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## Ensuring Miranda's Right to Counsel Abroad

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## Ensuring *Miranda's* Right to Counsel in U.S. Interrogations Abroad

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## I. INTRODUCTION

In 1966, in *Miranda v. Arizona*,<sup>1</sup> the Supreme Court issued a historic decision setting forth the guiding procedural framework for informing a suspect of his rights upon being taken into police custody.<sup>2</sup> Almost fifty years later, *Miranda*'s key holding—that suspects must be afforded adequate procedural safeguards to protect their Fifth Amendment right against self-incrimination<sup>3</sup> during custodial interrogation<sup>4</sup>—endures.<sup>5</sup> Today, prior to custodial questioning and absent one of three *Miranda* exceptions,<sup>6</sup> law enforcement is required to notify a suspect “in clear and unequivocal terms” that he has the right to remain silent, anything said can and will be used against him in a court of law, he has the right to consult with a lawyer

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1. 384 U.S. 436 (1966).

2. JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE, VOLUME 1: INVESTIGATION 445 (5th ed. 2010).

3. The Fifth Amendment reads, in pertinent part, “No person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V.

To enforce this right, *Miranda* held that any statement, whether exculpatory or inculpatory, obtained as a result of custodial interrogation may not be used against the suspect in a criminal trial unless the prosecutor proves that the police provided procedural safeguards effective to secure the suspect's privilege against compulsory self-incrimination.

DRESSLER & MICHAELS, *supra* note 2, at 450.

4. “Custodial interrogation—the triggering mechanism of *Miranda*—is defined as ‘questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.’” DRESSLER & MICHAELS, *supra* note 2, at 450. (quoting *Miranda*, 384 U.S. at 444). For purposes of *Miranda*, “‘interrogation’ refers not only to ‘express questioning,’ but also its ‘functional equivalent.’ The ‘functional equivalent’ of express questioning is ‘any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.’” *Id.* at 472 (citing *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)).

5. *Id.* at 452.

6. Three *Miranda* exceptions have been recognized: the public safety exception, the covert custodial interrogation exception, and the routine booking exception. *See id.* at 487–89. In *New York v. Quarles*, the Supreme Court recognized a “public safety exception” to *Miranda* that allows admission of non-Mirandized statements at trial for statements made during an exigency requiring immediate action by the officers beyond the normal need to expeditiously solve a serious crime. *See* 467 U.S. 649, 659 (1984). In *Quarles*, the defendant's statements about the whereabouts of his gun and the gun itself were admitted because the gun posed an immediate threat to public safety. Thus, the Court held that the officer did not have to Mirandize the defendant before inquiring about the gun's whereabouts. *Id.* at 651. In *Illinois v. Perkins*, the Supreme Court stated, “*Miranda* warnings are not required when the suspect is unaware that he is speaking to a law enforcement officer and gives a voluntary statement.” 496 U.S. 292, 294 (1990). This includes situations in which undercover police officers have obtained “voluntary” statements from defendants in prison or in other circumstances. In *Pennsylvania v. Muniz*, the Supreme Court announced a “routine booking question” exception that exempts from *Miranda*'s coverage questions to secure the “biographical data necessary to complete booking or pretrial services.” 496 U.S. 582, 584 (1990) (quoting *United States v. Horton*, 873 F.2d 180, 181 n.2 (8th Cir. 1989)).

and have a lawyer present with him during interrogation,<sup>7</sup> and, if he is indigent, a lawyer will be appointed to represent him.<sup>8</sup> *Miranda* remains an American staple, despite the fact that the decision has been debated by advocates<sup>9</sup> and opponents<sup>10</sup> and has been narrowly interpreted,<sup>11</sup> and exceptions to the doctrine have been developed.<sup>12</sup> Today, *Miranda* warnings have become a widely accepted and understood practice in American culture and the criminal justice system.<sup>13</sup> Not only do the warnings inform suspects of their rights, but they also help remind law enforcement of these protections and set a relatively uniform, bright-line framework for making an arrest and taking a

7. Although the Fifth Amendment does not explicitly state that one has a right to counsel,

*Miranda* observed that “[t]he circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege” against compulsory incrimination. Therefore, the Court held that an in-custody suspect also has a right to consult counsel prior to questioning and to have counsel present during interrogation.

DRESSLER & MICHAELS, *supra* note 2, at 451 (citing *Miranda v. Arizona*, 384 U.S. 436, 469 (1966)). The right to counsel discussed in *Miranda* may be described as the Fifth Amendment, or *Miranda*, right to counsel. *Id.* at 525–26. It should not be confused with the Sixth Amendment right to counsel. Under *Miranda*’s right to counsel, the police must cease interrogation of a custodial suspect who unambiguously requests a lawyer until the lawyer is present (and a waiver is obtained at that time), unless the suspect himself initiates communications with the police. *Id.*

8. *Id.*

9. *Id.* at 456. For a defense of *Miranda* and/or criticisms of it on the ground that it did not go far enough in limiting harsh interrogation practices, see generally Welsh S. White, *Miranda’s Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1214 (2001) (discussing the effectiveness of the safeguards *Miranda* does provide and the post-*Miranda* Court’s nearly total failure to identify pernicious interrogation practices); and Welsh S. White, *Defending Miranda: A Reply to Professor Caplan*, 39 VAND. L. REV. 1, 9 (1986) (arguing that *Miranda* rests on a legitimate constitutional basis and represents an effort both to apply the Fifth Amendment privilege to a vital stage of the adversarial process and to “alleviate some of the principal problems associated with the Court’s earlier efforts to control police interrogation at the police station”).

10. For scholarly work asserting that *Miranda* went too far, see generally Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2631 (1996) (arguing that as embodied in the U.S. Constitution, the privilege against self-incrimination was not intended to afford defendants a right to remain silent or to refuse to respond to incriminating questions, but rather to outlaw torture and other improper methods of interrogation); Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1419 (1985) (arguing that the Supreme Court should go further and reexamine the basic principles underlying *Miranda* and overrule it because it was not a wise or necessary decision); John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1054 (1994) (arguing that the privilege against self-incrimination is the “creature of defense counsel” and did not historically exist at common law); and Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1087 (1994) (suggesting a substantial revision of the standard narrative in early American legal and constitutional history of the privilege against self-incrimination and suggesting that it is not a fundamental right).

11. For a good discussion of court decisions that have narrowed *Miranda* without overruling it, see Leslie A. Lunney, *The Erosion of Miranda: Stare Decisis Consequences*, 48 CATH. U. L. REV. 727 (1999).

12. *See supra* note 6.

13. *See Dickerson v. United States*, 530 U.S. 428, 443 (2008) (“*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.”).

## ENSURING *MIRANDA*'S RIGHT TO COUNSEL IN U.S. INTERROGATIONS ABROAD

suspect into custody. In fact, studies have shown that most large city police administrators support *Miranda* because it has become custom,<sup>14</sup> providing the benefit of a clear standard that is easy to follow and regularly administer.

But while police administrators in the United States are comfortable following *Miranda*'s requirements, adhering to its standards becomes more difficult abroad, where U.S. law enforcement is increasingly expanding its presence.<sup>15</sup> As Justice Brennan stated in 1990 in *United States v. Verdugo-Urquidez*,

[p]articularly in the past decade, our Government has sought, successfully, to hold foreign nationals<sup>16</sup> criminally liable under federal laws for conduct committed entirely beyond the territorial limits of the United States that nevertheless has effects in this country. Foreign nationals must now take care not to violate our drug laws, our antitrust laws, our securities laws, and a host of other federal criminal statutes. The enormous expansion of federal criminal jurisdiction outside our Nation's boundaries has led one commentator to suggest that our country's three largest exports are now "rock music, blue jeans, and United States law."<sup>17</sup>

Justice Brennan's concern about the expansion of U.S. law abroad has become particularly acute within the last two decades, during which the United States has faced increasing threats of terrorism from asymmetrical terrorist networks operating in largely ungoverned foreign spaces.<sup>18</sup> The difficulties seen in fighting the U.S. "War on Terror" and protecting U.S. civilians, soldiers, and embassies abroad are an illustration of the many challenges currently facing U.S. authorities overseas.<sup>19</sup>

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14. Marvin Zalman & Brad Smith, *The Attitudes of Police Executives Toward Miranda and Interrogation Policies*, 97 J. CRIM. L. CRIMINOLOGY 873, 904–05, 924–25 (2007) ("Responses suggest that most support for *Miranda* is pragmatic, with a small percentage of respondents appearing to have ideological views in opposition to or in support of *Miranda*. The pragmatic agreement with *Miranda* is in accord with the well-supported conclusion that the police have adapted to *Miranda*.").
  15. See Mark Godsey, *Miranda's Final Frontier—The International Arena: A Critical Analysis of United States v. Bin Laden, and a Proposal for a New Miranda Exception Abroad*, 51 DUKE L.J. 1705–06 (2002).
  16. The courts have interchangeably used the terms "foreign national" and "non-resident alien" to refer to a "non-U.S. citizen." Therefore, for purposes of this note, these terms should be treated synonymously.
  17. 494 U.S. 259, 279–81 (1990) (Brennan, J., dissenting) (citing V. Rock Grundman, *The New Imperialism: The Extraterritorial Application of United States Law*, 14 INT'L LAW 257, 257 (1980)).
  18. See generally ANGEL RABASA ET AL., *UNGOVERNED TERRITORIES: UNDERSTANDING AND REDUCING TERRORISM RISKS* (2007), available at [http://www.rand.org/content/dam/rand/pubs/monographs/2007/RAND\\_MG561.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2007/RAND_MG561.pdf); *National Strategy for Combatting Terrorism*, U.S. DEP'T OF STATE (Sept. 2006), <http://2001-2009.state.gov/s/ct/rls/wh/71803.htm> (stating that "terrorist networks today are more dispersed and less centralized. They are more reliant on smaller cells inspired by a common ideology and less directed by a central command structure," and that it is a goal of U.S. counterterrorism policy to "prevent terrorists from exploiting ungoverned or under-governed areas as safehavens").
  19. See Glenn M. Sulmasy, *The Legal Landscape After Hamdan: The Creation of Homeland Security Courts*, 13 NEW ENG. INT'L COMP. L. ANN. 1, 2 (2006) (discussing various difficulties seen fighting the "War on Terror," including the fact that enemies do not wear standard military uniforms, do not follow the standard rules of war, and represent an ideology based on extreme religious beliefs as compared to an identifiable, single nation-state to fight against).

Typically, when U.S. law enforcement interrogates a suspect abroad, the suspect is in a foreign government's custody and U.S. agents are granted access to interrogate the individual.<sup>20</sup> This unique scenario has led courts and scholars to confront several difficult questions concerning *Miranda's* applicability overseas. First, does the holding in *Miranda* extend to situations in which U.S. law enforcement questions a suspect abroad about possible violations of U.S. law during a custodial interrogation?<sup>21</sup> Second, if *Miranda* protections do apply abroad, do they apply only to U.S. citizens or to all individuals, including foreign nationals?<sup>22</sup> Third, if the warnings apply to all individuals, what is specifically required to adequately apprise a suspect of his rights—is it permissible to adjust the warnings to comply with foreign laws and circumstances or should an individual be afforded the exact same protections he receives when being interviewed within the United States?

Federal courts addressing the first two questions—whether *Miranda* applies abroad and, if so, to what class of individuals—have concluded that some form of *Miranda* warning is required for *all* individuals, whether they are U.S. citizens or foreign nationals.<sup>23</sup> However, the answer to the third question—what is specifically required in giving *Miranda* warnings abroad—is not as clear. The challenge becomes particularly acute when considering *Miranda's* right to counsel: the requirement that law enforcement advise a suspect of his right to the assistance and presence of counsel during a custodial interrogation. First, if *Miranda* warnings are required abroad, but foreign law may not provide the right to an attorney, is it sufficient—and legally accurate—to tell the suspect that he has the right to an attorney and that one will be appointed for him if he cannot afford one? Second, if an individual does have a constitutional right to counsel abroad and the warnings must be issued in the same manner that they would be given in the United States, how should U.S. law enforcement actually fulfill this right? Is it unduly burdensome to require U.S. law enforcement to track down a lawyer admitted to practice in the United States?<sup>24</sup>

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20. See *In re Terrorist Bombings of U.S. Embassies* in E. Afr., 552 F.3d 177, 208 (2d Cir. 2008) (“[I]t is only through the cooperation of local authorities that U.S. agents obtain access to foreign detainees.”).

21. Most federal district and circuit courts that have interpreted *Miranda's* applicability abroad have stated that some form of *Miranda* warnings is required. See, e.g., *United States v. Bin Laden*, 132 F. Supp. 2d 168, 185–89 (S.D.N.Y. 2001), *aff'd sub nom. In re Terrorist Bombings of U.S. Embassies* in E. Afr., 552 F.3d 177 (2d Cir. 2008).

