistic minorities shall not be denied the right to enjoy their own culture, to profess and practice their own religion or to use their own language”.

Similar to *Charter* requirements for life, liberty and security of the person, not to be arbitrarily detained or imprisoned,⁵⁸¹ article 9 of the ICCPR provides that those detained “shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful”.⁵⁸² The ICCPR further requires that any subsequent judicial proceeding be held within a reasonable time, and that detainees are normally to be released pending this trial. These obligations under the ICCPR for limiting pre-trial detention and the liberty interests of an accused were cited with approval by the SCC in *Mills v. The Queen*⁵⁸³ where the court acknowledged Canada’s international obligations. The court then further drew guidance from the ECtHR decision in the *Wemhoff Case*,⁵⁸⁴ referring to ICCPR Article 5(3) to decide the issue of unreasonable delay and the right to be tried within a reasonable time. The majority of the SCC acknowledged the *Wemhoff Case* in recognizing that investigative difficulties, circumstances and the nature of the case including complexity of the facts, number of witnesses or need for evidence found abroad are proper factors to consider when determining if rights to be brought to trial within a reasonable time were observed.⁵⁸⁵

In the extra territorial context of RCN maritime operations, there is regrettably a distinct lack of judicial discussion on the applicability of the ICCPR to Canadian operations involving extra-territorial detentions. Guidance can be found however in

⁵⁸¹ *Supra* note 4 at ss 7 and 9 respectively.

⁵⁸² *Supra* note 359 at art 9(1) and (2).

⁵⁸³ *Supra* note 386 (*Mills v. The Queen*) at para 143.

⁵⁸⁴ *Ibid* at para 182. where the court referred to the ECtHR decision in *Wemhoff case*, judgment of 27 June 1968, Series A No. 7.

⁵⁸⁵ *Ibid*, generally at paras 180-217 and in particular at para 182.

General Comment 31 of the Human Rights Committee,⁵⁸⁶ which provides that States party to the treaty shall respect and ensure that the rights set out in the ICCPR are extended to all persons subject to their jurisdiction, including those not within the State's territory but within the "power or effective control of that State Party", and specifically contemplates expeditionary deployments of military forces.⁵⁸⁷ This guidance, while helpful, is not the final word in this matter however, as the degree to which the ICCPR, implemented in this context through the *Charter* and other legislation as described, has been held to apply is still open to interpretation. Where jurisdiction extra-territorially is being argued on the basis of authority and control over a person alleged to have suffered a violation, the "ECtHR has effectively required a more stringent test of State involvement in the alleged violation".⁵⁸⁸ This requirement for State involvement would require more than the mere assertion that the State was exercising authority and control

⁵⁸⁶ Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

⁵⁸⁷ *Ibid* at art 10, stating that "States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction", that these rights must be respected by States with regards to "anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party", and that the benefit of these rights

"is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation." (emphasis added).

⁵⁸⁸ Raffaella Nigro, "The Notion of 'Jurisdiction' in article 1: Future scenarios for the extra-territorial application of the European Convention on Human Rights" (2010) 20 Italian Y.B. Int'l L. 11 at 17, citing Issa (*supra* note 227) para 76.

over the alleged victim, but also would require evidence linking involvement of the State actors in the alleged violation itself “beyond a reasonable doubt”.⁵⁸⁹

The concern is therefore raised that under both the *Charter* and Canada’s international obligations, particularly the ICCPR, Canadian warships should act with all reasonable haste in observing the rights of detainees taken on the high seas to be promptly brought before judicial authorities, if subsequent Canadian legal action is to succeed. Although some contextual interpretation will occur to accommodate the circumstances of a given situation, these circumstances should not be interpreted so as to permit bringing detainees before judicial authorities “when convenient”. While obligations in this regard are not directly imposed on naval commanders, depending upon the objectives of the mission they may be asked to account for any delay in delivering a detainee to judicial authorities at a subsequent proceeding.

4.5 Breaches of Detainee Rights and Remedies

Under Canadian constitutional and statutory law those detained unlawfully, or in breach of their rights, may seek redress based upon that breach. Such redress involves a number of requirements including the venue, available lawful remedies and recognition that the Crown enjoys a large measure of immunity when acting under the authority of the Crown prerogative. I will therefore discuss several avenues of legal redress applicable to alleged breaches of detainee rights, beginning with civil remedies and followed by criminal sanctions.

⁵⁸⁹ *Ibid* (Raffaella) at pp. 18-19.

4.5.1 Crown and Agent Civil Liability for Breaches of Detainee Rights The *Crown Liability and Proceedings Act*⁵⁹⁰ provides one avenue of redress for those alleging that the federal Crown is vicariously liable at tort for the wrongdoings of its ‘servants’. Legal claims brought under this Act must, however, be brought in Canada for claims arising in Canada⁵⁹¹ in either the Federal or respective provincial courts,⁵⁹² and with few exceptions the Crown is immune from court orders directing or prohibiting actions.⁵⁹³ Crown servants acting beyond their authority under statute or Crown prerogative are not immune to these court orders.⁵⁹⁴ However, provided they acted reasonably, in good faith and within the scope of their duties the Crown servant may benefit from the Treasury Board policy on Legal Assistance and Indemnification.⁵⁹⁵ In order for the federal Crown to be found vicariously liable the tortious act must be sufficiently connected with the servant’s employment by the Crown, but not where the servant exercised ‘independent discretion’ or a power or duty conferred directly upon them by law when they committing the tort.⁵⁹⁶

⁵⁹⁰ *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 (“*Crown Liability Act*”).

⁵⁹¹ *Ibid* at s.3, and *supra* note 427 at 6.2(d) where the meaning of Crown servant is discussed.

⁵⁹² *Ibid* (Hogg) at 4.1, citing *ibid* s.21.

⁵⁹³ *Ibid* (Hogg) at 2.4(i) discussing constitutional injunctions as preventing a violation of the Constitution, which includes the *Charter*. Likewise Crown immunity from constitutional mandamus is not complete, particularly when a duty is imposed by virtue of the *Charter* for which relief is provided under s.24 (*ibid* (Hogg) at 2.6(d)).

⁵⁹⁴ *Ibid* (Hogg) at 2.4(c).

⁵⁹⁵ *Treasury Board policy on Legal Assistance and Indemnification* effective 1 September 2008 (Online: <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=13937§ion=text>). This policy applies to Crown servants acting in good faith, not against Crown interests, and within the scope of their duties of employment.

⁵⁹⁶ *Ibid* (Hogg) at 6.2(k) and (m). Independent discretion is commonly found in police officers when “acting in exercise of statutory or common law powers vested in him or her personally and must be exercised according to his or her independent discretion”, however is not found when performing “general police duties under the direction and control of his superiors”. Should independent discretion be found, the Crown servant remains personally liable for damages at tort.

In the event sufficient lawful authority is found to support a governmental act then liability in tort does not arise, however compensation under either the statutory authority or the prerogative may still be available⁵⁹⁷ and while the Crown is immune from enforcement of a court's judgment, the *Crown Liability Act* does account for court-determined damages.⁵⁹⁸

Despite these various legal avenues available to pursue a tort claim against the Crown, members within the CAF are granted sweeping immunity “for military activity, drawing no distinction between war and peace; between combat, training and discipline; or between injured civilians and injured members of the forces”.⁵⁹⁹ This *carte blanche* approach to questions of civil negligence where defence matters are involved is unique, as Canada stands alone among her allies in providing this sweeping grant of statutory immunity.⁶⁰⁰

4.5.2 Crown and Agent Criminal Liability for Breaches of Detainee Rights While in theory the Crown may be liable for offences contrary to Canadian criminal law provided the statute is sufficiently broad, in practice such prosecutions are rare.⁶⁰¹ Such a prosecution could potentially be made where acts constituting torture occur, bearing in

⁵⁹⁷ *Ibid* (Hogg) at 6.4 (a) – (c).

⁵⁹⁸ *Supra* note 590 at ss.29-30, and at common law as discussed at *ibid* (Hogg) 3.1(b).

⁵⁹⁹ *Ibid* (Hogg) at 7.6(b), referring to *ibid* section 8 exemption of the Crown from tortious liability “in respect of anything done or omitted in the exercise of any power or authority exercisable by the Crown, whether in time of peace or of war, for the purpose of the defence of Canada or of training, or maintaining the efficiency of, the Canadian Forces”.

⁶⁰⁰ *Ibid* (Hogg), citing the lack of a similar blanket immunity by the U.K., Australia, New Zealand and the U.S. who by contrast have adopted the common law to the unique environment of military activity.

⁶⁰¹ *Ibid* (Hogg) at 11.14(a) and (b).

mind that Canada has ratified the CAT,⁶⁰² and incorporated the offence into Canadian law.⁶⁰³ The “question of how States ought to treat detainees must never be confused with the question of what detention practices are so egregious as to subject the captor to criminal liability”.⁶⁰⁴ In order to find potential liability against the Crown, therefore, an ‘egregious’ detention practice constituting torture and sanctioned by government policy would need to be established. While such an offence is unlikely this factor must still be borne in mind by all members of the chain of command, and appropriate safeguards and oversights be enforced to ensure that those detained are cared for in an appropriate and lawful manner.

In contrast, Canadian Crown servants are unlikely to benefit from any protection of Crown immunity where their actions breach statutory law, regardless of whether by way of criminal charges or if named in civil proceedings. While Crown servants named in civil proceedings may be entitled to the protection offered under the Treasury Board provisions, provided they meet applicable criteria,⁶⁰⁵ only those charged under the *National Defence Act* Code of Service Discipline enjoy the right to be represented, at Crown expense, for any charges so brought.⁶⁰⁶ In such circumstances the defence of

⁶⁰² *Supra* note 358.

⁶⁰³ *Supra* note 20 at s.269.1, and in particular defined “official” as (2)(c) to include “a member of the Canadian Forces”.

⁶⁰⁴ *Supra* note 14, 8:20.40(a) at 8-18 citing B.R. Roth, “Just Short of Torture: Abusive Treatment and the Limits of International Criminal Justice”, JICJ 6 (2008), 215-239.

⁶⁰⁵ *Supra* note 595.

⁶⁰⁶ *Supra* note 13 Part III Code of Service Discipline, and art. 249.17 providing the right to be represented.

superior orders could conceivably be available,⁶⁰⁷ as was argued in a previous prosecution alleging torture by deployed CAF personnel.⁶⁰⁸ It is therefore incumbent upon individual sailors and the members of their chain of command immediately responsible for the care and treatment of detainees to be well advised of applicable rights and obligations owed in the situation.

4.6 Conclusion

Giving effect to international law in Canada's domestic law is accomplished in one of two ways – by incorporation in the case of customary international law, and by transformation in the case of treaty law. This melding of international and domestic law is important to the RCN's international deployments as both sources of lawful authority are normally required given the nature of operations conducted. In the context of contemporary Canadian naval operations, the domestic authority to conduct the operations themselves is most often derived from exercise of the Crown Prerogative, with potential exceptions grounded in statutory authority when the CAF acts in support of other Canadian governmental departments.

