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**2012 LatCrit South-North Exchange on Theory, Culture,
and Law**

Foreword, 2012 LatCrit South-North Exchange on
Theory, Culture, and Law: The Changing Face of Justice:
Access to the Inter-American System of Human Rights
Charles R. Venator-Santiago118

Theater of International Justice
Jessie Allen121

Paradigmatic Changes in Gender Justice: The
Advancement of Reproductive Rights in International
Human Rights Law
Alma Beltrán y Puga148

Empowering the Global Movement of Bodies: An ImmCrit
Jurisprudence
Patricia S. Mann.....163

What's the Constitution Got to Do With It? Expanding the
Scope of Constitutional Rights into the Private Sphere
Wilmai Rivera-Pérez177

“Asilo Americano” and the Interplay of Sovereignty,
Revolution, and Latin American Human Rights Advocacy:
The Case of 20th-Century Argentina
Lynsay Skiba201

INTRODUCTION

In this Fall volume of the *Creighton International and Comparative Law Journal*, we bring readers articles featuring authors from Mexico, Israel, and the United States. In this issue we focus on topics surrounding national security and feature articles from three of our own talented student writers as well as the Honorable Judge Robert M. Twiss, a former U.S. Attorney, and Professor Gabriel Hallevy of the Ono Academic College in Israel. In addition to these articles, we were fortunate enough to feature articles in conjunction with the LatCrit South-North Exchange on Theory, Culture, and the Law. These articles feature current legal topics that are relevant to the Americas and the CICLJ is proud to feature these discussions in our Journal.

The Journal is dependent on the hard work and dedication of its writers, staff, and faculty at Creighton University School of Law. I hope you enjoy this volume of the *Creighton International and Comparative Law Journal*.

Sean P. Lynch
Editor-in-Chief, 2012-13

NATIONAL SECURITY UNDER LIBERAL SUBSTANTIVE CRIMINAL LAW – WHEN DO NATIONAL SECURITY ISSUES BECOME CRIMINAL?

GABRIEL HALLEVY

I. Introduction

After weeks of analyzing complicated intelligence information and intensive investigations, the national security authorities discovered the name of the terrorist and his address. He is a 23-year old American college student majoring in chemistry, living alone in a modest rented apartment. According to the intelligence information, he planned to construct a simple bomb, board an airplane, and detonate the bomb en route, killing all passengers, most of them American citizens. When the authorities broke into his apartment, they found him sitting at a table with chemistry books, paper, and pencil, trying to figure out a chemical formula. He did not finish the calculation. In fact, he had barely begun. At that time he had not yet ordered any materials for the bomb, had not chosen a particular airplane or flight, or a specific date for his suicide mission. He was arrested, and during the interrogations he confessed that he had made the decision to become a suicide bomber on an American airplane. But when he was arrested there was no bomb, no materials to construct a bomb, and he confessed that he had not ordered any materials, had not chosen a particular airplane or flight, or a specific date for the attack.

The legal question in criminal law in this case is not simple: Has he committed any offense? It is obvious that he is extremely dangerous to the public, but can we indict him on the basis of his thoughts? These thoughts are dangerous, but he was far from constructing a bomb or detonating it. Should the authorities wait until thoughts become actions, endangering the unwitting public?

This is a common dilemma most Western democracies face in their legal fight against terrorism. On one hand, if the state does not exercise its police powers against a dangerous person waiting for an opportunity to execute his crimes, the public is in grave danger, and it is only a matter of time before the danger materializes into a terrorist attack. On the other hand, on what legal grounds could such a person be convicted? Punishing thoughts is a slippery slope that does not necessarily stop at terrorist attacks. The liberal concept of criminal law is opposed to prohibiting thoughts. Clearly, a proper balance is required.¹ If the infrastructure of terrorism cannot be destroyed at its

¹ See e.g. Sandra Day O'Connor, *Balancing Security, Democracy, and Human Rights in an Age of Terrorism*, 47 COLUM. J. TRANSNAT'L L. 6 (2009); David Scultz, *Democracy on Trial: Terrorism, Crime, and National Security Policy in a Post 9 – 11 World*, 38 GOLDEN GATE U. L. REV. 195 (2008); EMANUEL GROSS, THE STRUGGLE OF DEMOCRACY AGAINST TERRORISM: LESSONS FROM THE

foundation, the danger is far greater than the danger of not preventing a single act of terrorism, because that infrastructure remains at large to plan many more attacks. The accumulated experience in this regard indicates that when the necessary conditions for executing a terrorist attack have been met, the attack occurs within a very short time. Waiting for these conditions to ripen before arresting the perpetrators places society in jeopardy. But arresting people merely because they have criminal thoughts is not less dangerous in social terms.

