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Practicing What We Preach: Canadian Options For Dealing With Terrorist Detainees at Sea

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CONTENTS

ABSTRACT

Dealing with detainees is complicated business. There is no lack of media coverage or parliamentary debate on the subject and the detainee issue is further complicated by complex and overlapping policies and laws. This paper endeavours to sort through these legal and political complexities to determine the foundations upon which Canada bases its approach to the detainee issue. That foundation of policy and law can then be applied to a maritime terrorist detainee scenario.

Using policy and law as analytical frameworks to examine the detainee situation in Afghanistan as well as that of sea-faring pirates, one finds that there are elements of existing laws and policies applicable to the situation of a terrorist detained at sea. The analysis shows that Canada clearly has the legal foundation, both international and domestic, to detain and prosecute a maritime terrorist. In the realm of policy, it is equally clear that the 'catch-and-release' approach presently followed for pirate detainees is unacceptable as it serves only to aggravate the problem and erodes the credibility of Canada and its military.

The option for Canada is to seek out a third party transfer arrangement and, in the meantime, repatriate any detainees for domestic prosecution. If repatriation is unpalatable, then the Canadian forces should not be sent on the missions in the first place.

INTRODUCTION

Canadian warships have been sailing around this planet for decades. Depending on the mission, they have been used as vehicles of protection, diplomacy and even war. During their voyages, it has been necessary at times to take on board individuals that may present a threat to local sailors, the warship itself, or to Canada as a whole. These individuals have included prisoners of war (POWs), pirates, refugees and terrorists. Each of these categories of individuals present a unique challenge for the ship in terms of legalities, policies and processes but none as challenging as the terrorist.

In recent years, particularly since the attacks of 9 September, 2001, Canadian sailors have been put in a very difficult position with respect to detaining terrorists at sea. Unlike pirates, POWs, and refugees, there is a notable lack of specific national policy when dealing with terrorists at sea. This is not to say that the handling, processing and prosecution of the non-terrorist threats are without challenges or pitfalls, but there are at least frameworks within which to work. The purpose of this paper is to suggest a direction for Canada to take concerning detaining terrorists at sea in order to enable Canadian sailors to deal with these individuals in a manner that is in line with Canadian values and interests.

The paper will focus on the timeframe from the 9-11 attacks to the present. Despite the fact that there is relevant policy and law prior to this timeframe – which will be included where relevant – there is legislation, law and processes that did not exist prior to this period of time which have been designed specifically to deal with terrorism and terrorists. Those new legal and policy frameworks – international and domestic – will be the primary sources of reference for the paper's argument.

The approach of this paper will be to examine contemporary examples dealing with detainees in different contexts in order to determine if there are lessons to be learned in

these situations that can be applied to the conundrum of the terrorist detainee at sea. There are two specific contexts that will be examined. The first involves dealing with detainees in a foreign sovereign country, namely Afghanistan. There exist comprehensive processes and a framework within which suspected terrorists captured by Canadian Forces are transferred to the Afghan authorities. Recognizing that the Afghanistan detainee issue is neither free from controversy nor risk, the present system may provide some valuable insights. The second set of circumstances concerns dealing with piracy. Examining the details and frameworks surrounding the detention of pirates at sea will have relevance when considering terrorists in the same environment. Moreover, by comparing and analysing these contexts, each with its own successes and challenges, potential areas of development can be applied to a potentially new variant, the terrorist detainee scenario at sea.

Both law and policy define the parameters of detainee operations and they make up the framework under which the scenarios above will be analysed. Domestic, military, humanitarian, human rights and international law determine the complex legal framework within which detainee operations can be conducted. It is a contested arena, with overlapping and ever contradictory bodies of law, however, frameworks exist under which terrorists can be detained and processed which are worth evaluation. In terms of policy, there exist national guidelines that constitute direction from the government permitting the actual detention of detainees. Implementation of these policies is what permits the fighting forces of a country to put the legal frameworks into action.

Using existing legal and policy frameworks as analytical framework to examine the two contexts described earlier, this paper will demonstrate that there are elements of existing policy and law that present real options for a Canadian approach to dealing with

terrorist detainees at sea. There will be certain facets that will be peculiar to each of the situations being considered but it will be demonstrated that within each context examined there are also elements that have relevance worth highlighting.

Terrorists are only one of many hazards facing Canadians, and more specifically the Canadian Forces, in the contemporary operating environment. The soldiers, sailors and airmen and women directly facing that threat should be enabled to execute their duties within a clear mandate, supported by a legal framework, appropriate policies and procedures derived from both. Such a law and policy framework does not exist for Canadian sailors when detaining terrorists at sea and should be developed. The current public debate over more than a half decade of detainee policy amply highlights the reason why accountable and transparent processes are required – and sooner rather than later.

DEFINITIONS

Before proceeding, terrorism, piracy, law and policy should be clearly defined for the purposes of this paper for much is premised upon how these terms are defined.

Terrorism

Terrorism has many and conflicting definitions and the lack of an internationally accepted definition remains an issue. C.L. Lim offers three traditional stumbling blocks to the progress in finding an internationally acceptable definition. First, there is disagreement over the inclusion of state sponsored terrorism. Some states, such as the US and Israel, are opposed to definitions that would go beyond finding individual criminal responsibility. Such was the case concerning *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua V. United States)* regarding a claim against the US for support

given to armed insurgents by the Central Intelligence agency.[1] The case was about *state responsibility* not individual responsibility. The second obstacle to the definition process is the question of immunity of the state's armed forces. Some states are wary that members of their armed forces could be prosecuted for terrorism based on decisions they make. This is clearly linked to state-sponsored terrorism and has likewise resulted in many state's reluctance to accept a particular definition of terrorism. The final and most prevalent obstacle is that of national liberation movements. There exists a fine line between legitimate struggles for national liberation or resistance movements and terrorism. Moreover, former organizations and movements once deemed 'terrorist' can gain political legitimacy, thus making the term open to political manipulation. One only has to look to Northern Ireland, East Timor, and the Palestine/Israel situation to understand this complexity.[2] Lim puts it well in describing the situation the international community finds itself in:

> In an international community giving pride of place to the pursuit of state interests, questions of national liberation, self-determination, and the horrific instrumentality of terrorism as a tool, albeit an evil one, presented novel and inconvenient questions that stalled progress on a comprehensive and acceptable definition of international terror.[3]

At a practical level, obtaining an international agreed upon definition will not be possible so long as some states insist on including state sponsored terrorism. As such,

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[1]International Court of Justice, "Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)," http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=nus&case=70&k=66; Internet; accessed 17 April 2010.

[2]C. L. Lim, "The Question of a Generic Definition of Terrorism Under General International Law," in *Global Anti-Terrorism Law and Policy*, eds. Victor V. Ramraj, Micheal Hor and Kent Roach (New York: Cambridge University Press, 2005), 40-43.

[3]*Ibid*., 42.

finding a generic legal definition for terrorism has become a highly politicized issue for which there doesn't seem to be a simple solution. It should be noted, however, that the problem is not that there are *no* definitions, but that there are *many* definitions. It is reaching a consensus on a definition that seems to stymie the process. The UN itself has offered definitions in two of its piecemeal treaties on terrorism choosing to be content with incomplete definitions when there was insufficient agreement and focusing instead on condemning individual activities and actions.[4] A facet of the definition debate that Antonio Cassese highlights is that the disagreement between states is not on the definition itself but rather the *exceptions* to the definition, he refers specifically to the 'freedom fighter' issue within developing countries.[5] Cassese's view is supported by the fact that numerous states, including Canada, have defined terrorism in their own domestic law rather than subscribing to a generic international definition. In Canada's case the interpretation of terrorism is outlined in article 83 of the Canadian *Anti-Terrorism Act* (ATA) wherein it defines a 'Terrorist Activity'. The Act will be addressed in more detail later in the paper but the key elements of the definition are as follows:

> (*b*) an act or omission, in or outside Canada,
>
> (i) that is committed
>
> (A) in whole or in part for a political, religious or ideological purpose, objective or cause, and
>
> (B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or

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[4] Craig Forcese, *National Security Law: Canadian Practice in International Perspective* (Toronto: Irwin Law Inc., 2008), 208. In 2004, the UN released the *Secure World Report* wherein a definition of terrorism was offered. This is as close as the world has come to having an agreed upon definition of terrorism. For more, see http://www.un.org/secureworld/

[5] Antonio Cassese, *International Criminal Law* (New York: Oxford University Press, 2003), 121.

> compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and
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> (ii) that intentionally
>
> (A) causes death or serious bodily harm to a person by the use of violence,
>
> (B) endangers a person's life,
>
> (C) causes a serious risk to the health or safety of the public or any segment of the public,
>
> (D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or
>
> (E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C)

The Canadian definition also includes conspiracy, attempts, and threats as part of an overall definition and the offences considered as terrorist activities include those contained in no less than 10 international conventions or protocols. It further requires that the motive be religious, political or ideological (para (b)(i)(A)) and that either intimidation or compelling a person or organization to do or refrain from doing something be intentional (para (b)(i)(B)). Finally, death, injury or damage must result from the act (para (b)(ii)). The definition excludes acts of the military during an armed conflict governed under International Humanitarian Law (IHL).[6]

For the purpose of this paper, the definition for terrorism described in the ATA as explained above will be the accepted definition. The key features are present: Some kind of political or ideological motivation, intimidation of the public, and intentional violence, either to individuals or to property and infrastructure. These points are common to most post 9/11 legal definitions.[7]

Piracy

Pirates have been a scourge of the seas since humankind took to water. Piracy predates the pyramids and has been recorded throughout history dating as far back as the 14th century B.C.E.[8] It seems whenever there was a lack of central control over areas of the seas, piracy has flourished. Even when a central power commanded the seas, piracy still persisted even if in a diminished capacity. This was as true in ancient times as it is today. The history of piracy stretches from ancient times, through the medieval years up to present day. Pirates have appeared around the globe, from the 'Pirate Knights of the Mediterranean' to the 'Low-Lifes of the Caribbean,' these criminals have plundered and attacked civilians and militaries alike through the centuries. Pirates have been romanticized since the early 1700's when fictional books began to tell tales of brave men and women who embodied freedom and rebelled against the constraints of society when in actual fact they were simply sea-faring criminals for whom shipwreck, disease and

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[6]*Anti-Terrorism Act,* (SC 2001, c.41): Art 83.01, http://laws-lois.justice.gc.ca/PDF/Statute/A/A-11.7.pdf;http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=2330951&Language=e&Mode=1; Internet; accessed 20 February 2010.

[7]Ramraj, Hor and Roach, *Global Anti-Terrorism Law and Policy…*, 433,460,513,539,548-9.

[8]Konstam, Angus, *Piracy: The Complete History* (Oxford, UK: Osprey Publishing, 2008), 10.

starvation were constant threats.[9] This contrast is clear when images of pirates off the coast of Somalia appear in the media. These images of men equipped with AK-47s, RPGs and bandoleers of ammunition bear more resemblance to insurgent terrorists than the pirates of Hollywood.

There are many similarities between terrorism and piracy; in fact, piracy can well be used as a tool of terrorists in order to secure funding or supply their activities. Regardless, piracy is a separate crime from terrorism and has a distinct definition. The most commonly accepted definition for piracy can be found in the United Nations Convention on the Law of the Sea (UNCLOS). UNCLOS as a body of law will be discussed in the chapter on piracy but its definition will be the one used for the purposes of this paper:

> Piracy consists of any of the following acts:
> (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
> (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
> (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
> (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
> (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).[10]

On examination of the definitions, one will find two key characteristics that differentiate piracy from terrorism. Specifically, the motive of piracy is generally accepted to be that of plunder rather than ideological or political gain. This nuance is evident in the terrorism

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[9]*Ibid*., 10.

[10]Canada. Office of the Judge Advocate General, "United Nations Convention on the Law of the Sea (UNCLOS) -1994," in *Collection of Documents on the Law of Armed Conflict*, 2005 ed., ed. Directorate of Law Training (Ottawa: DND, 2005), 276.

definition discussed earlier wherein a political, religious or ideological objective is listed as the motivation. Conversely, the motive in the UNCLOS definition of piracy is described as an act committed 'for private ends.' A more striking differentiation is that of the factor of intimidation. The piracy definition does not mention intimidation whatsoever but the terrorism definition speaks of the intention to intimidate the public or compel a person or government or organization to do or to refrain from doing any act.

