Recent Developments

Up to the Bar? Designing the Hybrid Khmer Rouge Tribunal in Cambodia. By Kathleen Claussen

On July 18, 2007, the Extraordinary Chambers in the Courts of Cambodia (ECCC) charged Kaing Guek Eav (known as “Duch”), commandant of the main Khmer Rouge torture house, with crimes against humanity and ordered his placement in provisional detention. By December, the Chambers had detained and charged the four other remaining leaders of the Khmer Rouge regime, paving the way for trials the nation has awaited for three decades. The finalization of the Internal Rules for the Chambers in June 2007 paved the way for the much-anticipated prosecutions of the Khmer Rouge regime. However, the Internal Rules and their negotiation process have already come under attack for acquiescing to the whims of Cambodian authorities and failing to meet international standards.

This Recent Development analyzes the outstanding concerns and noteworthy provisions of the Internal Rules and the structure of the ECCC, assessing the validity of these criticisms and their consequences for the trials ahead. I proceed by presenting an outline of the ECCC and the Internal Rules, and conclude by identifying unsettled challenges that the institution confronts as it gets underway. The ECCC’s legal architecture represents a tenuous fusion of international and domestic elements, illustrative of competing claims of ownership between international and domestic actors. The administrators of the Court are charged with engineering a workable system in which to prosecute the aging Khmer Rouge leadership. Thus far, however, the process of balancing the international with the domestic has only bogged down the Chambers as it struggles to begin its work.

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After many years of negotiation and political controversy over the feasibility of such a tribunal, the United Nations and the Royal Government of Cambodia created the ECCC in 2003 to try leaders of the Khmer Rouge regime that caused the deaths of an estimated 1.7 million people from 1975 to 1979. The Agreement was incorporated into Cambodian law in 2004, though with provisions that differed from the original. Thus, before it began its work,
the Chambers had to reconcile its domestic and international founding documents. This discrepancy raised questions of how much control the United Nations and donor states would maintain over the Chambers.

The relationship between the international actors and domestic judiciary within the ECCC is neither a new model distinct from, nor a replication of, earlier international tribunals, though it has drawn lessons from the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL), particularly with respect to cost efficiency and time management. The ECCC’s hybrid design attempts to infuse international standards into Cambodian domestic law. The Chambers are not situated separately from the Cambodian judiciary; rather, they sit squarely within the existing judiciary as an ad hoc Cambodian court of original jurisdiction. Setting up the trials this way has required a careful legitimization of international crimes in Cambodian law, including the spontaneous execution of past treaty obligations and ratification of international conventions that criminalize the offenses committed by the Khmer Rouge. The structure that has evolved uses an innovative institutional design blending international standards into a highly flawed domestic legal structure with the aim of pleasing both international and domestic publics. The ECCC has, therefore, become yet another testing ground for the adjudication of the world’s most heinous crimes.

Originally, the administrators envisaged a three-year plan for the Chambers: one year for investigation, one for trials, and one for appeals. The Court began investigations in July 2006, and the judges subsequently began the tedious process of developing the Internal Rules. After considerable delay and trepidation, they adopted the Internal Rules in June 2007, signaling the commencement of the prosecution phase. Since then, the work of the Court has dramatically accelerated. Between September and November, the Court successfully detained and charged the five primary suspects expected for prosecution, and trials are expected to begin by mid-2008. The three-year time horizon is still attainable, though the ECCC will likely continue beyond 2009. The US$56.3 million budget, however, based on pledges from U.N. member states, may not sustain the Court’s operations that long. In late 2007, the ECCC was expected to appeal to donors for an estimated US$45 million in additional funding in order for the Court to continue its work through 2010.

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3. Cambodian ECCC Law, supra note 2.
In anticipation of this appeal, some nongovernmental organizations called for prudence among donor states, urging them to examine the Court’s work carefully to ensure that transparency and accountability benchmarks are met. They emphasized the failure of international actors to insulate the ECCC from local corruption. Additional concerns about the quality and effectiveness of the national criminal justice system prompted the international actors to claim a broad mandate, instigating reforms to bring Cambodia up to international standards.

Unlike most other criminal tribunals, the ECCC is embedded in the courts of the country in which it sits and where the atrocities at issue took place. Article 2 of the Cambodian ECCC Law states: “Extraordinary Chambers shall be established in the existing court structure . . . .” It must apply Cambodian domestic law, supplemented by international law for crimes and procedures not found in Cambodian law. Adapting the innovations of the other international or hybrid tribunals to Cambodia’s civil law system posed so much difficulty as to delay the adoption of the Internal Rules several months in late 2006 and early 2007. This “mainly . . . national affair” required blending civil law, a remnant of French colonialism, with evolving international law as gleaned from lessons learned at the other tribunals.

The Cambodian ECCC Law provides for a Trial Chamber, composed of three Cambodian judges and two international judges, as well as a Supreme Court Chamber, composed of four Cambodian judges and three international judges. No other international or hybrid court has more domestic judges than international judges. Also in contrast with similar institutions, the ECCC founding documents do not specify term limits for judges. Rather, the Internal Rules note that the same judges will serve for the duration of all the proceedings. This arrangement is intended to insulate the judges from political pressures, in accordance with the U.N. Basic Principles on the Independence of the Judiciary, although some human rights organizations have questioned whether some of the personnel were involved with politically manipulated proceedings in the past.