22. These first two questions were specifically at issue in *In re Terrorist Bombings of U.S. Embassies in East Africa*, in which the Second Circuit held that both U.S. citizens and “foreign nationals interrogated overseas but tried in . . . the United States are protected by the Fifth Amendment’s self-incrimination clause.” 552 F.3d at 201. The court then went on to hold, however, that “[e]ven if we were to conclude, rather than assume, that *Miranda* applies to overseas interrogations involving U.S. agents, that would not mean that U.S. agents must recite verbatim the familiar *Miranda* warnings to those detained in foreign lands.” *Id.* at 204.

23. See Jessica Schneider, *The Right to Miranda Warnings Overseas: Why the Supreme Court Should Prescribe a Detailed Set of Warnings for American Investigators Abroad*, 25 CONN. J. INT’L L. 459, 464 (2010).

24. If U.S. law enforcement is required to find a lawyer, it is unclear whether that lawyer must be admitted to practice in the United States or whether a lawyer admitted to practice in the foreign country will suffice. Because the suspect is being interrogated by U.S. officials and will possibly be subjected to U.S.

## ENSURING *MIRANDA*'S RIGHT TO COUNSEL IN U.S. INTERROGATIONS ABROAD

Does requesting a lawyer for a suspect in a foreign country that does not provide access to an attorney have the potential to damage U.S. relations with that state? If a lawyer cannot be procured, what choices remain for U.S. interrogators?

Federal courts did not confront the issue of what is specifically required to adequately apprise a suspect being interrogated abroad of his rights under *Miranda* until the Southern District of New York's holding in 2001 in *United States v. Bin Laden*<sup>25</sup> and the Second Circuit's holding in 2008, *In re Terrorist Bombings of U.S. Embassies in East Africa*, in which the defendants appealed their convictions of numerous terrorism charges on the grounds that the district court erred in failing to grant defendants' motions to suppress statements made overseas to U.S. officials in violation of *Miranda*.<sup>26</sup>

In each case, both courts held that *Miranda* applies to *all* individuals irrespective of their custodial situs (whether they are U.S. citizens or foreign nationals) and attempted to set forth clear guidelines for the warnings that must be issued by U.S. interrogators abroad. However, this note argues that neither case<sup>27</sup> sufficiently upholds the constitutional protections<sup>28</sup> that an individual must be afforded under *Miranda* and its progeny, particularly with regard to *Miranda*'s right to counsel abroad.<sup>29</sup>

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law and criminal procedure if he is extradited and prosecuted in the United States, this author believes that a lawyer admitted to practice in the United States would be required. Obviously, a lawyer who is not admitted to practice in the United States would not be deemed qualified, nor permitted, to represent the defendant in court, and would be unlikely to have the sufficient skill-set to appropriately advise his client of the relevant U.S. laws and constitutional provisions to adequately protect his client's interests. However, this note does not discuss this issue in detail.

25. 132 F. Supp. 2d 168 (holding that *Miranda* warnings are required abroad subject to modification reflecting the availability of counsel in a foreign country based upon U.S. law enforcement's reasonable inquiry into governing local law).
26. *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d at 180–81 (holding that *Miranda* rights are satisfied in an overseas interrogation when U.S. law enforcement informs a foreign detainee of his rights under the U.S. Constitution that no investigation of local law is required); *see also* Schneider, *supra* note 23.
27. Although this note discusses, and critiques, both decisions, it primarily focuses on the Second Circuit's decision. It should be noted that Judge Sand's district court opinion in *United States v. Bin Laden* was far more protective of an individual's *Miranda* rights abroad than the Second Circuit's opinion in *In re Terrorist Bombings of U.S. Embassies in East Africa*. However, even Judge Sand, who believed that U.S. law enforcement should engage in its "best efforts" to understand foreign law and apprise the suspect of the fullest rights available to him given his current location, would still ultimately cede to foreign law and allow one's *Miranda* right to counsel to be restricted or modified based on local circumstances. *Bin Laden*, 132 F. Supp. 2d at 168. Because Judge Sand's approach was reversed by the Second Circuit's opinion, this note will primarily discuss what this author considers to be the deficiencies in the Second Circuit's opinion.
28. In *Dickerson*, Chief Justice Rehnquist acknowledged that *Miranda* "was 'a constitutional design' and that *Miranda* has 'constitutional origin,' 'constitutional underpinnings,' and a 'constitutional basis.'" DRESSLER & MICHAELS, *supra* note 2, at 451 (citing *Dickerson v. United States*, 530 U.S. 428, 454 (2008)).
29. This author generally endorses Judge Sand's opinion in *United States v. Bin Laden* because it goes the farthest in protecting *Miranda*'s right to counsel abroad by requiring U.S. officials to give their best efforts to inquire about local laws and advise a suspect of his right to counsel in accordance with those laws. *See infra* pp. 572–73. In addition, the opinion wisely recognizes the "taint of compulsion [which] is equally prescient, if not more so, when U.S. agents are conducting custodial interrogations in foreign lands." 132

The Second Circuit's decision, which modified the district court's holding in *United States v. Bin Laden* that the warnings were ineffective, is notable in several key respects. First, the court "assumed" that *Miranda* applies to overseas interrogations involving U.S. agents, but the court explained that does "not mean that U.S. agents must recite verbatim the familiar *Miranda* warnings to those detained in foreign lands."<sup>30</sup> Second, the court stated that *Miranda* is not a "constitutional straightjacket" and that "other procedures which are at least as effective in apprising accused persons of their right of silence in assuring a continuous opportunity to exercise it' could pass constitutional muster."<sup>31</sup> Third, the court suggested a "context-specific approach" in which *Miranda* should be "applied in a flexible fashion to accommodate the exigencies of local conditions" abroad.<sup>32</sup> Missing from this analysis, however, was any specific guidance from the Second Circuit regarding whether the Constitution would permit the curtailment or elimination of the *Miranda* warnings in favor of foreign law.

The Second Circuit's opinion is problematic for several reasons. First, the Second Circuit did not give adequate weight to the *Miranda* decision itself, which emphasized that the primary purpose of issuing warnings is to prevent compulsion.<sup>33</sup> By failing to acknowledge that interrogation environments abroad have the potential to be far more coercive than U.S. stationhouses, the Second Circuit essentially ignored *Miranda*'s principal purpose.<sup>34</sup> Second, both the Second Circuit and the district court

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F. Supp. 2d at 168; *see infra* p. 571. However, because Judge Sand is ultimately willing to acquiesce to foreign law, and restrict one's right to counsel if there is a conflict of laws, this author believes Judge Sand's approach is not sufficiently protective of *Miranda*'s right to counsel abroad. *See Bin Laden*, 132 F. Supp. 2d at 188–89 ("We thus believe that the fair and correct approach under *Miranda* is for U.S. law enforcement simply to be clear and candid as to both the existence of the right to counsel and the possible impediments to its exercise. The goal is to convey to a suspect that, with respect to any questioning by U.S. agents, his ability to exercise his right to the presence and assistance of counsel—a right ordinarily unqualified—hinges on two external considerations arising from the fact of his foreign custody. First, since there exists no institutional mechanism for the international provision of an American court-appointed lawyer, the availability of public counsel overseas turns chiefly on foreign law. Second, foreign law may also ban all manner of defense counsel from even entering the foreign stationhouse, and such law necessarily trumps American procedure. Given these eventualities, U.S. law enforcement can only do the best they can to give full effect to a suspect's right to the presence and assistance of counsel, while still respecting the ultimate authority of the foreign sovereign." (citations omitted)).

30. *Bin Laden*, 132 F. Supp. 2d at 204.

31. *Id.* (citing *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)).

32. *Id.*

33. *Miranda v. Arizona*, 384 U.S. 436, 457 (1966).

34. Essential to the *Miranda* decision was the following principle:

An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures, cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.

*Id.* at 461.



holdings allow foreign law to infringe upon, and even possibly eliminate, an individual's *Miranda* rights. Despite holding that an individual has an unfettered right against self-incrimination regardless of his location, both courts allow the scope of that right to be restricted by curtailing one's right to counsel.

Another shortcoming of the Second Circuit decision is its broad reach. Of particular concern is that the Second Circuit's overly flexible, "context-specific" approach and vague *Miranda* requirements apply not only to terrorism cases, but to all criminal cases in which an interrogation occurs abroad—no matter how minor the criminal infraction.<sup>35</sup> Moreover, because the Supreme Court has never ruled on the issue of what is required by *Miranda* abroad,<sup>36</sup> the Second Circuit's decision is concerning because it is binding precedent in a circuit that sees the aggressive prosecution<sup>37</sup> of a high volume of crimes committed against the United States from abroad<sup>38</sup> and provides an inadequate guiding framework for the rest of the nation's courts deciding issues related to *Miranda*'s applicability overseas.

This note argues that the recent decisions in *United States v. Bin Laden* and its appellate counterpart, *In re Terrorist Bombings of U.S. Embassies in East Africa*, do not adequately protect a suspect's right to counsel as required by *Miranda*, during foreign interrogations by U.S. law enforcement. Specifically, the Second Circuit's decision did not give adequate weight to the possible compulsion inherent in a foreign interrogation and directly undermined *Miranda*'s primary purpose to prevent compulsion.<sup>39</sup> In addition, by holding that *Miranda*'s right to counsel may be restricted or modified by conflicting foreign law, the Second Circuit allows an

35. The rule would apply, for example, to everything from violations for arms and narcotics trafficking, to cyber crimes, securities fraud, and even minor offenses such as mail fraud. And although some may argue that *Miranda* requirements should be liberalized in terror-related crimes, *Miranda* made no such distinctions based on the severity of the crime. See, for example, Godsey, *supra* note 15, and Darmer, *infra* note 130, for arguments that *Miranda* requirements should be reduced in the international/terrorism context.

36. Schneider, *supra* note 23, at 461.

37. *The New York Times* has reported that "Preet Bharara, who currently has th[e] role [of U.S. Attorney of the S.D.N.Y.], said the aggressive approach [to prosecution] had become necessary in the post-9/11 era. 'As crime has gone global and national security threats are global,' he said, 'in my view the long arm of the law has to get even longer.'" Benjamin Weiser, *A New York Prosecutor with Worldwide Reach*, N.Y. TIMES (Mar. 27, 2011), [http://www.nytimes.com/2011/03/28/nyregion/28prosecutor.html?\\_r=2hp](http://www.nytimes.com/2011/03/28/nyregion/28prosecutor.html?_r=2hp).

38. The influence of the Second Circuit's jurisprudence is evidenced by the number of international criminal prosecutions handled by the U.S. Attorney's Offices in both the Southern and Eastern Districts of New York. For example, "[s]ince 2004, the [Southern District of New York U.S. Attorney's] office has sent prosecutors into more than 25 countries as part of investigations that have brought back dozens of suspected arms and narcotics traffickers and terrorists to Manhattan to face charges." *Id.* In prosecutions of terrorism offenses, the Southern and Eastern Districts are the second- and third-ranked districts in the United States in terms of the number of defendants charged. Although the Eastern District of Virginia ranks first, the Southern and Eastern District of New York figures combined equal the number of prosecutions in the Eastern District of Virginia. See RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN FEDERAL COURTS 24 (2008), available at [http://www.law.yale.edu/documents/pdf/Alumni\\_Affairs/USLS-pursuit-justice.pdf](http://www.law.yale.edu/documents/pdf/Alumni_Affairs/USLS-pursuit-justice.pdf).

39. *Miranda*, 384 U.S. at 436.

individual's *Miranda* rights to be curtailed, and quite possibly eliminated. Part II of this note provides the historical background of the *Miranda* decision and a summary of how U.S. district courts have interpreted the scope of *Miranda*'s protections abroad. Part III then analyzes the Southern District of New York's decision in *United States v. Bin Laden* and the Second Circuit's decision in the appeal of that case, *In re Terrorist Bombings of U.S. Embassies in East Africa*. Part IV explains why the analytical frameworks set forth in each of these decisions—with an emphasis on the Second Circuit decision—do not adequately protect *Miranda*'s right to counsel abroad and argues that *Miranda*'s right to counsel must be fully afforded to all individuals irrespective of where they are questioned by U.S. officials. Part V concludes the note by proposing that any adequate solution must require law enforcement to clearly inform all individuals of their right to counsel regardless of their custodial situs or conflicting foreign law. It also proposes that if a suspect abroad invokes his right to counsel, the burden should be on U.S. law enforcement to either procure counsel or terminate the interview.