A criticism of the piracy definition is that it does not account for piratical acts in territorial waters or when a vessel is alongside. The phrases 'on the high seas' and 'outside the jurisdiction of any State' are quite restrictive when considering the busy waters of littoral states such as Somalia where piracy is currently of great concern. That said, there are international bodies that have defined piracy differently. One of these is the International Marine Bureau (IMB). The IMB "...is a specialized [sic] division of the International Chamber Of Commerce (ICC). The IMB is a non-profit [sic] organization, established in 1981 to act as a focal point in the fight against all types of maritime crime and malpractice." [11] In his RAND report on terrorism and piracy, Peter Chalk uses the IMB definition of piracy: "…an act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in furtherance of that act."[12] This definition goes beyond the UNCLOS two-ship requirement and addresses piracy within internal waters or when a ship is alongside or at anchor. Such a definition is particularly relevant to situations like

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[11]International Chamber of Commerce, "International Maritime Bureau," http://www.icc-ccs.org/index.php?option=com_content&view=article&id=27:welcome-to-the-international-maritime-bureau&catid=25:home&Itemid=16; Internet; accessed 13 March 2010.

[12]Peter Chalk, *The Maritime Dimension of International Security: Terrorism, Piracy, and Challenges for the United States* (Santa Monica, California: RAND Corporation, 2008), 3.

Somalia where piracy is rampant within territorial waters, and a situation where the state does not possess either the capability or capacity to counter piracy in its own waters. Despite the IMB definition addressing the jurisdiction issue in terms of territorial waters – something that will be touched on later in the paper – the more commonly accepted UNCLOS definition will be used for the purposes of this paper.

Policy

There are numerous definitions for public policy which consider official statements, laws, declarations, actions and inactions of governments. Determining what exactly public policy is can be extremely complicated – or on the other hand, quite simple. The often-cited definition of American political scientist Thomas Dye describing political policy is 'whatever governments choose to do or not to do.'[13] This is obviously a simple definition but it contains two key elements; that of choice and action (or equally, inaction). In her writings, Lydia Miljan refers to this definition recognizing that conscious choice must be an element of any definition for public policy but she questions whether policy is determined by official government pronouncements or their actual track record in terms of actions. In the end, she declares that "…[t]o determine what actually constitutes public policy in some field we need to look carefully at both official claims and concrete action, and to remember that actions speak louder than words."[14] The approach to policy that will be taken in this paper will be that of Miljan – policy in either the field of terrorism, detainees or piracy will be based on both what the government says and what it does.

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[13]Thomas R. Dye, *Understanding Public Policy*, 7th ed. (Englewood Cliffs, N.J.: Pretence Hall, 1992).

[14]Lydia Miljan, *Public Policy in Canada: An Introduction* (Don Mills, Ontario: Oxford University Press, 2008), 4.

Law

There is widespread acceptance of the definition of law offered in the Oxford English Dictionary: "a rule or system of rules recognized by a country or community as governing the actions of its members."[15] There is no question that law is made up of a set of rules, however, S.M. Waddams suggests that "…the study of law is not the learning of rules." He explains that law is both a science and a humanity and is critical to both and actually a bridge between the two. He states that "[t]he law manifests the common values of a society, and, at the same time supplies a system for resolving it conflicts."[16] Based on Waddams' comments, it is easy to see how law and policy can and do 'bleed' into one another. Certainly policy is not created outside of the law and the writers and interpreters of law consider the relevant policies affecting that particular realm of law. This paper recognizes that a definition of law it is not as simplistic as merely a set of rules and there is certainly a strong connection between law and policy in the realm of detainees. As such, this paper accepts Waddams' approach to defining law.

With the definitions of terrorism, piracy, policy and law in mind, the analytical framework through which we will examine the Afghanistan and piracy scenarios is clearer. The following two chapters review the law and policy surrounding the paradigm of the terrorist detainee in Afghanistan in first chapter and that of the pirate detainee at sea in the second.

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[15]Catherine Soanes, ed., *Pocket Oxford English Dictionary*, 9th ed. (Oxford, UK: Oxford University Press, 2002), 512.

[16]S. M. Waddams, *Introduction to the Study of Law*, 5th ed. (Scarborough, ON: Carswell Thomson Professional Publishing, 1997), 2-3.

CHAPTER I – AFGHANISTAN

There is much attention in the media on the detainee issue in Afghanistan and has been since the beginning of the mission.[17] The coverage rightfully points to the importance of the issue but much of the debate is focussed at the communication – or lack thereof – by the Canadian Government and the military with the Canadian public surrounding alleged abuse of detainees at the hands of the Afghan authorities. The requirement for appropriate handling is acknowledged, however, the intent of this section of the paper is to focus on the frameworks that allow for the detention and transfer of detainees. Care and handling of detainees are matters of both law and policy and are captured currently in both of those frameworks. If a party to those laws and policies are not in compliance, it is a matter for separate action but does not invalidate the frameworks under which the detention and transfer are conducted. That said, the intent of this section to outline the legal frameworks and national policies at play in Afghanistan in order to provide an example of a working model for detention and processing of terrorism suspects.

LEGAL FRAMEWORK FOR DETAINEES IN AFGHANISTAN

When dealing with the legal framework concerning detainees during an armed conflict as part of the Global War On Terror (GWOT) as is the case for Canadians in Afghanistan, one finds themselves between the proverbial 'rock and a hard place.' In this analogy, the rock is International Humanitarian Law (IHL) under which non-state actors

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[17]Tim Naumetz, "JTF2 has Turned Over Prisoners to U.S.: Defence Minister's Disclosure Undercuts PM's Denial a Day Earlier," *The Ottawa Citizen*, 30 January 2002, http://proquest.umi.com/pqdweb?did=236711751&Fmt=7&clientId=1711&RQT=309&VName=PQD; Internet; accessed 17 April 2010.; Steven Chase, "Calls Grow for Public Inquiry on Detainee Abuse," *The Globe and* Mail, 16 April 2010, http://proquest.umi.com/pqdweb?did=2010490321&Fmt=7&clientId=1711&RQT=309&VName=PQD; Internet; accessed 17 April 2010.

like terrorists do not fit neatly, and the hard place is criminal law. There is little debate that terrorism is a domestic and indeed an international crime. However, Canadian criminal frameworks have not been historically built for use by military forces to counter a criminal threat rather than police. Further, the use of military force to deal with terrorism is a relatively new dynamic, especially in another jurisdiction. Each of these two legal frameworks will be examined as it relates to the mission in Afghanistan.

Criminal Law

Following the collapse of the World Trade Centre on September 11, 2001, the United States invaded Afghanistan on 7 October 2001. There was also considerable activity at the international level to formally criminalize acts of terrorism. The United Nations Security Council passed resolution 1373 (SCR 1373) on 28 September 2001, requiring all states to take action to counter terrorist threats.[18] However, it was not the first resolution of its kind. In fact, there were several prior resolutions dealing with terrorism but, as Forcese argues, SCR 1373 "…constitutes a universal, comprehensive anti-terrorism instrument."[19] It was an instrument that resulted in literally dozens of national responses that now collectively constitute the foundation of domestic criminal law upon which countries have prosecuted the Global War on Terror (GWOT).

In Canada, the legislation that was passed in response to SCR 1373 was the *Anti Terrorism Act* (ATA). Similar legislation was passed in other countries including the *PATRIOT Act* by the United States and the United Kingdom's *Anti-terrorism, Crime and*

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[18]*United Nations Security Council Resolution 1373 (2001),* http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_terrorism/4_Theme_Files/UN%20SC%20Res%201373%20(2001)%20E.pdf; Internet; accessed 20 February 2010.

[19]Forcese, *National Security Law: Canadian Practice in International Perspective…*, 248.

Security Act 2001 (ATCSA). The adjustments to Canadian law instituted by the ATA, along with national and international agreements to which Canada is a party, form the legal foundation for countering terrorism and more specifically, detaining terrorists. The following section will review post 9/11 law regarding terrorist detains in theatre.

International Law

UNSCR 1373 called on member nations to refrain from supporting terrorism in a number of ways including outright criminalization of specific acts of terrorism. Reaffirming that terrorism constituted a threat to international peace and security, the resolution specifically targeted financing of terrorist acts by calling on member states to prevent and suppress financing and criminalizing the provision or collection of funds to be used in support of terrorist acts. The resolution goes on to call for states to ensure that perpetrators are brought to justice and establish terrorist acts as serious criminal offences.[20]

Prior to SCR 1373, there were a number of resolutions relating to terrorism, some of which are reaffirmed in the text of SCR 1373, including resolution 1269 (1999) which called on states to co-operate with each other to prevent and suppress terrorist acts. SCR 1373 also encouraged those states that had not already become parties to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999, to do so as soon as possible.[21] It is generally regarded that the set of resolutions prior to 2001 were piecemeal reactions to specific incidents or terrorist behaviours. However, SCR 1373

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[20]*United Nations Security Council Resolution 1373 (2001)…*, 1-2.

[21]*United Nations Security Council Resolution 1269 (1999)* , http://laws-lois.justice.gc.ca/PDF/Statute/A/A-11.7.pdf; Internet; accessed 20 February 2010.

is a more comprehensive approach to addressing terrorism and provides more categorical language concerning bringing perpetrators to justice.[22] Regardless, SCR 1373 prompted the international community to act. Most western countries moved quickly to implement changes to their domestic laws including the United States, the United Kingdom, Australia and New Zealand. Canada was no exception and was one of the fastest to react. By the end of the year, Canada had ratified the resolution and passed legislation implementing the resolution. In Canada's case it was in the form of the Anti-Terrorism Act (ATA).

Domestic Law

Prior to the 2001 ATA, Canada had already ratified and implemented changes to its legal system satisfying a number of its international anti-terrorism obligations - but not all.[23] The ATA was a massive omnibus statute through which Canada enacted sweeping changes to a number of Canadian Acts and Laws. In its own text, the ATA is described as an "[a]ct to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism."[24] As mentioned in the introduction of this paper, the ATA included the creation of a new definition of terrorist activities in the Criminal Code but it goes much further than simply defining terrorist activities; the ATA provides measures for the government to create a list of entities that have conducted certain activities which cause them to be considered a

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[22]Forcese, *National Security Law: Canadian Practice in International Perspective…*, 248-249.

[23]*Ibid*., 256.

[24]*Anti-Terrorism Act…*, 1.

'terrorist group' under the law.[25] On that list one will find organizations that are currently engaged in the Afghanistan conflict against Canadian Forces, namely Al Qaeda and Hezb-e Islami Gulbuddin (HIG).[26] This creates an interesting circumstance where the Canadian Forces are in a conflict governed by military law facing an enemy who by legal definition can be both a combatant and a criminal. The ATA also introduced changes to address terrorist-related financial offences, an assortment of inchoate offences, and defined a significant set of secrecy laws for the government.[27] It is also worthy to note the fact that the ATA is not emergency legislation – that it is a statute of Parliament subject to same the constitutional discipline as any other legislation.[28] This Act effectively satisfied Canada's obligations under SCR 1373 and yet must also respect Canada's Charter of Rights and Freedoms.

Kent Roach argues that much of the elements of the act already existed in the Criminal Code and that the ATA was wrongfully built on the premise that existing criminal law was inadequate in addressing the post 9/11 terrorist threat. He concedes that the financing provisions of the ATA were required to address the as of yet non-ratified 1999 Convention for the Suppression of the Financing of Terrorism, but in his view "…the non-financing offences relating to participation, preparation and harbouring terrorists were not required to apprehend and punish those such as the September 11 terrorists."[29] He

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[25]*Ibid*. Art 83.01, 83.05.

[26]Public Safety Canada, "Currently Listed Entities," http://www.publicsafety.gc.ca/prg/ns/le/cle-eng.aspx; Internet; accessed 22 February 2010.

[27]Forcese, *National Security Law: Canadian Practice in International Perspective…*, 262.

[28]*Ibid*., 262.