The ECCC introduces three unique attributes meriting discussion. First, the Cambodian ECCC Law states that the judges “shall attempt to achieve unanimity in their decisions.” In cases where this is not possible, a decision by one of the Chambers requires an affirmative vote of a supermajority of the judges—four judges in the Trial Chamber and five in the Supreme Court Chamber. No other hybrid criminal court has implemented a supermajority
requirement. The supermajority requirement was created in response to concerns from international actors that the domestic judges could control the decision-making process without any sort of external check. A simple majority would mean that domestic judges could effectively impose their own decisions without any consultation with the foreign judges. Still, while the supermajority provisions strengthen the weight of their judgments in the final stages of the trials, they could serve to impede lesser decisions with too little support in the regular course of business.

A second innovative feature of the new Chambers is that, at the professional levels of administration, the Court features approximately equal numbers of Cambodian and international staff. The founding documents provide for a Cambodian prosecutor and an international prosecutor, serving as equals, and the same is true for investigating judges, defense counsel, and other positions.18

Third, the ECCC gives victims special rights and provides a mechanism for them to receive compensation. According to the Internal Rules, victims may join the proceedings as civil parties and have the power to make appeals,19 though they can be awarded non-financial reparations only.20 The Internal Rules outline many protections and rights for victims without ever defining who qualifies.

One serious omission on the part of the Chambers’ designers is the absence of a code of ethics for employees and judges. Regarding misconduct, Rule 38 empowers judges to take action against offending lawyers, and U.N. employees are subject to internal U.N. sanctions in cases of wrongdoing. However, these provisions do not cover all court personnel. A code of conduct is particularly necessary given the history of corruption in Cambodia’s criminal justice system. Concerns were heightened in September 2007 when the Chambers received serious criticism for its personnel policies and mismanagement of international funds.21 Allegations of corruption and unethical hiring practices emerged in international media and in the reports of international organizations monitoring the tribunal.

One article referred to an internal audit revealing that the tribunal had failed to address allegations of corruption with respect to funding from the United Nations Development Program “being siphoned off as kickbacks.”22 The UNDP made public the results of the audit the following week, confirming that Cambodian employees were suspected of paying part of their salaries to superiors. Though the UNDP issued a press release welcoming a “new recruitment and contracting process,”23 an October BBC report quoted

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20. Id., R. 23.
22. Id.
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the UNDP as saying that serious consideration should be given to withdrawing U.N. support from the project in the absence of serious reform on the Cambodian side. In the same press release, the UNDP claimed “a code of conduct—to be signed and followed by all staff—will be developed,” though it lacked an estimated timeline. A code of conduct should extend beyond financial wrongdoing to improper social activity, such as fraternization among the personnel from different Chambers or professional conflicts of interest.

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The Rules Committee strived to achieve a balance between existing domestic law and international standards related to the crimes under investigation by the ECCC. That it struggled to please many stakeholders in the creation of the Internal Rules is seen in the complexity of some of the provisions. For example, a single rule, Rule 11 on the Defense Office, is over one thousand words long. The intricate configuration it describes and the Rule’s own complicated organization (containing both redundancies and contradictions) provoked administrators to create a separate, clarifying document: the Administrative Regulations of the Defense Support Section. Even so, the main area of friction was the relationship between the Chambers and the Bar Association of the Kingdom of Cambodia (BAKC). The BAKC demanded an exorbitant application fee from foreign lawyers wishing to practice at the ECCC. Since approval of the BAKC is a prerequisite of practicing at the Chambers, this delayed the opening of the Tribunal.

Today, the Internal Rules continue to be revised. For example, the role of the Pre-Trial Chamber expanded to take on additional interlocutory appeals that may arise in the early stages of a case. Though the Chamber is only convened when necessary, its workload increased by fifty percent. A standing Rules Committee is responsible for any required redrafting and could reconvene if additional rules were needed, though the judges will likely take on this role themselves in the course of their decisionmaking. The Court’s founding documents instruct the judges to look to international law in the case of lacunae in the Internal Rules, but this provision only causes more controversy. To what international standard should the judges look? In the absence of clear precedent from one of the international or hybrid tribunals, what sources will be authoritative? On the other hand, this provision likewise demonstrates credence to the evolving international criminal justice system. It promotes the development of transnational customary law for more than just the most heinous offenses.

One aspect of the Internal Rules that exemplifies the difference of opinion between the international and the domestic actors is the definition of the crimes. The International Criminal Court’s “Elements of Crimes”

document clearly defines "genocide," "crimes against humanity," and "war crimes"; similar definitions can be found in relevant international conventions on related topics. But the particular method and nature of the acts and policies carried out by the Khmer Rouge may not fall neatly into existing categories within international law. The Chambers rendered charges of "crimes against humanity" and "war crimes" in the cases of the five former leaders charged by the ECCC. Notably, they have not been charged with genocide. The indiscriminate policies applied by the Khmer Rouge in their extermination campaign may not meet the threshold for "genocide," leading some genocide experts to call for a broader definition of "genocide." This presents an opportunity for the ECCC to modify the substance of international criminal law. Rather than confine itself to the boundaries of international legal norms defined by other tribunals, the ECCC could expand the notion of "genocide" to encompass the atrocities committed in Cambodia despite their nonconformity to former models of atrocity. The limitations of the international scheme should not render the judicial system powerless to fully prosecute perpetrators of such violent acts.