The application and effect of the Canadian *Charter*, if found to apply extraterritorially, is of equal importance to these contemporary missions where deprivation of liberty is present. Recent decisions in Canadian courts, including the

⁶⁰⁷ *Supra* note 427 at 11.15 (c), describing that merely by acting in the course of employment a Crown servant is not rendered immune from statutory law, and criticizing the obedience to superior orders doctrine as insufficiently prejudicial to the Crown to shield a perpetrator of a wrongful act while the superior remains liable.

⁶⁰⁸ *Supra* note 14, 8:20.40(b) at 8-20 describing court martial convictions of a CF officer and two subordinates for assaulting a detained foreign national while on a peacekeeping mission. The subordinates were convicted of assault contrary to *supra* note 20 s.266, while charges against the officer were withdrawn after a significant delay in prosecuting the matter.

Supreme Court, have evolved to restrict the extra-territorial reach of the *Charter*, but to date have only examined situations of Canadian law enforcement and CF deployments occurring in another State's territory. As a result of the Court's profound respect for comity and the territory of these foreign States, these decisions have largely limited *Charter* attribution for acts by Canadian State actors, rulings in contrast to the holdings of the ECtHR with respect to the extra-territorial reach of the ECHR. Given that Canadian Courts have not (yet) adopted the approach of the ECtHR in this regard, and the differences inherent in naval operations as compared to the law enforcement and military questions examined in the context of the Afghanistan conflict, these decisions cannot simply be taken as the final word in this regards.

Lastly, criminal or civil legal actions taken where a detainee's rights are alleged to have been breached, as well as possible sanctions against those held responsible and remedies for the victim, must be recognized. While some protection exists for Canadian State agents acting within the normal scope of their duties, not all breaches will fall within this range, and it becomes important for the chain of command to understand fully the nature of potential breaches and resultant consequences. Failure to do so can place both the mission, and individual sailors, in jeopardy.

I will therefore now turn to extrapolating Canadian domestic protections and obligations towards detainees, and their co-existent rights, to the sphere of contemporary RCN missions. This analysis will refer to a number of international decisions that provide useful guidance in this area and will assist in my subsequent analysis of those legal considerations present in these operations, and the considerations that I will propose be adopted.

CHAPTER 5: ANALYSIS OF THE LEGAL WATERS SURROUNDING CONTEMPORARY OPERATIONS

I will now analyze international and domestic law, in particular international and domestic human rights obligations, as they apply to contemporary operations of the RCN. In order to frame this analysis I will begin by setting out in greater detail a central issue, that being the reach of Canada's extra-territorial jurisdiction in the maritime environment. In analyzing this question I will again refer to the rationalization seen in a number of international decisions, followed by a proposed new way to view the question in the maritime environment – that being the adoption of concepts surrounding frontier zones and borders. These concepts frame my analysis, as they engage the issue of when a person may be considered to be within the critical aspects of Canadian jurisdiction and thus may perhaps engage extra-territorial application of Canadian IHRL obligations. By virtue of the nature of the maritime environment, HMC Ships regularly interact with other ships and those embarked on them. This interaction varies from hails involving simple passage of information but no physical contact, to intrusively boarding these ships and potentially bringing individuals back onboard the Canadian warship.⁶⁰⁹ Given this range of possible actions it is critical to examine the point at which an individual is considered detained, and whether this is affected by the situation or mission being conducted. It is through this lens that I suggest a rational and predictable set of norms can be most easily established, providing predictability to HMC Ships while ensuring Canada properly observes her human rights obligations. In conclusion on this point I will

⁶⁰⁹ Maritime Command Boarding Operations Manual CFCD 108 (B), (DMPOR 4-4-4) at 3-5/10 – 3-7/10, noting that the holding of detainees onboard HMC Ships will normally be done on an exceptional basis and only for the minimal time necessary to transfer them onward as required.

examine what actions can subsequently be taken towards those that are found to have been detained by HMC Ships, and any attendant obligations and rights likely found in these situations.

Lastly I will apply this analysis to the various RCN contemporary operations and how each mission may affect the status of a person detained onboard a Canadian warship, together with possible rights and obligations owed to the detainees in those situations. This will begin with missions conducted in support of OGDs in their law enforcement mandate, and as discussed are centered on support to the RCMP for criminal law enforcement action and the DFO for enforcement of Canadian legislation of the fishing industry. Next I will examine contemporary counter-piracy operations, both those conducted under UNCLOS alone as well as those performed in support of UN Security Council Resolutions. Lastly, I will discuss contemporary counter-narcotics operations being conducted by ships of the RCN.

5.1 What Determines Canadian Jurisdiction over Maritime Detainees?

In answer to this question I will first turn to international responses regarding the reach of extra-territorial jurisdiction. As was seen in *R(Al-Saadoon)* and *Al-Saadoon*, and in *Al-Skeini* and *Al-Skeini and Others*, the reach of a State's extra-territorial jurisdiction, and thus responsibility for the application of IHRL obligations at international law is far from settled. While the 'effective control, displacing other existing (domestic) law' approach to extend domestic human rights obligations extra-territorially was adopted in *R(Al-Saadoon)*, critics point out that this unfairly borrowed from the LOAC concept of occupation in favour of the more general public international law field, and that the House of Lords decision narrowly conflated the degree and nature of obligations

triggered extra-territorially when State forces exercised control of an area.⁶¹⁰ One proposed solution would instead revisit the “Sliding Scale/Cause and Effect” idea proposed by the applicants in *Banković*, that “Obligations apply insofar as control is exercised; their nature and scope is set in direct proportional relation to the level of control”.⁶¹¹ One positive aspect of this approach, although it is based on recognized LOAC laws of occupation (not IHRL), is that it is triggered where territory is “placed under the authority of the hostile army” and extends “to the territory where such authority has been established and can be exercised”.⁶¹² This proposal suggests that where such control is exercised extra-territorially by State forces, “a relatively modest set of substantive obligations would actually subsist, qualitatively and quantitatively different from those in play in the State’s own territory, even if derived from the same legal source”.⁶¹³ This means of extending a State’s domestic human rights obligations extra-

⁶¹⁰ R. Wilde, “Triggering State Obligations Extra-territorially: The Spatial Test in Certain Human Rights Treaties”, 40 *Isr. L. Rev.* 503 2007 at 515-523, and in particular at 520 - 523 where Wilde takes exception to the two arguments used in the Court of Appeal stage of *Al-Skeini*, *supra* note 218 against this concept – that being the cooling effect such a blanket assumption of legal authority would have on indigenous efforts to achieve self-governance; and the ‘cultural imperialism’ argument of importing foreign ideals into the controlled territory. His response rests on the argument that self-determination is itself an un-enumerated human right that must co-exist with other areas of international law, and that rather than demonstrating cultural imperialism such an approach would permit distinctions between the law as applied within a State’s own territory and foreign territory under its effective control. Although certainly useful as an academic viewpoint for further discussion, it provides little in the way of concrete guidance for operational commanders.

⁶¹¹ *Ibid* at 524-525, citing *Banković*, *supra* note 217 at para 75.

⁶¹² The test for occupation is found in the *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*. The Hague, 18 October 1907 (“Convention IV”) art. 42(1) and more generally at art. 42-46.

⁶¹³ *Supra* note 610 at 519, citing Lord Justice Sedley in the Court of Appeal decision *Al-Skeini v. Sec. of State for Defence* [2005] EWCA 1609 (Civ.) at paras 196-197 when he opined “No doubt it is absurd to expect occupying forces in the near-chaos of Iraq to enforce the right to marry vouchsafed by Art. 12 or the equality guarantees vouchsafed by Art 14. But I do not think effective control involves this... it involves two key things: the de facto assumption of civil power by an occupying State and a concomitant obligation to do all that is possible to keep order and protect essential civil rights. It does not make the occupying power the guarantor of rights; nor therefore does it demand sufficient control for all purposes. What it does is place an obligation on the occupier to do all it can. If this is

territorially suffers however from a flaw already identified in the purposive approach found in other, and most particularly Canadian, judicial decisions, that being the lack of predictability in its application. Such an approach would also permit the tailoring of a State's approach to IHRL, an outcome that facially appears normatively suspect.

The 'sliding scale' approach to the extra-territorial application of the *Charter* has received little acceptance in Canadian jurisprudence. Such a methodology would be a markedly different way of viewing *Charter* rights from the SCC's current approach, as will be discussed, and pays less attention to the reality and historical evolution of sovereign jurisdiction exercised extra-territorially as a customary international norm based on international legal principles including nationality,⁶¹⁴ protective,⁶¹⁵ universal,⁶¹⁶ and passive personality.⁶¹⁷ Although it may be pointed out that these established principles are all examples of legislative jurisdiction over individuals, and not human-rights based rules applied to enforcement jurisdiction which could inform the "substantial and *bona fide* connection between the subject-matter and the source of the jurisdiction", critics of this approach continue to argue it is unworkable due to the imprecise degree of jurisdiction granted in any particular situation.⁶¹⁸ The sliding-scale approach would see extra-territorial jurisdiction "divided and tailored in accordance with the particular

right, it is not enough to say that the U.K., because it is unable to guarantee everything, is required to guarantee nothing." This reasoning is also picked up by the ECtHR in *Al-Skeini and Others*, *supra* note 221 at paras 138-140 when discussing pre-conditions and factors to be considered in finding a State to exercise "effective control over an area" extra-territorially.

⁶¹⁴ *Supra* note 198 and discussed at *supra* note 209.

⁶¹⁵ *Ibid*, discussed at *supra* note 210.

⁶¹⁶ *Ibid*, discussed at *supra* note 212.

⁶¹⁷ *Ibid*, discussed at *supra* note 211.

⁶¹⁸ *Supra* note 198 at 1028, citing Ian Brownlie, *Principles of Public International Law* 297-98 (6th ed. 2003) at 309.

circumstances of the extra-territorial act in question”,⁶¹⁹ and while satisfying to the universal human rights advocate, would provide little certainty for those executing missions at sea.

5.1.1 Human Rights Obligations towards those onboard HMC Ships A second alternate approach found within international jurisprudence would combine the ‘effective control’ and ‘authority and control’ branches of reasoning seen in *Al-Saadoon*⁶²⁰ to determine when State domestic obligations are found extra-territorially, but again ambiguity is present. The suggested ‘authority and control’ test to establish extra-territorial control over individuals held by State agents, and the ‘effective control’ over territory outside of a States’ own borders requirement,⁶²¹ were used in combination by the Strasbourg Court without settling to what degree either arm of the test bears the greatest weight. The court in that matter held that in the situation of total and exclusive *de facto* and *de jure* control exercised by State authorities over the place in question, the person would be within that State’s jurisdiction.⁶²² This decision was based however on a very narrow and technical reading of the facts of that case, which may have given insufficient weight to tactical realities in favour of a narrow and precise reading of one of the U.K. rules in force at that time in the Iraq Theater. As may be noted from this decision, the ruling does not clearly set out which branch of the tests, ‘authority and control’ over the individual or the ‘effective control’ over a space, bear greatest weight in determining jurisdiction. Regardless, both tests may at some point apply in the situation of a warship –

⁶¹⁹ *Supra* note 610 at 524 citing *Banković* at paras 75-76.