[29]Kent Roach, "Canada's Response to Terrorism," in *Global Anti-Terrorism Law and Policy*, eds. Victor V. Ramraj, Micheal Hor and Kent Roach (New York: Cambridge University Press, 2005), 514.

critiques the insertion of religious or political motive as an element of proof since, under ordinary criminal law, motive is not relevant.[30]

Despite Roach's argument of repetition and the burden of demonstrating motive, there have been successful charges laid under the ATA such as the case of Mohammad Momin Khawaja. As Forcese observed when writing on the constitutionality of criminalizing motive in the ATA, Ontario Superior Court Justice Douglas Rutherford found the motive clause to be unconstitutional as it would cause scrutiny of political, religious and ideological beliefs and was therefore a transgression of the *Charter of Rights and Freedoms*. The motive clause was struck out while the remaining definition of terrorism remained in the charges against Khawaja. The result was a lesser burden on the Crown as it did not have to prove motive.[31] At the time of his writing, Forcese was not aware that the result of the case would be a successful conviction in October of 2008.[32] Suffice it to say, the ATA has proven to be a viable vehicle for bringing suspected terrorists to justice.

An element of the ATA that sets it apart from traditional criminal law is the element of extraterritorial jurisdiction. As Roach points out, "[t]he extra-territorial application of the new terrorism laws also builds on precedents relating to war crimes and aircraft hijacking. People can be prosecuted in Canada for sending financial and other support … to foreign lands."[33] The three principles that extra-territorial jurisdiction is

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[30]*Ibid*., 514.

[31]Forcese, *National Security Law: Canadian Practice in International Perspective…*, 271.

[32]*R. v. Khawaja [2008] O.J. no 04-G30282*, http://www.nefafoundation.org/miscellaneous/FeaturedDocs/Khawaja_ReasonsforJudgment.pdf; Internet; accessed 20 February 2010.

[33]Roach, *Canada's Response to Terrorism…*, 515.

plausibly predicated on are; nationality – where states regulate the conduct of their own nationals overseas; passive personality – where states pass laws applicable to their own nationals being the victims of an overseas act; and the protective principle – which permits states to prescribe certain overseas conduct so fundamental to a state's interests that they attract such regulations.[34] Wording in the ATA that reflects these extra-territorial principles is clearly outlined in sub-paragraphs (c) through (f):

> (3.72) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that, if committed in Canada, would constitute an offence against, a conspiracy or an attempt to commit an offence against, or being an accessory after the fact or counselling in relation to an offence against, section 431.2 is deemed to commit that act or omission in Canada if
>
> (*a*) the act or omission is committed on a ship that is registered or licensed, or for which an identification number has been issued, under any Act of Parliament;
>
> (*b*) the act or omission is committed on an aircraft
>
> (i) registered in Canada under regulations made under the *Aeronautics Act*,
>
> (ii) leased without crew and operated by a person who is qualified under regulations made under the *Aeronautics Act* to be registered as owner of an aircraft in Canada under those regulations, or
>
> (iii) operated for or on behalf of the Government of Canada;
>
> (*c*) the person who commits the act or omission
>
> (i) is a Canadian citizen, or
>
> (ii) is not a citizen of any state and ordinarily resides in Canada;
>
> (*d*) the person who commits the act or omission is, after the commission of the act or omission, present in Canada;
>
> (*e*) the act or omission is committed against a Canadian citizen;
>
> (*f*) the act or omission is committed with intent to compel the Government of Canada or of a province to do or refrain from doing any act; or[35]

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[34]Forcese, *National Security Law: Canadian Practice in International Perspective…*, 290.

[35]*Anti-Terrorism Act*…, Art 3.72.

From a legal perspective, it is obvious that the extra-territorial jurisdictional elements of the ATA are key in terms of defining the legal framework under which detainees may be taken overseas. Extra-territorial jurisdiction is a principle found in international legal frameworks as well. One of the earliest examples of extra-territorial or Universal Jurisdiction existed over 3000 years ago to counter piracy.[36] A more recent and widely known embodiment of Universal Jurisdiction is that of the International Criminal Court (ICC). Although terrorism is not on its list of crimes for which it exercises its jurisdiction there are those that think it should be. This will be explored in the following section.

Rome Statute and the International Criminal Court (ICC)

On 17 July 1998, 120 States took part in establishing the first ever permanent, treaty-based, International Criminal Court with a view to promoting the rule of law and ensuring that the gravest of international crimes would not go unpunished. The treaty, or 'Rome Statute of the International Criminal Court,' entered force on 1 July 2002 once the minimum number of states (60) ratified or acceded to the statute. Unlike the ad hoc tribunals set up within the United Nations framework for Yugoslavia and Rwanda, the ICC had to set up as a completely new, independent, international organization.[37] As of 21 July 2009, 110 states had joined the treaty and it is presently prosecuting a number of cases.[38]

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[36]A more recent example of exercising the Universal Jurisdiction principle existent in international customary law is that of Augusto Pinochet, the Chilean dictator arrested in the UK and extradited to Spain for Trail. This action took place mere months after the signing of the Rome Statute by many of the international community thereby establishing the International Criminal Court (ICC). Although not targeting terrorism like Canada's ATA, the ICC would likewise rely on Universal Jurisdiction to be the key principles through which it would exercise its authority.

[37]The International Criminal Court, "The ICC at a Glance: What is the ICC?" in *The International Criminal Court: Global Politics and the Quest for Justice*, eds. William Driscoll, Joseph Zompetti and Suzette Zompetti (New York: The International Debate Education Association, 2004), 30.

It is considered to be a complimentary court, in that it does not replace national courts. As such, the ICC will only investigate and prosecute a particular set of crimes if a state under its jurisdiction is unwilling or unable genuinely to investigate or prosecute."[39]

The list of crimes that are considered by the ICC is of particular relevance to this paper. Article 5 of the Rome Statute lists the four crimes for which the ICC has jurisdiction. The crimes are limited to what are considered to be the most serious of crimes of concern to the international community: genocide, crimes against humanity, war crimes, and the crime of aggression. As of yet, however, there is no agreed definition for the crime of aggression so there is no provision for the ICC to exercise jurisdiction over this crime. Each of these crimes is further defined in the Rome Statute under articles 6 through 8 but what is noticeably lacking is any mention of terrorism.[40]

Understanding the purpose of the ICC and the principle of universal jurisdiction, it has been argued that the crime of terrorism itself should be added to the list of crimes under the jurisdiction of the ICC. C.L. Lim describes three approaches to the inclusion of terrorism in the Rome Statute. First is the Schmid/Lador-Lederer proposal which effectively equates terrorism to a crime against humanity. It basically argues that terrorism is a peacetime equivalent of a war crime. The category of 'war crimes in peace time' is a category known to the drafters of the Nuremburg Charter and it is what we now refer to as

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[38]Mr Dilip Lahiri, "Explanation of India's Vote on the Adoption of the Statute of the International Criminal Court," in *The International Criminal Court: Global Politics and the Quest for Justice*, eds. William Driscoll, Joseph Zompetti and Suzette Zompetti (New York: The International Debate Education Association, 2004), 42-45.

[39]The International Criminal Court, *The ICC at a Glance: What is the ICC?...*, 32.

[40]Canada. Office of the Judge Advocate General, "Rome Statute of the International Criminal Court - 1988", in *Collection of Documents on the Law of Armed Conflict*, 2005 ed., ed. Directorate of Law Training (Ottawa: DND, 2005), 306.

crimes against humanity.[41] The second approach is that of Antonio Cassese whose proposal, rather than equating terrorism to crimes against humanity, is to include terrorism within the list of crimes against humanity. This is based on earlier proposals put forward by a number of countries during the negotiations of the Rome Statute but were objected to by other states on the grounds that terrorism would remain a vaguely defined offence resulting in highly politicized trials.[42] Without a clear definition of terrorism, this proposal is not likely to find wide acceptance. The final approach is to include terrorism on the list of serious crimes in the statute as a starting point for international negotiations – much the same as it is for acts of aggression. This approach was not adopted as there was only scant support during the negotiations leading up to the Statute. In the end, there was only a resolution included recommending a future Review Conference to work on a definition of terrorism with a view to future inclusion in the Rome Statute.[43]

The ICC is not without its critics. States such as Israel and India did not vote for the Rome Statute explaining that the ICC was being abused as a political tool. In India's case, objecting to the close involvement of the UN Security Council with the ICC in that the statute gave the Security Council the power to refer, the power to block and the power to bind non-states parties. For Israel, the objection was not surprisingly based on the inclusion of transferring a population into occupied territory as one of the offences under the war crimes section.[44] Beyond objecting states, critics such as Gary Dempsey and Ruth

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[41]Lim, *The Question of a Generic Definition of Terrorism Under General International Law…*, 52-53.

[42]*Ibid*., 54.

[43]*Ibid*., 58.

[44]Lahiri, *Explanation of India's Vote on the Adoption of the Statute of the International Criminal Court*, 42.; Judge Eli Nathan, "Explanation of Israel's Vote on the Adoption of the Statute of the International Criminal Court," in *The International Criminal Court: Global Politics and the Quest for Justice*, eds. William

Wedgwood also see flaws in the ICC. They question the wisdom of the court's creation and explain the potential negative ramifications on the signatory states – particularly the United States of America.[45] The criticism is due primarily to the requirement that signatory states must submit themselves to the jurisdiction of the court and could therefore find themselves as an accused should that state be involved in foreign internal conflicts like Nicaragua, Afghanistan or Israel.

Ironically, many of the elements of the Rome Statute were initially drafted and included to make it an acceptable arrangement for the United States which makes the argument that supporting the ICC is not in the interest of the US somewhat questionable.[46] As it turns out, the cases heard by the ICC have been composed primarily of referrals from states who find themselves unable to prosecute the criminals and look to the international community for assistance rather than the prosecutor entrepreneurially seeking out opportunities to execute international justice.

Nonetheless, despite objections by states or critics towards the potential flaws and shortcomings of the ICC, it is presently an internationally accepted body that is exercising its jurisdiction in a number of cases thus providing an international framework for legally exercising jurisdiction. As unlikely as it may be, if terrorism was added to its list of crimes, it could be a vehicle by which international law could be exercised. Until that

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Driscoll, Joseph Zompetti and Suzette Zompetti (New York: The International Debate Education Association, 2004), 46.

[45]Gary T. Dempsey, "Reasonable Doubt: The Case Against the Proposed International Criminal Court," in *The International Criminal Court: Global Politics and the Quest for Justice*, eds. William Driscoll, Joseph Zompetti and Suzette Zompetti (New York: The International Debate Education Association, 2004), 48-72.; Ruth Wedgwood, "The International Criminal Court: Reviewing the Case," in *The International Criminal Court: Global Politics and the Quest for Justice*, eds. William Driscoll, Joseph Zompetti and Suzette Zompetti (New York: The International Debate Education Association, 2004), 81-88.

[46]Note here that the US had originally signed the treaty, but under the first term of President George W. Bush, it was "unsigned," i.e. the US withdrew its signature.

time, implementation of applicable international law pertaining to terrorists will be up to the states involved as is the case for Canada in Afghanistan.

International Humanitarian Law (IHL)

The Canadian forces in Afghanistan are governed by International Humanitarian Law (IHL). IHL is the body of international law that applies to armed conflict. It is divided into two categories: those laws that apply to international conflicts (state on state) and those that apply to non-international (non-state) conflicts such as civil wars. It is readily apparent that the issue of terrorism under IHL presents a problem as IHL attempts to apply inter-state and intra-state paradigms on a conflict between several states and a transnational, non-state entity. Regardless of this predicament, the actions of the CF in Afghanistan are dictated by both of the realms of IHL.

The primary body of law governing the international (state on state) conflicts is the Geneva Conventions. These delineate both *jus ad bellum* principles – the rules for going to war, as well as the *jus in bello* principles – the rules for conducting a war. In terms of *jus ad bellum* and the CF presence in Afghanistan, the right of collective self-defense, as provided under Article 51 of the UN Charter and Article V of the 1949 North Atlantic Treaty,[47] was invoked in Afghanistan. The deployment was further supported by UNSCR 1386 authorizing the International Security Assistance Force (ISAF).[48] It is not the intent of this paper to address the legality of deploying forces to Afghanistan beyond the

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[47]*The North Atlantic Treaty*, (1949): Article 5, http://www.nato.int/cps/en/natolive/official_texts_17120.htm; Internet; accessed 24 February 2010.