The present article proposes that the proper solution lies in the redefinition of inchoate offenses, so that they become legally consistent with the values of the modern democratic society and are capable of meeting its needs. The solution is not necessarily exclusive to the legal fight against terrorism, because criminal law theory is applicable to all offenses, including terrorist attacks but not limited to them. As a result, a redefinition of inchoate offenses will affect all offenses. The article begins by discussing the existing legal means available for factual incapacitation of terrorism.² On that foundation, it examines the role of inchoate offenses in criminal law in the context of counter-terrorism, and proposes a redefinition of inchoate offenses as they apply to terrorism.³ Finally, it addresses the effect of such redefinition on offenses other than terrorist attacks.⁴

II. Dealing with Terrorism

The main objective of state security authorities dealing with terrorism is to incapacitate it. Convicting any given terrorist for acts he has already carried out has a social benefit, but the social benefit would have been far greater had the terrorist attack been prevented. When terrorism is incapacitated, no innocent people become victims.⁵ Therefore, this is one of the most important missions of modern national security authorities. But the question remains: How can terrorism be incapacitated before innocent people become victims?

A. INFRASTRUCTURE OF TERRORISM

Analysis of terrorist attacks in the Western world since the second half of the 20th century has revealed that the terrorist attacks

UNITED STATES, THE UNITED KINGDOM, AND ISRAEL (2006); Samuel Issacharoff, *Political Safeguards in Democracies at War*, 29 OXFORD J. OF LEGAL STUD. 29(2)1 (2009); Ed Bates, *Anti-Terrorism Control Orders: Liberty and Security Still in the Balance*, 29 LEGAL STUD. 99 (2009); Emanuel Gross, *How to Justify an Emergency Regime and Preserve Civil Liberties in Times of Terrorism*, 5 S. C. J. INT'L L. & BUS. 1 (2008-2009); Edmond P. Blanchard, *The Role of the Federal Court in National Security Issues: Balancing the Charter against Anti-Terrorism Measures*, 18 CONST. F. 37 (2009).

² The Incapacitation of Terrorism is discussed hereinafter at paragraph II.

³ Inchoate Offenses as an Instrument of Criminal Law in Incapacitating Terrorism are discussed hereinafter at paragraph III.

⁴ The Side Effect on Non-Terrorist Offenses is discussed hereinafter at paragraph IV.

⁵ Amos N. Guiora, *Human Rights and Counterterrorism: A Contradiction or Necessary Bedfellows*, 46 GA. L. REV. 743 (2012); Amos N. Guiora, *Determining A Legitimate Target: The Dilemma of the Decision-Maker*, 47 TEX. INT'L L. J. 415 (2012)

themselves are only the tip of the iceberg of terrorist activity. The attacks are the last link in the chain of terrorism. The work-plan of terrorism embraces the following activities: draft potential combatants who will become terrorists; create effective propaganda against the social or political targets; train the terrorists; obtain financing for the missions; purchase the necessary materials and devices; collect and analyze intelligence information; plan detailed operative plans for destroying the target, etc. The more sophisticated the terrorist organization's work plan is, the more preparations are required.⁶

The investigations of the terrorist attacks of September 11, 2001, on the World Trade Center, the Pentagon, and the Capitol found that specific preparations for their execution began in 1998 and took more than three years. The investigations of the terrorist attack on four train stations in Madrid on March 11, 2004, found that the preparations took more than two years. The investigations of the terrorist attack in the subway in London on July 7, 2005, found that the preparations took more than two years. The examples are many.⁷

When a terrorist organization is established, it does not focus on a single terrorist attack but endeavors to establish an infrastructure that supports a series of attacks in the future. If national security authorities succeed in thwarting a given attack at a specific time and place but fail to destroy the terrorist infrastructure on which that attack is based, the organization is likely to use that infrastructure to attempt additional attacks. If the objective of national security authorities is to prevent terrorism, they must focus on destroying the terrorist infrastructure while it is in the making, that is, during the early preparatory stages of execution of most terrorist attacks.

Although various terrorist organizations differ in the ways in which they carry out terrorist attacks, some basic actions are part of the infrastructure of all terrorist organizations. All terrorist organizations act through people who carry out the attacks. These may function as suicide bombers, snipers, bombers, suicide pilots, etc., and every organization must begin by drafting them, an activity that requires the involvement of drafters. The drafters must be well trained in psychology in order to motivate the draftees to become part of the organization.⁸

⁶ RUSSELL HOWARD, REID SAWYER AND NATASHA BAJEMA, *TERRORISM AND COUNTERTERRORISM: UNDERSTANDING THE NEW SECURITY ENVIRONMENT, READINGS AND INTERPRETATIONS* (3rd ed. 2008); BRIGITTE L. NACOS, *TERRORISM AND COUNTERTERRORISM: UNDERSTANDING THREATS AND RESPONSES IN THE POST 9/11 WORLD* (3rd ed. 2009); SEUMAS MILLER, *TERRORISM AND COUNTER-TERRORISM: ETHICS AND LIBERAL DEMOCRACY* (2008); M. R. HABERFELD, JOSEPH F. KING AND CHARLES ANDREW LIEBERMAN, *TERRORISM WITHIN COMPARATIVE INTERNATIONAL CONTEXT: THE COUNTER-TERRORISM RESPONSE AND PREPAREDNESS* (2009).