⁶²⁰ *Supra* note 219 at para 35 (summary).

⁶²¹ *Ibid* at paras 76-77.

⁶²² *Ibid* at para 88, speaking with reference to the ECHR.

the question operationally becomes at what point in the encounter either or both tests are sufficiently met.

In the Canadian domestic context, Canadian courts are noted for employing a flexible and progressive interpretation to the *Charter* together with a ‘purposive construction’ approach when examining *Charter* rights against government actions, largely driven by the desire for predictability.⁶²³ This concern for predictability can be seen in both the *Hape* and *Amnesty* SCC decisions, where the court commented on the lack of certainty the “Sliding Scale/Cause and Affect” approach would involve. While recognizing that the wording of Article 32(1) of the *Charter* and Article 1 of the *ECHR* are completely dissimilar, both have been interpreted to (normally) confine the enforcement jurisdictional reach of these two instruments on a territorial (or regional) basis, recognizing that extra-territorial enforcement jurisdiction is an uncommon event. In the result, Canadian courts in *Hape* and *Amnesty* did not fully resolve this question by finding that human rights protected by the *Charter* could exist where Canadian agents exercise both ‘effective control’ over territory outside of Canadian borders, and where detained individuals come under the ‘authority and control’ of Canadian agents acting on behalf of Canada. It may be noted that these decisions do not fully square up with the SCC’s decisions in *Khadr* and *Khadr II*, which by using the *Hape* “human rights” methodology found that Canada’s international obligations had been breached by State agents and in the result found his s.7 *Charter* rights were engaged extra-territorially.⁶²⁴ While extra-territorial application of the *Charter* was found in these two instances, it can

⁶²³ Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (Oxford: University Press 2000) at 3.30.

⁶²⁴ *Supra* note 542 at para 18, *supra* note 495 (*Khadr II*) at para 20.

be argued that due to the narrow basis used by the Courts in finding Canada's agents had breached Canada's international obligations, they are of little precedential or instructive value.⁶²⁵

While effective control over territory and authority and control over a person remains broadly defined within international law, in the context of naval operations this question can most easily be established at one point - when a person is detained onboard the effective control of a Canadian warship, thus also finding themselves under the authority and control of Canadian agents. At this point, strong argument exists to support the view that those detained could be entitled to IHRL protections triggered by their detention, and likewise Canada could become obligated to observe those rights, as Canadian warships remain subject to Canadian law to the exclusion of all other State claims of jurisdiction.

5.1.2 Human Rights Obligations towards those not onboard HMC Ships

Such a jurisdictional nexus is not so clearly found, however, prior to embarking individuals onboard Canadian warships. In those situations where Canadian warships have boarded another vessel, while arguably Canadian sailors are exercising a measure of authority and control over the crew onboard of that vessel, exercise of effective control is in question, particularly where the target vessel is a foreign flagged ship. As discussed, UNCLOS recognizes that in most circumstances it is the law of the flag State that is applied onboard flagged ships, thus on the high seas to find effective control over persons onboard would require a displacement of flag State law. While it must be acknowledged that the degree of jurisdiction exercised by a flag State over its vessels is not the same as

⁶²⁵ *Supra* note 544 at 565.

sovereignty exercised over its territory, while on the high seas it nevertheless falls to the flag State to exercise legislative, enforcement and adjudicative jurisdiction over the vessel and, in most circumstances, those onboard. Such a displacement of this law of the flag would therefore likely require an exception to the principle of sovereignty, and as explored in *Hape*⁶²⁶ and *Amnesty Canada*⁶²⁷ would also likely not accord with Canadian judicial respect for comity. Thus, absent an express intent to displace flag State jurisdiction (likely pursuant to enforcing Canadian domestic law or where law of the flag protection is lost, as in cases of piracy), effective control will not be found and the crew will continue to enjoy the protection of the ship's flag State.

In those situations where RCN sailors board flagless vessels, finding effective control sufficient to extend Canadian State obligations is still not certain. While it has been stated that within the context of counter-piracy operations the holding of pirates onboard their own vessel vs. the warship is a distinction without a difference,⁶²⁸ such an argument ignores the UNCLOS Articles on this subject. UNCLOS is manifestly silent with regards to what is required to "seize" a pirate vessel and "arrest the persons" under the authority of Article 105. This silence may then be contrasted with UNCLOS Article 110, authorizing the boarding of suspected vessels in order to make a determination of their status. This limited investigative authority has been described as insufficient to argue *de jure* control over those onboard the vessel in order to engage international

⁶²⁶ *Supra* note 490.

⁶²⁷ *Supra* note 67.

⁶²⁸ *Ibid* at 155 where the "effective control" test is referred to and it is opined that regardless of where the pirates are held (retained in their own vessel, or brought onboard the warship) they are under effective control of the warship.

protections,⁶²⁹ thus leaving bare this required arm of the test. Therefore it is likely that while boarding flagless vessels for the purpose of simply investigating and determining the status of those onboard, *de jure* control is not exercised to the extent required to establish effective control over the vessel.

In partial response to this question of the extent and nature of extra-territorial jurisdiction a State assumes during maritime operations, I would propose to adopt a number of terms and concepts that already see widespread acceptance. Special Rapporteur M. Kamto for the United Nations General Assembly set out these terms in his 2006 *Second Report on the Expulsion of Aliens* when discussing the nature of State territory, and it is to these that I will now refer.

5.1.3 Re-Conceptualizing Naval Operations through Frontiers and Borders

Common to the issue of Canadian human right obligations due to detainees in maritime operations is the situation of an individual, held under constraint and within the known limits of one place (the ‘sending State’), and possibly their compelled movement to the ‘receiving State’ or ‘receiving entity’. This circumstance as it has been examined through Canadian and international jurisprudence and writings therefore rests upon the concept of a State’s territory. As will be explained and applied in my analysis, a State’s territory is bounded by a territorial frontier, and thus the concepts of what constitutes a State’s territory and its frontier will be examined with a view to extrapolating this idea to the context of HMC Ships operating on the high seas.

A State’s territory is that space where “the State exercises all of the powers deriving from sovereignty”, and “excludes spaces where it exercises only sovereign rights

⁶²⁹ *Ibid* at 155, where the applicability of the ECHR is questioned.

or functional jurisdiction, such as the continental shelf and the contiguous zone, fishing zone and exclusive economic zone.”⁶³⁰ It has been proposed that while a strict delineation of State territory is not required at international law for that State to exist, a recognized frontier must be found that “carries with it legal consequences from its existence”, and “imports ... a definite boundary line throughout its length”.⁶³¹ The boundary of State territory consists of a frontier line, with its sharp geographic delineation of sovereignty, and what has been conceptually proposed as a multi-functional “frontier zone” made up of delineated areas with varying legal status that “generally only happens through official points of entry and departure, including ports, airports and land frontier posts”.⁶³²

A State’s ability to refuse an alien’s entry to its territory is well established at international law, expressed in the preamble to the International Rules on the Admission and Expulsion of Aliens adopted by the Institute of International Law, and every State has as a consequence of its sovereignty and independence the right to admit, deny admission, conditionally admit or expel aliens.⁶³³ This right is not unqualified though, as

⁶³⁰ M. Kamto, Special Rapporteur, *Second Report on the Expulsion of Aliens* (20 July 2006 UN General Assembly) (Online: <http://www.unhcr.org/refworld/docid/49997af60.html>, accessed 29 December 2012) ‘Second Report’ at para 179. At para 181 he goes on to point out that there is no requirement at international law that only a single State possesses the territory in question, or that the constituted components (either land or islands) be co-located, much less be geographically close to the main part of the State.

⁶³¹ *Territorial Dispute (Libya v. Chad)*, 1994 I.C.J. 7 (Feb 3) at paras 42, 47. *Ibid* at paras 183-184, this boundary can exist both on land and into the maritime zone for riparian States, and as a creature of both international and a States domestic law is a geographic delineation of the limit to which a State may fully enforce its laws.

⁶³² *Ibid* (Kamto) at para 185-186. These are all considered ““checkpoints and, in international airports and certain ports, special areas for the detention of aliens denied entry or in the process of expulsion, and international areas where aliens are considered still outside the territory”.

⁶³³ M. Kamto, Special Rapporteur Third Report on the expulsion of aliens A/CN.4/581 at para 4, citing *Annuaire de l’Institut de droit international*, vol. XII, 1892-1894, Geneva session, pp. 218-219.

universal concepts of humanity and justice require States to also respect “the rights and freedom of foreigners who wish to enter their territory or who are already in it”, to the extent compatible with State security.⁶³⁴ Thus a State retains the ability to refuse an alien’s entry, even one who has formally filed an application for refugee status, provided they are not yet within the State’s territory or remain within “centers where candidates for admission to the country’s territory are detained”.⁶³⁵ This territorial distinction is critical, as aliens who have traversed beyond a State’s immigration control barriers and into the State’s territory are no longer subject to non-admission and may only be subjected to expulsion as will be further defined below.⁶³⁶

Returning then to the territorial frontier zone of a State, it is conceptualized as more than a physical line separating territorial areas, but an international limit of State sovereignty and jurisdiction⁶³⁷ formed by a series of points delineating the furthest limits within which the legal order of a State is applicable, either on land or within the maritime environment.⁶³⁸ Within this zone the State continues to exercise legislative, enforcement and adjudicative jurisdiction and can regulate activities therein, as it exists “at the limits of the territory of a State in which a national of another State no longer benefits from the status of resident alien and beyond which the national expulsion procedure is completed”,

⁶³⁴ *Ibid.*

⁶³⁵ *Supra* note 630 at para 172.

⁶³⁶ *Ibid.*

⁶³⁷ *Ibid.*, at p. 58.

⁶³⁸ *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau/Senegal)*, 1991 I.C.J. Reports 53.

although respect for dignity and fundamental human rights must still be observed.⁶³⁹

In Canadian jurisprudence, *Charter* rights as they apply to individuals traversing or being held within such border crossing points or zones has been examined. In the case of *Dehghani v. Canada (Minister of Employment and Immigration)*, the SCC reviewed whether Mr. Dehghani was detained for the purposes of s.10(b) of the *Charter*, and whether he enjoyed s.7 rights with respect to access to legal counsel during this period and in the circumstances.⁶⁴⁰ Mr. Dehghani was seeking to enter Canada and while undergoing a secondary screening process his cell phone and laptop computer were searched. In reviewing first whether this secondary screening procedure was a detention, the Court affirmed that there is no right for non-citizens to enter or remain in Canada.⁶⁴¹ The Court then further held that within the context of a person seeking to enter Canada through a border crossing, the manner of search conducted was a relevant factor in determining what, if any, constitutional issues arose.⁶⁴² In the circumstances the Court held that Mr. Dehghani's liberty was restrained but he was not detained in the sense contemplated by s.10(b),⁶⁴³ and then turned to the question of whether he had a right to counsel as a matter of fundamental

⁶³⁹ *Supra* note 630. Therefore an alien subject to expulsion and present within one of these special areas is already considered expelled, as "the frontier cannot be treated as a line, but as a zone with limits fixed by State regulations according to the areas that are established there".