[48]*United Nations Security Council Resolution 1386 (2002)*, (2002): , http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/708/55/PDF/N0170855.pdf?OpenElement.; Internet; accessed 24 February 2010.

justification offered above as the focus is not on the question of Afghanistan being a just war or if Canada ought to have joined the conflict or not, it is about the rules of conduct within the conflict.[49] This section will deal with the application of the *jus in bello* principles and the laws surrounding Canadian Forces' interaction with suspected terrorists.

Despite the debate surrounding the terrorist definition and the applicability of overlapping bodies of law, the treatment of detainees in Afghanistan is conducted in accordance with the Third Geneva Convention pertaining to the treatment of Prisoners of War (POW). The detainee transfer arrangement between Canada and Afghanistan recognizes that detainees are not necessarily combatants as it states specific definition for a detainee in the arrangement that is not congruent to the Article 4 conditions describing combatants. What it does specify, however, is that detainees will be afforded all of the protections entitled to a combatant as a POW.[50] This element of the transfer arrangement is fully in line with Article 5 of Convention III wherein it is stated that if there is any doubt whether the belligerent fits the criteria of a combatant, they are to enjoy the protection of the convention until their status has been determined by a competent tribunal. The Transfer Arrangement will be addressed in more detail later in the paper but suffice it to say that using IHL as the 'default setting' for detention and handling of individuals in Afghanistan is done to ensure a high standard of treatment and satisfy the *jus in bello* requirements under international law. The treatment of POW's under the Third Geneva Convention constitutes the highest standard of ethical treatment of a captured individual

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[49]Adam Roberts, "The Laws of War," in *Attacking Terrorism; Elements of a Grand Strategy*, eds. Audrey Kurth Cronin and James M. Ludes (Washington D.C.: Georgetown University Press, 2004), 207.; Jordan Paust, "After 9/11: Attacks on the Laws of War," *The Yale Journal of International Law"* no. 28 (Summer 2003): 325.

[50]"Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan," http://www.afghanistan.gc.ca/canada-afghanistan/assets/pdfs/Dec2005.pdf ; Internet; accessed 03/13, 2010.

under international law as it affords a host of protections and rights for that individual that do not exist under international or domestic criminal law.

Detainees taken at the hands of Canadian Forces Personnel in Afghanistan must, in accordance with IHL, "…at all times be humanely treated. Likewise, [they] must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity." Further, they are entitled by way of Article 25 of the Convention, to quarters, food and clothing commensurate to that enjoyed by the detaining forces. They are also to be afforded hygiene and medical attention as well as specific provisions according to their age, sex or state of health.[51] In general terms, detainees are afforded a level of respect and treatment that is normally reserved for lawful combatants who themselves obey IHL – whether that is actually the case or not.

The standards of treatment mentioned above are only a sampling of the broad range of rights and privileges that are afforded to detainees by means of the Third Geneva Convention. By using this standard of treatment for detainees in Afghanistan, the Canadian Forces are providing the highest standard of care possible and thereby soundly satisfying the *jus in bello* requirements of IHL. This is not to say that the system is perfect and that breaches of this standard have not happened in the past or will not happen in the future – particularly once the transfer to the Afghan authorities has happened. Certainly this has been a topic of previous investigations most notably the recent *Board of Inquiry into In-theatre Handling of Detainees*.[52] The intent of this paper is to examine the

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[51]Canada. Office of the Judge Advocate General, "Geneva Convention (III) Relative to the Treatment of Prisoners of War," in *Collection of Documents on the Law of Armed Conflict*, 2005 ed., ed. Directorate of Law Training (Ottawa: DND, 2005), 95-99.

[52]Canada. Department of National Defence, "Board of Inquiry into in-Theatre Handling of Detainees," http://www.vcds.forces.gc.ca/boi-cde/ihd-tdt/part2-partie2-eng.asp#chap1-sec3; Internet; accessed 10 April

frameworks dictating the detention process, not allegations of whether or not the process is being followed.

The legal frameworks discussed above are mandated by Canadian national policy. It will be demonstrated in the following section that these policies are not always readily evident but are nonetheless real and worthy of examination.

POLICY FRAMEWORK SURROUNDING DETAINEES IN AFGHANISTAN

International and domestic law, both criminal and military, define the parameters for taking action and the circumstances under which that action can be taken legally. However, having the authority and jurisdiction to act in a particular circumstance does not necessarily mean a state will take action. It is the national policies based on the state's interests and values in combination with its political will that determines if a state *will* act. This is very much the case when examining Canada's position on detaining terrorist suspects. The international and domestic legal frameworks may exist that allow Canada to detain an individual for his or her actions but if there is a lack of policy to direct security forces, or a lack of the political will to deploy those forces, nothing will likely be done. In general terms, the legal frameworks are the *authority* to act, but policy and political will comprise the *willingness* to act and see the process through. This section will examine the existing Canadian policies on detention of terrorist suspects in Afghanistan as well as political will that may or may not be behind those policies.

2010). It is worth mention that in the executive summary of the BOI report the board stated that it has "… heard no evidence suggesting that members of the Canadian Forces have mistreated detainees in Afghanistan. Indeed, we heard of several instances where CF members went far beyond what was expected of them to protect the lives of Afghan detainees, even though doing so dramatically increased the risk to themselves and their allies."

One singular statement of Canadian policy regarding detainees does not exist. It is necessary to examine several sources to determine Canada's position on detainees. This section will examine the latest International Policy Statement, relevant statements from government and the inter-governmental arrangements with Afghanistan regarding the transfer of detainees. It was mentioned in the introduction of this paper that in order to determine the actual policy in a field, one must examine the claims of a government as well as its actions. Through examination of what Canada 'says' as well as what it 'does' in terms of detainees in Afghanistan, one can determine the Canadian national policy on detainees.

Strategic Policy – Documentary Evidence

2005 IPS

As Lydia Miljan states "…[i]n politics, as in life generally, no statement should be taken at face value. Vagueness and ambiguity are oftentimes deliberate, and are always part of the recipe for political longevity in democratic political systems."[53] This certainly rings true for much Canadian Foreign policy and the 2005 *Canadian International Policy Statement* (IPS) is no exception. Not surprisingly, there is no specific mention of detainees within the document. In the section on defence, however, it asserts Canada's intentions to respond to the global threat of terrorism by engaging potential threats abroad by focussing on failed and failing states as potential breeding grounds for terrorism. It recognizes regional flashpoints and articulates Canada's duty to act. It further concludes that one of the complex challenges of today's international security environment is global terrorism

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[53]Miljan, *Public Policy in Canada: An Introduction.…*, 4.

and that "Canada, working in close partnership with friends and allies, must do its part to confront [it]."[54]

Although the words are broad and the entire document provides a great amount of flexibility for the government to shift left or right, important parameters are set. The IPS is a post 9/11 document that recognizes the transnational nature of the terrorist threat facing Canada. It also recognizes that threats to Canada are likewise threats to our allies, and the inverse is true as well. It is also worth noting that, although the document was drafted and published under a Liberal government, it has endured through a change in national leadership to a Conservative government without repudiation. The IPS is Canada's most recent international policy document and the fact that it still stands is demonstrative of its value as an accurate reflection of Canada's position – read policy – concerning terrorist threats.

DFAIT

The Department of Foreign Affairs and International Trade (DFAIT) has the mandate of "…ensuring that Canada's foreign policy reflects true Canadian values and advances Canada's national interests."[55] As such, it aligns its departmental priorities along these same lines. On its website, DFAIT lists its departmental priorities and included in those is Afghanistan. Looking further into Afghanistan, one will find the 6 priorities of the Canadian mission there – the first of which is security which includes providing support to

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[54]Canada. Department of National Defence, "Canada's International Policy Statement," http://www.army.dnd.ca/land-terre/news-nouvelles/text-texte-eng.asp?id=478; Internet; accessed 8 April 2010.

[55]Department of Foreign Affairs and International Trade Canada, "About the Department," http://www.international.gc.ca/about-a_propos/index.aspx; Internet; accessed 14 February 2010.

the justice and corrections system.[56] DFAIT, as the lead department for the mission in Afghanistan, is responsible for the tracking and follow up of detainees turned over the Afghan authorities so it is of little surprise that the restructure of the Afghan judicial and corrections system ranks so high within its Afghan priorities. Although not an outright statement of national policy, treatment and processing of detainees – including prosecution – is of particular interest and concern to the government of Canada. As mentioned earlier in the paper, the detainee issue attracts much media attention and has become an explosive issue on parliament hill. With groups like BC Civil Liberties Association and Amnesty International taking the Canadian Government to court over alleged Charter violations and human rights concerns regarding detainee treatment, the issue has persisted as a high profile concern to three consecutive minority governments. Considering the political sensitivity on this issue, it is no surprise that the aspect of processing and treatment of suspected terrorist detainees is readily evident in the transfer arrangements between the governments of Canada and Afghanistan. The specific details of the arrangement are covered in more detail later in this section.

G8

The Group of Eight (G8) defines itself as "… a forum for the leaders of eight of the world's most industrialized nations, aimed at finding common ground on key topics and solutions to global issues."[57] Canada has been a member of the G8 since 1976 and has

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[56]Department of Foreign Affairs and International Trade Canada, "Our Priorities 2009-2010," http://www.international.gc.ca/about-a_propos/priorities-priorites.aspx; Internet; accessed 14 March 2010. Priorities may not necessarily translate into concrete policy, but they are nonetheless part of what governments "say" they will "do;" as this is in accordance with the broad definition of policy, they are included here.

played a lead role in a number of those global issues – one of which is terrorism. There have been multiple summits over the years that have had counter-terrorism on the agenda – particularly since 9/11. By reviewing the formal statements from those summits one can gain a perspective on the member states' policy regarding terrorism and their position on what constitutes counter-terrorism and their desire to bring alleged terrorists to justice.

The importance of global counter-terrorism efforts to the G8 is obvious. Every G8 Summit since 9/11 has included a 'Declaration on Counter Terrorism' in one form or another, wherein the leaders of the member states reaffirm their position condemning terrorist acts and state their policies regarding a myriad of terrorist-related issues.[58] Some of the statements relate specifically to prosecuting terrorists and thus are particularly relevant when examining member states' policies towards detention. In 2002 at the Kananaskis Summit, the first summit following the 9/11 attacks, G8 leaders affirmed, "…[they] are committed to sustained and comprehensive actions to deny support or sanctuary to terrorists, to bring terrorists to justice, and to reduce the threat of terrorist attacks."[59] At the Gleneagles Summit in 2005, G8 leaders further asserted that they would "…respond resolutely, together and severally, to this global challenge and work to bring terrorists to justice wherever they are."[60] Most recently in L'Aquila, the G8 Declaration on Counter Terrorism "…stress[ed] the fundamental importance of disrupting and prosecuting terrorists."[61] As a member of the G8, Canada shares the view stated in the

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[57]Muskoka 2010 G8, "About the G8," http://g8.gc.ca/about/; Internet; accessed 22 March 2010.

[58]*Ibid*.

[59]*Ibid*.

[60]*Ibid*.

[61]*Ibid*.

declarations mentioned above. Moreover, the G8 declarations are consistent with foreign policy statements and domestic criminal law, such as the ATA. .

One can see from the preceding sections that Canada has a clear policy regarding counter-terrorism and, more specifically, bringing terrorists to justice. As discussed earlier, this is only half of the picture – what is *said*. The following section will address the other half – what is *done*.

Operational Policy – Actual Practice

The primary embodiment of foreign policy with regards to the Canadian position on counter-terrorism is arguably the actual deployment of the CF to Afghanistan as part of the International Security Assistance Force (ISAF) mission in that country. There is no argument that the deployment of roughly 2500 troops in 2002, an effort that has only increased since, is a demonstration of the political will of the Canadian government and action that speaks louder than any words in terms of public policy with respect to combating terrorism.