* * *

Although the finalization of the Internal Rules and the detention of the remaining Khmer Rouge leaders are good first steps, the judges and administrators now have the reins and must steer the Chambers down a stable and manageable path. If they succeed, the ECCC may serve as a model for future hybrid innovations that draw upon international mechanisms in order to improve domestic systems. It can demonstrate the power of international law to effect domestic reform. Moreover, the Chambers’s model confirms the importance of designing ad hoc tribunals that are appropriate to the context in which they must operate. First, however, the gaps and ambiguities in the Internal Rules must be amended in order for the proceedings to run smoothly and be considered legitimate. Uncertainty over the distribution of responsibilities between international and domestic actors leads to larger questions about the audience for the court: who is this court for? Efforts to fit the Chambers into the domestic legal culture may require stepping outside the bounds of traditional transnational legal norms. This may meet the demands of the Cambodian people, but will it suit the international community that holds the ECCC’s purse strings?

The limited justice the Chambers provides is less than satisfactory to many. Like the other tribunals, lower level perpetrators will never be brought to court. As one judge put it: "You may know who killed your father or sister and still see that person walking around. They will not be prosecuted, so that is a limitation [of the ECCC]. . . . [B]ut it’s better than nothing."27

27. Interview with Motoo Noguchi, supra note 7.

I. Introduction

On September 16, 2007, a team of security contractors from Blackwater Worldwide shot dead seventeen Iraqi civilians while escorting American diplomats through central Baghdad. The fallout was swift and far-reaching. Iraq demanded that Blackwater cease operating in the country. Its parliament introduced legislation to revoke the blanket immunity granted to contractors in the early days of the war by the American administrators who governed Iraq. Within a week, family members of the victims had filed a lawsuit in U.S. court, the FBI had launched an investigation and warned of criminal charges, and the House Government Reform Committee had issued a withering report on security contractors' transgressions.

Soon after the United States invaded Iraq in 2003, military commanders, academics, and Iraqi officials have warned of insufficient oversight and accountability for the private contractors operating there. Deployed in unprecedented numbers, contractors have been implicated in a range of alleged crimes and human rights violations. So far, however, not a single contractor has been successfully prosecuted for violence perpetrated in Iraq. Furthermore, no contractor or company has been held liable for torts committed there. Attempts at self-regulation by the industry have also proven ineffective.¹

Recent months have seen wide-ranging attempts to bring accountability to the industry. This Recent Development will explain these efforts, which include legislative initiatives, criminal charges against individual contractors, and attempts by private litigants to secure judgments for money damages. Because of the enormous body of literature on the topic of private military contractors, the analysis will focus narrowly on the issue raised by the September shootings—the various punishments and remedies available under both civilian and military law for harms done by American contractors to Iraqi civilians.²

II. Contractors at War

"Soldiers of fortune" have accompanied American troops on the battlefield in every major conflict since the Revolutionary War. In the War of 1812, "privateers"—ships under contract with the U.S. government—sunk 2,500 British naval vessels and far outnumbered the fledgling American navy.³ The industry expanded rapidly at the close of the Cold War, as many Western nations scaled back their militaries in the absence of an obvious foreign threat. While in Vietnam there was roughly one contractor for every

². This analysis does not address, among other topics, the important issue of foreign-born security contractors or those who are not employed by the U.S. government.
five hundred soldiers, in the 1991 Gulf War, that ratio jumped to one for every fifty uniformed troops. Amid the post-9/11 expansion of American operations overseas, private security companies have enabled an overstretched American military to wage simultaneous wars in Iraq and Afghanistan and maintain force commitments elsewhere in the world. In doing so, they have taken on a range of roles—from preparing meals to guarding convoys—once filled by uniformed service members. In the current Iraq War, there are more contractors serving in theater than American service members.

Of the estimated 180,000 contractors serving in Iraq, up to thirty thousand are so-called “security contractors,” who carry guns and perform quasi-military roles. Contractors are immune from prosecution in Iraqi courts under Coalition Provisional Authority Order 17, passed in the early days after the war when U.S. administrators were governing the country and still in force today. As a result, many egregious incidents have gone unpunished, including a videotape posted on the Internet by former employees of Aegis, a British security firm, which depicted security contractors riddling Iraqi civilian vehicles with gunfire. In December 2006, a drunken Blackwater employee shot and killed the bodyguard of a prominent Iraqi politician inside Baghdad’s Green Zone. Within twenty-four hours, U.S. Embassy officials had whisked the shooter out of the country. No charges were filed in either incident.

III. An Evolving Legal Regime

In explaining the paucity of prosecutions, scholars, military and political officials, and the security companies themselves have long maintained that security contractors operate outside the bounds of an effective legal regime. Secretary of State Condoleezza Rice told Congress in October 2007 that a “hole” in U.S. law has allowed contractors to operate with impunity. International law has provided little guidance, since security contractors do not fit neatly into definitional categories banned under the United Nations International Convention Against the Recruitment, Use, Financing and Training of Mercenaries.

Because of recent changes, however, American military and civilian law provide promising avenues through which contract employees, and their employers, can be held accountable. Civilian and military legal regimes offer

7. See also Human Rights Watch, US: Close Legal Loopholes Allowing Contractors to Act with Impunity, HUM. RTS. NEWS, Oct. 2, 2007, http://hrw.org/english/docs/2007/10/02/usint17002.htm (stating that at least seventeen cases of detainee abuse have been referred to federal prosecutors).
two kinds of accountability mechanisms: retributive accountability, which
punishes contractors; and compensatory accountability, which provides
financial remedies for those harmed by the contractors’ actions.