⁶⁴⁰ *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053

⁶⁴¹ *Ibid* at 1070, citing *Chiarelli v. Canada (Minister of Employment and Immigration)*, 1992 CanLII 87 (SCC), [1992] 1 S.C.R. 711, at p. 733 where Sopinka J. stated that "[t]he most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country."

⁶⁴² *Ibid* at pp. 1069-1070, citing *R. v. Simmons* 1988 CanLII 12 (SCC), [1988] 2 S.C.R. 495. The court held that there were three distinct forms of search that could be conducted, ranging from routine questioning and possibly an over-the-clothing pat down search, through to a secondary search that might involve a strip search, and culminating in an intrusive search of the person including body cavity searches, and reasoned that the more intrusive the search the justification required and Constitutional protection provided.

⁶⁴³ *Ibid.*

justice under s.7. The Court again noted that the concept of fundamental justice varied according to the circumstances, and that in these circumstances no such right was triggered and thus s.7 of the *Charter* did not apply to Mr. Dehghani.⁶⁴⁴

From this I suggest that a number of critical issues are identified within the context of a frontier zone. Foremost among these issues is the contextual nature of the application of the *Charter*, in that it may apply in certain circumstances but not in others. Relevant factors that would assist in determining when Charter protections would apply include the reason for the restraint on liberty, what if any form of search is conducted and for what purpose (intrusiveness of the search), and what if any stigma arises from any search conducted. In answering these questions, the presence and degree of *Charter* protections available to those within a frontier zone may be identified and conceptualized.

I therefore propose that flagged and unflagged vessels stopped and boarded by Canadian warships, and individuals embarked onboard Canadian warships as the result of these boardings, should be considered to be within a Canadian maritime frontier zone. Despite the warship not forming an ‘official port of entry’ directly akin to a port, airport or land frontier post, this reasoning would recognize a number of interrelated issues that are then more easily addressed in determining what, if any, rights and obligations are triggered in the circumstances:

- 1) First, the issue of whether the stopped vessel is flagged or unflagged assists in informing the *Hape* analysis that would be required. As discussed, unflagged vessels enjoy no flag state protection on the high seas, and thus any concern for comity and sovereign equality would be absent as a factor to be considered. In the event the

⁶⁴⁴ *Ibid* at pp 1075-1078.

stopped vessel is flagged, *Hape*'s respect for comity and sovereign equality provide legal argument against the extension of *Charter* protections, but in the circumstances of a maritime boarding would then have to recognize that unlike *Hape* and *Amnesty* the extent of sovereignty exercised over a flagged vessel is not as strong as the territorial sovereignty examined in those cases.

- 2) Next, the reason behind the boarding and search of the vessel and potentially its crew must be considered. Again as recognized by the SCC in *Dehghani*, the reasons for a search conducted at a boarder crossing – or, as in my proposed analogy a “Canadian maritime frontier zone” – are an important factor to inform whether Charter rights and obligations are triggered in the circumstances. This would be particularly true where Canadian agents are exercising domestic law enforcement authority, as compared to simply exercising the right of visit and search as provided for under UNCLOS.
- 3) Lastly, the fact of whether the stopped vessel is merely boarded, or whether members onboard are embarked onto the Canadian warship, is a factor to be considered. This factor recognizes the varying degrees of control extended over the vessel and those onboard, both *de facto* and *de jure*. As described by the SCC in *Simmons* the degree of restraint on a person's liberty is a critical factor in determining whether they are detained, and in the context of a maritime boarding would take on added significance, as while embarked in the Canadian warship one's liberty is significantly reduced. Should an individual be embarked onboard a Canadian warship a stronger argument could be made that at that point they benefit from the ship's sovereign immunity and are thus entitled to the protection of the *Charter* and Canadian

observation of IHRL rights, but again this would only be a factor to consider. Such a finding would again be subject to the circumstances of their presence onboard the warship, whether compelled or by other reasons (such as safety of life), and would not necessarily require that the *Charter* and other protections become engaged.

5.2 Attribution Within Coalition Operations

HMC Ships frequently work alongside with, or under some degree of authority exercised by, foreign allied forces or international organizations such as NATO, and the question of attribution arises when Canadian actions are taken at the direction of these non-Canadian authorities. Such coalition operations are not novel and as already discussed in section 2.5 this question has been the topic of significant international discussion, resulting in the creation of Draft Articles on the Responsibility of International Organizations.⁶⁴⁵ These ILC Draft Articles include “rules of attribution, excuses precluding wrongfulness, effects of a breach, and principles of reparations”, but codify only some principles of responsibility under customary international law while otherwise only proposing novel approaches to issues.⁶⁴⁶ As a starting point then, the Draft Articles provide guidance for responsibility over acts contrary to international law which are alleged to have been taken by State forces acting in concert with or under the direction of other States, or under the direction of IOs such as the UN or NATO.⁶⁴⁷ The

⁶⁴⁵ *Supra* note 429.

⁶⁴⁶ Kristen E. Boon, “New Directions in Responsibility: Assessing the International Law Commission’s Draft Articles on the Responsibility of International Organizations” (Spring 2011) Y.J.I.L vol 37 (Online: <http://www.yjil.org/docs/pub/o-37-boon-new-directions-in-responsibility.pdf>) at 1, 9, discussing the draft Articles as a long-term program within the fifty-second ILC session.

⁶⁴⁷ Such as Operation Unified Protector, the NATO led operation to protect civilians and civilian populated areas under the authority of UNSCR 1973 authorizing “all necessary measures”. In the event civilian targets were attacked by NATO forces, the Draft Articles would guide the attribution of

Draft Articles guide determination of apportionment of responsibility jointly and singly, and where appropriate would hold responsible the IO, participating member State or any combination thereof.⁶⁴⁸ The Draft Articles also recognize the law of responsibility and the use of lawful excuses to escape liability,⁶⁴⁹ and contemplate financial obligations for those found responsible for these wrongful acts.⁶⁵⁰

A number of recent international decisions have built on the useful guidance provided by the Draft Articles regarding the apportionment of responsibility for wrongful acts under international law. I will review a select number of these decisions: first, the Grand Chamber of the ECtHR's rulings in *Behrami v. France*⁶⁵¹ and *Saramati v. France*,⁶⁵² followed by the U.K. House of Lords decision on this issue in *Al-Jedda*.⁶⁵³ These decisions all examined the question of attribution within the context of multinational forces operating under the authority of the UN Security Council and

responsibility as between the UN, NATO and / or the troop sending nation(s) involved for alleged violations of the laws of war, or actions taken in excess of the use of force authorized within the UNSCR.

⁶⁴⁸ *Supra* note 646 at 2.

⁶⁴⁹ *Supra* note 429 at art. 20, stating "The wrongfulness of an act of an international organization is precluded if and to the extent that the act constitutes a lawful measure of self-defence under international law".

⁶⁵⁰ *Ibid*, at art. 33 stating "Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter". Such an arrangement is not completely novel, as the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951 (4 U.S.T. 1792) at art. 8 provides a claims process between the members of NATO.

⁶⁵¹ *Behrami v. France* (Application No 71412/01)(2007) 45 EEHR SE 85. This decision incorporated Article 5 of the Draft Articles, conduct of organs placed at the disposal of an IO by a State or another IO.

⁶⁵² *Saramati v France, Germany and Norway* (2007) 45 EHRR SE10; 46 ILM 746; (2008) 133 ILR 1.

⁶⁵³ *Supra* note 251. The majority opinion was written by Lord Bingham, writing for Baroness Hale and Lord Carswell.

highlight the complexity of applying competing human rights obligations within the context of multinational forces operating under a supra-national command, versus where States act unilaterally but pursuant to international authority.⁶⁵⁴

In *Behrami* the UN Security Council authorized multinational forces to deploy into Kosovo under Chapter VII authority as part of “effective international civil and security presences, endorsed and adopted by the United Nations, capable of guaranteeing the achievement of the common objectives”.⁶⁵⁵ Following the deaths of several children due to unexploded NATO cluster bombs, the Grand Chamber examined the question of attribution and noted that effective control over the area was being exercised at the time by the international presence, rather than the Yugoslav government.⁶⁵⁶ Finding that demining operations at the relevant time were included within the UN mission’s mandate,⁶⁵⁷ the Grand Chamber attributed responsibility for this accident to the UN.⁶⁵⁸ In *Saramati* compensation was sought for an alleged extra-judicial detention by security forces purportedly acting on behalf of the UN authorized Kosovo international security force. In that instance the Grand Chamber again held that the detention was attributable

⁶⁵⁴ *Supra* note 67 at 155 – 156.

⁶⁵⁵ *Ibid* at para 18 quoting from S.C. Res 1244, U.N. Doc. S/RES/1244 (6 May 1999).

⁶⁵⁶ *Supra* note 651 at paras 69-70.

⁶⁵⁷ *Ibid* at paras 123 – 127.

⁶⁵⁸ *Ibid* at para 129. Here the court used “delegate” to refer to the Security Council’s empowerment of another entity to exercise S.C. functions, in contrast to “authorizing” another entity to carry out functions the S.C. was incapable of conducting.

to the UN, this time because while operational command had been delegated to individual State authorities, ultimate authority and control was retained by the UN.⁶⁵⁹

The U.K. House of Lords examined the reasoning employed in *Behrami* and *Saramati* in the case of *Al-Jedda*, and reasoned that wrongful acts would be attributable to an IO where it exercised effective control over the conduct in question, where the State agents are fully seconded to the IO, in contrast to peace keeping operations where the State continues to exercise disciplinary and criminal jurisdiction over its forces.⁶⁶⁰

⁶⁵⁹ *Supra* note 652 at paras 133-141, and summarized at para 149 stating:

“In the present case, Chapter VII allowed the UNSC to adopt coercive measures in reaction to an identified conflict considered to threaten peace, namely UNSC Resolution 1244 establishing UNMIK and KFOR. Since operations established by UNSC resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member States, the Convention cannot be interpreted in a manner which would subject the acts and omissions of contracting parties which are covered by UNSC resolutions and occur prior to or in the course of such missions, to the scrutiny of the court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a UNSC resolution which were not provided for in the text of the resolution itself. This reasoning equally applies to voluntary acts of the respondent States such as the vote of a permanent member of the UNSC in favour of the relevant Chapter VII resolution and the contribution of troops to the security mission: such acts may not have amounted to obligations flowing from membership of the UN but they remained crucial to the effective fulfilment by the UNSC of its Chapter VII mandate and, consequently, by the UN of its imperative peace and security aim.”

⁶⁶⁰ *Supra* note 251 at para 5, stating:

“The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct... When an organ of a State is placed at the disposal of an international organization, the organ may be fully seconded to that organization. In this case the organ's conduct would clearly be attributable only to the receiving organization... [vs.] the different situation in which the lent organ or agent still acts to a certain extent as organ of the lending State or as organ or agent of the lending organization. This occurs for instance in the case of military contingents that a State placed at the disposal of the [UN] for a peacekeeping operation, since the State retains disciplinary powers and criminal jurisdiction over the members of the national contingent. In this situation the problem arises whether a specific conduct of the lent organ or agent has to be attributed to the receiving organization or to the lending State or organization.”