## II. THE *MIRANDA* DECISION AND ITS APPLICATION ABROAD

### A. *Miranda v. Arizona*

*Miranda v. Arizona*<sup>40</sup> involved four cases, from four jurisdictions, consolidated for appeal.<sup>41</sup> All four cases were similar in their facts: each suspect had been taken into custody, was questioned “in a police-dominated environment” where he or she was alone with the police, and was “never informed of their privilege against self-incrimination.”<sup>42</sup> In each case, the suspect confessed to the crime or provided statements in a custodial environment that were inculpatory without being informed of his right against self-incrimination under the Fifth Amendment.<sup>43</sup> The issue in each case was whether “incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without *full warnings* of constitutional rights” constitutes compulsion to, and thus violates one's right against compelled self-incrimination under the Fifth Amendment.<sup>44</sup>

*Miranda* was significant largely because of its expansion of the definition of compulsion or involuntariness. Although the Court acknowledged that the defendants' statements may not “have been involuntary in traditional terms,” the Court emphasized that a “psychological” interrogation could be “equally destructive of human dignity” as “physical intimidation.”<sup>45</sup> In reaching this conclusion, the Court

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40. *Id.*

41. DRESSLER & MICHAELS, *supra* note 2, at 450.

42. *Id.*

43. The Court defined “custodial interrogation” to mean “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Miranda*, 384 U.S. at 444.

44. *Id.* at 445 (emphasis added).

45. *Id.* at 457.

## ENSURING *MIRANDA*'S RIGHT TO COUNSEL IN U.S. INTERROGATIONS ABROAD

reviewed various police manuals that encouraged an interrogation environment in which the “subject should be deprived of every psychological advantage” and sometimes induced to confess out of “trickery.”<sup>46</sup> After reviewing all of the various psychological tactics that police officers use during questioning, the Court stated, “[A]n individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak.”<sup>47</sup> The Court then stated, “In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be *fully* honored.”<sup>48</sup> The Court then explained in detail that in order to overcome the “inherent pressures of the interrogation atmosphere,” a suspect must be informed of his right to remain silent, that anything he says can and will be used against him in a court of law, that he has the right to an attorney, and if he cannot afford an attorney, one will be provided for him if he desires.<sup>49</sup>

### *B. Federal Court Interpretations of Miranda's Applicability Abroad*

Because of the inherent pressures of the interrogation atmosphere, the question arises whether *Miranda* is required during U.S. interrogations abroad and, if so, what the Constitution specifically requires of those warnings. Most federal district and circuit courts that have interpreted *Miranda*'s applicability abroad have stated that some form of *Miranda* warning is required;<sup>50</sup> however, prior to *United States v. Bin Laden* in 2001, federal courts were unwilling to lay out a framework for the specific warnings required.<sup>51</sup>

The first cases dealing with the issue of *Miranda*'s applicability overseas arose in the 1970s. Both courts stressed the importance of *Miranda* warnings during foreign interrogations, but adopted somewhat flexible approaches to *Miranda*.<sup>52</sup> In *United States v. Dopf*, the Fifth Circuit held that as long as American interrogators did “everything possible” to advise suspects “of their right to remain silent, of the possible use against them of incriminatory statements, [and] of the reason why they could not be furnished counsel by the U.S. Government while they were in Mexico,” subsequent admissions would be allowed at trial.<sup>53</sup> In *Cranford v. Rodriguez*, the Tenth Circuit

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46. *Id.* at 449, 453.

47. *Id.* at 461.

48. *Id.* at 467 (emphasis added).

49. *Id.* at 468–73.

50. *See, e.g.*, *Pfeifer v. U.S. Bureau of Prisons*, 615 F.2d 873, 877 (9th Cir. 1980); *United States v. Heller*, 625 F.2d 594, 600 (5th Cir. 1980); *Cranford v. Rodriguez*, 512 F.2d 860, 863 (10th Cir. 1975); *United States v. Dopf*, 434 F.2d 205, 207 (5th Cir. 1970).

51. *Schneider*, *supra* note 23, at 465.

52. *Id.*

53. *Dopf*, 434 F.2d at 207.

emphasized that *Miranda* should apply abroad, but recognized that because it “was not possible to get an attorney . . . this should not mean that, while the defendant is in detention, investigation must stop.”<sup>54</sup> The court held that because officers made a “good faith” effort to comply with *Miranda*, *Miranda* requirements were satisfied and the defendant’s statements should be admitted.<sup>55</sup>

In the 1980s, two circuits addressed the issue as to when non-Mirandized statements obtained by foreign officials could be used in U.S. trials. In *United States v. Heller*, the Fifth Circuit held that it was proper to admit non-Mirandized statements because the foreign authorities who conducted the interrogation acted independently from American officials.<sup>56</sup> In conclusion, however, the court held that *Miranda* is required if American officials participate in the interrogation or if the foreign authorities are acting as agents for their American counterparts.<sup>57</sup> The Ninth Circuit similarly held in *Pfeifer v. U.S. Bureau of Prisons* that, “[u]nder the joint venture doctrine, evidence obtained through activities of foreign officials, in which [United States] federal agents substantially participated and which violated the accused’s Fifth Amendment or *Miranda* rights, must be suppressed in a subsequent trial in the United States.”<sup>58</sup> Surprisingly, for the next few decades, federal courts did not address issues related to *Miranda*’s applicability abroad. It was not until the after the U.S.-Africa embassy bombings in 1998 that the courts reassessed the issue in greater detail.

### C. *The U.S. Embassy Attacks and the Interrogation of Mohamed Al-Owhali*

On August 7, 1998, suicide car bombers simultaneously detonated trucks filled with explosives outside the U.S. Embassy buildings in Dar es Salaam, Tanzania and Nairobi, Kenya, killing 224 people and injuring over 4500.<sup>59</sup> Immediately following

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54. *Cranford*, 512 F.2d at 863.

55. *Id.*

56. *United States v. Heller*, 625 F.2d 594, 599 (5th Cir. 1980) (citing *United States v. Morrow*, 537 F.2d 120, 139 (5th Cir. 1976)). In *United States v. Heller*, the defendant challenged his conviction in the United States based on the admissibility of evidence that was obtained by British officials without issuing any form of *Miranda* warnings. The court found that the British officials acted independently from the American officials, and that U.S. law enforcement’s activities were “peripheral at most.” *Id.* at 600.

57. *Id.* at 599.

58. *Pfeifer v. U.S. Bureau of Prisons*, 615 F.2d 873, 877 (9th Cir. 1980). In *In re Terrorist Bombings of U.S. Embassies in East Africa*, the Second Circuit described the joint-venture doctrine as an exception to the rule that statements taken by foreign police in the absence of *Miranda* warnings are admissible if voluntary. The court stated that although the doctrine’s “precise contours” have yet to be defined, “pursuant to this exception, ‘statements elicited during overseas interrogation by foreign police in the absence of *Miranda* warnings must be suppressed whenever United States law enforcement agents actively participate in questioning conducted by foreign authorities.’” *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 177, 203 (2d Cir. 2008) (quoting *United States v. Yousef*, 327 F.3d 56, 56 (2d Cir 2003)).

59. *This Day in History, Aug. 7, 1998: U.S. embassies in East Africa bombed*, HISTORY.COM, <http://www.history.com/this-day-in-history/us-embassies-in-east-africa-bombed> (last viewed Feb. 27, 2013).

## ENSURING MIRANDA'S RIGHT TO COUNSEL IN U.S. INTERROGATIONS ABROAD

the attack, criminal investigators and counterterrorism specialists from the U.S. State and Defense Departments and the F.B.I. were sent to Nairobi to investigate.<sup>60</sup>

On August 12, 2008, two members of the Joint Terrorist Task Force, based in New York City, accompanied two Kenyan police officers to a hotel in Kenya to arrest Mohamed Al-Owhali, a dual Saudi and United Kingdom citizen<sup>61</sup> and a suspect in the case.<sup>62</sup> Al-Owhali was taken into Kenyan custody and U.S. authorities were permitted to question him.<sup>63</sup> When questioning began on August 12, U.S. officials presented Al-Owhali with a modified Advice of Rights form (the "AOR form" or "AOR"), written in English, outlining the suspect's *Miranda* rights, as they believed them to apply in Kenya. The AOR stated:

We are representatives of the United States Government. Under our laws, you have certain rights. Before we ask you any questions, we want to be sure that you understand those rights.

You do not have to speak to us or answer any questions. Even if you have already spoken to the Kenyan authorities, you do not have to speak to us now.

If you do speak with us, anything that you say may be used against you in a court in the United States or elsewhere. *In the United States, you would have the right to talk to a lawyer to get advice before we ask you any questions and you could have a lawyer with you during questioning. In the United States, if you could not afford a lawyer, one would be appointed for you, if you wish, before any questioning.*

*Because we are not in the United States, we cannot ensure that you will have a lawyer appointed for you before any questioning.*

If you decide to speak with us now, without a lawyer present, you will still have the right to stop answering questions at any time.

You should also understand that if you decide not to speak with us, that fact cannot be used as evidence against you in a court in the United States.

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.<sup>64</sup>

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60. *Embassy Terror in Africa*, N.Y. TIMES (Aug. 8, 1998), <http://www.nytimes.com/1998/08/08/opinion/embassy-terror-in-africa.html>.

61. *Mohamed Rashed Daoud Al-Owhali*, GLOBALSECURITY.ORG, [http://www.globalsecurity.org/security/profiles/mohamed\\_rashed\\_daoud\\_al-owhali.htm](http://www.globalsecurity.org/security/profiles/mohamed_rashed_daoud_al-owhali.htm) (last modified Nov. 9, 2007).

62. *United States v. Bin Laden*, 132 F. Supp. 2d 168, 173 (S.D.N.Y. 2001), *aff'd sub nom. In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 177 (2d. Cir. 2008).

63. *See id.* at 171–72.

64. *Id.* at 173–74 (emphasis added).

Because Al-Owhali told law enforcement that he could not read English, but that he “could understand spoken English to a limited degree,” the form was read to him aloud in English. He then signed the form and was questioned for one hour.<sup>65</sup> Afterwards, an Arabic interpreter was brought in who translated the form in its entirety. Al-Owhali stated that he understood the AOR to be the same one that was read to him and signed by him that morning.<sup>66</sup> Al-Owhali was then questioned for eight more days. At each interview, he was shown his signed AOR and asked “whether he remembered his rights, and whether he would continue to answer their questions.”<sup>67</sup> On each occasion, he responded, “Yes.”<sup>68</sup> From the moment of his arrest on August 12 until August 21, Al-Owhali consistently denied involvement in the Nairobi embassy bombing. But on August 21, after American officials disclosed the evidence against him, he stated he would tell the truth about his involvement in the bombing if he could be tried in the United States, and he subsequently made inculpatory statements.<sup>69</sup> Eventually, Al-Owhali was rendered<sup>70</sup> to the United States for trial.<sup>71</sup>

At trial, Al-Owhali moved to suppress his inculpatory statements on the grounds that he had not been properly Mirandized abroad because the AOR form misled him about his right to counsel in Kenya.<sup>72</sup> Al-Owhali’s lawyers argued that the warnings in the AOR form were misleading because they essentially conveyed to him that he did not have access to an attorney because he was in Kenya, when in fact Kenyan law did not

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65. *See id.* at 174.

66. *See id.*

67. *Id.* at 175.

68. *Id.*

69. *Id.* at 176.

70. *Extraditions and Renditions of Terrorists to the United States*, U.S. DEP’T OF STATE (Jan. 8, 1999), [http://www.state.gov/www/global/terrorism/terrorists\\_extradition.html](http://www.state.gov/www/global/terrorism/terrorists_extradition.html). Further,

[a]t its base, a “rendition” is the forcible movement of an individual from one country to another, without use of a formal legal process, such as an extradition mechanism. Such operations are alternatively described as “abductions,” “kidnappings,” “seizures,” or “transfers,” depending on the sentiment of the commentator describing such activities.

Daniel L. Pines, *Rendition Operations: Does U.S. Law Impose Any Restrictions?*, 42 LOY. U. CHI. L.J. 523, 525 (2011). It is unclear to this author why Al-Owhali was rendered by the United States instead of being extradited, especially given the fact that the United States has an extradition treaty with Kenya. *See infra* note 148. Little information is publicly available, but this author believes more information would be helpful to understanding the foreign relations at play and for evaluating the Second Circuit’s concerns, which focused to a large extent on preserving U.S. foreign relations and respecting foreign law. *See discussion infra* Part III.C. One possible obstacle the United States has faced when trying to extradite suspects is that foreign countries that do not recognize the death penalty are unwilling to extradite to the United States if it is seeking the death penalty. *See, e.g.*, Benjamin Weiser, *Suspect in Embassy Bombings Moves Closer to Extradition*, N.Y. TIMES (Dec. 12, 1998), <http://www.nytimes.com/1998/12/12/world/suspect-in-embassy-bombings-moves-closer-to-extradition.html>.

71. *Bin Laden*, 132 F. Supp. 2d at 178.

72. *See id.* at 181.