⁷ See e.g. BRUCE HOFFMAN, *INSIDE TERRORISM* (2006); JONATHAN R. WHITE, *TERRORISM AND HOMELAND SECURITY: AN INTRODUCTION* (6th ed. 2008); Yoram Dinstein, *Terrorism and Afghanistan*, 85 INT'L L. STUD. US NAVAL WAR C. 43 (2009).

⁸ Note, *Responding to Terrorism: Crime, Punishment, and War*, 115 HARV. L. REV. 1217 (2002); Note, *Organized Crime, Terrorism, and Money Laundering in the Americas*, 15 FLA. J. INT'L L. 3 (2002); Cara Muroff, *Terrorists*

Draftees are trained in the execution of terrorist attacks and training requires a plan, a camp, and equipment. Financing is needed to meet these requirements. The financial support of a terrorist organization for the funding of its activities may come from internal or external sources. Fundraising activity is an intrinsic part of the infrastructure of terrorism. When the organization obtains funds, it needs someone to manage its finances, and therefore the infrastructure also requires professional accountants.⁹ Managing the "legal" activity of a terrorist organization vis-à-vis various officials (banks, local authorities, suppliers, etc.) means that the infrastructure needs attorneys as well.¹⁰

The construction of explosive devices requires the professional knowledge of engineers, chemists, and physicists. Sometimes, additional professional knowledge and experience are needed in fields such as aviation, if the terrorist attack is to be committed by suicide pilots. The terrorist infrastructure is, therefore, comprised of these and many other functions and activities, and its role is to enable terrorist attacks and to handle all their logistic and other aspects. The terrorist infrastructure is the tree that produces the fruits of terrorist attacks. Destruction of the terrorist infrastructure is tantamount to the destruction of all terrorist attacks deployed by it or that would have been deployed by it.

If the terrorist infrastructure is well established, it is designed to create more than one attack or to create an alternate attack (a "Plan B") in case the national security authorities thwarted the primary attack. The infrastructure of terrorism is established and maintained to enable various assault capabilities against the chosen targets. Therefore, the thwarting of a single terrorist attack produced by a terrorist infrastructure is only a temporary measure, because an alternate or new attack is imminent, depending on the ingenuity of the infrastructure and the availability of resources.¹¹

Current intelligence capabilities make it possible to trace terrorist infrastructures from the time of their establishment. It is not a simple task, but it is possible. Consequently, most of the efforts of national security intelligence authorities concentrate on discovering the terrorist infrastructure. Although in emergency situations, owing to specific intelligence about an imminent attack, the main efforts of the authorities are redirected to thwart the attack, in general the main

and Tennis Courts: How Legal Interpretations of the Freedom of Information Act and New Laws Enacted to Prevent Terrorist Attacks Will Share the Public's Ability to Access Critical Infrastructure Information, 16 U. FLA. J. L. & PUB. POL'Y 149 (2005).

⁹ Richard Barrett, *Time to Reexamine Regulation Designed to Counter the Financing of Terrorism*, 41 CASE W. RES. J. INT'L L. 7 (2009); Sireesha Chenumolu, *Revamping International Securities Laws to Break the Financial Infrastructure of Global Terrorism*, 31 GA. J. INT'L & COMP. L. 385 (2003).

¹⁰ Peter Margulies, *Lawyers' Independence and Collective Illegality in Government and Corporate Misconduct, Terrorism, and Organized Crime*, 58 RUTGERS L. REV. 939 (2006).

¹¹ JAMES S. CORUM, *FIGHTING THE WAR ON TERROR: A COUNTERINSURGENCY STRATEGY* (2007).

mission of national security intelligence authorities is to trace the terrorist infrastructure.

This choice of national security authorities in most of the Western world is the result of a preference for incapacitation over retribution, rehabilitation, and deterrence of offenders in the case of terrorism. When balancing the damage caused by a terrorist attack with the general considerations of criminal law, incapacitation weighs far more than any other consideration.¹² When dozens, hundreds, or perhaps thousands of innocent civilians are liable to lose their lives in a terrorist attack, the rehabilitation of the offenders is a negligible consideration. When a terrorist attack is fueled by propaganda so persuasive that members are willing to commit suicide bombings, no punishment can deter them. And when many innocent civilians lose their lives in a terrorist attack, no punishment can give an offender his “just desert” according to the terminology of retribution in criminal law.¹³

For all the reasons listed above, incapacitation becomes the major consideration of criminal law in the war against terrorism. Preventing terrorist attacks is the highest priority of the national security authorities, because the only effective way to prevent terrorism is by incapacitating it. The incapacitation of terrorism is possible only when the efforts of incapacitation are concentrated on destroying the terrorist infrastructure. Therefore, destroying the infrastructure of terrorism is the main goal of the incapacitation efforts against terrorism.