Applying this reasoning to the facts, the majority determined that: U.K. forces were not placed at the disposal of, nor was effective control over their conduct exercised by, the UN; that the UN did not have effective command and control over U.K. forces; and that U.K. forces were not part of a UN peacekeeping force.⁶⁶¹ The Strasbourg Court and Grand Chamber adopted this reasoning and result in subsequently examining this same situation in *Al-Jedda v. United Kingdom*.⁶⁶²

Together these decisions put “flesh on the bones” of the ILC Draft Articles and support the proposition that wrongful acts committed by State forces acting under UN Security Council Chapter VII authority could be attributable to the UN rather than their States.⁶⁶³ This reasoning is not universally accepted, however, as critics argue that such a

⁶⁶¹ *Ibid* at para 22, paras 23- 24. The House of Lords were not unanimous in this decision, as while the strong dissent written by Lord Rodger (joined by Lord Brown) agreed with the legal issues identified by the majority, they strongly differed in their assessment of a number of the facts supporting the majority decision. The majority had in part supported their finding by stressing the fact that unlike *Behrami* and *Saramati* where international forces entered Kosovo after resolution 1244, U.K. forces were already present in Iraq when resolution 1546 was adopted (which also preceded Mr. Al-Jeddas detention) – a factor the dissent held at paras 61-62 to be “legally irrelevant”. At para 63 the dissent further held the civil administrative body in authority at the time, whether operating under a UN civil administration as in Kosovo or the Iraqi Interim government, was irrelevant. In a lengthy explanation at paras 66-69 the role of the UN and powers granted within the *UN Charter* were discussed and contrasted older public international law and the Covenant of the League of Nations, pointing out the robust provisions at Articles 39, 42 and 43 permitting the Security Council authority to determine threats to the peace, and take measures to maintain or restore international peace and security. Contrasting cold-war Security Council resolutions with the situation in Iraq and the evolution of key concepts related to delegation and authorization by the Security Council, the dissent then concluded at para 80 that the Security Council resolution pursuant to Chapter VII authority was a proper delegation of authority in this instance, as it had been in Kosovo.

⁶⁶² *Al-Jedda v. United Kingdom* (Application No 27021/08), 147 INTL 107 (7 July 2011). At para 80 the Grand Chamber relied upon the unified command structure that pre-dated Security Council resolution 1511, the fact that both US and U.K. forces continued to exercise government powers in Iraq, and that merely by requiring periodic reports on activities of the Multi-National Force the UN did not thereby assume any degree of control over the force or executive functions of the Coalition Provisional Authority. At para 82 they further reasoned that repeated protests by UN organs against the use of security internments was evidence that the UN did not exercise requisite command and control of the military forces.

⁶⁶³ *Supra* note 67 at 156. See also *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* (Judgment) at para 306

result is contrary to the general principle of international law that attribution is only found against those IOs exercising effective control over the operation, and not simply holding the ultimate source of legal authority.⁶⁶⁴ Critics reject the ‘ultimate authority and control’ jurisdiction test as ‘Top Down’ centric, and while acknowledging few alternatives are apparent,⁶⁶⁵ have proposed instead a ‘Bottom Up’ approach, asking:

1. Is the detained individual within the ‘control’ of a prima facie State agent such as a soldier or sailor; if so then
2. Is it the State, or State authorities that effectively control the State agent’s actions?⁶⁶⁶

Using the ‘bottom up’ approach, if the detained person is under the control of a State agent (such as a soldier or sailor) AND that State agent is following orders, or effectively being controlled by superior State agents, then the sending State retains responsibility and no attribution to the IO can be found. Arguing that this approach is more practical than the “theoretical approach” of the House of Lords and Grand Chamber in *Al-Jedda*,⁶⁶⁷ critics suggest that by using this analysis wrongful acts would be more

arguing that international operations could attribute to [any IO] the UN where operating as “subsidiary organs created under Chapter VII . . . (or) within the exercise of powers lawfully delegated by the Security Council” and would rely upon a finding that the UN Security Council was exercising ultimate authority and control’ as provided for under Chapter VII . It was further argued that UNSC Resolutions could not ground attribution where ‘fundamental rights’ were involved.

⁶⁶⁴ G Gaja (ILC Special Rapporteur) ‘Seventh Report on Responsibility of International Organizations (27 March 2009) UN Doc A/CN.4/610, 10 citing the ILC Draft Article 6 which states “The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the later organization if the organization exercises effective control over that conduct”. See also *supra* note 67 at 156.

⁶⁶⁵ M Milanovic and T Papic, ‘As Bad as it Gets: The European Court’s Behrami and Saramati Decision and General International Law’ (2009) 58 ICLQ 267, 294-5 at 273 and D Van der Toorn, ‘Attribution of Conduct by State Armed Forces Participating in UN-Authorized Operations: The Impact of Behrami and Al-Jedda’ (2009) 15 Australian International Law Journal 9.

⁶⁶⁶ *Supra* note 67 at 156-157.

⁶⁶⁷ *Ibid* at 157 citing P Klein, ‘Responsabilite pur les faits commis dans le cadre d’operations de paix etendue du pouvoir de controle de la Cour europeenne des droits de l’homme: quelques considerations critiques sur l’aret Behrami et Saramati’(2007) 40 Revue Belge de Droit International

likely found to engage international responsibility on the part of multiple bodies (i.e. both troop-sending States and the IO in overall control), possibly even under separate and distinct obligations.⁶⁶⁸ Another criticism holds that the *Al-Jedda* autonomous characterization of international responsibility would allow States to downplay effective control over their agents in favour of ultimate legal authority vested elsewhere, thus avoiding responsibility.⁶⁶⁹

In applying this attribution analysis to contemporary Canadian naval operations, the question must determine which entity exercises sufficient ‘effective control’ or ‘factual control’ over the conduct in question – ranging from Canadian-only operations, through operations conducted under the authority of UN Security Council Resolutions and ultimately to operations where Canadian Forces are placed under measures of control of another authority, either another State or an International Organization.⁶⁷⁰ This review

627, stating “one cannot start with the legal authority of the international organization and work backwards: to do so is to take a purely theoretical approach at the expense of any analysis of the facts. Legal authority is not the same thing as effective control; the latter is a fact-driven inquiry. The only thing that ultimate legal authority might suggest is the possibility of joint responsibility between a State and an international organization. One might be directly responsible for the wrongful conduct (i.e. where the official is acting as its organ), while the other might be in breach of a separate ‘due diligence’ or similar obligation to take positive steps designed to secure effective human rights protection. Where, for example, an international organization is in a position to regulate acts in territory under its legal or effective control it might perhaps be held responsible for failure to take measures to prevent certain abuses”.

⁶⁶⁸ *Matthews v United Kingdom*, ECtHR, Application No 24833/94 (Judgment) 18 February 1999 at para 32; *Bosphorus Airways v Ireland*, ECtHR, Application No 45036/98 (Judgment) 30 June 2005, paras 152-158; *Supra* note 651 at paras 125, 129-130 (legal control/administration of territory); and *cf Ilia cu and Others v Moldova and Russia* (2004) 40 EHRR 1030 paras 3325, 392-4 (holding Russia and Moldova jointly responsible for events in Transnistria, Russia due to de facto control and Moldova due to de jure control).

⁶⁶⁹ *Supra* note 67 at 157. This argument reasons that a State acting at the bequest or under the authority of another State does not detract from the issue of factual control over persons detained, but even where detention is onboard a State warship (and thus factual control is a given) the argument can be made that the detention is outside of international human rights protections in certain multilateral operations.

⁶⁷⁰ ILC Report 2009, 63.

of command and control being exercised over a ship's operations would focus specifically on any unified or bifurcated command structure between Canadian authorities and that of the IO or other State. Examining this question in the context of an allied contemporary naval operation, the European Naval Force operating off the coast of Somalia ("EUNAVFOR") under Op ATALANTA employs a unified EU command structure extending from the EU Political and Security Committee, through an EU Operational Commander and Force Commander, to theatre level operations.⁶⁷¹ Should a detainee held by an Op ATALANTA warship be transferred to another State, this decision if exercised by the ATALANTA Operation Commander without input from the European warship's flag State could avoid national responsibility and applicable HR international treaty jurisdiction in favour of EUNAVFOR responsibility, as this would likely satisfy the *Behrami* test.⁶⁷² Operation ATALANTA transfers of detainees are not, however, conducted in this way. Instead, ATALANTA transfers are conducted under joint responsibility by requiring agreement from both the EU Operation Commander and that of the warship flag State.⁶⁷³ This use of joint-responsibility over detainee transfers is unique, and is not followed within NATO operations which see coalition forces revert to

⁶⁷¹ Council Joint Action 2008/851/CFSP (10 November 2008) arts 3 and 6, European Union on Military Operation to Contribute to the Deterrence, Prevention and Repression of Acts of Piracy and Armed Robbery off the Somali Coast [2008] OJ L 301/33 ("EUNAVFOR Joint Action"). Under this command and control system, Article 12 outlines the EUNAVFOR process regarding holding and transferring of suspected pirates, however the precise decision making procedure for transfers is not provided for. Using the attribution analysis described, should a transfer decision be exercised.

⁶⁷² *Supra* note 651 at paras 132-139, and would ask who precisely holds the authority to order the transfer of detainees. The Report of the International Law Commission, Sixty-first session (4 May-5 June and 6 July-7 August 2009) A/64/10 at pp. 69-70, citing with approval the majority of the House of Lords in *Al-Jedda*, *supra* note 251 apparently endorsing the ECHR decision in *Behrami*, *supra* note 651, in that the conclusion reached "appears to be in line with the way in which the criterion of effective control was intended".

⁶⁷³ *Supra* note 1 at 158-159.

national authorities in order to authorize the transfer or other actions to be taken for detained individuals.⁶⁷⁴

5.3 The Canadian Maritime Frontier Zone, Attribution and Contemporary RCN Operations

Given the significant differences between the three sets of contemporary naval operations being contemplated, I will now apply my proposal for a Canadian maritime frontier zone to these operations individually. Lawful authority for each operation, as well as the context of the operations and degree of extra-State control over HMC Ships, varies and as a result each operation is deserving of separate consideration.