There is a fundamental reality that should be understood when considering policies surrounding conflict and detainees for the Canadian Forces. When a military force is tasked by its government to execute a mission governed by the IHL and other international customary law, it may necessitate the taking of detainees by virtue of those laws. In other words, there are situations wherein a CF member is obliged by law to detain an individual. A simple example can illustrate this circumstance: an individual, in the process of attacking the Canadian Forces, is wounded in action and the site is then secured by Canadian Forces. The individual is entitled to medical care but is still regarded as a threat to friendly forces. To leave that wounded individual either shipwrecked or on the battle

field to die is contrary to Geneva Conventions I and II and Additional Protocol II wherein it is explained that following an engagement, parties are obliged to take all possible measures to search for and collect the wounded, sick and shipwrecked.[62] That said, in the case mentioned above, there is no option but to detain the injured individual. This example clearly demonstrates how and why a military force is compelled to take detainees in particular circumstances. In accordance with IHL, a government that decides to assert force in the form of a military intervention must realize that it is at the same time authorizing the taking of detainees. Put bluntly, a policy to intervene with force necessarily equals a policy to detain. Understanding this reality, the question becomes *what next?* One of the options is to transfer that detainee. The embodiment of that policy in Afghanistan is the transfer arrangements which will be now be addressed.

Transfer Arrangements

The requirement to be capable of detention is certainly understood by soldiers. The military is the vehicle of intervention and the body that executes the profession of arms. The need to detain is clear in IHL and as a professional military, the CF is trained formally in IHL and rules of engagement (ROE) which embody these principles. This comprehension is certainly clear in the testimony of military leaders within the Board of Inquiry into In-Theatre Handling of Detainees, wherein a comment that was made that "One of the points that was identified clearly [early] on was the issue of detainees. We are going to go there … and the likelihood of encountering persons that we will have to detain

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[62]Canada. Office of the Judge Advocate General, *B-GG-005-027/AF-021 the Law of Armed Conflict at the Operational and Tactical Level -Annotated-* (Ottawa: DND Canada, 2001), 9-1. Note that not all states are signatory to AP I, and it is not considered customary international law in the same way as is Common Article III.

is very high, especially if you design a mission to go capture someone."[63] This comment was made describing the situation prior to the existence of a Transfer Arrangement.

The necessity of having a policy for handling and transfer of detainees was clear to the military chain of command and may explain why the first detainee transfer arrangement signed in December of 2005 was an arrangement "…between the *Canadian Forces* and the Ministry of Defence of the Islamic Republic of Afghanistan [emphasis added]." The arrangement was signed by the Chief of Defence Staff (CDS) of the day on behalf of the Government of Canada and by the Afghanistan Minister of Defence, Mr. Abdul Rahim Wardak.[64] A supplemental arrangement was developed and then signed by Mr. Arif Lalani, the Canadian Ambassador to Afghanistan, in May of 2007. This arrangement was signed at the same time a federal court case against the Government of Canada by the BC Civil Liberties and Amnesty International concerning the treatment of detainees in Afghanistan was winding down through the courts. The title of the supplemental arrangement specifies that it is "… between the *Government of Canada* and the Government of the Islamic Republic of Afghanistan [emphasis added]."[65] This evolution in the transfer arrangement makes it clear that it is an embodiment of government policy rather than a stipulation of military operating procedures. As the second arrangement is a supplement to, rather than a replacement of, the first, the transfer arrangement will be considered one document in the paragraphs that follow.

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[63]Canada. Department of National Defence, *Board of Inquiry into in-Theatre Handling of Detainees…*, Para 78.

[64]*Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan*…, 2.

[65]"Arrangement for the Transfer of Detainees between the Government of Canada and the Government of the Islamic Republic of Afghanistan," http://www.afghanistan.gc.ca/canada-afghanistan/documents/arrangement_detainee.aspx?lang=eng; Internet; accessed 13 February 2010.

The transfer arrangement outlines the responsibilities of both states with regards to handling and transfer. Some key elements of the arrangement are that detainees will be treated by both parties in accordance with the Third Geneva Convention, access to detainees for both the International Committee of the Red Cross (ICRC) and the Afghanistan Independent Human Rights Commission (AIHRC) is assured, the requirement to keep accurate records is stipulated, and the requirement to notify ICRC and the Government of Canada prior to release of the detainee or if there is a change in his or her circumstances.[66] These elements illustrate the close connection to IHL and, along with the remainder of requirements in the document, serve as a strong statement of policy in terms of the 'how' when it comes to the handling and transfer of detainees in Afghanistan. The transfer arrangement forms the basis of policy both written and actual upon which the CF in Afghanistan can execute its duties in terms of detainee operations.

Summary

One could argue that the detainee situation in Afghanistan is rife with problems given media, parliamentary, and judicial attention paid to the issue. However, from a legal and policy perspective, it is evident that there exist solid frameworks regarding detainees in Afghanistan. It has been demonstrated that the international and domestic laws provide a legal basis by which the Canadian Forces can detain, process, transfer, and even domestically prosecute detainees. Further, by looking at what the Canadian government says through its own International Policy Statement and DFAIT as well as declarations as part of the G8 community, its position on bringing terrorists to justice is clear. In terms of

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[66]*Ibid*.; *Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan*…, 2.

what the government *does*, the deployment of the CF to Afghanistan and the signing of the transfer arrangement are clear demonstrations that put the government's words into action. There is no debate that Canada has a policy on detainees in Afghanistan and that policy is in accordance with international laws and customs.

CHAPTER II – PIRACY

This section of the paper will examine a second scenario where the Canadian Forces find themselves in a situation that detainees may be taken – one in which the detainees are taken at sea. The scenario concerns the detention of pirates and, similar to the previous section, the legal underpinnings and policy frameworks will be examined but in this case it will be in the context of the sea environment. Due to the international characteristics of the sea itself, international laws govern the actions taken in that environment. As such, the focus of this section will be on those bodies of law and policy that are specific to operations at sea and are the basis for the capture and processing of pirates.

LEGAL FRAMEWORK FOR PIRATES – HORN OF AFRICA

One of the earliest legal frameworks addressing piracy was that of the Roman Republic where Gnaeus Pompeius Magnus (Pompey the Great) was tasked to rid the Mediterranean Sea of pirates. The legal mandate was in the form of the *lex Gabinia de piratis persequendisi* or 'anti-piracy law.' This law granted him an immense budget and huge military force. In three months he succeeded in destroying 500 ships and killing (by death in battle or execution) 10000 pirates. The campaign was a success but it stretched the resources of Rome to the limit and effectively moved the centre of piratical activity from Asia Minor to the North African Coast.[67]

Writing in the 17th century, Hugo Grotius (1583-1645) imagined that the seas were a global commons and was an early exponent of both international law and law of the sea.

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[67]Konstam, *Piracy: The Complete History…*, 20-22.

In his work *De jure belli ac pacis* ('On the Law of War and Peace') Grotius constructed a set of principles and rules aimed at regulating international interaction and "… helped establish International Law as an independent branch of learning." In an earlier work, *De jure paedae* ('The Law of Prize and Booty'), he set out his doctrine of *mare liberum* which was the claim that the seas are "free to all."[68] Grotius saw the need for both freedom and regulation. His expression of this belief was the eventual foundation for present day international laws pertaining to the high seas, today found in the UN Convention on the Law of the Sea (UNCLOS).[69]

Other than demonstrating the earliest of legal frameworks for piracy, the Roman example above illustrates the sheer magnitude and complexity of dealing with the threat of piracy. Complexity also exists when dealing with contemporary piracy. Moreover, the methods used to deal with the pirates in ancient times - namely destruction, exile and execution - may have been effective in its day, but are neither acceptable nor legal today. Despite the inherent complexities and challenges, the legal constructs of today, originating with the works of Grotius, define acceptable conduct for states countering piracy. Those constructs will be examined in the following section.

United Nations Convention on the Law of the Sea (UNCLOS)

UNCLOS is a legal convention with roots back to Grotius' *mare liberum* that represents the culmination of decades of international negotiations. It governs many aspects of the world's oceans ranging from fisheries and scientific research to navigation

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[68]Torbjorn L. Knutsen, *A History of International Relations Theory*, 2nd ed. (Manchester: Manchester University Press, 1997), 99.

[69]Canada. Office of the Judge Advocate General, *United Nations Convention on the Law of the Sea (UNCLOS) -1994.…*, 262-280.

and security. It is likely the most recognized body of international law concerning the sea and came into force in 1994. Canada ratified UNCLOS in November 2003 and came into force for Canada a month later. The Canadian Forces publication, *The Law of Armed Conflict at the Operational and Tactical Level*, describes UNCLOS as the "…most accepted source for the law of the sea" and is one of the frameworks that form the foundation of laws governing the Law of Armed Conflict (LOAC) for the Canadian Forces while at sea.[70] Within the UNCLOS, there are a series of articles that deal specifically with piracy. Articles 100 to 110 explain the duties of signatory states, define piracy and outline the rights of warships with regard to the interdiction of pirate vessels.[71] These are the elements of UNCLOS that are the most relevant to this discussion. Although UNCLOS does not cover every aspect surrounding piracy, it does lay a foundation upon which states can legally take action against pirates and thus represents a starting point for dealing with pirate detainees.

Even if an act fits the definition of piracy according to UNCLOS, jurisdiction is still restricted to the open seas or areas outside the jurisdiction of any state. That is unless the coastal state desires otherwise – which happens to be the case with Somalia. The Security Council of the United Nations issued Resolution 1846 in 2008 which rendered the question of jurisdiction for piracy in the territorial waters of Somalia a non-issue. UNSCR 1846 (2008) took note of a letter from the President of Somalia to the Secretary-General of the UN requesting international help countering piracy in its own waters and called on capable states to provide assistance. The resolution, specifically under paragraph 10,

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[70]Canada. Office of the Judge Advocate General, *B-GG-005-027/AF-021 the Law of Armed Conflict at the Operational and Tactical Level -Annotated-…*, 8-2.

[71]Canada. Office of the Judge Advocate General, *United Nations Convention on the Law of the Sea (UNCLOS) -1994.…*, 262, 276-277.

permits states to enter the territorial waters of Somalia and use all necessary means in repressing piracy and armed robbery at sea.[72] This addresses the UNCLOS definition issues surrounding jurisdiction by basically extending the counter-piracy mandate of signatory countries into territorial waters.

Despite the shortcomings in the UNCLOS definition and the potential means to work around those issues, it is the actions of the states sanctioned in the convention that are of particular importance. The convention provides the legal basis for counter piracy operations and Canada, as a signatory state, is *expected* to act.

Article 100 of UNCLOS compels signatory states to take action against piracy. Specifically it states: "Every State shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State."[73] This article, in very simple terms, describes the duty of states to take action and provides jurisdiction for those states to act. This jurisdiction is further reinforced in articles 105, 107 and 110 wherein the boarding and seizure of pirate ships, by military craft in particular, is authorized.

There is no question that piracy is an international problem. Considering that piracy often takes advantage of non-territorial waters and even the pirates themselves can be without state affiliation, it is not surprising that much of the laws governing piracy are international in nature. However, many countries have domestic laws concerning piracy and Canada is no exception.

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[72]*United Nations Security Council Resolution 1846 (2008)*, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/630/29/PDF/N0863029.pdf?OpenElement; Internet; accessed 13 March 2010.

[73]Canada. Office of the Judge Advocate General, *United Nations Convention on the Law of the Sea (UNCLOS) -1994.…*, 276.

Canadian Domestic Law

Within the Criminal Code of Canada, under Part II: Offences Against Public Order, one will find the offence of piracy. There are two articles dedicated to piracy, Article 74 describing 'Piracy by Law of Nations', and Article 75 describing 'Piratical Acts'.

> Piracy by Law of Nations
> 74. (1) Every one commits piracy who does any act that, by the law of nations, is piracy.
> Punishment
> (2) Every one who commits piracy while in or out of Canada is guilty of an indictable offence and liable to imprisonment for life.
>
> Piratical acts
> 75**.** Every one who, while in or out of Canada,
> (*a*) steals a Canadian ship,
> (*b*) steals or without lawful authority throws overboard, damages or destroys anything that is part of the cargo, supplies or fittings in a Canadian ship,
> (*c*) does or attempts to do a mutinous act on a Canadian ship, or
> (*d*) counsels a person to do anything mentioned in paragraph (*a*), (*b*) or (*c*),
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.[74]

In both articles the element of universal jurisdiction is obvious. Canada asserts its domestic legal right to prosecute piracy 'in or out of Canada.' In terms of what constitutes piracy, Article 75 is clear in terms of ships flying Canadian National Colours but in the case of Article 74 it defaults to the Law of Nations rather than offering a distinct Canadian definition. In article 74(1), 'Piracy … by the law of nations', is referring to the UNCLOS definition described earlier in the paper.