## ENSURING *MIRANDA*'S RIGHT TO COUNSEL IN U.S. INTERROGATIONS ABROAD

expressly prohibit him from meeting with an attorney.<sup>73</sup> The question for U.S. District Court Judge Leonard B. Sand in the Southern District of New York was whether a non-U.S. citizen must be afforded *Miranda*'s protection when being interviewed by U.S. law enforcement abroad and, if so, what the warnings specifically require.

### D. *United States v. Bin Laden*

In *United States v. Bin Laden*,<sup>74</sup> Judge Sand stated that Al-Owhali's motion presented a question of first impression as to whether a nonresident alien's statements to U.S. law enforcement abroad are protected by the Fifth Amendment's self-incrimination clause.<sup>75</sup> In addition, Judge Sand also analyzed whether the rights read to Al-Owhali in the AOR form complied with *Miranda*'s right to counsel.

Judge Sand started his opinion by noting that a violation of the privilege against self-incrimination occurs when a defendant's involuntary statements are actually used against him in a criminal proceeding, not at the moment of the actual interrogation.<sup>76</sup> Accordingly, for purposes of *Miranda*, the location of where the interrogation occurred is largely immaterial. Judge Sand concluded that,

as long as [the defendant] is the present subject of a domestic criminal proceeding, [he] is indeed protected by the privilege against self-incrimination guaranteed by the Fifth Amendment, notwithstanding the fact that his only connections to the United States are his alleged violation of U.S. law and his subsequent prosecution.<sup>77</sup>

From this viewpoint, Judge Sand held that courts may and should apply the familiar warning/waiver framework<sup>78</sup> to *Miranda* interrogations abroad.<sup>79</sup> In addition, Judge Sand recognized that the original purpose of *Miranda* was to protect suspects against "presumptively coercive" interrogation environments<sup>80</sup> and that interrogations abroad present "greater threats of compulsion since all that happens to the accused cannot be controlled by the Americans."<sup>81</sup> In light of *Miranda*'s underlying purpose—to avoid

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73. See discussion *infra* text accompanying note 92.

74. In this case, Al-Owhali was one of two defendants who were charged with participation in the bombings of U.S. embassies in Kenya and East Africa and who moved to suppress statements made to American authorities while they were in the custody of Kenyan (Al-Owhali) and South African (other defendant) police. *Bin Laden*, 132 F. Supp. at 171–72, 181.

75. *Id.* at 181.

76. *Id.* at 181–82 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990)).

77. *Id.* at 181.

78. If a suspect is properly given his *Miranda* warnings, he may waive his rights and his subsequent statements may be introduced at trial. In order to constitute a valid waiver, the waiver must be made "voluntarily, knowingly and intelligently." See DRESSLER & MICHAELS, *supra* note 2, at 477 (citing *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)).

79. *Bin Laden*, 132 F. Supp. 2d at 181.

80. *Id.* at 186 (citing *Miranda v. Arizona*, 384 U.S. 436, 448 (1966)).

81. *Id.*

coercive interrogation environments—Judge Sand expressed concern about foreign laws that might permit lengthy incommunicado detention or aggressive practices that would not be tolerated in the United States.<sup>82</sup> Given these concerns, Judge Sand stated,

American law enforcement must do what it can at the start of interrogation to dissipate the taint of compulsion [which] is equally prescient, if not more so, when U.S. agents are conducting custodial interrogations in foreign lands. . . . [Therefore] a principled but realistic application of *Miranda*'s familiar warnings/waiver framework . . . is both necessary and appropriate under the Fifth Amendment.<sup>83</sup>

According to this standard, Judge Sand found “uncontroversial” the requirement that a suspect be warned that he “has the right to remain silent . . . even if he has already spoken to the foreign authorities . . . [and] that anything he does say may be used against him in a court in the United States or elsewhere.”<sup>84</sup>

Regarding the right to counsel, however, Judge Sand stated that the issue was more difficult to resolve because a suspect may not have those rights under the law of the country where he is detained and “[n]o constitutional purpose is served by compelling law enforcement personnel to lie or mislead subjects of interrogation.”<sup>85</sup> Yet, irrespective of these challenges, Judge Sand took a fairly forceful stand protecting *Miranda*'s right to counsel by requiring law enforcement to inquire about local circumstances and laws, and insisting that officials do the best they can to scrupulously honor *Miranda*'s right to counsel during foreign interrogations.<sup>86</sup>

Judge Sand then held that the written AOR warning in Al-Owhali's case was “facially deficient in its failure to apprise Defendant[] accurately and fully of [his] right under *Miranda*, to the assistance and presence of counsel if questioned by U.S. agents, even considering the fact that Defendants were in the custody of foreign authorities.”<sup>87</sup> Because the warnings stated, “In the United States, you would have the right to talk to a lawyer,” the court held:

[S]ince the suspect is obviously aware that he is not now ‘in the United States,’ the logical conclusion for him to draw is that neither of the two previously enumerated rights<sup>88</sup> are currently available to him. The clear, overriding message is that the right to counsel is instead geographically based. . . . Nothing else in the AOR addresses a suspect's right to the assistance and presence of counsel for purposes of custodial interrogation by U.S. personnel.

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82. *Id.*

83. *See id.* at 185–87.

84. *Id.* at 187–88.

85. *Id.* at 188.

86. *See infra* discussion accompanying notes 94–99.

87. *Bin Laden*, 132 F. Supp. 2d at 190.

88. The two rights referenced are: (1) the right to talk with and get advice from a lawyer before and during questioning, and (2) the right for an appointed lawyer if one cannot be afforded. *See id.*



## ENSURING *MIRANDA*'S RIGHT TO COUNSEL IN U.S. INTERROGATIONS ABROAD

Yet, standing alone, the three sentences<sup>89</sup> above wrongly conveyed to the suspect that, due to this custodial status outside the United States, he currently possesses no opportunity to avail himself of the services of an attorney before or during questioning by U.S. officials. The AOR, as is, prematurely forecloses the significant possibility that the foreign authorities themselves may, if asked, either supply counsel at public expense or permit retained counsel inside the stationhouse.<sup>90</sup>

Ultimately, Judge Sand held that the AOR *Miranda* warnings were deficient because “conspicuously absent was the right to counsel before and during interrogation, a right *Miranda* itself underscores as paramount and vital for those who suddenly find themselves alone inside a police interrogation room.”<sup>91</sup> Because the laws of Kenya did not appear to completely eliminate one’s right to counsel, the court held that the AOR was “on its face . . . inadequate under *Miranda* and its progeny.”<sup>92</sup> Judge Sand provided instructions for curing this deficiency, stating:

[I]f the particular overseas context actually presents *no* obvious hurdle to the implementation of an accused’s right to the assistance and presence of counsel, due care should be taken not to foreclose an opportunity that in fact exists. To

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89. The three sentences referenced are the following warnings from the AOR:

In the United States, you would have the right to talk to a lawyer to get advice before we ask you any questions and you could have a lawyer with you during questioning. In the United States, if you could not afford a lawyer, one would be appointed for you, if you wish, before any questioning. Because we are not in the United States, we cannot ensure that you will have a lawyer appointed for you before any questions.

*Id.*

90. *Id.*

91. *Id.* at 191.

92. *Id.* at 192. Regarding Kenyan law, the court stated:

The Court’s understanding of the law as to Kenya, however, is murky at best. Kenya’s Constitution imparts: “Every person who is charged with a criminal offense shall be permitted to defend himself before the court in person or by a legal representative of his own choice.” Moreover, “nothing contained in [the aforementioned provision] shall be construed as entitling a person to legal representation at public expense.” Yet the Kenyan Criminal Procedure Code guarantees that “[a] person accused of an offense before a criminal court, or against whom proceedings are instituted under this Code in a criminal court, may of right be defended by an advocate.” And the Kenya Police Force Standing Orders also ensure: “Every person detained by police should be given facilities for communicating with a friend or legal adviser, and such person should be permitted to visit the prisoner.” We deem it highly inadvisable for the Court to interpret, in the first instance, how these various provisions play out in practice within Kenya. That exercise, however, is fortunately unnecessary since we see nothing in the Government’s submissions that leads us to believe that, in Kenya, a suspect under interrogation is *always* banned from seeking the advice and presence of *retained* counsel. Indeed, the Government’s own representation has been that “any participation by [retained] counsel in the interview process is at the sole discretion of the investigators.

*Id.* at 190–91.

the maximum extent reasonably possible, efforts must be made to replicate what rights would be present if the interrogation were being conducted in America.<sup>93</sup>

In effect, Judge Sand's holding would have required that "U.S. law enforcement . . . do the best they can to give full effect to a suspect's right to the presence and assistance of counsel, while still respecting the ultimate authority of the foreign sovereign."<sup>94</sup> In essence, Judge Sand's approach could be categorized as a "best efforts" approach,<sup>95</sup> in which law enforcement would be required to inquire about local access to counsel and tailor their *Miranda* warnings to accurately reflect the availability of an attorney. According to Judge Sand, these steps are necessary because the "fair and correct approach under *Miranda* is for U.S. law enforcement to be clear and candid as to both the existence of the right to counsel and the possible impediments to its exercise."<sup>96</sup>

On the facts of the particular case, Judge Sand proposed his own warnings, which he believed would fairly and accurately convey to suspects their right to counsel under *Miranda* while they are being interrogated by U.S. officials in a foreign country. Although the full text<sup>97</sup> of his warnings is provided in a footnote below, in summary, Judge Sand proposed that the warnings explain that U.S. law enforcement is uncertain whether foreign law would allow the presence and appointment of counsel, but that if the suspect wishes to have a lawyer present, U.S. law enforcement will ask the foreign authorities for permission to permit access. Judge Sand's recommended warnings also clearly stated that if the foreign authorities refuse access to an attorney, the suspect still has the right to remain silent.

In conclusion, Judge Sand advocated a far broader right to counsel than the subsequent Second Circuit decision by requiring law enforcement to use its "best efforts" to investigate foreign law and permit access or appoint counsel if foreign law did not prohibit access or appointment and the suspect requested counsel. However,

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93. *Id.* at 188.

94. *Id.* at 188–89.

95. This author will use the term "best efforts" to describe Judge Sand's approach throughout this note. *See id.* at 181.

96. *Id.* at 188.

97. Judge Sand proposed the following warnings:

Under U.S. law, you have the right to talk to a lawyer to get advice before we ask you any questions and you can have a lawyer with you during questioning. Were we in the United States, if you could not afford a lawyer, one would be appointed for you, if you wished, before any questioning. Because you are not in our custody and we are not in the United States, we cannot ensure that you will be permitted access to a lawyer, or have one appointed for you, before or during any questioning. However, if you want a lawyer, we will ask the foreign authorities to permit access to a lawyer or to appoint one for you. If the foreign authorities agree, then you can talk to that lawyer to get advice before we ask you any questions and you can have that lawyer with you during questioning. If you want a lawyer, but the foreign authorities do not permit access at this time to a lawyer or will not now appoint one for you, then you still have the right not to speak to us at any time without a lawyer present.

*Id.* at 188 n.16.

based on the language of Judge Sand's opinion, it appears that his decision would still allow foreign law to control U.S. interrogations if the two laws were in conflict, thereby potentially allowing foreign law to limit the right to counsel—a right to which a defendant would be fully entitled if he were present in the United States.

Ultimately, Judge Sand concluded that the AOR was “deficient . . . to apprise Al-'Owhali of his rights for the first five interrogation sessions” but that “[b]y the sixth interrogation session” the AOR had been cured.<sup>98</sup> Because Al-'Owhali subsequently “made it clear that he was willing to inculcate himself in the embassy bombing in exchange for some kind of guarantee from the Americans that any criminal trial would take place in the United States instead of Kenya,” his statements were ultimately used against him and Al-'Owhali was convicted of various counts of terrorism in U.S. District Court.<sup>99</sup>

#### *E. In re Terrorist Bombings of U.S. Embassies in East Africa*

On appeal, in *In re Terrorist Bombings of U.S. Embassies in East Africa*,<sup>100</sup> the Second Circuit upheld Judge Sand's holding that the Fifth Amendment's privilege against self-incrimination applied to overseas interrogations and, therefore, *Miranda* warnings were required.<sup>101</sup> However, the court disagreed with and reversed Judge Sand in regard to the specific warnings required—particularly Judge Sand's requirements for informing a suspect of his right to counsel abroad.<sup>102</sup>

First, the Second Circuit agreed with Judge Sand's determination that the privilege against self-incrimination governs the admissibility of evidence at U.S. trials, not the conduct of agents investigating criminal activity.<sup>103</sup> In other words, under the Fifth Amendment, agents may interrogate abroad as they wish; however, if any statements were “compelled” because of an absence of *Miranda* warnings, it would be a violation of the Fifth Amendment to admit those statements in a U.S. trial.<sup>104</sup> Therefore, non-Mirandized, “compelled” statements cannot be introduced at

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98. *Id.* at 192. (“Al-'Owhali was told that he had the right to remain silent, that anything he said could be used against him in court, and that he had the right to the presence of an attorney ‘during this meeting,’ although an American attorney was currently unavailable. Al-'Owhali was additionally told that his silence could not be used against him in court, and that even if he decided to talk now he could still change his mind later. AUSA [redacted] further stressed that he was an attorney for the U.S. government, not for Al-'Owhali.”).