5.3.1 Support to OGD As described, RCN support to OGDs recognizes that the individual federal departments will in most situations retain overall responsibility as lead for the operation, with the RCN frequently supporting with manpower, equipment and expertise. RCN ships supporting these missions, either law enforcement or support to DFO, are therefore acting in accordance primarily with domestic statutory authority, and any resultant detentions will be authorized and governed first by this domestic authority. While international law will also play a part, particularly with regards to where the operation may occur and the basis for extra-territorial extension of Canadian jurisdiction, these requirements have in large part already been incorporated into Canadian legislation. Likewise any follow-on actions taken with regards to the detainees, ranging from decisions to release, where to hold the detainees (onboard their own vessel or embarked in the RCN warship) and subsequent disposition of the detainee, are again largely within

⁶⁷⁴ *Ibid.*

the domestic authority of the lead OGD. For these reasons, discussion of detainee rights and recommended mitigation strategies in the context of RCN support to OGD lead missions will be brief. Detentions under the authority of domestic law enforcement agencies rely primarily on domestic legislation as permitted under international law, and are limited in purpose and jurisdictional reach by their enabling legislation. Within the context of maritime operations such detentions would most likely range from brief “investigative” detentions onboard the target vessel to detaining suspects onboard an RCN warship for transit back to Canada for further law enforcement purposes. While naval personnel might be employed in a sentry capacity, any such employment would most likely be in support of an embarked, lawfully appointed peace officer and the overriding purpose of such detentions would be to bring the prisoner back to Canada to commence criminal proceedings. From the perspective of individual rights and State obligations however, regardless of the lead OGD agency involved it will remain a Canadian State responsibility to observe any rights and obligations engaged.

In these operations the purpose of the detention would of necessity drive the finding of when rights and corresponding obligations are triggered for those detained.⁶⁷⁵ Given that such an operation would be at the request of Canadian law enforcement these rights and obligations would be no different than those provided for in other Canadian criminal law contexts, with the sole exception of circumstances imposed by the location of the detention, i.e. at sea and away from Canadian courts. In the case of DFO detentions, the most common activity would require only a brief period of investigative detention while evidence is gathered and, potentially, offence tickets are

⁶⁷⁵ Discussed at *supra* notes 27 and 30.

issued. Taking place onboard the target vessels for Canadian law enforcement purposes, such activity would provide sufficient control over the place and person as to extend *Charter* rights; however it would not necessarily entitle those onboard further rights under other Canadian Legislation. In extreme situations like that of the ESTAI, however, detentions could include holding the suspects for longer periods in order to bring them back to Canada to be dealt with by Canadian courts. Such detentions would most commonly be made onboard the detainee's own vessel, but in situations where concerns exist for security and continuity of evidence, the prisoner could be embarked within the HMC Ship. Again, as in situations of support to law enforcement, any naval personnel employed in a sentry capacity would be acting in support of an embarked, lawfully appointed fisheries officer and the overriding purpose of such detentions would be to bring the prisoner back to Canada to commence criminal proceedings.⁶⁷⁶ Likewise, detained individuals again would be able to raise allegations that any of their rights were breached during the course of their prosecution, remedy again ranging from criminal or civil sanction against those involved to exclusion of evidence or other remedy by Canadian courts.

5.3.2 Counter-Piracy Operations Unlike missions in support of OGDs, contemporary counter-piracy operations rely upon a blend of international and domestic legal authorities. Those operations are conducted pursuant to the blended authority and jurisdiction provided by customary international law, UNCLOS and SUA, together with UN Security Council Resolutions.⁶⁷⁷ These resolutions are expressed in terms normally

⁶⁷⁶ *Supra* note 49 *Jose Pereira E Hijos, S.A. v. Canada (Attorney General)*, where the court permitted that *Charter* rights including the right to counsel without delay could be found in such circumstances.

⁶⁷⁷ *Supra* note 67 at 148.

used by the Security Council when authorizing the use of armed force by State members,⁶⁷⁸ but here authorize ‘necessary means ... for the repression of piracy on the high seas’. These UNSCRs imbue participating States with quasi-law enforcement authority and employ IHRL as the *lex specialis*, in contrast to situations where UNSCRs authorize the use of armed force within the *lex specialis* of IHL.⁶⁷⁹ This language, viewed through the lens of my analysis above and in keeping with the principle of complementarity, may as a consequence have the effect of qualifying otherwise applicable human rights obligations with regards to those detained as part of authorized counter-piracy operations. For example, while the conditions of detention and adjudicative process normally guaranteed by the ICCPR and Canadian *Charter* are uniformly high, in the situation where individuals are detained off the coast of Somalia as alleged pirates and then transferred to regional states for prosecution and possibly incarceration, the judicial process used will most certainly not observe *Charter* guarantees nor will the conditions of imprisonment match that seen in Canada.

Another consequence of the language found in these UNSCRs is the possible affect they may have on the interpretation of domestic legal obligations applicable in these contemporary missions. While acting under Security Council authorizations, authority under international law is thereby created and actions taken by Canadian naval forces are thus qualified – the recourse being to withdraw Canadian forces from participating in order to not subvert the international system of collective security. This particular issue was present on the facts within the *Amnesty Canada* case, however

⁶⁷⁸ *Supra* note 94 at 841, and *supra* note 68 (UNSCR 1851) where the Council expresses concern for ‘pirates being released without facing justice’.

⁶⁷⁹ *Supra* note 59 at 131.

unfortunately the court declined to consider the qualifying affect of the UN Charter and UNSCRs on domestic obligations, relying instead primarily on *R. v. Hape* and the SCC's reasoning which did not engage this factor after the Rule 107 motion was decided. Moving forward however it can be argued that these two cases, read together, demonstrate that in an international operation the effect of domestic law can be shaped by UN Charter, applicable UNSCRs and international humanitarian law, and that this added complexity will affect a State's obligations towards those detained as part of UN authorized operations.

For HMC Ships detaining suspected pirates, the first issue will be the existence or lack of flag State jurisdiction in the suspected piracy vessel. To date most suspected pirate attacks have been launched from unflagged vessels, a significant issue as any concern for comity between States is thereby removed. This was a critical factor for the courts in *Hape* and *Amnesty* in finding that the *Charter* could not be exported in a manner that would displace existing laws or without permission of the affected State. Next is the location of the detention. On the high seas RCN ships can exercise the universal prescriptive jurisdiction over piracy found in UNCLOS, and the qualified jurisdiction over offences contrary to SUA, as no other State enjoys jurisdictional claims over these matters beyond their own territorial or archipelagic waters (with some exceptions, not applicable and already discussed). Likewise, within the territorial waters of Somalia and with the acquiescence of the Somali government, HMC Ships may exercise the expanded jurisdiction created by the applicable UNSCRs. In either event, the lawfulness of any detention of individuals would hinge on the location of the detention and existing

UNSCRs, as both domestic and international lawful authority must exist for the detention.

Once detained, the reasonableness of any search and seizure of the suspected pirates would become an issue, as would their access to applicable judicial proceedings. In the event suspected pirates are returned to Canada for prosecution the full panoply of *Charter* and Canadian Criminal law protections would apply, which are beyond the scope of this paper. If however Canada conducts a disposition of suspected pirates pursuant to an agreement to a third party State, such as Kenya, a more nuanced legal regime would likely apply. In Canada the act of extradition⁶⁸⁰ is governed by the *Extradition Act*⁶⁸¹ and involves a bilateral agreement between the sending and receiving States.⁶⁸² In contrast the act of deportation⁶⁸³ is only cited in the *Crimes Against Humanity and War Crimes Act*⁶⁸⁴

⁶⁸⁰ *Supra* note 630 at para 159-160, and M. Kamto, 'Sixth Report on the Expulsion of Aliens, International Law Commission' UN Doc A/CN.4/625 (2010) at para 44. Extradition is described as an exercise of judicial authority and cooperation between States to surrender a person from one State to another by reason of "a criminal prosecution or sentence by the second party and is sought to stand trial or to serve a sentence there" and consists of both the domestic law of the sending State and a bilateral or multilateral treaty with the receiving State. Such agreements normally involve the principle of 'reciprocity', referring to an agreement between States sharing such an international agreement to surrender, subject to Stated conditions or provisions, all persons requested under the agreement. See 1957 European Convention on Extradition, art 1 which provides that all parties "undertake to surrender to each other, subject to the provisions and conditions laid down in this Convention, all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order".

⁶⁸¹ *Extradition Act*, S.C. 1999, c.18 governs extraditions from persons in Canada. Article 3(1) of the Act states that extraditions may only be granted for the purpose of prosecuting the person or imposing or enforcing a sentence imposed on a person, to designated States or entities, as set out within Part 2 of the Act.

⁶⁸² *Supra* note 630 at para 161. See also ICJ, Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, p. 24, where four members of the ICJ recognized the propriety of US and U.K. requests for the extradition of two Libyan nationals from Libya in connection with the Lockerbie incident, and the lawfulness of Libya's refusal to extradite these individuals – particularly where its domestic law prohibited such extradition.

⁶⁸³ Deportation– see *supra* note 680 (M. Kamto) at para 64 citing *Mohamed and Another v. President of the Republic of South Africa and Others*, op. cit., pp. 486- 487, paras. 41-42. See also *supra* note 630

and involves the unilateral act of expelling an alien found to be illegally within a State's territory. These actions are commonly understood when taken with regard to non-citizens found within State territory,⁶⁸⁵ but not so well in the context of non-citizens detained extra-territorially. Such an action is commonly known as a transfer, and in other circumstances involves a sending State responding to a foreign State or other international body's request to make the concerned individual available to their jurisdiction either to appear personally, to give evidence, or to otherwise assist an investigation.⁶⁸⁶ While similar to extradition, the legal basis for a transfer is primarily within the realm of international law.⁶⁸⁷ International agreements such as Status of Forces Agreements ("SOFA")⁶⁸⁸ or treaties (commonly known as "Mutual Legal

at para 155. The term deportation is linked historically and with regards to the Laws of War as the "forced displacement or forced transfer of individuals or groups of the civilian population - who are protected persons under the provisions of the Geneva Conventions of 1949 - from an occupied territory" - see Agreement concerning Prosecution and Punishment of the Major War Criminals of the European Axis, London, 8 August 1945, UNTS, vol. 82, No. 251, p. 288. M. Kamto proposes this link due to the language found in Article 6 of the Charter of the International Military Tribunal at Nuremberg, which referred to "the deportation to slave labour or for any other purpose of civilian population of or in occupied territory", as a crime that fell within the Tribunal's jurisdiction and incurred individual responsibility.

⁶⁸⁴ *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24 (Schedule: Provisions of Rome Statute) (War Crimes Act) at art. 7.1(d), defined as the "forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law".

⁶⁸⁵ *Supra* note 630 at para 177. See also *supra* note 115 at paras 45, 113 - 115 and 118, holding that deportation only applies to non-nationals as no State can expel its own nationals.

⁶⁸⁶ *Ibid* at para 174, also described as "the forced movement of individuals from one State to another, in other words, beyond its frontier".

⁶⁸⁷ *Supra* note 630 at para 177. In contrast, extradition as explained *ibid*, is a consensual act between two States, combining domestic law with international treaties or customary law as the lawful basis to remove the individual.