¹² The general incapacitation considerations are designed to create a physical prevention from being able to commit the offense. For the general incapacitation considerations: See Malcolm M. Feeley and Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449 (1992); See generally Andrew von Hirsch *Incapacitation*, PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY 75 (Andrew von Hirsch, Andrew Ashworth & Julian Roberts eds., 3rd ed. 2009); ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 176-178 (1985); MARK H. MOORE, SUSAN R. ESTRICH, DANIEL MCGILLIS, & WILLIAM SPELMAN, DANGEROUS OFFENDERS: THE ELUSIVE TARGET OF JUSTICE (1985); Anthony E. Bottoms & Roger Brownsword, *Incapacitation and "Vivid Danger"*, PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY 83 (Andrew von Hirsch, Andrew Ashworth, & Julian Roberts eds. 3rd ed. 2009); Andrew von Hirsch and Andrew Ashworth, *Extending Sentences for Dangerousness: Reflections on the Bottoms-Brownsword Model*, PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY 85 (Andrew von Hirsch, Andrew Ashworth, & Julian Roberts eds. 3rd ed. 2009); Andrew von Hirsch and Lila Kazemian, *Predictive Sentencing and Selective Incapacitation*, PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY 95 (Andrew von Hirsch, Andrew Ashworth, & Julian Roberts eds., 3rd ed. 2009); Lila Kazemian and David P. Farrington, *Exploring Residual Career Length and Residual Number of Offenses for Two Generations of Repeat Offenders*, 43 J. OF RES. IN CRIME AND DELINQ. 89 (2006).

¹³ For the "just desert" concept in criminal law see Russell L. Christopher, *Detering Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843 (2002); Douglas Husak, *Holistic Retributivism*, 88 CALIF. L. REV. 991 (2000); Douglas N. Husak, *Retribution in Criminal Theory*, 37 SAN DIEGO L. REV. 959 (2000); Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157 (2001).

B. THE LEGAL PROBLEM

If the incapacitation of terrorism is possible only through the destruction of the terrorist infrastructure, most of the intelligence efforts should be focused on identifying that infrastructure. In a liberal democratic regime, intelligence efforts are aimed at collecting evidence to indict offenders and impose criminal liability on them. But in the case of terrorism, preventing further attacks is no less important. If people involved in the establishment of terrorist infrastructure are released freely, nothing prevents them from establishing a new terrorist infrastructure. To prevent further terrorism, it is imperative to be able to impose criminal law based on evidence collected by national security intelligence authorities.

Most activities of the terrorist infrastructure, however, are categorized as preparatory. If a terrorist blows up a train full of innocent passengers, legally, at the very least, the terrorist can be charged with the individual murder of each passenger. But most of the actions performed by the terrorist infrastructure for the purpose of enabling the terrorist to carry out the attack on the train are considered preparatory and cannot even be classified as attempted murder. In Western legal systems, the purchasing of a train schedule and surveillance conducted to find out when trains are most crowded are not considered attempted murder of passengers. But these are part of the activities of the terrorist infrastructure that are essential to the success of the terrorist attack, and are categorized as preparatory activities.

Categorization of the activities of the terrorist infrastructure as “preparatory” is of great significance. Most legal systems recognize three stages in the commission of any offense: (1) preparation to commit the offense; (2) attempt to commit the offense; and (3) the perpetration of the offense. Preparation is not considered a punishable stage, whereas the attempt and perpetration are. Various legal systems differ in their sentencing of an attempted as opposed to perpetrated crime, but all modern legal systems consider the attempt as a punishable stage for which criminal liability is imposed on the offender. Defendants indicted in court and charged with an attempted crime often use the defense argument that their actions represented merely preparation, which did not mature to the point of an actual attempt. If the court accepts the argument, the defendant is exonerated and released immediately.¹⁴

Traditionally, preparation has not been considered a punishable offense as it lacks the minimum conduct deemed to be a punishable activity because of the maxim common in liberal criminal law that thoughts alone cannot constitute an offense, and that criminal liability

¹⁴ *People v. Hawkins*, 311 Ill.App.3d 418, 723 N.E.2d 1222 (Ill. App. 2000); *Boyle*, (1987) 84 Cr. App. Rep. 270; *Jones*, [1990] 3 All E.R. 886, [1990] 1 W.L.R. 1057, 91 Cr. App. Rep. 351, 154 J.P. 413; *Gullefer*, [1990] 3 All E.R. 882, [1990] 1 W.L.R. 1063, 91 Cr. App. Rep. 356; *Geddes*, [1996] 160 J.P. 697; *Litholetovs*, [2002] EWCA Crim 1154; *Bowles*, [2004] EWCA Crim 1608.

cannot be imposed without a minimal act (*nullum crimen sine actu*).¹⁵ Indeed, even if various types of activities accompanied preparatory activities, preparatory activities are considered tantamount to mere thoughts. Purchasing a train schedule is an activity that does not consist of thoughts alone, but in most legal systems, relative to the perpetration of murder by bombing the train it is deemed preparation.

In most legal systems, delineation of the borders between “preparation” and “attempt” in current criminal law is vague and uncertain. It is commonly stated that more than one act of preparation must occur,¹⁶ but *what* exactly, varies from case to case. But when a specific conduct has been categorized as preparatory and not as an attempt, it is commonly stated that no criminal liability is imposed on the offender. When it comes to the legal fight against the terrorist infrastructure, however, it is vital that such activity not be categorized as preparatory.