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Table 1

IV. Military Law

A. Retributive Justice: UCMJ

Civilians accompanying military forces have been tried in military
courts since at least the time of the American Revolution. Prior to the 1950
enactment of the Uniform Code of Military Justice (UCMJ), military
prosecution of civilians was well-established under the Articles of War, which
codified military law in the early days of the American republic. Civilians
were tried under this system during both World Wars.

The advent of the UCMJ allowed for the court-martialing of civilian
persons serving with or accompanying the military in the field “in a time of war.” This provision, however, was significantly limited through a series of
Supreme Court cases. In Reid v. Covert, the Court held that the wife of a
service member could not be tried for capital crimes in a military court during
peacetime. That principle was soon extended to non-capital cases and to
civilian employees of the military in both capital and non-capital cases. What some saw as the death knell for military jurisdiction over civilians came
in the military appellate court decision, United States v. Averette, in which a
Vietnam-era contractor was convicted of stealing shipments of batteries from
a military base. Because Congress never declared war on Vietnam, the court
reasoned, military courts had no jurisdiction over the defendant. No civilians
have been court-martialed since.

Late last year, however, Congress expanded military jurisdiction over
civilians. The 2007 defense authorization bill amended the Uniform Code of
Military Justice to cover civilians accompanying military forces in both
declared wars and “contingency operations”—official parlance for undeclared
wars like Iraq and Afghanistan. As the Army explained in its 2007 annual
guide to the UCMJ, the full impact of this change has not yet been
determined: “Subjecting contractor personnel to the UCMJ during all
contingency operations appears to constitute a significant change rather than a

10. See FREDERICK BERNAYS WIENER, CIVILIANS UNDER MILITARY JUSTICE 22-23 (1967).
clarification. No legislative history explains this change. Further, as there is no published guidance, it is unclear how this change will be implemented and precisely what the ramifications will be." So far, no guidelines have been issued to military prosecutors, however, and no cases have been brought under this new provision.

Even if military prosecutors bring charges under the new provision, the expansion of the UCMJ will only apply to Defense Department contractors, leaving many contractors operating in Iraq—including the State Department’s Blackwater guards—uncovered. In addition, because it applies only to contractors involved in a declared war or contingency operation, contractors serving in humanitarian or economic development operations may be exempt.

There will also likely be a host of constitutional objections raised to this provision. Since military law provides neither the Fifth Amendment right to indictment by grand jury nor the Sixth Amendment right to trial by jury (among other protections) the constitutionality of applying it to American civilians remains in doubt. In addition, the UCMJ amendment is over-inclusive, because it does not differentiate among the various categories of civilians who might be accompanying military forces, such as contractors and embedded journalists. Nor does it distinguish among the various provisions of the UCMJ, meaning military regulations about sexual orientation or disparaging the commander-in-chief could in theory be applied to civilians. The new provision should be narrowed with a stricter definition of who is covered and should include a clause indicating that only crimes that have a parallel in civilian law should be prosecuted.

B. Compensatory Justice: Foreign Claims Act

Military units are authorized to compensate victims of crimes committed by contractors under the Foreign Claims Act, which was passed during the Second World War. While military commanders routinely make informal “condolence payments” when soldiers accidentally kill or wound a civilian, these payments are generally small ($2,500 or less) and include no admission of wrongdoing. Payments under the Foreign Claims Act, on the other hand, can be up to one hundred thousand dollars, but require a decision by an adjudicative body called a Foreign Claims Commission that a wrong was done—the minimum standard is negligence. The Act exempts those killed or wounded “in combat,” and their families or dependents, from receiving compensation.

While the Act currently covers “civilian employee[s] of the military department concerned,” on its face it does not reach civilian contractors, who work for private companies and are, at most, only indirectly employed by the government. In October, the military released a slew of documents describing claims filed by Iraqi civilians whose relatives were killed or whose property

was damaged.\textsuperscript{21} In all, the Army has paid out at least thirty-two million dollars in Iraq and Afghanistan.\textsuperscript{22} But only one of the cases described is a killing by a security contractor. The claim is listed as "denied, because the contractors are not governmental employees."\textsuperscript{23}

The Foreign Claims Act should be amended to allow the military to make payments to victims of contractors’ violence. Clauses could be included in contracts that would require security companies to reimburse the military for any payments. There is reason to believe that the military would willingly adhere to such a system. Commanders on the ground in Iraq often complain that contractors turn local populations against the military by committing crimes that are then blamed on soldiers.

V. Civilian Law

A. Retributive Justice: MEJA

Between 1970, when \textit{Averette} was decided, and 2000, there was no civilian corollary to using the military justice system to try civilian contractors who commit crimes,\textsuperscript{24} meaning contractors fell into what one commentator has described as a legal "Bermuda Triangle."\textsuperscript{25} In 2000, however, Congress passed the Military Extraterritorial Jurisdiction Act (MEJA),\textsuperscript{26} which created jurisdiction for federal prosecutors to bring cases against Defense Department contractors and employees in U.S. federal courts. MEJA was expanded in 2005 to include contractors with any government agency "supporting the mission of the Department of Defense."\textsuperscript{27}