⁶⁸⁸ *Queens Regulations & Orders Volume IV - Appendix 2.4 Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces* provides at Article VII for State military authorities to exercise criminal and disciplinary jurisdiction over their own forces when located within the territory of other party States. Where concurrent jurisdiction between the host State and the sending State is created by virtue of the nature of the offence committed, rights of primary and secondary jurisdiction are provided for and all parties to the Agreement agree to give "sympathetic

Assistance Treaties”, or MLATs) oblige party States to carry out transfers upon request are common,⁶⁸⁹ and contemporary experiences with transfers have largely developed due to the creation of a number of international criminal courts⁶⁹⁰ including the ICTY⁶⁹¹ and the International Criminal Court (“ICC”).⁶⁹² The use of transfers has not been without controversy however, particularly with regards to the use of “extrajudicial transfers” following the events of September 11, 2001.⁶⁹³ For a few years these extrajudicial transfers, also termed “extraordinary renditions”, saw an increase both in volume and the

consideration” to requests to surrender their jurisdiction over an offence when such a request is made by other party States. Further, State authorities agree to assist other State parties to the Agreement by arresting and handing over affected persons. (Online: <http://www.admfincs.forces.gc.ca/qro-orf/vol-04/appendix-appendic-02-04-eng.asp>).

⁶⁸⁹ The UN General Assembly adopted a model treaty for mutual assistance in criminal matters in 1990 at General Assembly resolution 45/117, 14 December 1990, Article 13, para 1. This model treaty contemplates a sending State transferring an individual to the requesting State (or body), subject to the individuals consent, agreement of the sending State, and provided the transfer is permitted by the sending States domestic law.

⁶⁹⁰ *Ibid* at para 175. See for example the *International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991* (“ICTY”), UN Security Council Resolution 827, S/RES 827 (1993) 25 May 1993, which provides within the *ICTY Rules of Procedure and Evidence*, IT/32/Rev. 38 (13 June 2006) adopted 23 April 1996, that the ICTY may request that a suspect held in custody by a State be transferred to the Tribunal at Rule 40, or that a State-detained witness be transferred at Rule 90 *bis* (adopted 6 October 1995).

⁶⁹¹ The transfer of Slobodan Milosevic, former President of the Federal Socialist Republic of Yugoslavia, from Serbia and Montenegro is described at Konstantinos Magliveras, *The Interplay Between the Transfer of Slobodan Milosevic to the ICTY and Yugoslav Constitutional Law*, EJIL (2002), Vol 13 No 3, 661-677 (Online: <http://ejil.oxfordjournals.org/content/13/3/661.full.pdf>).

⁶⁹² *Supra* note 214 (*Rome Statute*) art 58-60. These articles actually uses the term “surrender”, however as noted by M. Kamto, Special Rapporteur for the UN in his Second Report (*Supra* note 630), no distinction is created through the use of this term. The ICC used similar authority under Article 59 to order the transfer, or “surrender” of Thomas Lubanga Dyilo from the Democratic Republic of the Congo (DRC) for subsequent prosecution – see International Criminal Court Warrant of Arrest dated 10 February 2006, ICC-01/04-01/06(Online: <http://www2.icc-cpi.int/iccdocs/doc/doc191959.PDF>).

⁶⁹³ *Supra* note 630 at para 176. The first contemporary use of the extrajudicial transfer occurred in 1989, when US forces entered Panama, in part to seize the former leader General Manuel Noriega and bring him to American courts for prosecution. In this instance General Noriega was then provided the benefit of legal due process both under American criminal law, but also under IHL as a prisoner of war – see Matthew Reichstein, *Extradition of General Manuel Noriega: An Application of International Criminal and Humanitarian Law to answer the Question, If so, Where Should He Go*, 22 Emory Int’l L. Rev. 857 (2008), pp. 858-859.

number of countries participating in the practice.⁶⁹⁴ Despite that surge in use however, the US Supreme Court found these extraordinary renditions to be unconstitutional.⁶⁹⁵

In contemporary RCN counter-piracy operations, issues raised by the *Charter, Refugee Convention*,⁶⁹⁶ CAT⁶⁹⁷ and ICCPR⁶⁹⁸ converge at the point of any subsequent prosecution of suspected pirates. States are encouraged, but not obliged, to cooperate in the prosecution of suspected pirates,⁶⁹⁹ and may transfer suspected pirates to other States for prosecution.⁷⁰⁰ As a result, two practices have emerged. The first practice is known as “burden-sharing” and involves the transfer of suspected pirates from capturing warships to regional States for prosecution and, if necessary, punishment.⁷⁰¹ Under international law, jurisdiction can validly be claimed by the seizing State or IO, another State within the region affected by piracy, a State with strong links to the offence, or even the pirate’s own State of nationality. The practice of burden sharing has therefore been suggested to be an act of a political, rather than a legal, matter.⁷⁰² Key to the burden-

⁶⁹⁴ *Ibid* at para 176. and at para 235, where the author highlights that the judicial reasoning used by American authorities in the context of the Iraq conflict beginning in 2003 to transfer detainees from that State to US detention facilities was the same reasoning used to transfer Maher Arar from the US to Syrian authorities in September 2002.

⁶⁹⁵ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), where the court held that the detention and proposed style of prosecution of these ‘unlawful combatants’ was contrary to the Geneva Conventions.

⁶⁹⁶ *Supra* note 357.

⁶⁹⁷ *Supra* note 358.

⁶⁹⁸ *Supra* note 359.

⁶⁹⁹ *Supra* note 38 (UNCLOS) at art 100, urging States to “cooperate to the fullest possible extent in the repression of piracy”.

⁷⁰⁰ *Ibid* at art 105

⁷⁰¹ *Supra* note 67 at 145, and *supra* note 59 at 169-170. It should be noted that this contemporary practice uses regional states, although any state with domestic authority to prosecute pirates could perform this role.

⁷⁰² *Ibid* (note 67 at 145).

sharing practice and of consequence to the detaining warship is the lawfulness of the manner and arrangement used to move the suspected pirate from the seizing State's forces to the State exercising judicial jurisdiction. While extradition has been suggested as a means to carry out this practice⁷⁰³ it has not been used in contemporary instances.⁷⁰⁴ Instead, States have more commonly simply transferred the suspected pirates to the regional State for prosecution.⁷⁰⁵

These transfers involve the detaining State making the suspected pirate(s) available to another State's jurisdiction for subsequent judicial proceedings and have become known as 'dispositions'.⁷⁰⁶ These dispositions have been encouraged by the UN Security Council, but precise procedures are not set out and thus a number of *ad hoc* processes have emerged largely governed by agreements between the detaining forces and receiving States.⁷⁰⁷ Canada has publically concluded one agreement with Kenya, and while the precise details are not publically available the UN Secretary General report of 26 July 2010 states that Canada may request to transfer suspected pirates to Kenya based upon a number of factors including evidence gathered to support a prosecution.⁷⁰⁸ This

⁷⁰³ While UNCLOS is silent in this regards, *supra* note 299 (SUA) obliges the extradition or prosecution of suspects by the detaining State at art 10.

⁷⁰⁴ *Supra* note 59 at 187-191, where the author also canvases *ibid* (SUA) art 8 authorizing the ship's master of a State party to SUA to 'deliver' anyone suspected of committed any offence contrary to the offences listed at art. 8. It is likewise pointed out that this mechanism has not been used, likely as the authority at art 8 does not extend to those commanding warships.

⁷⁰⁵ *Ibid* at t 191.

⁷⁰⁶ *Ibid* at 192-194.

⁷⁰⁷ *Ibid* at 194, further discussing procedures used by EUNAVFOR, NATO and national contingents at 194-196. As pointed out however, NATO has not concluded any arrangements for the disposition of suspected pirates, rather ships operating as part of the NATO Operation Ocean Shield revert to their national control for disposition authority, which may include transfer.

⁷⁰⁸ UN Security Council, *Report of the Secretary-General*, 26 July 2010, S/2010/394, (Online: <http://www.refworld.org/docid/4c74d3a02.html> [accessed 18 August 2013] at para 23.

agreement also requires that those detained be treated in accordance with international human rights standards.⁷⁰⁹ To date, no public information has been made available indicating Canada has transferred suspected pirate detainees as the result of this agreement.

The second emerging practice seen in contemporary counter-piracy operations is that of ‘catch-and-release’,⁷¹⁰ which despite domestic Canadian authority to prosecute and the availability of the Kenyan transfer agreement has been the only option used by RCN forces to date.⁷¹¹ Under this practice, suspected pirates are retained onboard their own vessels and not embarked onboard HMC Ships, while piracy equipment and weapons are disposed of on site. Thus suspected pirates, to date only found onboard flagless vessels, have likely remained outside the frontier zone necessary to extend Canadian jurisdiction and while they may fall with the authority and control of Canadian forces, do not find themselves within Canadian effective control of territory.

Should Canada commence dispositions of suspected pirates in accordance with the Kenyan or another similar transfer agreement, suspected pirates would likely need to be brought onboard the warship for evidence collection and safety thus placing them more fully within the maritime frontier zone of the HMC Ship. At this point the series of factors set out by the SCC in *Simmons* and discussed with regards to the proposed maritime frontier zone are engaged in determining if this constitutes a “detention”, and if

⁷⁰⁹ *Ibid.*

⁷¹⁰ *Supra* note 68 (UNSCR 1897) at para 8, noting with concern that some suspected pirates were “released without facing justice, regardless of whether there is sufficient evidence to support prosecution”.

⁷¹¹ *Supra* note 67 at 144, citing that it is likely the lack of an obligation to prosecute which drives this decision.

so what if any *Charter* protections apply. With regards to the transfer however, a central question would likely focus on issues of *refoulement*. International jurisprudence has held that “mere words of assurance” are insufficient to vouchsafe detainees transferred to States with questionable human rights records, but Canadian courts have been significantly more deferential to such agreements. In any event, the provisions of the transfer agreement in question would likely be examined, and provided sufficient mechanisms are in place to provide for both Canadian and impartial third party access to those transferred it is unlikely that such dispositions would be successfully challenged. The only remaining question would be what, if any, right an alleged pirate has to apply under Canadian law for determination of their status under the IRPA. As the SCC in *Singh* and *Jallow* have already refused to see the *Charter* employed as a sword compelling the extension of IRPA rights outside of the territory of Canada, combined with the fact that alleged pirates are, absent additional facts, not protected by the Refugee Convention, it again is unlikely any such claim would succeed.

5.3.3 Counter Drug Trafficking Operations - Op CARIBBE Borrowing largely from the reasoning applied to counter-piracy operations, individuals detained in the course of Op CARIBBE counter-narcotics operations by the RCN face many similar legal issues but with a number of different factors at play. Current Op CARIBBE missions see US Coast Guard LEDETs apprehend, detain and oversee the transfer of alleged narcotics smugglers. Those individuals detained by the USCG LEDETs are of necessity brought on board the host warship for further transfer to the U.S. and prosecution within the American criminal justice system, or returned to their State of origin for judicial

proceedings. At this point in Op CARIBBE deployments it is likely that HMC Ships support by providing surveillance, refueling USCG helicopters carrying prisoners, and now with LEDETs embarked may also support the boarding of suspected smuggling vessels for the purpose of detaining suspected smugglers. In any event, much as is the case with support to Canadian law enforcement operations the overriding purpose of such detentions would be to bring the prisoner back for subsequent criminal proceedings.