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[74]*Criminal Code, R.S.C. 1985, c. C-46,* , http://laws.justice.gc.ca/eng/C-46/page-2.html; Internet; accessed 12 March 2010.

It may come as a surprise to many that piracy exists in the Criminal Code of Canada. It is a relatively short section of law but it leverages the accepted international definition of piracy and demonstrates Canada's right to apply that law outside its own territorial boundaries. However, having the legal right does not mean that action will be taken. As has been mentioned, it is the political will expressed through word and action that constitutes a true policy for enforcement of the law. This policy will be examined in the section that follows.

POLICY FRAMEWORK FOR PIRATES – HORN OF AFRICA

States have long been involved in combating piracy. The previous section demonstrated that bodies of both domestic and international law have been created to deal specifically with piracy. However, Canada does not have concrete national policy regarding pirates and piracy. Canada has committed ships to anti-piracy missions, denounced the act of piracy, taken the lead on anti-piratical initiatives, and even dedicated itself to supporting failed and failing states where piracy is rampant. Notwithstanding all of this effort, there is no guiding national or military policy on Canada's approach to piracy.

Not unlike the policy section pertaining to detainees in Afghanistan, this section will examine the actions and statements of the Canadian government regarding piracy in order to determine Canada's *de facto* policy. The International Policy Statement issued in 2005 as well as statements by government leaders all provide some information and set he scene for Canada's actions. The actions of the government – in terms of signing international agreements, deploying forces, and taking decisions during operations – all contribute to an informal but real policy.

Strategic Policy – Documentary Evidence

Just as the IPS lacks specifics mention of detainees, it is also devoid of any specific comment on piracy. The threat of terrorism is recognized and, as mentioned earlier, the ties to taking action against terrorists can be extrapolated from this focus. This however, is not the case for piracy. Piracy is not terrorism but it still constitutes a threat to Canada and its allies particularly economically. The sole focus in the document from which one could imply a tie to piracy is that of failed and failing states where the government of Canada recognizes that situations created in failed and failing states like Somalia are an "affront to Canadian values" and they have the potential to be "… breeding grounds or safe havens for terrorism and organized crime."[75] That is, if one considers piracy to be a form of organized crime. It is somewhat disappointing that a document intended to describe 'the international security environment at the beginning of the 21st century' omits one of the key transnational economic security threats of the day.

Despite the absence of a specific comment on piracy in the IPS, there is little doubt that the Canadian Government is fully aware of the issue of piracy and aware of the potential economic impacts of its continuation or escalation. In November of 2009, Minister of Defence, Peter Mackay, called for an international conference on piracy. It was during an International Security Forum being held in Halifax Nova Scotia where Mackay expressed the need for a conference to determine a coordinated response to piracy and discuss what should be done with captured pirates. Ironically, it was also during this conference that the Minister and CDS explained that there had been a need to halt detainee

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[75]Canada. Department of National Defence, *Canada's International Policy Statement*…, 5.

transfers in Afghanistan due to the possibility of torture.[76] Certainly the issue of treatment of pirates following transfer to a third party is likely in the minds of government officials as well. Despite the potential issues, Mackay's statement demonstrates the desire for Canada to take action and even assume a leadership role in combating piracy. This point is reinforced by the Government's decision to deploy ships as a part of anti-piracy missions overseas. This commitment will be addressed later when examining actions taken by the government as demonstration of existing national policy.

G8

The Group of Eight (G8) summits are excellent vehicles for determining and communicating the collective policies and approaches of the member nations on a myriad of international issues. Piracy is among the many issues addressed by the G8 and is important because of the global economic weight the G8 represents. Moreover, their economies are heavily dependant on maritime transportation for growth and trade. At the G8 Summit in L'Aquila Italy from 8 to 10 July 2009, the members specifically addressed the issue of piracy. Indeed, the final 'Political Declaration' included a section on piracy and maritime security. That section recognized the regional and international impacts piracy has on trade, development and regional stability. One of the paragraphs in the section addresses the issue of dealing with pirates themselves. It reads:

> We [the G8 nations] support international initiatives undertaken to that end, to which G8 members are already contributing, including those aimed at ensuring the development of adequate legal frameworks to fight piracy and other maritime-related crimes, and at attracting resources, commitment and action to build the capacity of regional states to better control their coasts and territorial waters, contribute to maritime security, as well as to judge

[76]CBC News, "Afghan Prisoner Transfers Halted 'More than 1 Time'," http://www.cbc.ca/canada/story/2009/11/22/mackay-halifax-forum.html; Internet; accessed 10 April 2010.

> and detain the pirates. We commended the leadership role of Kenya in the prosecution and detention of pirates. We intend as well to improve coordination and cooperation with industry to ensure best security measures and practices are in effect to prevent these acts.[77]

Canada's position on piracy is consistent with the G8 position. The desire for detention and prosecution of pirates is also clear in the excerpt above yet the focus on the regional states to take on the role of detention and prosecution is equally clear. Prior to the L'Aquila summit, the G8 Justice and Interior Ministers agreed to "…work toward a legal framework for the trial of Somali pirates…" and further pledged to "… help strengthen the criminal justice system in poor regions affected by piracy, such as east Africa."[78] Again, it is obvious that the desire is for the regional players to take the lead on bringing pirates to justice. This is a tall order for many of the affected states as their policing and judicial systems are well below Western standards and many of these states are identified by Amnesty International as routine human rights violators, including Kenya, who nonetheless is commended by the G8 for its leadership in prosecuting pirates.[79] That commendation is due primarily to Kenya's willingness to take on pirates captured by Western forces patrolling the region – namely those of the European Union (EU). This arrangement is formalized in an exchange of letters between the EU and the government of Kenya.

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[77]Muskoka 2010 G8, *About the G8*…

[78]Daniel Flynn, "G8 Vows Legal Co-Operation on Piracy; Ministers Agree to Create Framework for Bringing Somali Pirates to Justice," *Times - Colonist*, May 31, 2009, http://proquest.umi.com/pqdweb?did=1738280991&Fmt=7&clientId=1711&RQT=309&VName=PQD; Internet; accessed 14 March 2010.

[79]Amnesty International, "Human Rights Information for Kenya," http://www.amnesty.org/en/region/kenya; Internet; accessed 10 April 2010.

Transfers to Kenya

The letter from the EU to the Government of Kenya contains an annex which lays out the provisions for the transfer of suspected pirates from the EU-led naval force to the Republic of Kenya. Therein it stipulates the requirements for treatment and processing of transferred persons as well as recording and notification responsibilities of both parties.[80] In terms of content is bares some resemblance to the Canada-Afghanistan detainee transfer arrangement in that the standard of care is in accordance with acceptable international standards. It should be noted the basis of the EU-Kenya arrangement is International Human Rights Law rather than International Humanitarian Law as it for the Canada-Afghanistan arrangement. This is logical given that IHL is a form of *lex specialis* which only applies at a time of state-based international or civil conflict.

The EU-Kenya arrangement seems to be a reasonable solution in terms of a potential transfer policy for Canada. In fact, this potential avenue was announced by Minister Mackay following his visit to HMCS Winnipeg in May 2009. The Winnipeg was Canada's contribution to a NATO anti-piracy task force in the Gulf of Aden. He was quoted in the *Edmonton Journal* as saying that "Canada is actively seeking an arrangement with Kenya to prosecute suspected Somali pirates arrested by Canadian Warships." He also acknowledged the precedents in place for allowing countries to transfer pirates for prosecution, and that the international community needs to provide support to Kenya to handle the volume of suspected pirates.[81] The Minister forecasted correctly that Kenya

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[80]Europa Gateway to the European Union, "Official Journal of the European Union," http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:079:0049:0059:EN:PDF; Internet; accessed 22 March 2010.

[81]Dan Lett, "Canada Asks Kenya to Prosecute Pirates; Defence Minister Pushing for Action After Touring Frigate," *Edmonton Journal*, May 22, 2009,

would require additional support to handle the influx. Unfortunately, whatever support may have been offered or given proved inadequate when, on 26 March 2010, "[t]he government of Kenya … declined to accept three Somali pirates and one corpse that were handed over to them by Italian warship."[82] This situation left Kenya to argue that its prison and judicial system were overwhelmed and couldn't accommodate any other prisoners. This problem may only be temporary, but it is unlikely that Kenya will enter into an additional agreement with Canada when the existing arrangements with the EU have already overwhelmed their limited capacity. The Canadian Government will likely have to find alternate arrangements to pursue its advertised policy.

Canada has been quite vocal in its opposition to piracy and, as made evident by the preceding paragraphs, has verbalized its intention to detain and transfer pirates to a third party. Once again, however, these are only words. It is the actual actions that complete the picture concerning Canada's policy towards piracy. The following section will address those actions.

Operational Policy – Actual Practice

When examining what the Government of Canada has expressed as policy in terms of its conduct there are two particular actions to consider. The first is the *actual* deployment of naval assets on anti-piracy missions – an action that certainly speaks louder than words when it comes to demonstrating the political will to support a national policy. The second action to consider is *what* those Canadian ships actually do during those

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http://proquest.umi.com/pqdweb?did=1726498981&Fmt=7&clientId=1711&RQT=309&VName=PQD; Internet; accessed 14 March 2010.

[82]Newstime Africa, "Kenyan Government Declines to Accept Somali Pirates," http://www.newstimeafrica.com/archives/11471; Internet; accessed 10 April 2010.

missions in terms of detention and processing of pirates and suspected pirates. It will become clear that this is where what is *done* diverges from what is *said* in terms of piracy policy.

The deployment of military forces to execute the national policy is probably the most concrete action that can be taken to demonstrate the political will. This is certainly the case for the Canadian effort to combat piracy. Canada has deployed a number of ships in recent years to execute anti-piracy missions in the waters off of eastern Africa. These ships have included HMCS Fredericton, HMCS Ville de Quebec, and HMCS Winnipeg, whose mission was extended in 2009. Each of these Halifax Class warships has a ship's company of approximately 240 personnel and they are highly capable platforms. Their commitment to the anti-piracy mission as part of Operation SEXTANT or Operation SAIPH can certainly be considered an action that speaks louder than words in terms of national policy.[83] Unfortunately, one only has to look to the media coverage on the *actual* interaction with pirates during those missions to see that there is a divergence between *what is said* and *what is done* when it comes to Canada's apparent 'catch and release' policy towards piracy.[84]

Catch and Release

There is no debate that the presence of a warship is certainly an intimidating reality for Somali pirates that are normally equipped with small arms on a out-board powered

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[83]Canada. Department of National Defence, "International Operations," http://comfec-cefcom.forces.gc.ca/pa-ap/ops/index-eng.asp; Internet; accessed 10 April 2010.

[84]Dan Lett, "Canada Helps Capture Unlucky Pirates, but Too often it's 'Catch and Release'; Jurisdiction, Nationality Issues are Complex a Lawyer Advises Warship Commander," *Edmonton Journal*, 23 May 2009, http://proquest.umi.com/pqdweb?did=1727871551&Fmt=7&clientId=1711&RQT=309&VName=PQD; Internet accessed 14 March 2010.

skiff. If that warship, however, only has a mandate to deter or disrupt the activities of those pirates, and they are aware that will not be taken captive, the level of intimidation surely diminishes. This is the case for pirates facing Canadian warships. Time and again the story is told of a Canadian warship running down a boat load of pirates who invariably toss there weapons and equipment overboard and are subsequently released. One account by journalist Dan Lett of the *Edmonton Journal*, writing on the HMCS Winnipeg's release of captured pirates, described how "…[t]he blowback from this incident was almost immediate. Media commentators from across the country challenged the efficacy of the anti-piracy mission. Ottawa was chastised for running a "catch-and-release" program." In defence of the Canadian government he does go on to mention the pitfalls faced by those countries that have brought pirates home for prosecution. He specifically mentions the Netherlands and the United States whose trials have "…unearthed a welter of complex issues". He also cites media interviews of pirates in the Netherlands where it was suggested that some pirates view prosecution as a vehicle to claim refugee status.[85]

Other than the fact that a catch-and-release program seems to fail the test of public opinion, having a *de facto* policy that is diverges from the stated intention undermines both the policy as well as national reputation. Canada's actual policy of the disruption of piracy, rather than the advertised policy of capture and prosecution for piracy, erodes the credibility of both the Canada and its military.