Even as expanded, however, MEJA has been largely impotent, leading to only a handful of prosecutions and no convictions related to crimes committed in Iraq or Afghanistan. It is difficult for American prosecutors to gather evidence overseas, particularly in war zones. And the fact that MEJA can only be used to prosecute felonies considerably narrows the range of potential cases. Congress is seeking to amend MEJA again to end the exemption for contractors who are arguably not "supporting" the Pentagon, such as those involved in reconstruction. The MEJA Expansion and Enforcement Act of 2007 passed the House of Representatives on October 4, 2007. It would expand MEJA to cover all contractors "[within] an area, or in close proximity to an area (as designated by the Department of Defense), where the Armed Forces is conducting a contingency operation."\textsuperscript{28} It also calls

\textsuperscript{21} The documents are available at American Civil Liberties Union, Documents Received From the Department of the Army in Response to ACLU Freedom of Information Act Request (released on Oct. 31, 2007), http://www.aclu.org/natsec/foia/log.html.
\textsuperscript{22} See id.
\textsuperscript{23} Id.
\textsuperscript{24} An exception is the Special Maritime and Territorial Jurisdiction of the United States, 18 U.S.C. § 7 (2006), under which civilians can be prosecuted for crimes committed on military bases.
\textsuperscript{28} Id.
for the establishment of FBI “theater investigative units,” whose sole purpose would be to develop cases against contractors.\(^{29}\)

MEJA will soon be tested by a pair of cases at different stages of adjudication. On February 15, 2007, contractor Aaron Langston stabbed to death a female colleague on a military base north of Baghdad. In March 2007, a federal prosecutor in Arizona secured an indictment under MEJA. Separately, at the time of writing, the FBI was conducting an investigation into the September 16, 2007 Blackwater shootings and had concluded preliminarily that the shootings were unprovoked, contradicting Blackwater’s claim that the guards had responded to hostile fire. A grand jury was reportedly convened in November to hear testimony and consider indictments under MEJA.

Even if it passes, however, MEJA expansion will not be a panacea. Its failings stem not just from loopholes, but from a simple lack of political will to bring cases. Prosecutions are hampered by the difficulties inherent in conducting investigations in war zones given language barriers and the security climate, particularly for civilian investigators. Furthermore, prosecuting contractors under MEJA poses numerous evidentiary hurdles. Iraqi witnesses may not be willing to travel to the United States to testify or be able to obtain the requisite visas needed to do so in a timely manner.

B. Compensatory Justice: Tort Claims

It has proven very difficult to bring tort cases against contractors for their actions in Iraq. The Alien Tort Statute (ATS), which was enacted as part of the Judiciary Act of 1789, creates jurisdiction for foreigners to claims for torts “committed in violation of the law of nations or a treaty of the United States.”\(^{30}\) It lay virtually untested and dormant until revived by the U.S. Court of Appeals for the Second Circuit in 1980 in *Filartiga v. Pena-Irala*.\(^{31}\) But the Act’s applicability has been considerably narrowed in a series of lawsuits against corporations. Among the judicially created defenses that have proven to be major barriers are the combatant activities defense, which exempts from liability actions taken during combat, and the government contractor defense, which grants immunity to government contractors from state tort claims.

Iraqi civilians have brought prominent tort cases against two U.S. contractors involved in the Abu Ghraib prison scandal: Titan Corporation (a translation firm) and CACI International (which handled some interrogations).\(^{32}\) The ATS claims against both defendants were dismissed last year and, in November, the judge dismissed the state law tort claims against Titan because of the high degree of military oversight and control over its employees. The state law claims against CACI were allowed to proceed. The trial will begin in the coming months. Another tort case was brought in September, soon after the Blackwater shootings, by family members of the victims. The case makes both ATS claims for extrajudicial killing and war

\(^{29}\) *Id.*


\(^{31}\) 630 F.2d 876 (2d Cir. 1980).

crimes and common law claims for assault and battery, wrongful death, intentional and negligent infliction of emotional distress, and negligent hiring and supervision of employees.\textsuperscript{33}

As in the earlier cases, major challenges include doctrinal hurdles such as the combatant activities and government contractor defenses and the evidentiary hurdles discussed earlier, which give rise to claims of \textit{forum non conveniens}.

VI. Conclusion

It remains to be determined whether any of these attempts will prove effective.\textsuperscript{34} Many questions remain. Whether contractors are retributively punished will depend on political and prosecutorial discretion and the difficulties inherent in bringing legal actions based on events that take place in a war zone. Will military lawyers be willing to test the amended UCMJ by bringing cases against contractors? Will military judges, or the Supreme Court, uphold the amendment in the face of constitutional challenges? Will Congress pass the proposed legislation strengthening MEJA, and will federal prosecutors use it? As for compensatory justice, the Foreign Claims Act should be definitively expanded to allow for claims made against contractors, and such payments should be issued with greater frequency. The ATS and common law tort cases yet to be decided will go a long way toward determining the viability of future suits.

Even if none of these measures proves effective, the Baghdad government appears to have lost patience with the immunity arrangement that has allowed contractors to avoid legal entanglement there. Contractors have suggested that even without immunity they will continue to work in Iraq.\textsuperscript{35} But given the country’s troubled and arbitrary legal system,\textsuperscript{36} they may be better off if the accountability regime described above has teeth.


\textsuperscript{34} At the time of this writing, the Pentagon and State Department reportedly agreed on new guidelines for how security contractors should operate in the field. The guidelines call for military commanders to be given more control over contractors, and for cameras to be mounted in contractors’ vehicles. See, e.g., \textit{New Rules for Iraq Security Firms}, BBC NEWS, Dec. 6, 2007, http://news.bbc.co.uk/2/hi/americas/7130147.stm.