99. *Id.*

100. In the appeal, Al-'Owhali contended that his conviction should be overturned because neither the AOR form nor the subsequent oral warnings of an assistant U.S. attorney satisfied *Miranda v. Arizona*. In addition, he asserted that the conditions of his confinement made his statements involuntary and therefore inadmissible under the Fifth Amendment. *See In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 177, 180–81 (2d Cir. 2008).

101. *Id.*

102. *Id.* at 205.

103. *Id.* at 199.

104. *Id.*

trial regardless of whether the statements were made: (1) in a foreign state or domestically; or (2) by a resident or non-resident of the U.S.<sup>105</sup>

Recognizing that the Supreme Court has not decided this particular issue, the Second Circuit carefully interpreted the Fifth Amendment right of self-incrimination by analyzing its text and Supreme Court cases assessing the applicability of other Fifth Amendment clauses to foreign nationals.<sup>106</sup> Regarding the text of the Fifth Amendment, the Second Circuit emphasized that, unlike other constitutional provisions specifying “citizens” or “the people,” the Fifth Amendment expressly states that “no person” shall be compelled to be a witness against himself.<sup>107</sup> In addition, the Second Circuit emphasized that the Supreme Court has held that the Due Process Clause of the Fifth Amendment applies equally to U.S. citizens and foreign nationals present in the U.S., even unlawfully present individuals.<sup>108</sup> Given these facts, the Second Circuit expressly held “that foreign nationals interrogated overseas but tried in the civilian courts of the United States are protected by the Fifth Amendment’s self-incrimination clause.”<sup>109</sup> According to this logic, Al-Owhali theoretically should have had the exact same Fifth Amendment rights as any U.S. citizen being interrogated domestically, including an unfettered right to counsel. Nonetheless, the Second Circuit still ruled that *Miranda* warnings with respect to the right to counsel could be modified to take into account foreign law and local circumstances.

In addition, the Second Circuit’s interpretation of what *Miranda* requires abroad was far more limited than the “best efforts” approach advocated by Judge Sand.<sup>110</sup> The Second Circuit stated, “Insofar as *Miranda* might apply to interrogations conducted overseas, that decision is satisfied when a U.S. agent informs a foreign detainee of his rights under the U.S. Constitution when questioned overseas.”<sup>111</sup> Rejecting Judge Sand’s requirements that law enforcement “do the best they can [to effectuate the rights of counsel] . . . while still respecting the ultimate authority of the sovereign,”<sup>112</sup> the Second Circuit stated:

U.S. agents acting overseas need not become experts in foreign criminal procedure in order to comply with *Miranda*; nor need they advocate for the appointment of local counsel on a foreign suspect’s behalf. While doing so may provide additional grounds for determining that any statements obtained

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105. *Id.*

106. *Id.* at 199–200.

107. *Id.*

108. *Id.*

109. *Id.* at 201.

110. See discussion *supra* p. 573.

111. *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d at 198.

112. *United States v. Bin Laden*, 132 F. Supp. 2d 168, 188–89 (S.D.N.Y. 2001), *aff’d sub nom. In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 177 (2d. Cir. 2008).

## ENSURING *MIRANDA*'S RIGHT TO COUNSEL IN U.S. INTERROGATIONS ABROAD

in the course of interrogations were made voluntarily, it is not required by either the Fifth Amendment or *Miranda*.<sup>113</sup>

In short, the Second Circuit's opinion held that law enforcement *may* investigate and *may* take efforts to provide the fullest legal protections permitted under foreign law, but that these efforts are not required. According to this standard, law enforcement arguably could simply ignore foreign law, make no efforts to ascertain what protections the suspect might be afforded, and satisfy *Miranda* by merely informing the suspect of what his rights to counsel would be if he or she was currently situated in the United States.

The Second Circuit cited several grounds for its decision. First, it stated that the *Miranda* decision itself emphasized that the warnings did not need to be recited verbatim, that the "decision in no way creates a constitutional straightjacket," and that "other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it" could "pass constitutional muster."<sup>114</sup> Second, the Second Circuit emphasized that "*Miranda* does not require the provision of legal services" and "does not compel the police to serve as advocates for detainees before local authorities, endeavoring to expand the rights and privileges available under local law."<sup>115</sup> On this point, the court explained that law enforcement may, "in their discretion, appeal to local authorities to appoint counsel," but that doing so is not constitutionally mandated.<sup>116</sup> It also cautioned that requiring officers to ask local authorities to appoint counsel could have the effect of straining U.S. relations with that particular country—relations which are essential to mutual cooperation on law enforcement.<sup>117</sup>

Contrary to Judge Sand's opinion in *United States v. Bin Laden*, the Second Circuit held that the AOR form did not "wrongly convey to a suspect that, due to his custodial situs outside the United States, he currently possess[ed] no opportunity to avail himself of the services of an attorney before or during questioning by U.S. officials."<sup>118</sup> In the Second Circuit's view, because the AOR presented the defendant "with a factually accurate statement of [his] right to counsel under the U.S. Constitution"<sup>119</sup> and accurately explained to him that he *may not* be "entitled to (a) the appointment of

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113. *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d at 198.

114. *Id.* at 204 (quoting *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)).

115. *Id.* at 208.

116. *Id.*

117. *Id.*

118. *Id.* at 206 (quoting *United States v. Bin Laden*, 132 F. Supp. 2d 168, 190 (S.D.N.Y. 2001), *aff'd sub nom. In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 177 (2d. Cir. 2008)).

119. *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d at 205–06 ("The AOR presented defendants with a factually accurate statement of their rights under the U.S. Constitution and how those rights might be limited by the governing non-U.S. criminal procedures.") The oral warnings informed Al-Owhali "he had the right to remain silent, that anything he said could be used against him in court, and that he had the right to the presence of an attorney 'during this meeting,' although an American attorney was currently unavailable." *See supra* note 98.

publicly financed counsel and (b) the presence of counsel during interrogations” because of the law of Kenya, the detaining authority, *Miranda’s* requirements were satisfied.<sup>120</sup>

*F. The Current Framework for Determining the Adequacy of Miranda’s Right to Counsel Warnings Abroad*

The Second Circuit’s decision attempted to set forth a framework for determining whether U.S. officials abroad have adequately Mirandized a suspect. According to the Second Circuit’s standard, *Miranda* warnings, whether oral or written, are satisfied when “a U.S. agent informs a foreign detainee of his rights under the U.S. Constitution when questioned overseas.”<sup>121</sup> In addition, the Second Circuit explained that as long as the suspect is presented “with a factually accurate statement of [his] right to counsel under the U.S. Constitution,” *Miranda* is satisfied when U.S. officials inform a suspect that he may not be entitled to appointment of counsel because of conflicting foreign laws or the difficulty of obtaining counsel.<sup>122</sup>

According to this standard, one’s right to counsel is satisfied by telling a suspect, “If you were in the United States, you would have a right to a lawyer, and if you could not afford one, one would be appointed for you.” Such a standard allows *Miranda* warnings to be improperly adjusted by limiting *Miranda’s* requirements in favor of foreign law and local circumstances. Even more troubling is that the Second Circuit’s opinion does not specify to what extent *Miranda* warnings abroad may be adjusted and curtailed in favor of the above-mentioned considerations. Such an approach leaves *Miranda’s* right to counsel requirement at risk of being completely eradicated in the overseas interrogation context.

**III. HOW *IN RE TERRORIST BOMBINGS OF U.S. EMBASSIES IN EAST AFRICA* FAILS TO ADEQUATELY PROTECT A DEFENDANT’S *MIRANDA* RIGHT TO COUNSEL ABROAD**

The Southern District of New York and Second Circuit decisions properly hold that the Fifth Amendment’s right against self-incrimination applies to all individuals and that some form of *Miranda* warnings is required overseas, but the framework articulated by the Second Circuit is insufficient for several reasons.

First, the Second Circuit’s opinion failed to adequately take into account the underlying purpose of the *Miranda* warnings, which is to overcome the “inherent

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120. *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d at 206. Although the Second Circuit expressly disagreed with Judge Sand on the adequacy of the warnings provided in the AOR, it noted that it “need not rule definitively on the matter because of the adequacy of the subsequent oral warnings, and because the error, if any, in excluding the statements obtained prior to the oral warning benefitted the defendants and was therefore harmless.” *Id.* at 209. The Second Circuit explicitly stated: (1) “The AOR presented defendants with a factually accurate statement of their rights under the U.S. Constitution,” (2) “the AOR presented defendants with a factually accurate statement of their right to counsel under the U.S. Constitution,” and (3) “the AOR substantially complied with whatever *Miranda* requirements were applicable.” *Id.* at 205–06.

121. *Id.* at 198.

122. *Id.* at 206.

## ENSURING *MIRANDA*'S RIGHT TO COUNSEL IN U.S. INTERROGATIONS ABROAD

pressures of the interrogation atmosphere<sup>123</sup> and to avoid the compulsion of the accused to speak in custodial interviews. Despite Judge Sand's warnings that foreign interrogation environments pose particularly serious threats of compulsion,<sup>124</sup> the Second Circuit refused to mention this concern while it simultaneously decreased the level of *Miranda* protection available to suspects abroad.

Second, the Second Circuit undermined *Miranda*'s explicit holding that the "accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored."<sup>125</sup> Stating that the Fifth Amendment applies to all individuals abroad, but then allowing the scope of one's right to counsel to be overridden by foreign law, utilizes inconsistent reasoning. Such reasoning gives some Fifth Amendment rights absolute protection, but permits other Fifth Amendment rights to be curtailed—based not on U.S. constitutional guarantees, but rather on the suspect's geographical location. The ability to adjust *Miranda*'s right to counsel based on foreign law is improper because it fundamentally restricts the scope of *Miranda*'s right to have counsel present during questioning, a right which the Court in *Miranda* viewed as indispensable to upholding the constitutional right against self-incrimination.<sup>126</sup>

Third, the Second Circuit's determination that obtaining counsel would be unduly burdensome on law enforcement is unpersuasive because it ignores the reality of customary practice within the United States, where, if one invokes his right to counsel, the practical effect of such an invocation is that counsel is rarely, if ever, appointed. Because the typical remedy<sup>127</sup> is that the interview is simply terminated,<sup>128</sup>

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123. *Miranda v. Arizona*, 384 U.S. 436, 468 (1966).

124. *See supra* text accompanying note 83.

125. *Miranda*, 384 U.S. at 467.

126. *See id.* at 470.

Th[e] need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced . . . .

*Id.*

127. *See infra* notes 177 and accompanying text.

128. Although some may argue that in cases of serious crimes, such as terrorism, terminating the interview is not a realistic option, this author would disagree. The fact remains that *Miranda* warnings are not crime-specific; they apply to all custodial interrogations regardless of the crime's severity or degree. Where the courts have thought that particular circumstances justified some sort of *Miranda* exception, they have created one. For example, *Miranda* exceptions such as the public safety exception have applied when courts believe that the facts show the existence of an immediate and imminent threat to public safety. *See supra* note 6. While some scholars have argued for a new international crimes or terrorism exception, *see* discussion *infra* Part III.D, this author is unwilling to go so far. Although this author does not endorse military tribunals, the reality is that the use of military tribunals does exist for the prosecution of terrorists deemed to be serious threats to U.S. national security and who the United States believes cannot be prosecuted in civilian courts. In short, this author believes that *Miranda* and

the Second Circuit's concern about burdening law enforcement or damaging U.S. foreign relations is misplaced.<sup>129</sup>

Fourth, although some have argued for a terrorism or international crimes exception to *Miranda* warnings based on the severity of the crime or the unique challenges of foreign interrogations,<sup>130</sup> these exceptions are unnecessary and unjustified. The terrorism exception is unnecessary because there are already adequate safeguards in place for dealing with the terrorist threat. The international crimes exception is also unjustified because it would reduce the rights afforded under *Miranda* in favor of foreign law and lessening the burden on law enforcement—two factors that are insufficient to override the level of Constitutional protection envisioned in *Miranda*.