Summary

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[85]*Ibid.*

This Chapter has highlighted the long history of piracy and its socio-economic impact on the states of the world. It also demonstrated that the legal frameworks, both international and domestic, exist to support Canada's efforts to counter the piracy threat. Unfortunately, the examination of Canada's national policy confirmed that, despite the commitment of national resources in the form of Canadian warships, the actions taken with pirate detainees are at odds with the stated policies of bringing pirates to justice. This schizophrenic approach will only worsen the problem while damaging Canada's reputation. The potential that the same approach is taken with terrorist detainees at sea is of serious concern.

CHAPTER III - TERRORISM AT SEA

Having examined the legal frameworks and national policies at play for terrorist detainees in Afghanistan as well as those dealing with the counter-piracy effort, it is now possible to examine the potential nexus of both. The GWOT is not restricted to land operations. As in Afghanistan, much of the same legal and policy frameworks apply equally to terrorism at sea. Likewise, piracy has impacts as far-reaching as terrorism and there are transnational elements of piracy that are specific to the sea and are worth considering in the anti-terror campaign in the maritime domain.

One must appreciate that both terrorism and piracy have evolved greatly over the years. Piracy in the past could be generally characterized as organized criminals that targeted, and were targeted by, one or two dominant 'superpowers' of the day. Representative of this characterization is the early 19th century skirmishes between pirates and the British East India Company or the early 20th century where the Royal Navy and US Navy took an active role in stamping out Chinese piracy that resulted from a collapse of the central authority and the resultant rule of local warlords.[86] Now, enter globalization: sea traffic of a massive scale now congest chokepoints in some of the poorest regions of the world. In the Gulf of Aden, it is estimated that 50,000 vessels transit each year carrying cargo of all varieties including 12% of the daily world supply of oil. Piracy is estimated to cost between $13 and $16 billion every year.[87] This reality, combined with the downsizing of specialized navies with a reduced interest in policing the high seas have

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[86]Konstam, *Piracy: The Complete History…*, 303-304.

[87]J. Kraska and B. Wilson, "Piracy Repression, Partnering and the Law," *Journal of Maritime Law and Commerce* 40, no. 1 (January 2009), 43, http://proquest.umi.com/pqdweb?did=1701092851&Fmt=7&clientId=1711&RQT=309&VName=PQD.; Internet accessed 14 March 2010.

created a situation where it has become extremely easy for a cheaply equipped criminals to pick and choose slow moving targets that are manned with cost saving skeleton crews and demand cash for the release of the vessel and crew. Piracy in this complex reality has proven to be a problem with human, political, economic and potentially environmental issues that span the globe.[88]

Equally, an evolution has occurred in terrorism. Using terror as a tool is as old as mankind itself but in terms its use as a socio-political tool, its beginnings can be found in state-centric or civil conflicts where a particular movement or organization resorted to terror in order to have their political agenda seen and heard by either the global community or the governing autocracies with in a state. This was certainly the case in Northern Ireland with the IRA and the ANC in South Africa. With the advent of Al Qaeda and Osama Bin Laden, terrorism has become a transnational phenomenon confounding traditional laws and policies that were based in state-on-state conflicts.

The growth of terrorism and piracy in the 20th century has been so immense that there is little surprise that they will overlap, and may have done so already. The line between a terrorist act at sea and piracy is easily blurred as the mechanism of the crime can be the same and only once the true motive is understood, can an attack at sea be classified as one or the other. This is more complicated by the difficulty in successfully prosecuting on the basis of motive, as Canada's experience with the ATA has demonstrated. Take for instance a supply ship held for ransom where that ransom money is to be used to finance terrorist activities. Is the attack an act of piracy or terrorism at sea? The answer is not legally clear.

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[88]Chalk, *The Maritime Dimension of International Security: Terrorism, Piracy, and Challenges for the United States…*, 10-14.

Terrorism at sea is not a new phenomenon and there has been study and work in this field in terms of international cooperation and safeguards to combat the threat. One need only look at the hijacking of the cruise ship, *Achille Lauro* in 1985 to see that terrorist activities at sea exist and are relatively easy to execute.[89] This chapter will touch on some of the existent work dealing with the terrorism at sea including the potential nexus between terrorism and piracy mentioned above. It will also tease out the relevant elements of law and policy that were examined in the previous chapters to determine if there are lessons to be learned from the two scenarios that can be used plot a course forward or at very least avoid potential pitfalls for detaining terrorists at sea.

Efforts on Maritime Terrorism

In *The Maritime Dimension of International Security; Terrorism, Piracy, and Challenges for the United States*, Peter Chalk addresses the potential nexus between piracy and terrorism. He recognizes that the convergence between these two remains questionable and there has been no credible evidence to support the speculation that there is an actual nexus yet. However, he does explain that the possibility of a nexus between piracy and terrorism has caught the attention of governments and highlights potential reasons why that attention is warranted. Specifically, he discusses the possibility that a raiding party seizing the *Dewi Madrim* was not a random piratical act but that it was a terrorist training exercise "…to hone the navigation and sailing skills of terrorists intent on

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[89]AP-Reuter-Staff, "Two Hostages Executed, Diplomats Report Palestinians Hijack Cruise Ship," *Toronto Star,* 8 October 1985.

ramming an ocean-going vessel into a very large crude carrier, a major port such as Singapore, or an offshore petrochemical factory."[90]

Robert Beckman concurs: "As a result of 9/11, states and international organizations were forced to completely rethink the threat of maritime terrorism. They recognized that if terrorists groups could strike powerful states using commercial aircraft, they could also strike using commercial shipping." He explains the American realization that unilateral action would be inadequate in addressing the threat caused by this convergence of terrorism and piratical acts.[91]

One of the first efforts of the US on the international front to address the threat of Maritime Terrorism was via the IMO. The result was an American led effort during a 2002 conference to have amendments made to the 1974 *International Convention for the Safety of Life at Sea* (SOLAS). These additions to the Convention require a number of security improvements including the requirement to follow the International Ship and Port Facility Code (ISPS). The ISPS Code prescribes a number of requirements: the requirement for emergency plans, training and exercises for port staff and ship crews; appointment of a Company Security Officer (CSO) and a Ship Security officer (SSO); the requirement for detailed information on crew members; and a number of other security measures. In addition to improving security, these measures increased the role of the IMO to include security rather than just safety and expanded its authority to make rules influencing the port facilities, something that had been previously a matter of domestic

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[90]Chalk, *The Maritime Dimension of International Security: Terrorism, Piracy, and Challenges for the United States…*, 32.

[91]Robert C. Beckman, "International Responses to Combat Maritime Terrorism," in *Global Anti-Terrorism Law and Policy* (New York: Cambridge University Press, 2005), 248.

jurisdiction.[92] These initiatives were adopted on 13 December 2002 and entered into force on 1 July 2004.[93]

The United States also worked along with the international community through the International Labour Organization (ILO) to revise the Seafarer's Identity Documents Convention of 1958 to address the issue of poor or false documentation of many crew members on the seas. The new biometrically-based identification system set a new global standard. Beckman described this development as "… another example of how the international community moved with unprecedented speed after 9/11 to modernize its rules and standards in response to the threat of maritime terrorism."[94]

Not all initiatives of the United States have been multilateral in scope. The US Customs Container Security Initiative (CSI) requires sea containers to be modernized, tracked and pre-screened prior to their arrival in US ports with a view to targeting the transport of Weapons of Mass Destruction (WMD) or terrorists themselves in the United States. The US also developed and promoted the Proliferation Security Initiative (PSI), an effort to create international cooperation outside existing international organizations and treaties. PSI targets the transport of WMD and lays out a set of interdiction principles allowing boarding of suspected vessels.[95] The initiative remains controversial as its criteria allowing for interdiction of vessels goes beyond that of the UNCLOS. Regardless, it has been supported by Canada in terms of attendance at plenary and working group

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[92]*Ibid*., 251-252.

[93]International Maritime Organization, "Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA), 1988," http://www.imo.org/Conventions/mainframe.asp?topic_id=259&doc_id=686; Internet; accessed 04/18, 2010.

[94]Beckman, *International Responses to Combat Maritime Terrorism…*, 253.

[95]*Ibid*., 255-256.

meetings as well as the view that "Canada's participation provides an important opportunity to advance [its] non-proliferation, arms control and disarmament (NACD) objectives through multilateral cooperation." The potential role the CF can play in the form of interdiction by warships has also been advertised on the same Department of National Defence website.[96]

A provision on the interdiction and boarding of ships was also sought by the US in its proposal for a new protocol under the 1988 *Suppression of Unlawful Acts Against the Safety of Maritime Navigation Convention* (SUA). The 2002 proposal included a set of new offences related to maritime terrorism, as well as the expansion of jurisdiction to board and search suspicious vessels. Much like the CSI and PSI initiative, this addition to the SUA targets the potential proliferation of WMD on the seas.[97] Unfortunately, the jurisdictional claim flies in the face of the existing exclusive jurisdiction of the flag state stipulated under UNCLOS and was therefore met with resistance. The protocol was redrafted to include a stipulation that, prior to boarding, the authorities of the boarding state must request permission from the flag state of the suspect vessel who would then have four hours to respond. Further, it requires that if a ship is boarded, the boarding state is to ensure that all persons are treated with dignity and according to human rights law. In the end, the protocol was accepted on 13 October 2005 and the provisions mentioned above can be found under Article 3 bis and Article 8 bis.[98]

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[96]Canada. Department of National Defence, "The Proliferation Security Initiative," http://www.forces.gc.ca/site/news-nouvelles/news-nouvelles-eng.asp?cat=00&id=1329; Internet; accessed 11 April 2010.

[97]Beckman, *International Responses to Combat Maritime Terrorism…*, 261-266.

[98]International Maritime Organization, *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA), 1988…*, 3bis, 8bis.

It is clear that there has been much effort by states to address the issue of maritime terrorism. For the purpose of this paper's argument, a future nexus between piracy and terrorism is not at issue. What is of concern is the potential for natural laws and development of best legal and normative practices in both terrorist detention and pirate detention regimes. It stands to reason that the potential of facing terrorists at sea is real and Canada should be prepared to do just that. With that in mind, the legal and political analysis in the previous chapters can be reviewed to determine if there are characteristics of the piracy or terrorism paradigms that would influence how Canada can or should approach the issue of terrorist detainees at sea.

Legal Frameworks

Considering the legal framework surrounding detention of terrorist suspects at sea, a number questions must be answered: Does the legal framework grant the authority to interdict a vessel and potentially detain an individual aboard? Does the detaining power, namely Canada, have the jurisdiction to execute the detention? Is there a mechanism by which the detainee can be processed and potentially prosecuted? This section will endeavour to answer these questions.

In terms of the authority required to take action against a terrorist at sea, it is clear from the examination in Chapter I that legal frameworks currently exist to support interdiction of suspect vessels. The laws permitting the detention of terrorists at sea are the same laws that permit detention of terrorists in Afghanistan. International customary law as embodied in the UN Charter and Security Council Resolutions, particularly 1373, not only authorize states to act but *obliges* them to act. Even without an international legal framework, the changes to Canadian law enacted through the passage of the ATA provide

an extensive definition of what constitutes a terrorist activity and goes further in providing a vehicle to list specific terrorist groups. Going beyond the laws applicable to the conflict in Afghanistan, the measures initiated by the United States mentioned above may provide additional authority for interdiction in terms of the proposals under SUA and SOLAS.