No Right to Fight: The Modern Implications of Japan’s Pacifist Postwar Constitution. By Zachary D. Kaufman*

I. Introduction

Allowing Japan to rearm “is like giving chocolate liqueur to an alcoholic.” So said former Singaporean Prime Minister Lee Kuan Yew.1 Japan, a global leader in many fields, has since World War II lagged in at least one: offensive military capabilities. Japan’s apparent rearmament, perhaps inevitable, would violate the country’s pacifist postwar constitution and prompt concerns among its neighbors and around the globe, especially at a time in which Japan is increasingly nationalistic and revisionist. As it remilitarizes to secure its future, Japan must confront its past. If it does not fully and sincerely address the wartime atrocities it perpetrated, Japan may ultimately find itself facing an increasingly suspicious and hostile environment.

II. Background and Recent Developments

Since World War II, Japan has been constitutionally barred from maintaining an offensive military. U.S. government officials drafted the Japanese Constitution, which came into effect on May 3, 1947.2 Article 9, entitled “Renunciation of War,” states in full:

1. Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.
2. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.3

Since the end of the U.S. occupation, however, Japan has gradually taken steps to strengthen—and flex—its military muscle. In 1990, Japan announced that it would provide a substantial financial package to assist Allied forces in the first Gulf War.4 Two years later, Japan passed legislation to permit Japanese soldiers to join U.N. peacekeeping operations. Since September 11, 2001, Japan has enacted various laws to circumvent Article 9 and participate in the U.S.-led wars in Afghanistan and Iraq.5

In 2003, Japan launched its first spy satellites and declared that it would install a “purely defensive” U.S.-made missile shield.6 Three years later, the

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3. KENPI [Constitution], art. 9 (Japan).
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Diet, Japan’s parliament, approved the creation of the country’s first full-fledged defense ministry since World War II. By 2007, Japan was spending US$41.75 billion annually on its military, the sixth most of any country in the world.

Beyond merely extending its military capabilities, postwar Japan has also been more willing to use them. In 1992, in its first foreign deployment of troops since the end of World War II, Japan sent approximately 1,200 non-combat soldiers to Cambodia as part of a U.N. peacekeeping mission. In 2001, for the first time since World War II, Japan sank a foreign vessel when an unidentified and unresponsive North Korean spy ship approached Japan. In another move unprecedented since World War II, Japan deployed forces to a combat zone when it sent “non-combat” soldiers to Iraq in 2004. Additionally, to assist with the U.S.-led war in Afghanistan, from 2001 to 2007, Japan provided fuel to U.S., U.K., and allied ships operating in the Indian Ocean.

Notwithstanding the fact that most opinion polls indicate that Japanese citizens oppose remilitarization, official Japanese rhetoric has become increasingly militaristic in recent years. Japan’s “three non-nuclear principles,” outlined in 1967 by Prime Minister Eisaku Sato—and which earned him the Nobel Peace Prize in 1974—prohibit Japan from possessing, developing, or introducing nuclear weapons on its territory. However, several senior Japanese officials, including recent and current prime ministers Shinzo Abe and Yasuo Fukuda, respectively, declared in 2002 that, despite Article 9, Japan could possess nuclear weapons. The following year, Japanese Foreign Minister Shigeru Ishiba advocated Japan’s right in principle to attack preemptively. Since then, senior Japanese officials have not publicly disavowed these claims.

III. Word Games

In the face of this mounting evidence of its remilitarization, Japan engages in semantic contortions to downplay its military capabilities and activities. Japan calls its military “Self-Defense Forces” and justifies its growing capabilities as strictly defensive. While it acknowledges that in recent years it has “purchased a great deal of military equipment from the U.S., including more than 200 F-15 fighters, more than 100 P3C Orion patrol planes, 4 AWACS [Airborne Warning and Control System] surveillance
aircraft, and 4 Aegis ships,"\(^\text{14}\) at the same time, Japan claims not to "possess capabilities for projecting offensive power," reasoning that it "has no aircraft carriers, no ICBMs [intercontinental ballistic missiles], no long-range bombers, and no marines."\(^\text{15}\) As one commentator observed:

Article 9 has been so diluted by doublespeak as to become virtually meaningless. An early strike against Korea, Ishiba explains, would be "defensive", not "pre-emptive."
Likewise, in May 2002, Deputy Chief Cabinet Secretary Shinzo Abe declared that Japan could have nuclear weapons so long as they were "small." In fact, he added, "in legal theory Japan could have intercontinental ballistic missiles and atomic bombs."\(^\text{16}\)

However, Japan's capabilities—and their use—can be viewed differently. Soldiers are not necessarily or always "non-combat"; a missile shield may not be "purely defensive"; and even a small nuclear weapon is still a nuclear weapon. Military troops and technologies often have dual usage as defensive and offensive weapons.