If involvement in the creation and establishment of a terrorist infrastructure is categorized as preparatory activity, criminal law is unable to incapacitate terrorism by destroying the terrorist infrastructure. There is no justification for infringing upon the rights of a person who did not commit any offense. If a person’s involvement is limited to the terrorist infrastructure, and such involvement is considered preparation, which is not punishable, the person is deemed innocent, and infringement of his rights is unlawful. After a brief investigation by the national security authorities, this person would be released and able to resume immediately preparations for the next terrorist attack.

When all preparations have been completed and the terrorist infrastructure has been fully established, the impending terrorist attack is almost inevitable and will occur within a short time. The national security authorities cannot wait until that time because innocent lives are at stake. But if they act too early, when the terrorist infrastructure is still incomplete, all suspects involved are likely be released because no specific offense has been committed.¹⁷

There are two possible legal solutions to this problem. One is to redefine the legal meaning of an “attempted offense,” and derivatively, to redefine all other inchoate offenses. This is a doctrinal change of the

¹⁵ JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 576-586 (2nd ed. 2005); GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 621-632 (2nd ed. 1961); Francis Bowes Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821, 843-858 (1928); Robert H. Skilton, *The Requisite Act in a Criminal Attempt*, 3 U. PITT. L. REV. 308 (1937); Donald Stuart, *The Actus Reus in Attempts*, [1970] CRIM. L.R. 505 (1970); Robert L. Misner, *The New Attempt Laws: Unsuspected Threat to the Forth Amendment*, 33 STAN. L. REV. 201 (1981).

¹⁶ *People v. Gallardo*, 41 Cal. 2d 57, 257 P.2d 29 (1953); *State v. Bereman*, 177 Kan. 141, 276 P.2d 364 (1954).

¹⁷ See, e.g., Wayne McCormack, *Inchoate Terrorism: Liberalism Clashes with Fundamentalism*, 37 GEO. J. INT'L L. 1 (2006); Stuart Macdonald, *The Unbalanced Imagery of Anti-Terrorism Policy*, 18 CORNELL J.L. & PUB. POL'Y 519 (2009); Robert D. Sack, *Judicial Skepticism and the Threat of Terrorism*, 31 W. NEW ENG. L. REV. 1 (2009).

fundamental principles of criminal law. The other is to create specific laws prohibiting certain activities pertaining to terrorist infrastructure. Considering the complexities of the problem, Western democracies that are fighting terrorism have chosen the second legal solution. Intensive legislative efforts have produced dozens of new statutes prohibiting certain activities frequently performed by the terrorist infrastructure.¹⁸ These statutes prohibit specific activities, including the funding of terrorist organizations, organizing terrorist activities, consulting to terrorist organizations, money laundering in the context of terrorism, quasi-military training, dissemination of terrorist propaganda, and many more.¹⁹

But choosing the second type of legal solution is problematic for two main reasons. Firstly, specific statutes are designed to prohibit specific types of conduct and not more. Clearly, any statute cannot cover all types of human behavior that relate to terrorism. No legal provision is intended to predict all types of human behavior. Thus, a legal provision that prohibits funding of terrorist activities does not include a prohibition against money laundering, which is a separate crime, but which eventually funds terrorist activities. In any case, a given activity may be designed and carried out, with or without legal counseling, in a way that would not be considered criminal by a specific statute.

¹⁸ See, e.g., in the United States: 6 U.S.C.S. §§ 101, 121, 441-444, 482, 1114; 8 U.S.C.S. §§ 1101, 1182, 1184, 1189, 1227, 1231, 1252, 1255, 1258, 1326; 10 U.S.C.S. § 2302; 15 U.S.C.S. § 2216; 18 U.S.C.S. §§ 175, 758, 1965, 2331, 2333, 2337; 22 U.S.C.S. §§ 287, 2151, 5201-5203; Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001; in Britain: Counter-Terrorism Act, 2008, c.28; Terrorism (Northern Ireland) Act, 2006, c.4; Terrorism Act, 2006, c.11; Prevention of Terrorism Act, 2005, c.2; Anti-Terrorism, Crime and Security Act, 2001, c. 24; Terrorism Act, 2000, c.11; Criminal Justice (Terrorism and Conspiracy) Act, 1998, c.40; Prevention of Terrorism (Additional Powers) Act, 1996, c.7; Suppression of Terrorism Act, 1978, c.26; in Canada: Criminal Code, c.46, part II.1; Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism, Under the United Nations Act, 2001; in New Zealand: International Terrorism (Emergency Powers) Act, 1987 No. 179; Terrorism Suppression Act, 2002 No. 34; Anti-Money Laundering and Countering Financing of Terrorism Act, 2009 No. 35.