SUA and SOLAS could also be vehicles for satisfying the jurisdiction question. Regardless of these initiatives, the analysis shows that jurisdiction is not at issue. Again, both international customary law and domestic law contain provision for extra-territoriality, thus allowing states to take action against terrorism outside their national borders. As the foregoing analysis has demonstrated, jurisdiction has not historically been an issue for piracy, and piracy has a long history. Although the issue of jurisdiction in territorial waters is a complicating factor, it has been addressed in Somalia by UNSCR 1846. The present situation in Somalia (and Afghanistan for that matter) demonstrates that jurisdiction can be affected so long as the state that is unable to enforce the law is willing to have assistance from the states that are able.

It is worth reiterating the findings from the analysis that there is potential for the ICC to provide a future jurisdiction for the prosecution of terrorism and a body for the application of justice. However, at present it is highly unlikely, especially given sustained American opposition to the Rome Statue. At the same time, there remains the thorny issue of state-sponsored terrorism and the lack of an internationally-agreed upon definition of terrorism.

The final question to answer is whether the legal framework provides the vehicles necessary for processing and prosecution. This too was demonstrated in the analysis. First, there exists a legal framework for the actual handling and processing of detainees - that framework is International Humanitarian Law. Using it as a ‘default setting’ provides

the highest standard of care, reporting and follow up as it treats terrorist detainees as if they were combatants, regardless of whether they are or not. IHL can apply to a maritime scenario as easily as it is applied in Afghanistan as the Third Geneva Convention applies equally to POWs captured at sea.

Arguably the handling and processing of detainees is a simple problem compared to the actual prosecution. What has been illustrated here, however, is that there *are* legal frameworks by which detainees can be prosecuted. One instance sees detainees handed over to a regional state as is the case for terrorist suspects in Afghanistan, as *was* the case for pirate suspects in Kenya. The challenges surrounding treatment and fair trial of transferred detainees aside, the legal system does exist in third-party states which opens the door for potential transfer arrangements. It must be recognized however that the transferring state bears a responsibility to follow up the treatment of those individuals and should likely be involved in the institutional development of the receiving state's policing and judicial system. The other solution is Canada's own judicial system as was demonstrated by the successful conviction of Momin Khawaja under the ATA. The same body of law can be used against a terrorist detained at sea, as long as interdiction and transfer to Canada is matched by a successful prosecutorial investigation that can in turn bring an effective evidence-based case forward in Canadian courts.

From a strictly legal perspective, the questions listed at the beginning of this section can and have been answered. Adequate legal frameworks do exist to provide the authority and jurisdiction to apprehend terrorist suspects at sea and there exist laws under which that detainee can be handled, potentially transferred, and eventually prosecuted.

Policy Framework

Reviewing the analysis of national policies, it was evident that specific statements on either detainees or pirates do not exist in a formal manner. However, by examining what the governments says and especially what it does, it was possible to determine the *de facto* policy for detainees in Afghanistan and for pirates at sea. This section will summarize those findings and highlight where the policies are lacking – be it in words or actions.

There is certainly no lack of assertions by the government that terrorists and pirates should be brought to justice. This theme has been repeated on paper and in front of the camera in many fora that we can easily conclude there is no lack of evidence to determine what Canada says in terms of policy for both terrorists and pirates. One only need review the statements by the G8 foreign ministers, most recently chaired by the Canadian Foreign Affairs Minister, Lawrence Cannon. Following the 29 March terrorist bombings in Moscow, the "…ministers strongly condemned the cowardly terrorist attacks on the Moscow subway on March 29, and called for the *prosecution* of those responsible [emphasis added]."[99]

It has been further demonstrated that these kinds of statements on policy are so vague and sweeping so it is no surprise that a separate and distinct statement on maritime terrorism does not exist – nor does it need to. Terrorism is terrorism regardless of the environment so the theme of bringing terrorists (and pirates for that matter) to justice that is repeated throughout the policy examinations of this paper apply equally to land-based and sea-based scenarios.

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[99]Government of Canada, "Muskoka 2010 G8; Canadian Chair's Statement," http://g8.gc.ca/5364/canadian-chairs-statement/; Internet; accessed 12 April 2010.

Based on the examination of policy statements, it is safe to say that the message is clear in terms of what is said by the Canadian government in terms of policy for both terrorist and pirate detainees but it is necessary to examine what the government actually does to fully appreciate the actual policy. It is only by taking action that a state demonstrates its political will and resolve to address an issue. Without action, a policy is only mere words on paper or in a speech.

It was discovered that the actions taken by the Canadian government in the Afghanistan scenario supported what was said in terms of policy. Terrorist detainees are legally transferred for trial and prosecution by the Afghanistan authorities. It is recognized that this process is not without risk as the need to support the Afghan policing and judicial system is evident to ensure fair treatment and trial in accordance with human rights and due process norms. As such, support to these institutions remains a priority for Canada as stated by DFAIT. It is worth noting that, despite the legal framework mentioned earlier, to process terrorist suspects domestically back in Canada, there has been no repatriation of detainees for prosecution. This unwillingness for repatriation demonstrates the policy of Canada by inaction rather than action. This particular reluctance is evident when reviewing the actions surrounding piracy as well.

The actions of the Canadian government in executing its policy on piracy are somewhat schizophrenic. The allocation of resources in terms of Canadian warships deployed on anti-piracy missions demonstrates an obvious will to commit expensive resources and take a leadership role in addressing the piracy issue. However, the 'catch-and-release' of pirates flies in the face of the policy statements calling for pirates to be brought to justice and prosecuted. This action erodes the credibility of both the CF and Canada and serves only to embolden pirates to continue their activities. No transfer

arrangement is presently in place and there likely will not be for some time to come. It is also clear that there is no desire to repatriate these criminals for prosecution. Despite government officials, including the Prime Minister lauding the successes of the Canadian Navy in their anti-piracy missions, the policy of 'catch-and release' does not solve the problem.[100]

So what of the policy for terrorist detainees at sea? Earlier in this section, the argument was made that what applies for terrorists in general applies to terrorists at sea but what is *done* is of greater concern. The situation for maritime terrorism in terms of potential actions bears more resemblance to the pirate scenario than that of Afghanistan. In terms of its actions, Canada deploys ships on anti-terrorism missions just as it does on anti-piracy missions and will often shift the same vessel from one mission to the other during the same deployment as has been the case with Operation SAIPH.[101] Similar to the piracy situation, there is presently no transfer arrangement with a regional state for terrorists taken at sea, nor is there an international body to hand them over to. Likewise, there is probably no future political will to repatriate them to Canada. It is an unfortunate reality that, due to the present situation, the national policy would likely be another instance of saying one thing and doing another. 'Catch-and-release' will likely continue to be the order of the day.

Maritime Terrorism – Options

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[100]Bevege, *Canadians Pursue Pirates on High Seas; Harper Lauds 'Tremendous' Job in Gulf of Aden…*, A.1.; Lett, *Canada Helps Capture Unlucky Pirates, but Too often it's 'Catch and Release'; Jurisdiction, Nationality Issues are Complex a Lawyer Advises Warship Commander…*, B.10.

[101]Canada. Department of National Defence, *International Operations*…

Having put the lesson learned from the previous chapters together in the context of existing efforts for combating maritime terrorism the options open to the Canadian government are clear. By reviewing the existing legal and policy frameworks for terrorist detainees in Afghanistan and pirate detainees at sea, it is obvious that the legal authority and jurisdiction exist to detain and process terrorist suspects at sea but it in the realm of action that the policies fall short of the mark. There are three options currently open to the Canadian Government. The first is to pursue a third party transfer arrangement with the requisite support to that party's judicial system. The second option is to repatriate the detainee and bring them to justice by means of Canadian domestic law. Lastly, Canada and continue to release the individual accepting both the political and security ramifications of practicing different than what is preached.

Summary

Reviewing the analysis of preceding chapters, it is obvious that existent frameworks in the realm of policy and law can be applied in the case of terrorist detainees at sea. It has also been demonstrated in this chapter that much work has already been done in the field and that it is not likely to be a problem that will go away. That said, although it may be the difficult course of action for the time being, catch-and-release should not be considered the preferable solution. It erodes national credibility and does nothing to solve the problem – in fact it may worsen the problem in the longer run. If a regional power can be found to which transfer of terrorist detainees would be viable, it would be the preferred solution. However, until that arrangement is made, the Canadian government should either repatriate the detainees for domestic prosecution or reconsider deploying ships in the first place.

CONCLUSION

It is clear that the issue of dealing with detainees – in any circumstance – is a complex field of overlapping laws and policies. The approach of this paper has been to examine the details surrounding terrorists in Afghanistan and pirates at sea – two contemporary situations where the Canadian Forces have found themselves confronted with the reality of dealing with detainees – and to conclude how both frameworks might offer lessons for the other. Using law and policy as the analytical frameworks, the rules and procedures surrounding the detention of these individuals were examined to determine if existing piracy and terrorism laws or policies are applicable to maritime terrorism and in particular the detention of terrorist suspects at sea.

In order to ensure a common understanding on the issues, this paper specified definitions for terrorism, piracy, policy, and law. It was evident from those definitions that there are similarities between terrorism and piracy in terms of their transnational characteristics and the actual activities that would constitute each offence. It was also important to note the fundamental differences of motive and intimidation that clearly set the two crimes apart. The definitions of policy and law demonstrated that neither is as simple as many may believe and the tendency of the two to 'bleed' into each other was highlighted. It is evident that the two frameworks were complementary and closely related particularly by the international treaties signed by Canada, which constitute both a statement of policy and a representation of customary international law.

With these definitions in mind, the detainee situation in Afghanistan was examined in the context of existing laws as well as the national policies concerning detainees. In terms of legal frameworks, both international and domestic laws were reviewed including, the pertinent UNSCRs, the ATA, and the relevant elements of IHL. It was concluded that

legal frameworks exist that support the detention, handling, and prosecution of detainees. Likewise, policies were determined to be adequate in terms of political will to bring detainees to justice. By reviewing what the government has *said* through policy statements and expression of its priorities by both its own departments and through bodies like the G8, the position of the government was made clear. The actual political will was then demonstrated through the review of what Canada has *done* in terms of deployment of forces as well as the government itself taking responsibility for enabling the transfer of detainees to the Afghan authorities. Having understood the applicable policies and laws for the Afghanistan scenario, the same approach was taken for pirate detainees.

Not unlike Afghanistan, legal frameworks exist in both international and domestic realms for dealing with pirates. In fact, piracy law has a long history and is the earliest example of universal jurisdiction – a principle that applies to both terrorism and piracy. A review of the policies surrounding piracy illustrated a major and obvious inconsistency. Despite the expression of national policies through international bodies, statements to the media and calls for conferences to address the issue of prosecuting pirates, it is clear that the policy in practice was just the opposite. Canada's 'catch-and-release' approach to piracy demonstrated the lack of political will to *act* in accordance with what was *said*. Understandably, this situation is due mainly to the absence of a third party state to which detained pirates can be transferred. However, the option remains to repatriate the pirates or even cease deployments until a transfer agreement is reached. Releasing pirates will surely worsen the problem and erode Canada's credibility. Taking a similar approach to terrorist detainees at sea would most certainly have the same outcome.

In examining the elements of the two scenarios considered, it is plain to see that some constructs also apply to the maritime terrorism scenario. The laws that permit the

detention, processing and prosecution of detainees in Afghanistan apply equally to the land and sea environment. This, in combination with existing protocols and conventions like SUA and SOLAS, provides a legal framework that is more than adequate in justifying actions against maritime terrorists. It is in the realm of policy that there is concern. The desire to bring both pirates and terrorists to justice is made clear by means of what the government *says*. The other, and arguably more important, part of policy however, is what actually gets *done*. This is where the similarities with Afghanistan end - there is no transfer arrangement for terrorist detainees taken at sea and the location of detention is not likely to be within the sovereign territory of a state. Unfortunately, this is where the similarities between terrorists at sea and the piracy begin. Canada already participates in anti-terrorism missions with its warships much the same as anti-piracy mission – without a framework to transfer detainees.

This situation leaves the Canadian government in an difficult situation. In order to preserve the credibility and reputation on the international, and even the domestic stage, Canada cannot adopt a policy of 'catch-and-release.' Canada should pursue a third party transfer arrangement, but in the meantime accept the fact that maritime terrorist detainees will have to be repatriated. If this is unpalatable to the government or the electorate, the deployment of military forces in the first place should not happen.

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