Finally, the decision is particularly problematic because of its broad reach in two respects. The first major concern in this regard is that the Second Circuit's overly flexible, "context-specific" approach and vague *Miranda* requirements will not only apply to terrorism cases, but to all criminal cases in which an interrogation occurs abroad—no matter how minor the criminal infraction.<sup>131</sup>

Despite arguments that terrorist crimes warrant curtailing *Miranda*'s protections,<sup>132</sup> *Miranda* made no such pronouncements that the level of a suspect's constitutional rights should be adjusted based upon the severity of the crime. The second concern is that, because the Supreme Court has never ruled on this issue,<sup>133</sup> the Second Circuit's decision has the potential to greatly affect a wide array of jurisprudence in a jurisdiction which oversees a large number of terrorist prosecutions and is likely to adversely influence the law in other jurisdictions.<sup>134</sup>

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the civil liberties we afford individuals under our Constitution and in our civilian courts are simply too important and fundamental to U.S. values to restrict them in the name of terrorism.

129. It should also be noted that from a policy perspective the Second's Circuit's decision is inadequate because it directly contradicts U.S. foreign policy goals, which highlight the importance of expanding, not restricting, U.S. laws and values abroad. See *infra* text accompanying note 189.

130. See M. Katherine B. Darmer, *Miranda Warnings, Torture, the Right to Counsel and the War on Terror*, 10 CHAP. L. REV. 631, 632 (2007) ("I have argued previously that the "public safety" doctrine should be expanded in the terrorism context, as terrorism cases present a much more compelling need for addressing public safety than does the discovery of a gun in a supermarket. I have also advocated that courts should adopt a 'foreign interrogation' exception to *Miranda* in the terrorism context. This article picks up on those themes and argues even more broadly for exceptions to *Miranda* in the terrorism context."); Godsey, *supra* note 15, at 1704 (2002) (suggesting that "*Miranda* should be interpreted as a flexible prophylactic rule that can be modified or discarded abroad where its application is illogical").

131. The rule would apply, for example, to everything from violations for arms and narcotics trafficking, to cyber crimes, securities fraud, and even minor offenses such as mail fraud.

132. See, e.g., Godsey, *supra* note 15; Darmer, *supra* note 130.

133. Schneider, *supra* note 23, at 461.

134. See *supra* note 38.



*A. Miranda's Underlying Purpose*

The most fundamental problem with the Second Circuit's legal analysis is that it decided whether the *Miranda* warnings espoused in the AOR were adequate without addressing *Miranda*'s underlying purpose—to protect suspects against “presumptively coercive” interrogation environments.<sup>135</sup> As previously discussed, the Second Circuit did not give adequate weight, nor even discuss, *Miranda*'s principal holding, that

[a]n individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above [In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures.] cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.<sup>136</sup>

Despite Judge Sand's incisive warnings that overseas interrogations present “greater threats of compulsion,”<sup>137</sup> the Second Circuit held that the AOR *Miranda* warnings were adequate because they accurately apprised the suspect of how his constitutional rights might be limited by local circumstances.<sup>138</sup> In doing so, the Second Circuit failed to address a variety of possible coercive situations that might occur as a result of the suspect's custodial location outside of the United States and, therefore, undermined *Miranda*'s principal purpose.

First, the Second Circuit's decision effectively enables U.S. law enforcement to mislead suspects, either unintentionally or intentionally, about their rights to an attorney abroad. As already discussed, the AOR form stated that “[i]n the United States you would have the right to talk to a lawyer” or have one appointed for you if you could not afford one, but “[b]ecause we are not in the United States, we cannot ensure that you will have a lawyer appointed for you.”<sup>139</sup> As Judge Sand articulated, this statement is misleading because the “logical conclusion” a suspect would draw is “that neither of the two previously enumerated rights are currently available to him . . . [and] he currently possesses no opportunity to avail himself of the services of an attorney before or during questioning by U.S. officials.”<sup>140</sup>

Not only are these warnings misleading, but they may also be factually inaccurate. As Judge Sand pointed out in his opinion, although the laws in Kenya were “murky,”<sup>141</sup> there is no evidence that, under Kenyan law, “a suspect under interrogation is *always*

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135. *Miranda v. Arizona*, 384 U.S. 436, 448 (1966).

136. *Id.* at 461.

137. *United States v. Bin Laden*, 132 F. Supp. 2d 168, 186 (S.D.N.Y. 2001), *aff'd sub nom. In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 177 (2d. Cir. 2008).

138. *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 177, 206 (2d. Cir. 2008).

139. *Bin Laden*, 132 F. Supp. 2d at 190.

140. *Id.*

141. *Id.*

banned from seeking the advice and presence of *retained* counsel.”<sup>142</sup> Put differently, it may have been possible that the foreign authorities would permit access to a lawyer. Therefore, the AOR’s language wrongly and prematurely foreclosed that possibility for the suspect. In addition, the AOR was misleading because “the right to counsel was made to seem dependent on geography, when instead it actually hinged on foreign law.”<sup>143</sup>

More troubling, however, is that the Second Circuit’s holding opens the door for U.S. law enforcement to intentionally use tactics that the *Miranda* warnings were designed to protect against, including various forms of “trickery” and deception<sup>144</sup> present in interrogation environments that the *Miranda* Court believed were “created for no purpose other than to subjugate the individual to the will of his examiner.”<sup>145</sup> For example, law enforcement may, consistent with the Second Circuit’s holding, manipulate AOR forms in an intentional effort to mislead the suspect into thinking he does not have the right to an attorney or other rights. Because the Second Circuit’s holding merely requires that a suspect be apprised of his rights “as they exist in the United States,” it permits, and possibly encourages, law enforcement to create AOR forms that seem to indicate that *Miranda*’s full protections may not be available because of the suspect’s geographical location or because of foreign law.<sup>146</sup> The holding

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142. *Id.* at 191.

143. *Id.*

144. *Miranda v. Arizona*, 384 U.S. 436, 461 (1966); *see id.* at 449. As Judge Sand properly articulated, since *Miranda* was concerned with compulsion, intimidation, and trickery in domestic police stations, it would be fair and logical to conclude that these pressures would be far greater in a foreign jurisdiction, stationhouse, or jail.

145. *Id.* at 457.

146. The original *Miranda* opinion held the right to counsel to be equally important as the other *Miranda* rights, if not indispensable to giving full effect to those other rights and as a method of helping to guard against coercion and other violations of the Fifth Amendment right against self-incrimination. The *Miranda* Court’s language is worth quoting in full:

The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, *the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today.* Our aim is to assure that the individual’s right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere warning given by the interrogators is not alone sufficient to accomplish that end. Prosecutors themselves claim that the admonishment of the right to remain silent without more ‘will benefit only the recidivist and the professional.’ Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Thus, *the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.*

The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless

## ENSURING *MIRANDA*'S RIGHT TO COUNSEL IN U.S. INTERROGATIONS ABROAD

also creates a disincentive for law enforcement to learn foreign law and accurately apprise a suspect of his right to counsel as it exists in the foreign country.

A more troubling possibility is that law enforcement could use the Second Circuit's holding to take advantage of local circumstances in an effort to compel a suspect to cooperate, thereby violating *Miranda*'s underlying principle against compulsion. For example, Judge Sand properly expressed concern about local laws that might permit lengthy incommunicado detention or "aggressive practices . . . not tolerated within the United States,"<sup>147</sup> such as deprivation of food or water, inhumane conditions, or even torture. Under the Second Circuit's framework, U.S. law enforcement could interview a suspect who was being held under such conditions by the foreign country and, even though U.S. officers could not engage in those practices themselves, they could utilize those circumstances against the suspect in order to gain cooperation. For instance, U.S. officials might state to a suspect that they will only extradite<sup>148</sup> or render<sup>149</sup> him if he agrees to tell them all of the facts and admit culpability for the offense.<sup>150</sup> Given the fact that many countries may have inferior prison conditions, or may not have rules that are as protective of prisoner rights as in the United States, the "inherent compulsion"<sup>151</sup> that may exist in custodial settings abroad has the potential to be far stronger than in the United States—making adequate *Miranda* safeguards even more necessary abroad. Although proper *Miranda* warnings may not always effectively avoid the taint of compulsion present in a foreign country, the warnings provide a starting point that must be honored by U.S. interrogators.

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exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial.

*Id.* at 469–70 (emphasis added) (citations omitted).

147. *Bin Laden*, 132 F. Supp. 2d at 186.

148. See Glenda K. Harnad & Eric Mayer, *International Extradition: Overview*, in 35 C.J.S. EXTRADITION AND DETAINER § 52 (2011) ("The right of a foreign power to demand the extradition of one accused of crime and the correlative duty to surrender that person to the demanding country exist only when created by treaty. In the absence of an extradition treaty, an obligation to transfer a fugitive to a state seeking custody of that individual would infringe upon the state's sovereign right to exercise jurisdiction over objects within its territory."). Out of the 195 independent states that the United States recognizes, it has extradition treaties with 118. See 18 U.S.C. § 3181 (1996); *Independent States in the World*, U.S. DEP'T OF STATE (Jan. 3, 2012), <http://www.state.gov/s/inr/rls/4250.htm>.

149. See Pines, *supra* note 70, at 525.

150. In *United States v. Bin Laden*, Judge Sand made a similar point by stating,

The interplay between foreign custody and U.S. interrogation may render some suspects vulnerable in a separate sense: They may be unduly predisposed to talking to U.S. agents in the hope that doing so provides a means of relocation to the United States, where criminal defendants enjoy greater protection from governmental overreaching.

132 F. Supp. 2d at 186 n.12.

151. *Miranda*, 384 U.S. at 467.

*B. Changing the Nature of the Right Afforded*

The second problem with the Second Circuit's opinion is that it improperly changes the very nature of the constitutional right to counsel that *Miranda* affords.<sup>152</sup> As already discussed, *Miranda* explicitly held that "an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the [Fifth Amendment] privilege we delineate today."<sup>153</sup> The Supreme Court also recently held in *Dickerson v. United States* that a suspect must be warned that "he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning."<sup>154</sup> Despite these requirements, the Second Circuit effectively held that foreign law may supersede one's right to counsel, permitting law enforcement to notify a defendant that his right to counsel "depend[s] on geography" or foreign law.<sup>155</sup>

Such a holding is inconsistent with the Second Circuit's overall holding that *Miranda* applies overseas. *Miranda*'s basic principles are grounded in the Fifth Amendment's right against self-incrimination, a right that may or may not be applicable in other countries. Despite the fact that a range of Fifth Amendment rights, such as *Miranda*'s right to remain silent, may conflict with foreign law,<sup>156</sup> the court singles out the right to counsel as being more limited, while viewing the other *Miranda* warnings as indispensable to the privilege against self-incrimination. While it may be understandable to single out this right because it is the only right requiring affirmative acts by law enforcement once invoked,<sup>157</sup> the potential burden does not warrant a reduction in *Miranda*'s right to counsel. A more reasonable approach would be to hold that if individuals are subject to U.S. laws abroad, they must also be afforded their full protections.

Despite the Second Circuit's efforts to support its holding by stating that *Miranda* warnings do not need to be delivered verbatim and that the nature of the warnings

152. *Id.* at 471.

153. *Id.*

154. *Dickerson v. United States*, 530 U.S. 428, 435 (2008). In *Dickerson*, Chief Justice Rehnquist acknowledged that *Miranda* "was 'a constitutional decision' and, as he also put it, that *Miranda* has 'constitutional origin,' 'constitutional underpinnings,' and a 'constitutional basis.'" DRESSLER & MICHAELS, *supra* note 2, at 451 (citing *Dickerson*, 530 U.S. at 446).

155. *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 117, 207 (2d Cir. 2008).

156. In *United States v. Bin Laden*, the district court solicited evidence about whether or not Kenyan laws conflicted with a suspect's right to the assistance and presence of counsel under U.S. law. Although the court acknowledged that Kenyan law is "murky at best," it also noted that there was no evidence that, in Kenya, a suspect is always banned from seeking the advice and presence of counsel. *United States v. Bin Laden*, 132 F. Supp. 2d 168, 190–91 (S.D.N.Y. 2001), *aff'd sub nom. In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 177 (2d Cir. 2008).

157. If a suspect invokes his right to remain silent, law enforcement's only obligation is to not coerce the suspect into talking. However, if a suspect invokes his right to counsel and law enforcement wishes to continue the interview, they will have to obtain a lawyer for the individual if counsel has not already been retained. *Miranda*, 384 U.S. at 436.

## ENSURING *MIRANDA*'S RIGHT TO COUNSEL IN U.S. INTERROGATIONS ABROAD

are “context-specific,”<sup>158</sup> *Miranda* holds that the “right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege,”<sup>159</sup> and that a suspect must be “adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.”<sup>160</sup> An individual cannot be adequately and effectively apprised of his rights when the statements made to him are unclear as to whether a lawyer is actually available and whether his right to a lawyer depends on geography or foreign law, or is absolute and unqualified. To hold that one may not have a right to counsel because of foreign law does far more than change the language of the *Miranda* warnings—it is changing the nature of the right to counsel itself and is not adequately apprising a suspect of the right.