¹⁹ See, e.g., Helen Fenwick, *The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?*, 65 MOD. L. REV. 724 (2002); C. H. Powell, *South Africa's Legislation against Terrorism and Organised Crime*, 2002 SING. J. LEGAL STUD. 104 (2002); David Bonner, *Managing Terrorism while Respecting Human Rights? European Aspects of the Anti-Terrorism Crime and Security Act 2001*, 8 EUR. PUB. L. 497 (2002); Virginia Helen Henning, *Anti-Terrorism, Crime and Security Act 2001: Has the United Kingdom Made a Valid Derogation from the European Convention on Human Rights*, 17 AM. U. INT'L L. REV. 1263 (2002); Curry K. Gaskins, *Chiquita Goes Bananas: Counter-Terrorism Legislation Threatens U.S. Multinationals*, 34 N.C.J. INT'L L. & COM. REG. 263 (2009); Ben Middleton, *Section 57 and 58 of the Terrorism Act of 2000: Interpretation Update*, 73 J. CRIM. L. 203 (2009); Christopher J. Newman, *Revolutions of Control Orders under the Prevention of Terrorism Act 2005*, 73 J. CRIM. L. 291 (2009); Seth T. Bridge, *Russia's New Counteracting Terrorism Law: The Legal Implications of Pursuing Terrorists beyond the Borders of the Russian Federation*, 3 COLUM. J. E. EUR. L. 1 (2009).

The argument goes back to the 19th century debate between the Anglo-American and European-Continental legal systems over codification.²⁰ The legal thought in 19th century Europe was that the law is able to predict all types of human behavior by formulating specific legal provisions that together can cover all legal situations in any given area. This legal thought resulted in codification and the emergence of a legal codex in Europe that tended toward uniformity, where courts were not allowed to change the legal provisions of the codex by way of interpretation.

Anglo-American legal thought differed, believing that it was impossible to predict *all* types of human behavior, and that therefore laws should be drafted in a general way, allowing courts to match the legal provision to the facts by way of interpretation. It is not necessary to predict every types of human behavior, only to formulate legal principles and use the binding precedent practice (*stare decisis*).²¹ In the course of the 19th century, the European-Continental legal systems realized that no legal provision can truly predict every type of human behavior, and some open terms were added to the codification, such as good faith, reasonableness, etc., enabling the courts to match the legal provision to the facts by way of interpretation.²²

If this realization was successfully applied to the legal areas of contracts, torts, criminal law, corporations, procedure, and many other legal areas, there is no reason why it cannot be applied to terrorism.

The legal fight against terrorism is a relatively new area of law, and this realization must become an essential element of it, as terrorism grows more and more sophisticated. Even if every type of terrorist behavior were to be defined explicitly at some point in time, it would not necessarily include new types of behavior developed in order to evade the given prohibitory legal provisions. Even if legislation could be enacted with all due speed, and after every terrorist attack a new statute were enacted addressing the aspects of that attack, such statute could not be applied retroactively on that attack, and planners of future terrorist attacks would design new types of attack that evade those statutes.²³

Moreover, the enactment of specific statutes is problematic also because these statutes do not necessarily follow the general principles of criminal law. A statute that prohibits given preparatory activities while

²⁰ Wienczyslaw J. Wagner, *Codification of Law in Europe and Codification Movement in the Middle of Nineteenth Century in the United States*, 2 ST. LOUIS U. L.J. 335 (1953); George M. Hezel, *The Influence of Bentham's Philosophy of Law on the Early Nineteenth Century Codification Movement in the United States*, 22 BUFF. L. REV. 253 (1973); Frederick G. Kempin Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28 (1959).

²¹ William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949); Roscoe Pound, *What of Stare Decisis?*, 10 FORDHAM L. REV. 1 (1941).

²² JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* (1969).

²³ United States Constitution, art. I, § 9; *Calder v. Bull*, 3 U.S. 386(1798); *People v. Stead*, 845 P.2d 1156 (Colo. 1993); *Smith v. Doe*, 538 U.S. 84 (2003); *Seling v. Young*, 531 U.S. 250 (2001); *Kansas v. Hendricks*, 521 U.S. 346 (1997); *United States v. Crawford*, 115 F.3d 1397 (8th Cir. 1997).

full conduct is still required to impose criminal liability, unless that conduct is present, no offense has been committed. Finally, the question remains: What is the criminal liability of a person who merely attempted to commit a preparatory offense? To be deemed an attempt to commit a prohibited preparatory activity, what conduct requirement must be fulfilled in this case? This article suggests that better solution is to redefine inchoate offenses under the liberal concept of criminal law.

III. Modern Criminal Law as an Instrument in Incapacitating Terrorism

A. THE MODERN RATIONALE – SOCIAL HARM VERSUS SOCIAL ENDANGERMENT

The development of modern inchoate offenses in criminal law began as a social response to the "terrorism" of the 16th century, which was manifest mainly by offenses committed against national security, such as high treason. There were no legal problems when these offenses were fully perpetrated. The need for a new legal doctrine appeared when police became more efficient and succeeded in arresting offenders before they fully perpetrated the offense. Then, because no offense had been committed, the defendant could ask: On what charge? At the end of the 15th century, the English crown established a new court – the Star Chamber Court (*camera stellata*).²⁴

By the 16th century, when the efficiency of the police in England had increased to the point that a doctrinal legal change was required, the Star Chamber Court developed the maxim of *voluntas reputabitur pro facto*²⁵ (the desire comes for the act, and sometimes even will be regarded as the act itself) and formulated a doctrine that criminalized inchoate offenses. Under that doctrine, a strong desire to harm society may fulfill the *actus reus* requirement for the imposition of criminal liability – the desire being regarded as the act. This was the legal birth of the modern offenses of attempt, conspiracy, and solicitation, which were later termed "inchoate offenses."