Critics further assert that Japan's recent involvement in the Middle East cannot be characterized as self-defensive or even humanitarian.\(^\text{17}\) Even financially supporting or contributing troops to U.N. peacekeeping missions, as Japan did in Cambodia, may be illegal according to Article 9, if such actions are not in Japan's self-defense. States have claimed significant latitude under the banner of "self-defense." As critics argued when the United States invaded Iraq in 2003, preemptive self-defense may be nothing more than thinly veiled—and miscalculated—aggression. For example, some argue that, because Japan has limited natural resources, "[t]he protection of Japan's oil supply could be incorporated easily within the definition of self-defence,"\(^\text{18}\) which could justify military action in oil-rich states. Those wary of Japan rearming are especially sensitive to Japan's understanding and use of the term, as "self-defense" is a justification apologists of Japanese wartime aggression offered—and still do.\(^\text{19}\)

**IV. Rationale**

Why the trend towards remilitarization? American pressure offers a partial explanation: by not seeking to enforce the dictates of Japan's pacifist constitution, the U.S. government has implicitly signaled to Japan that the country can, and perhaps should, rearm. Almost immediately, the United States started to view Japan as critical to defending the United States's
postwar interests in Asia, and particularly in combating communism. As soon as 1947, the United States began encouraging Japan to rearm. Recently, especially after the 2003 U.S.-led invasion of Iraq, the United States has counted on Japan as one of its few reliable military allies.

U.S. encouragement to rearm occurs at a time when Japan is increasingly concerned about its neighbors and feels it must bolster its military to ensure its security. In 1998, North Korea fired a Taepodong-1 missile over Japan, and has since test-fired seven more long-range missiles. Four years later, North Korea declared that it already possessed and was continuing to develop nuclear weapons, and claimed to have performed its first successful nuclear weapons test in 2006. In 2003, North Korea announced its withdrawal from the Nuclear Nonproliferation Treaty.

China has also appeared threatening to Japan. In recent years, Chinese submarines and aircraft have repeatedly entered Japanese sea and air spaces, and Chinese civilians have staged sometimes violent anti-Japanese protests, perhaps conducted with official Chinese sanction. In response to perceived Chinese and North Korean military buildup and aggression, Japanese nationalism and public support for rearming and revising the constitution to eliminate pacifism have grown, as has support for Japanese politicians who advocate these policies.

Japan is also concerned with threats emanating from non-state actors. In 1995, Aum Shinrikyo, a religious sect, released sarin—a deadly nerve gas—in Tokyo’s subway, killing twelve people and injuring thousands. The events of September 11, 2001, then prompted Japan to declare its interest in combating global terrorism. In a 2007 policy speech, Fukuda cited “the proliferation of terrorists” as one reason Japan must engage more with the international community.

While Japan grows increasingly distrustful of the rest of the world, the Japanese have mixed feelings about exclusive strategic reliance on the U.S. security umbrella. In 1995, after American soldiers stationed on Okinawa raped a local schoolgirl, many Japanese demanded the withdrawal of U.S. troops from the island. Then, in 2001, a U.S. submarine collided with a Japanese training vessel, sinking the latter ship and resulting in the loss of nine Japanese, an event that prompted some Japanese to further question their

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21. Kerr, supra note 16. See also Martin E. Weinstein, The Evolution of the Japan Self-Defense Forces, in THE MODERN JAPANESE MILITARY SYSTEM, supra note 13, at 41, 43 (noting that in a 1951 meeting between Japan and the United States, Special Ambassador John Foster Dulles “insisted that a mutual defense agreement would be possible only if Japan rearmed to the level where it could assume primary responsibility for defending itself against a direct Soviet attack and could assist militarily in protecting regional security” and “[h]e urged rapid expansion of the National Policy Reserve into a 350,000-man army”).
22. Wiseman, supra note 19.
country’s close military ties with the United States. By 2007, many Japanese felt that Japan had become too associated with the U.S. military.\(^{25}\) Upon assuming office, Fukuda acknowledged that “[t]he Japan-U.S. alliance is the cornerstone of Japan’s diplomacy,” while simultaneously promoting “the principle of self-reliance” for Japan.\(^{26}\)

Increased threats from its neighbors and encouragement from the United States to become more independent coincide with Japan’s desire for an increased role in international affairs, including security issues. In 2004, Japan began actively campaigning for a permanent seat on the U.N. Security Council,\(^{27}\) an effort continued by Japan’s current administration, which has declared that “Japan will realize its responsibilities commensurate with its national strength in the international community, and become a country which is relied upon internationally.”\(^{28}\) Some senior U.S. officials, such as former ambassador to Japan Howard Baker, support Japan’s ambitions for a permanent, veto-wielding seat on the Security Council.\(^{29}\)

V. Evaluation

Views on Japan’s rearmament are mixed. Some believe that it is a “healthy development,” one pursued “wisely.”\(^{30}\) As another commentator has argued, “the U.S. security guarantee prevents Japan from acting like a self-sufficient country. Consequently, U.S. long-term policy should be to withdraw from the role of Japan’s protector wherever possible to encourage Japan to act more like a leader internationally.”\(^{31}\)

Others are more critical of Japan’s remilitarization. Lee, the former Singaporean leader, for instance, believes that if Japan were permitted to remilitarize, it could not help but be aggressive. Still others are especially concerned about “the advent of a nuclear-armed Japan,” which, they argue, “would be potentially catastrophic for both East Asia and the larger global international security environment.”\(^{32}\)

A third view holds that, whether for good or ill, Japan’s military growth may simply be inevitable, a parallel to Japan’s postwar growth in technology and business. A recent New York Times editorial observed that “Japan is the world’s second-largest economic power, and nobody should expect it to remain aloof to matters involving its own defense.”\(^{33}\) To be sure, Japan faces legitimate threats, especially from North Korea. And even if Japan did not seek to balance against such threats, as some international relations theorists suggest states do,\(^{34}\) the country would likely still seek to balance against the