In order to support its holding, the Second Circuit relied heavily on the Supreme Court’s decision in *Duckworth v. Eagan*, which declared arguably similar warnings to those contained in the AOR form to be adequate under *Miranda*.<sup>161</sup> In Indiana, the state of arrest, the procedure for appointment of counsel did not occur until the defendant’s first court appearance.<sup>162</sup> Accordingly, the police read the defendant a set of warnings that included the following remarks:<sup>163</sup>

Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. *You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning.* You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.* If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you’ve talked to a lawyer.<sup>164</sup>

Although a federal court had concluded that the warnings were defective because they could reasonably be interpreted to mean that a lawyer would not be available until formal charges were brought, the Supreme Court disagreed. It stated:

*Miranda* does not require that attorneys be producible on call, but only that the suspect be informed of his right to an attorney and to appointed counsel, and that if the police cannot provide appointed counsel, they will not question him until he waives, as respondent did, his right to counsel.<sup>165</sup>

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158. *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d at 202.

159. *Miranda*, 384 U.S. at 469.

160. *Id.* at 467.

161. 492 U.S. 195 (1989).

162. *Id.* at 195–96.

163. *Id.* at 197.

164. *Id.* at 198.

165. *Id.* at 196.

The Court then held that governmental officials are permitted to “accurately describe[] the procedure for the appointment of counsel” under applicable law.<sup>166</sup> Seizing upon this language, the Second Circuit took the opportunity to expand the Supreme Court’s holding to interrogations abroad and applied it to the AOR *Miranda* warnings in *In re Terrorist Bombings of East Africa*.

As Judge Sand recognized, however, there were several critical differences between *Duckworth* and the overseas interrogation of Al-Owhali. First, the suspect in *Duckworth* was still advised that he had the right to talk to a lawyer prior and during questioning<sup>167</sup> while Al-Owhali was told, “In the United States, you would have the right to talk to a lawyer.”<sup>168</sup> The difference is critical because in Al-Owhali’s case, the AOR warnings never informed him that he had the absolute right to talk with a lawyer—that right was conditioned on geography.<sup>169</sup> Second, “the ‘if and when’ construction in *Duckworth* accurately described the future point in time at which appointed counsel would be available in Indiana.”<sup>170</sup> In Al-Owhali’s case however, the “AOR misinformed [him] of [his] current opportunity to access counsel while being interrogated in Kenya.”<sup>171</sup> Finally, the cases are distinguishable because of the different laws involved. In *Duckworth*, the law limiting one’s right to counsel was U.S. state law, which must comply with the U.S. Constitution,<sup>172</sup> while in the present case the limiting law was foreign law, which may conflict with the U.S. Constitution.

These differences are critical to the proper resolution of the present matter. The key is that Al-Owhali was never told in his AOR that he had the right to talk with a lawyer or have one present during questioning. Pursuant to *Miranda*, this right is “*indispensable* to the protection of the Fifth Amendment privilege”<sup>173</sup> and must be “fully honored.”<sup>174</sup> In short, one must always be told that he has the right to consult

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166. *Id.* at 204.

167. *United States v. Bin Laden*, 132 F. Supp. 2d 168, 191 n.22 (S.D.N.Y. 2001), *aff’d sub nom. In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 177 (2d. Cir. 2008).

168. *Id.* at 173.

169. *Id.*

170. *Id.* at 191 n.22.

171. *Id.*

172. U.S. CONST. art. VI, cl. 2; *see McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (holding that Maryland’s tax on the bank was unconstitutional because it violated the Supremacy Clause); *see also Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000) (holding that even when a state law is not in direct conflict with a federal law, the state law could still be found unconstitutional under the Supremacy Clause if the state law is an obstacle to the accomplishment and execution of Congress’s full purposes and objectives); *Abelman v. Booth*, 62 U.S. 506 (1859) (holding that state courts cannot issue rulings that contradict the decisions of federal courts); *Cohens v. Virginia*, 19 U.S. 264 (1821) (holding that the Supremacy Clause and the judicial power granted in Article III give the Supreme Court the power to review state court decisions involving issues arising under the Constitution and laws of the United States therefore giving the Supreme Court final say in matters involving federal law, including constitutional interpretation, and the authority to overrule decisions by state courts); *Martin v. Hunter’s Lessee*, 14 U.S. 304 (1816).

173. *Miranda v. Arizona*, 384 U.S. 436, 469 (1966) (emphasis added).

174. *Id.* at 467.

with a lawyer, even if local circumstances interfere with that right. Anything less changes the very nature of *Miranda*'s right to counsel and does not fully inform a suspect of his rights under the U.S. Constitution.

*C. The Practical Realities of the Invocation of Counsel*

The third problem with the Second Circuit's approach is that it relaxes *Miranda*'s right to counsel warnings under the justification that requiring law enforcement to investigate whether an individual has a right to counsel under foreign law would be overly burdensome to law enforcement and might damage U.S. foreign relations.<sup>175</sup> Although not overburdening law enforcement and preserving U.S. foreign relations are laudable goals, the Second Circuit did not discuss the practical realities of what occurs when an individual invokes his right to counsel. Typically, in the United States, when a suspect invokes counsel, he is rarely appointed a lawyer or provided the opportunity to consult with a lawyer.<sup>176</sup> Ordinarily, the remedy for an invocation of counsel is to terminate the interview.<sup>177</sup> This means that law enforcement is rarely burdened with responsibilities of appointing a lawyer or assisting in the production of the suspect's lawyer. Therefore, the Second Circuit's concern about burdening law enforcement abroad because they might have to investigate local laws regarding the appointment of counsel is misplaced. As a practical reality, law enforcement could always tell a suspect that he has the right to a lawyer, and if the suspect then invokes his right, law enforcement could choose to either carry the burden of investigating local law and produce a lawyer<sup>178</sup> or terminate the interview.<sup>179</sup>

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175. See *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 117, 208–09 (2d Cir. 2008).

176. See D. Christopher Dearborn, "You Have the Right to an Attorney," but Not Right Now: Combating *Miranda*'s Failure by Advancing the Point of Attachment Under Article XII of the Massachusetts Declaration of Rights, 44 SUFFOLK U. L. REV. 359, 359–60 (2011) ("[T]he 'right' guarantees neither access to a lawyer to explain the procedural complexities of a criminal case, nor unbiased, professional advice on whether it is prudent to waive any constitutional protections . . . . When police recite a suspect's *Miranda* warnings, they implant in him an expectation that is not legally cognizable. The misleading reality is that an arrestee has the right to an attorney, but not right then.")

177. See Darmer, *supra* note 130, at 647 ("In practice, if a suspect invokes his right to counsel, counsel is almost never provided to assist him during the interrogation. Instead, the interrogation is simply terminated."); Mark A. Godsey, *Reformulating the Miranda Warnings in Light of Contemporary Law and Understanding*, 90 MINN. L. REV. 781, 797–98 (2006) ("In the vast majority of interrogations in which a suspect invokes her right to counsel, no attorney is provided. Indeed, a careful reading of *Miranda* demonstrates that it does not require that an attorney be supplied to the suspect; an attorney is mandated only if the police wish to continue the interrogation after the suspect invokes her rights. The law enforcement community has learned through experience that if an attorney is contacted or obtained for the suspect, the defense attorney invariably advises the suspect to remain silent and the interrogation ends.")

178. Despite the Second Circuit's concerns about burdening law enforcement officers, it never fully discusses why it will be so burdensome to obtain a lawyer for a suspect in a foreign country. While this author could not find data on the prevalence of American lawyers in Kenya or abroad, surely in our ever-globalizing world the task would not be that arduous.

179. Although there may be a greater desire in a foreign interrogation to interview the suspect in order to decide whether there is enough evidence to expend the resources to prosecute him in the United States, those circumstances do not justify lessening *Miranda*'s right to counsel requirements. Surely, a

It is worth noting that when *Miranda* was first decided, its critics voiced the same concerns about burdening law enforcement.<sup>180</sup> Today, however, it is recognized that “for all practical purposes, *Miranda*’s empirically detectable harm to law enforcement shrinks virtually to zero.”<sup>181</sup> In fact, “[a]ll the studies suggest that suspects frequently waive their rights,”<sup>182</sup> and that *Miranda* “‘liberate[s] the police,’ because the warnings reduce the likelihood that a court will find that the interrogation process was coercive under traditional voluntariness principles.”<sup>183</sup> In light of these findings, it is difficult to understand why *Miranda*’s right to counsel should be curtailed abroad in favor of lessening the burden on law enforcement.<sup>184</sup>

Another reason the Second Circuit advances in support of its holding is that providing a suspect with a lawyer, when it conflicts with foreign law, may serve to hinder U.S. foreign relations with that country.<sup>185</sup> Although preserving U.S. foreign relations is certainly a laudable goal, the Second Circuit provides no real evidence as to why U.S. foreign relations would be hindered by asking another sovereign to bring an attorney into the interview room in which U.S. officials have already gained access and interview rights. The court’s reasoning is speculative and relies on factors that were not even present in the current case. For example, the Second Circuit’s concern about a possible strain in foreign relations was premised on the other state not recognizing a right to counsel.<sup>186</sup> However, as Judge Sand stated in his opinion, no evidence was ever produced showing that Kenya forbids such a right,<sup>187</sup> making any

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determination to prosecute should be based on a variety of credible evidence, not merely on what a suspect admits during a custodial interrogation. Therefore, it seems that in most cases, law enforcement should be able to determine whether there is enough evidence to prosecute in the United States without an interview. If, however, they believe an interview is necessary with a suspect who has invoked his right to counsel, they may choose to find counsel in the foreign country or, if the burden is too high, they may choose to wait to interview the suspect until after he is provided with counsel in the United States.

180. See, e.g., Richard H. Seeburger & R. Stanton Wettick, Jr., *Miranda in Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1 (1967).

181. Stephen J. Schulhofer, *Miranda’s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 Nw. U. L. REV. 500, 502 (1996).

182. Caplan, *supra* note 10, at 1466.

183. DRESSLER & MICHAELS, *supra* note 2, at 462 (citing Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 454 (1987)).

184. Again, some have argued that the circumstances or severity of international crimes such as terrorism warrant a restriction on *Miranda* protections. Rebuttals to these arguments have been previously discussed *supra* note 128.

185. *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 177, 208 (2d Cir. 2008) (“Our decision not to impose additional duties on U.S. agents operating overseas is animated, in part, by our recognition that it is only through the cooperation of local authorities that U.S. agents obtain access to foreign detainees. We have no desire to strain that cooperation by compelling U.S. agents to press foreign governments for the provision of legal rights not recognized by their criminal justice systems.”).

186. *Id.*

187. See discussion *supra* p. 572 & n.92; *United States v. Bin Laden*, 132 F. Supp. 2d 168, 191–92 (S.D.N.Y. 2001).



## ENSURING *MIRANDA*'S RIGHT TO COUNSEL IN U.S. INTERROGATIONS ABROAD

potential conflict not only speculative, but unlikely. Surely at least some evidence<sup>188</sup> should be produced before reaching the conclusion that asking a foreign country to bring a lawyer into the interview room is likely to “strain” foreign relations.

However, even if evidence were produced which tended to show a possible strain in diplomatic relations, that the benefits of upholding U.S. constitutional rights abroad should greatly outweigh the benefits of acquiescing to foreign jurisdictions opposing such rights. From a policy perspective, it is in the United States’ best interest to expand U.S. laws and values abroad so that other governments treat their citizens (and our citizens when apprehended abroad) with the same rights and protections that U.S. citizens are afforded at home. In fact, “protecting Americans” and improving “international understanding of American values and policies” are listed as two of the State Department’s four main policy goals.<sup>189</sup>

### *D. The Terrorism and International Crime Exceptions*

Finally, an argument that the Second Circuit does not specifically address, but that others have offered in favor of more limited *Miranda* protections abroad, is that because many international crimes, such as terrorism, are so severe and so greatly threaten U.S. security, a new *Miranda* exception should apply.<sup>190</sup> A new *Miranda* terrorism exception should be rejected because it is unwarranted and ignores several crucial factors. First, and probably most important, a *Miranda* terrorism exception seems unnecessary because, as far as we know, “the *Miranda* rule has not prevented the government from obtaining convictions in any terrorism cases.”<sup>191</sup> Second, as the Second Circuit itself stated, *Miranda* requirements “in no way impair the ability of the U.S. government to gather foreign intelligence.”<sup>192</sup>

In addition to these factors, it is important to note that there are already a variety of *Miranda* exceptions in place, which should adequately protect the United States against serious threats like terrorism. For example, the “public safety exception,” which was adopted in *New York v. Quarles*, allows the admission of non-Mirandized statements at trial if those statements were made during an “exigency requiring immediate action by the officers beyond the normal need expeditiously to solve a serious crime.”<sup>193</sup> The Second Circuit case of *United States v. Khalil*, in which the court allowed the admission of non-Mirandized statements made by defendants who were arrested with pipe bombs under the *Quarles* public safety exception, is one

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188. Possible evidence could include listing known countries that actually prohibit a lawyer being present during an interrogation or providing examples in which U.S. foreign relations were strained because of requests by U.S. officials.