Incriminating inchoate offenses differ from other specific offenses that are defined based on the social harm caused by their commission. In general, the more severe the social harm, the more severe the offense is. In most modern societies, murder is more severe a crime than theft because the social harm caused by murder is more severe than that caused by theft. An inchoate offender, however, causes no physical harm to anyone. A person who attempted to murder someone but failed, while the potential victim was not even aware of the attempt, causes no social harm. Under the old doctrine, such a person cannot be indicted for any offense relating to murder because no murder has been committed.

²⁴ Thomas G. Barnes, *Due Process and Slow Process in the Late Elizabethan-Early Stuart Star Chamber*, 6 AM. J. LEGAL. HIST. 221 (1962); Thomas G. Barnes, *Star Chamber Mythology*, 5 AM. J. LEGAL. HIST. 1 (1961).

²⁵ HENRY DE BRACON, DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE 337, f. 128, 13 (G. E. Woodbine ed., S. E. Thorne trans., 1968-1977) (1260); JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 223-24 (1883, 1964).

Under the modern doctrine of inchoate offenses the social harm is immaterial. The significant factor in criminalizing inchoate offenses is the danger to society that they pose. The attempt to commit murder causes no harm to society but it endangers it. The person who attempted to commit murder but failed is not less dangerous to society than an actual murderer. In most cases, after a murderer has murdered the victim, no further danger is expected because the act of murder has already been accomplished. By contrast, a person who attempted but failed to murder is likely to attempt it again in order to complete the act. Therefore, an inchoate offender is no less dangerous to society than the offender who succeeded in committing the offense.

Thus, it was the need for a response to the social endangerment caused by a criminal who committed an incomplete offense that has led to the modern doctrine of inchoate offenses. Most legal systems worldwide recognize three main inchoate offenses: attempt, conspiracy, and solicitation, although in some legal systems the list of inchoate offenses is longer.²⁶ All three original inchoate offenses became part of modern criminal law based on the same rationale, namely that social endangerment must be criminalized in the same way as social harm. The absence of harm in these offenses is counterbalanced by the strong and focused desire of the offender.

The attempted offense was shaped after the abolition of the Star Chamber Court in 1640, when the case law created by it was transferred to the ordinary criminal courts. These courts accepted the maxim of *voluntas reputabitur pro facto* ("the will is taken for the act"), and "attempt" was recognized as a general legal structure that may be applied to all serious offenses, not only in the area of national security.²⁷

²⁶ See, e.g., in Britain, in addition to the attempt, conspiracy and solicitation, the accessory and abettor are also considered inchoate offenders since 2008 due to art. 44 of the Serious Crimes Act, 2007, c.27.

²⁷ JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 223-224 (1964); Hall, *supra* note 15, at 565-568; SIR EDWARD COKE, INSTITUTIONS OF THE LAWS OF ENGLAND—THIRD PART 5, 69, 161 (6th ed. 2001); William Hudson, *Treatise of the Court of Star Chamber*, 2 HARGRAVE COLLECTANEA JURIDICA 8 (1882) (argues "Attempts to coin money, to commit burglary, or poison or murder, are in ordinary example; of which the attempt by *Frizier* against *Baptista Basiman*, in 5. *Eliz.* is famous; and that attempt of the two brothers who were whipped and gazed in Fleet-street in 44. *Eliz.* is yet fresh in memory", and concludes (pp. 12-13): "Infinite more are the causes usually punished in this court, for which, for which the law provideth no remedy in any sort or ordinary course, whereby the necessary use of this court to the state appeareth; and the subjects may as safely repose themselves in the bosoms of those honourable lords, reverend prelates, grave judges, and worthy chancellors, as in the heady current of burgesses and meaner men, who run too often in a stream of passion after their own or some private man's affections, the equality of whose justice let them speak of who have made trial of it, being no subject fit for me to discourse of."). See, e.g., *Le Roy v. Sr. Charles Sidley*, (1662) 82 E.R. 1036, 1 Sid. 168, 1 Keble 620; *Mr. Bacon's Case*, (1663), 83 E.R. 341, 1 Lev. 146, 1 Sid. 230, 1 Keble 809; *The King v. Johnson*, (1689) 89 E.R. 753, 2 Shaw. K.B. 1; *The King v. Cowper*, (1701) 87 E.R. 611, 5 Mod. 206; *Domina R. v. Langley*, (1703) 91 E.R. 590, 2 Salk. 697; *Dominus Rex v. Pigot*, (1706) 90 E.R. 1317, Holt 758; *The King v. Sutton*, (1736) 95 E.R. 240, Cas. T. Hard. 370; *Rex v. Vaughan*, (1769) 98 E.R. 308, 4 Burr. 2494; *Rex v. Scofield*, (1784) Cald. Mag. Cas.397 (K.B.) 400; *The King v. Higgins*, (1801) 102