As an international effort to combat the trafficking of narcotics, persons are detained in a law enforcement capacity as suspects in a crime. The form this operation takes is unique, however, as the RCN warship would CHOP⁷¹² to the operational, or effective, control of the embarked USCG personnel for the purpose of supporting a U.S. domestic law enforcement action. As described by the ILC Draft Articles and supported by the decisions in *Al-Jedda* and *Al-Jedda v. United Kingdom*, such an assumption of both ultimate authority and control of the mission and effective control over the detained person would likely be sufficient to find any detention attributable to the USCG, who themselves are acting in accordance with permissive American lawful authority. Provided that any action taken following the CHOP from Canadian to USCG control did not retain some residual Canadian authority to influence the transfer, the transfer would likely be fully attributable to U.S. authorities. As well, provided the detention of these individuals continues to be deemed lawful and not contrary to international human rights obligations (such as was seen in *Khadr* and *Khadr II*), it is unlikely that the Charter will be held to apply to these actions.

⁷¹² As defined and discussed in section 2.3.1.

American authorities have long argued (and without challenge to date) that the lawful authority for these detentions is the result of permissive international law condemning the transport of narcotics internationally combined with expansive U.S. domestic law permitting such enforcement action. By contrast, Canada does not share similar domestic legal authority and thus lacks the required combination of international and domestic authority to take similar enforcement action unilaterally. This factor, together with the obvious exercise of Crown prerogative in a matter of high policy, would likely be significant factors in any judicial challenge mounted against participation in Op CARIBBE detentions and transfers.

Likewise, as with counter-piracy detentions questions of *refoulement* would arise, but would likely receive much the same treatment. Suspected narcotic smugglers would be as unlikely to find shelter under the *Refugee Convention* as suspected pirates, and Canadian jurisprudence would likely see little difference between such claims with regards to any *Charter* argument that the IRPA should be available extra-territorially in such situations. In the same vein any examination of the transfer agreements used would balance the insufficiency of “mere words of assurance” where questionable human rights records exist against Canadian jurisprudence, including *Amnesty*, which accorded greater deference to the sufficiency of such agreements. Regardless, while the effected transfer agreement could be examined, much as with counter-piracy transfer agreements provided sufficient mechanisms were in place to assure Canadian and impartial third party access to those transferred it is unlikely that such dispositions would be successfully challenged.

CHAPTER 6: CONCLUSION

From the foregoing discussion and analysis of select contemporary RCN maritime operations, the confluence of international and domestic legal considerations and perils is both complex and unclear. Unlike previous generations of sailors concerned primarily with situations of international armed conflict, epitomized by naval operations of WWII and the Korean conflict, today's sailors find themselves on a far different 'legal sea'. This new environment requires not only adherence to the recognized IHL concepts of caring for a defeated and captured enemy, but also requires consideration of a vast array of domestic and international law that themselves remain unsettled. This question of what IHL to apply in any given situation on the dynamic ocean of contemporary operations is far from settled, and it behooves naval leaders to address this uncertainty head on.

As evidence of the lack of consideration such contemporary operations have received, current Canadian Forces regulations in this regard are comprised only of the *Prisoner-of-War Status Determination Regulations*.⁷¹³ This regulation was drafted in contemplation of *ad hoc* tribunals⁷¹⁴ applying the *lex specialis* of IHL⁷¹⁵ to determine prisoner-of-war status for detained individuals who had committed belligerent acts.⁷¹⁶

⁷¹³ *Prisoner-of-War Status Determination Regulations* (SOR/91-134) pursuant to the *Geneva Conventions Act* (R.S.C., 1985, c. G-3) ("POW Regulations").

⁷¹⁴ *Ibid* at art 7 – 9. A tribunal established under this authority would be convened following a request from the detaining unit's commanding officer, and if a designated higher authority remained in doubt following review an investigation would be caused into the status of the detainee. Of note, no qualification is provided for in the regulation for the investigator.

⁷¹⁵ Geneva Convention III at *supra* note 8, and AP I at *supra* note 10, section II of part III.

Despite the POW regulations remaining in force since 1991, no published instance of use could be found.⁷¹⁷ Furthermore, current CAF doctrine speaks to five classes of detainees, none of which directly considers the nature of contemporary maritime operations as discussed here.⁷¹⁸

From my examination of Canadian and international jurisprudence and analysis of contemporary naval operations, a number of inter-related principles emerge which I would propose be applied going forward:

1. The *Charter* is a constitutional document related to Canadian public order, and like the *ECHR* for European State parties is intended to operate within the context

⁷¹⁶ *Supra* note 713 at art 3 -7. Tribunals consisting of a single officer of the Legal Branch who would, “when directed by the authority who established the tribunal, hold a hearing to determine whether a detainee brought before it is entitled to prisoner-of-war status”. Only those detainees for whom there was doubt with respect to entitlement of POW status would be so entitled to a hearing, this decision held by the Authority defined at art 3 as the Minister of National Defence, Chief of Defence Staff, an officer commanding a command or formation, and any other authority appointed by the CDS. At art 10-13 the detainee is to be represented by an “officer or non-commissioned member” without further qualification, while art. 17 permits a right of appeal (termed a “review”) conducted by the designated higher authority and again, no further qualification is required.

⁷¹⁷ *Supra* note 14, 8:20.40 at 8-16.

⁷¹⁸ *Supra* note 14, 8:20.40 at 8-13 citing B-GJ-005-110/FP-020, Prisoner of War Handling, Detainees and Interrogation & Tactical Questioning in International Operations (January 8, 2004). The categories are as follows:

Category 1: Belligerents, including armed civilians, who commit a hostile act, demonstrate hostile intent or otherwise obstruct friendly forces in the conduct of operations.

Category 2: Non-belligerents who commit an assault on any member of the friendly forces, who attempt to steal or loot friendly or protected property, or who commit any serious offence as designated by the component commander.

Category 3: Non-belligerents who enter or attempt to enter without authority any area controlled by friendly forces, or who obstruct the progress of friendly forces, whether by demonstration, riot or other means.

Category 4: Belligerents or non-belligerents who are suspected of having committed War Crimes, Crimes Against Humanity, or any other breach of humanitarian or human rights law.

Category 5: Non-belligerents who are detained for reasons of security and are not suspected of any criminal activity.

of a territorial ‘legal space’ or *espace juridique* – protections from these constitutional documents are not designed to be applied throughout the world, even in respect of the conduct of the respective State actors, thus any extra-territorial application is found on an exceptional basis only.

2. The concept of jurisdiction is legally distinct from the concept of state responsibility. While state responsibility for acts may be found despite a lack of recognized state jurisdiction, under Article 32(1) of the *Charter* jurisdiction is an autonomous concept that applies to all Canadian State actors but does not necessarily create enforceable rights for those affected.
3. The *Charter*, including Article 32(1), and Canadian obligations under international law should be interpreted in harmony with the general principles of international law when determining extra-territorial jurisdiction.
4. The obligation under Article 32(1) to secure *Charter* rights and obligations to those within its jurisdiction is not dependent on the nature or quality of the alleged *Charter* breach - jurisdiction under Article 32(1), and by extension jurisdiction for all Canadian domestic and international legal obligations, is an indivisible matter and cannot be divided or tailored in accordance with the circumstances of an extra-territorial act in question.
5. As an exception to the principle of sovereign equality and comity, effective control over the relevant area (in the context of maritime operations, the HMC Ship, unlike a Canadian base or presence inside a foreign State as was the case in Afghanistan) and authority and control of the person must be established both in fact and law (*de facto* and *de jure*) for *Charter* jurisdiction to be found. Control of the person alone is insufficient to establish *Charter* jurisdiction or trigger Canadian human rights obligations.

6. *Charter* jurisdiction and Canadian human rights obligations are not ‘living instruments’ and do not expand the narrowly defined categories of cases in which jurisdiction is recognized extra-territorially.
7. Canadian State actors are individually responsible to adhere to international human rights norms as imported into Canadian law; this does not however engage Canadian State responsibility to extend the protection of the *Charter*.

Based upon these principles and with regards to the contemporary operations discussed within this paper, I therefore propose the following:

1. Ships and individuals sailing in them on the high seas are beyond both the Canadian frontier line and any Canadian maritime frontier zone. HMC Ships which hail and query these vessels do not bring them within either their effective control or authority and control, and these vessels are not entitled to Canadian enforcement jurisdiction nor observance of IHRL or Canadian domestic legal rights and obligations as a consequence of such limited action;
2. Any boarding or subsequent detention of ships and individuals sailing within them may only lawfully be conducted either under exclusive Canadian domestic authority, normally the exercise of the Crown prerogative, or under a domestic authority coupled with international authority including international agreements such as UNCLOS and SUA, customary international law, and U.N. Security Council Resolutions.
3. Ships and individuals sailing in them may be brought within a Canadian maritime frontier zone upon being boarded by RCN sailors acting as Canadian State agents. The extent and nature of this Canadian maritime frontier zone would likely be dependent upon the reason for the boarding, the degree of effective control exercised over the vessel, and the authority and control exercised over the

individuals both *de facto* and *de jure*. Dependent upon the extent and nature of the Canadian maritime frontier zone found in a boarding situation, *Charter* and IHRL rights and obligations may become engaged.

4. Where individuals are subsequently brought onboard Canadian warships in the course of boarding operations, this will be an additional factor to be considered in determining the nature of the Canadian maritime frontier zone and any rights and obligations triggered. At this point observance of both the Canadian *Charter* and IHRL rights and obligations is more likely to become engaged, however may be tempered by the circumstances of the Canadian and, if applicable, international authority permitting the detention.
5. Any requirement for observance of Canadian *Charter* and IHRL rights and obligations does not automatically trigger rights provided under other Canadian Acts, including the IRPA, and those detained within the proposed Canadian maritime frontier zone are not automatically entitled to avail themselves of those Acts.
6. Factors that likely will be considered in finding effective control over the vessel and authority and control over the person, both *de facto* and *de jure*, include whether the boarded vessel is flagless or deemed flagless, the effect of the UN *Charter* and any applicable Security Council Resolutions, and whether the actions can be attributed to another State or IO.
7. Any *Charter* or IHRL rights or obligations breached while detained within a Canadian maritime frontier zone during contemporary maritime operations, or as the result of being transferred to another State following detention, may be redressed in Canadian Federal court proceedings or, if sufficiently grave, before an international tribunal.

8. Canadian sailors, acting as State agents in the detention or subsequent transfer of individuals during contemporary maritime operations, may become liable under Canadian criminal or civil jurisdiction for any breach of detainee IHRL rights.

Moving forward, naval leaders and planners of the RCN and CAF have not yet benefited from the same rich judicial consideration of rights and obligations owed by Canadian Forces when detaining individuals extra-territorially. The diverse nature of contemporary operations does not show any sign of diminishing, nor does a return to strictly IHL dominated operations seem likely. Naval leaders and planners alike must recognize this reality and are advised to move forward, engaging with legal experts to create and implement policy and doctrine that acknowledges these contemporary operations and provides useful guidance for, and legal protection over, the officers and sailors called upon to execute those missions. If we as Canadians are to judge our Navy by how well it treats its prisoners, we must first give the RCN the necessary tools to properly conduct this duty.

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