189. *Why Foreign Policy Is Important*, U.S. DEP’T OF STATE, <http://future.state.gov/why/44560.htm> (last visited Jan. 29, 2013).

190. See Darmer, *supra* note 130, at 632–33.

191. ZABEL & BENJAMIN, *supra* note 38, at 101.

192. *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 177, 203 n.19 (2d Cir. 2008).

193. *New York v. Quarles*, 467 U.S. 649, 659 n.8 (1984).

example of how the doctrine may be applied in terrorism cases.<sup>194</sup> Similarly, the “covert interrogation” exception adopted in *Illinois v. Perkins*, which held that “*Miranda* warnings are not required when the suspect is unaware that he is speaking to a law enforcement officer and gives a voluntary statement,” provides additional methods of targeting and investigating serious threats to national security.<sup>195</sup> Under this exception, U.S. law enforcement officers may conceal their identity from suspects, go under cover, and try to solicit relevant information from suspects abroad as long as the suspect provides the information voluntarily.<sup>196</sup> Accordingly, calls for a new *Miranda* terrorism exception at this point are not entirely persuasive.

Instead of a *Miranda* “terrorism exception,” other scholars have proposed an even broader *Miranda* exception for all U.S. foreign interrogations.<sup>197</sup> For example, Mark Godsey contends that as U.S. law enforcement expands its presence abroad, “a modification to the *Miranda* doctrine is inevitable in the international context.”<sup>198</sup> He argues that *Miranda* warnings may be curtailed and limited by foreign law, proposing that “American law enforcement officials should be required to advise a suspect only of the rights that he actually enjoys in the country in which the interrogation occurs.”<sup>199</sup> According to Godsey, this approach merely requires that law enforcement abroad “act in good faith and make a reasonable effort, under the

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194. ZABEL & BENJAMIN, *supra* note 38, at 103–04. The Second Circuit also acknowledged in *In re Terrorist Bombings of U.S. Embassies in East Africa* that “*Miranda*’s ‘public safety’ exception . . . would likely apply overseas with no less force than it does domestically. When exigent circumstances compel an un-warned interrogation in order to protect the public, *Miranda* would not impair the government’s ability to obtain that information.” 552 F.3d at 203 n.19.

195. 496 U.S. 292, 294 (1990).

196. *See id.* at 296–97. A recent brief filed by the U.S. Attorney’s Office for the Southern District of New York in a terrorism prosecution illustrates in great detail the vast array of tools law enforcement may use to obtain information from a potential suspect without violating his rights to counsel. The brief states the following:

It is well established that “the presence of a direct or implied promise of help or leniency alone” does not “bar[] the admission of a confession where the totality of the circumstances indicates it was the product of a free and independent decision.” “[S]tatements to the effect that it would be to a suspect’s benefit to cooperate,” for example, “are not improperly coercive.” Nor does the use of trickery by law enforcement officers render a confession involuntary.

Indeed, as a general matter, “ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak” do not render a defendant’s statements involuntary. That is because of the axiomatic principle that the Fifth Amendment “forbids coercion, not mere strategic deception by taking advantage of a suspect’s misplaced trust.” Thus, the use of ruses by law enforcement has long been held to be proper.

The Government’s Opposition to the Defendants’ Pre-Trial Motion to Dismiss and to Suppress, *United States v. El-Hanafi*, No. S4 10 Cr. 162 (S.D.N.Y. Aug. 12, 2011) (citations omitted).

197. *See generally* Godsey, *supra* note 15.

198. *Id.* at 1780.

199. *Id.* at 1781.

## ENSURING *MIRANDA*'S RIGHT TO COUNSEL IN U.S. INTERROGATIONS ABROAD

circumstances, to determine what rights are available to a suspect.”<sup>200</sup> As long as this good faith effort is made to advise a suspect of his rights as they exist in the foreign country, *Miranda* would be satisfied.

Godsey’s approach is inadequate for several reasons. First, like the Second Circuit’s holding, this approach changes the nature of the *Miranda* rights that individuals should be afforded. If foreign law governs, and is not as protective as U.S. law, *Miranda* rights may be curtailed for the convenience of law enforcement abroad. Although Godsey correctly recognizes that “compelled” and/or truly “involuntary” statements would be inadmissible because the Fifth Amendment privilege against self-incrimination is inflexible, he views *Miranda* warnings as prophylactic and adjustable in favor of foreign law.<sup>201</sup> In countries where few rights are available to suspects, this would effectively enable U.S. law enforcement to engage in a variety of psychological tactics, including deception and trickery, as long as those tactics do not rise to the level of compulsion. Such an approach is contrary to U.S. values and *Miranda*’s underlying principles and should not be followed.

Godsey’s approach is also inadvisable because of the difficulty of applying the analytical framework he proposes. Because his “good faith effort” standard does not offer a bright-line rule, courts would be forced to undertake an analysis of determining what constitutes good faith.<sup>202</sup> Yet good faith standards in other contexts have been vigorously debated and their analytical frameworks have been criticized as unclear and arduous to apply.<sup>203</sup> Instead of trying to devise objective criteria for determining one’s subjective state of mind, a far more reasonable and manageable approach would be to create a bright-line rule by which courts would not have to engage in a detailed fact-specific inquiry that could produce mixed and confusing results.

### IV. A BRIGHT-LINE RULE FOR APPLYING THE *MIRANDA* RIGHT TO COUNSEL ABROAD

The Second Circuit’s error in allowing U.S. law enforcement to potentially mislead suspects about their right to an attorney abroad by stating “you would have access to a lawyer in the United States, but we cannot guarantee you access to a lawyer here” can be remedied with a clear and concrete solution: U.S. law enforcement should be required to tell a suspect that he has a right to an attorney and if he cannot afford one, one will be appointed for him, irrespective of foreign law or local circumstances. Under this bright-line standard, there is no risk that the defendant will fail to either understand that he has a right to consult with an attorney prior to questioning or be fully apprised of his constitutionally protected *Miranda* rights. Such a bright-line requirement will be less subjective for law enforcement and will protect against the dangers of misleading a suspect into thinking that he does not have a right to an attorney because he is being interrogated in a foreign jurisdiction.

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200. *Id.* at 1775.

201. *Id.* at 1770.

202. *Id.* at 1776 (“The framework proposed in this Article does not offer a bright-line rule, because such a rule cannot be formulated for the complex international arena . . .”).

203. *See, e.g.*, Mark J. Loewenstein, *The Diverging Meaning of Good Faith*, 34 DEL. J. CORP. L. 433 (2009).

It also protects against possible compulsion and trickery by U.S. law enforcement, something that *Miranda* specifically sought to prevent.

Pursuant to this proposed standard, if a suspect invokes his right to counsel, the burden would then be on law enforcement to obtain counsel if it wishes to continue the interview, just like in the United States. If obtaining counsel is too burdensome for law enforcement, or if law enforcement does not believe obtaining the information would be worth the burden, they may choose to simply terminate the interview, a solution that is most often seen in the United States.<sup>204</sup> Under such an approach, there are several possible scenarios that might arise, but, regardless of foreign law or local circumstances, U.S. authorities should be required to inform suspects that they have the right to consult with an attorney prior to or during questioning.

In the first scenario, the suspect would be read his warnings and would waive his rights. This scenario would provide no additional burden to law enforcement and the validity of the suspect's waiver would be adjudged under the traditional waiver framework used in the United States.<sup>205</sup> In a second scenario, the suspect would invoke his right to counsel in a jurisdiction where foreign law permits the right or appointment to counsel. Here, the only question is what type of counsel is sufficient to satisfy *Miranda*'s right to counsel. Is local counsel appropriate or would a U.S.-admitted lawyer be required?<sup>206</sup> In a third scenario, the suspect would invoke his right to counsel in a jurisdiction where foreign law does not allow the presence of counsel or permit the appointment of an attorney. There is no doubt that this scenario is the most difficult because it could involve challenging conflict-of-law questions<sup>207</sup> and has the potential to damage U.S. foreign relations with a state that does not share U.S. values. However, this author believes that a potential danger to U.S. foreign relations does not outweigh the costs associated with depriving a defendant who may face trial in the United States of his constitutionally protected *Miranda* rights. By virtue of the fact that the foreign government has already granted the United States access to the defendant, this author believes it is quite realistic to expect the foreign government to grant the United States permission to interview the suspect according to its own principles and values. By granting U.S. authorities access to the suspect, the foreign state has already given the United States some form of

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204. See Darmer, *supra* note 130; see also Godsey, *supra* note 177.

205. 1 KARL OAKES, *CYCLOPEDIA OF FEDERAL PROCEDURE* § 39:54 (3d ed. 2012).

206. While this author believes the latter would probably be required, he leaves this question for scholars to debate in the future. See *supra* note 24.

207. See Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 5–6 (1991) (“The larger reaches of comity in the United States encompasses a wide range of cases in which U.S. courts limit domestic prescriptive, adjudicatory, and enforcement jurisdiction, even where the rights of U.S. parties are adversely affected. Under the rubric of comity, U.S. courts have justified this deference as a sign of respect for foreign sovereignty, as a means of protecting the parties’ expectations in the interest of international commerce, and as a mechanism for avoiding conflict with the management of foreign relations.”); see also Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323 (2001); Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11 (2010); Donald Earl Childress III, *When Eric Goes International*, 105 NW. U. L. REV. 1531 (2011); Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041 (1987).

comity.<sup>208</sup> Under such circumstances, this author finds it hard to believe that telling the foreign country that our laws require a U.S. lawyer present could pose a serious threat—especially one warranting a curtailment of a defendant's constitutionally protected rights—to U.S. foreign relations.<sup>209</sup>

Under each of these possible scenarios, requiring U.S. law enforcement to give these full warnings on the right to counsel abroad is a better approach for several reasons. First, the solution is a bright-line rule that is easily administrable. It does not require law enforcement to investigate local circumstances or tailor its warnings accordingly. Second, the solution fully apprises an individual of his right to consult with counsel pursuant to *Miranda* and protects against possible deceptive tactics or trickery that law enforcement might take advantage of abroad to induce a suspect to cooperate. Third, these required warnings are good U.S. policy because they expand and promote knowledge of U.S. laws and values abroad. Further, such a rule would illustrate the United States' commitment to ensuring all individuals their full constitutional rights pursuant to the Fifth Amendment's right against self-incrimination regardless of the interview's location.

## V. CONCLUSION

As the world globalizes, U.S. law enforcement will continue to expand its presence abroad, seeking to hold both citizens and non-citizens liable for violations of U.S. law. Amidst such expanding prosecutorial reach,<sup>210</sup> it is important to set a clear and workable standard for U.S. law enforcement operating abroad. The Southern District of New York and Second Circuit opinions in *United States v. Bin Laden* and *In re Terrorist Bombings of U.S. Embassies in East Africa*, should be applauded for their recognition that the Fifth Amendment right against self-incrimination applies to all individuals regardless of where they are interviewed and for holding that some form of *Miranda* warnings are required abroad.

Both opinions fall short, because they would allow law enforcement to modify *Miranda* warnings based on foreign law and local circumstances, which does not sufficiently protect *Miranda*'s underlying opposition to compulsion. Further, concerns about overburdening law enforcement, hindering U.S. foreign relations, and terrorism do not outweigh the reasons for enforcing Fifth Amendment rights. Allowing the scope of the right to counsel to be curtailed by foreign law strips individuals of

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208. See, e.g., UNITED NATIONS OFFICE ON DRUGS AND CRIME, MANUAL ON INTERNATIONAL COOPERATION IN CRIMINAL MATTERS RELATED TO TERRORISM 27 (2009), available at [https://www.unodc.org/tldb/pdf/Manual\\_on\\_Intl\\_Cooperation\\_in\\_Criminal\\_Matters.pdf](https://www.unodc.org/tldb/pdf/Manual_on_Intl_Cooperation_in_Criminal_Matters.pdf) ("Without being legally mandatory, the courtesy of nations contributes to maintaining good relations between States.").

209. See, e.g., *id.* ("An example of how the courtesy of nations played a role at the transnational level was when the American judicial authorities made a request to the French judicial authorities for an examining magistrate, in France, to question a simple witness face to face with the defence attorney of the accused, even though such a procedure is not provided for by the provisions of the French Code of Criminal Procedure. Nevertheless, the French authorities consented by courtesy, as the provision was not proscribed by French law.").

210. See Weiser, *supra* note 37.

essential rights otherwise available under the Fifth Amendment, increases uncertainty for U.S. law enforcement abroad, and ultimately undermines the principles established in *Miranda*.