25. Onishi, supra note 5.
27. Timeline: Japan, supra note 6.
29. Kurlantzick, supra note 9.
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growing power of state and non-state actors, as other international relations theorists contend.\textsuperscript{35}

A final group also accepts Japan’s remilitarization, but believes it has already occurred. One commentator argues, “[t]he debate over whether Japan should rearm is moot: Japan has long since rearmed and is capable of striking far beyond its borders. Indeed, Japan has enough plutonium and the technology to produce nuclear weapons in a matter of months.”\textsuperscript{36}

VI. Consequences

Japan’s full and unambiguous remilitarization would have significant consequences for itself, its neighbors, and its closest military ally, the United States. For Japan, remilitarizing could alienate Japan’s former victims or current competitors. As Francis Fukuyama argues, “Japan’s unilateral revision of Article 9, viewed against the backdrop of its new nationalism, would isolate Japan from virtually the whole of Asia.”\textsuperscript{37} Such a scenario might prompt an arms race between Japan and China or North Korea.

Nonetheless, some believe that, even with a constitutional revision, Japan would remain peaceful since “no country could fail to learn its lesson after such a horrible war.”\textsuperscript{38} But it is precisely Japan’s perceived lack of learning that so concerns domestic and foreign critics of its remilitarization. Nationalist Japanese authorities have revised schoolbooks in order to exonerate Japan for its guilt over aggression and atrocities in World War II.\textsuperscript{39} Japanese teachers claim to have been punished for discussing taboo topics such as the “comfort women” or for refusing to participate in nationalistic demonstrations, such as saluting the flag or standing for the national anthem.\textsuperscript{40} Several recent official visits to Japanese shrines that glorify the country’s war dead have angered China and Korea, which suffered Japanese wartime atrocities.\textsuperscript{41} And Japan continues to resist officially acknowledging the atrocities it perpetrated in its horrific past.\textsuperscript{42} As one commentator observed, “because of this omission, Japan lives in dread of its neighbors’ disgust and misunderstanding.”\textsuperscript{43}

Precisely because the United States, Japan’s closest military ally, provides a nuclear umbrella, the United States, more than most countries, could experience both benefits and drawbacks from a rearmed Japan. A Japan more capable of defending itself and projecting its power would reduce or even relieve the U.S. burden to safeguard its ally and would provide the United States with a more able partner in promoting international security.\textsuperscript{44}

\textsuperscript{35} See, e.g., Kenneth N. Waltz, Theory of International Politics (1979).
\textsuperscript{36} Kerr, supra note 16.
\textsuperscript{38} French, supra note 19.
\textsuperscript{39} Id.
\textsuperscript{40} Wiseman, supra note 19.
\textsuperscript{41} French, supra note 19. See also Green, supra note 19.
\textsuperscript{43} Ajemian, supra note 31, at 349.
\textsuperscript{44} See Japan Essay, supra note 20 (“As Japan’s economy continues to grow and its manufactured exports compete with and sometimes take markets away from American industries, many
Japan's increased involvement in U.S. military ventures would bolster the credibility of American claims of multilateralism. On the other hand, a less dependent Japan might mean a less trusted ally. A Japan not shielded under the U.S. nuclear umbrella might become a greater critic of, or even threat to, U.S. strategic interests. At the same time, a United States less reliant on Japan for its loyalty and assistance might be more willing to criticize Japan. After all, Fukuyama suspects that the United States's "gratitude for Japanese support in Iraq" caused the United States to refrain from discussing Japan's nationalistic trend.45

Rearmament would also have consequences for U.S. relations with Japan's neighbors, especially if it appears that Japan rearmed with or because of U.S. support. William O. Beeman, a professor of Japanese anthropology, argues that, because of states like Korea, where "memories of Japanese military atrocities in World War II are still alive," the United States, "in encouraging Japan's increased military action, may think it has helped some short-term problems. But it may have bought a great deal of trouble down the line."46 And such long-term consequences might include a shifting of regional alliances that would harm U.S. interests. One commentator hypothesizes that the United States "could find itself and Tokyo ostracized by vital allies like Korea and Thailand, moving it even further from China."47

VII. Conclusion

Japan now has two main options: It can continue as it has, employing linguistic gymnastics to claim that it technically complies with its pacifist constitution, or it can amend its constitution to reflect what many believe is already a reality—that the previously defanged island country has been rearming for years and will continue to do so. A third option—that Japan reverse its rearming trend and thus comply with Article 9—seems unlikely.

If Japan does continue to rearm, it remains to be seen how far it will go. Japan's remilitarization was "unthinkable" after World War II. Because Japan remains the only country ever to suffer an atomic bombing, its acquisition or development of nuclear weapons is supposedly "unthinkable" still.48 But, given that the unthinkable has occurred already, why should it not again? The fact that Japan has not fully acknowledged its past atrocities creates uncertainty about its true intentions and likely behavior. Whatever route Japan takes to help allay the concerns of its neighbors and the rest of the world that it would behave responsibly if rearmed, Japan should fully account and apologize for the atrocities it committed during World War II, and should cease officially and tacitly authorizing its whitewashing of history. Even then, Japan's sincerity may be perceived as a strategic ploy. Regardless, just as a

45. Fukuyama, supra note 37.
47. Kurlantzick, supra note 9.
first step in recovering from alcoholism is admitting the problem, the first step in Japan’s remilitarization should be to admit its problematic past.