The principle was accepted by the European-Continental legal systems as well.²⁸ Solicitation was also accepted pursuant to the same maxim, as a special form of attempt.²⁹ In time, it became a separate inchoate offense based on the criminal attempt concept, and may be applied to any severe offense both in the Anglo-American³⁰ and the European-Continental legal systems.³¹

Although the roots of conspiracy lie in the 13th and 14th centuries,³² the modern concept of criminal conspiracy was formulated in the Star Chamber Court. In 1611, the Court ruled that an offense does

E.R. 269, 2 East 5("[A]ll offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the community, are indictable..."); *Butler*, (1834) 172 E.R. 1280, 6 Car. & P. 368 ("An attempt to commit a misdemeanour created by statute is a misdemeanour itself."); *Roderick*, (1837) 173 E.R. 347, 7 Car. & P. 795 ("an attempt to commit a misdemeanour is a misdemeanour, whether the offense is created by statute, or was an offense at common law."); *State v. Redmon*, 121 S.C. 139, 113 S.E. 467 (1922); Criminal Attempts Act, 1981, c. 47, § 1, sch. 1 (Eng.) ("If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence."); and thus interpreted, *See, e.g., R. V. John Charles Walker*, (1990) 90 Crim. App. 226; ; *Regina v. M.H.*, [2004]EWCA (Crim) 1468 (Eng.).

²⁸ *See, e.g.,* STRAFGESETZBUCH [STBG] [PENAL CODE] § 22-24, 26, 30-31; C. PÉN. art. 121-5, 121-6, 121-7 (Fr.).

²⁹ John W. Curran, *Solicitation: A Substantive Crime*, 17 MINN. L. REV. 499 (1933); James B. Blackburn, *Solicitation to Crimes*, 40 W.VA. L. REV. 135 (1934); W.H.Hitchler, *Solicitations*, 41 DICK. L. REV. 225 (1937); Herbert Wechsler, William Kenneth Jones and Harold L. Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571 (1961); *The Queen v. Daniell*, (1703) 87 E.R. 856, 6 Mod. 99; *The Queen v. Collingwood*, (1704) 87 E.R. 1029, 6 Mod. 288; *Rex v. Vaughan*, (1769) 98 E.R. 308, 4 Burr. 2494; *The King v. Higgins*, (1801) 102 E.R. 269, 2 East 5.

³⁰ *State v. Lampe*, 131 Minn. 65, 154 N.W. 737 (1915); *The Queen v. Gregory*, (1867) L.R. 1 C.C.R. 77; *United States v. Lyles*, 4 Cranch C.C. 469, 26 F.Cas. 1024 (1834); *Cox v. People*, 82 Ill. 191 (1876); *Allen v. State*, 91 Md. App. 705, 605 A.2d 960 (1992); *Commonwealth v. Barsell*, 424 Mass. 737, 678 N.E.2d 143 (1997); *Commonwealth v. Flagg*, 135 Mass. 545 (1883); *State v. Beckwith*, 135 Me. 423, 198 A. 739 (1938); *State v. Hampton*, 210 N.C. 283, 186 S.E. 251 (1936); *State v. Avery*, 7 Conn. 266 (1828); *State v. Foster*, 379 A.2d 1219 (Me. 1977); *State v. Blechman*, 135 N.J.L. 99, 50 A.2d 152 (1946); *Smith v. Commonwealth*, 54 Pa. 209 (1867); *State v. Sullivan*, 110 Mo. App. 75, 84 S.W. 105 (1904); *Director of Public Prosecutions v. Armstrong*, (1999) 143 S.J. L.B. 279, [2000] Crim. L.R. 379; *Regina v. Goldman*, [2001] EWCA (Crim.) 1684; Jessica Holroyd, *Incitement – A Tale of Three Agents*, 65 J. CRIM. L. 515 (2001).

³¹ *E.g.* art. 26 of the German Penal Code (provides "Als Anstifter wird gleich einem Täter bestraft, wer vorsätzlich einen anderen zu dessen vorsätzlich begangener rechtswidriger Tat bestimmt hat"; art. 121-7 of the French Penal Code provides: "Est également complice la personne qui par don, promesse, menace, ordre, abus d'autorité ou de pouvoir aura provoqué à une infraction ou donné des instructions pour la commettre"); *See, e.g.,* in the German court decisions in RG 36, 402; RG 53, 189; BGH 6, 359; BGH 7, 234; BGH 8, 137; BGH 34, 63.

³² Francis B. Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 394-409 (1922); JOHN HAGAN, VICTIMS BEFORE THE LAW – THE ORGANIZATIONAL DOMINATION OF CRIMINAL LAW 8 (1983); 13 Edw. I, c.12 (1285); 33 Edw. I, c.10 (1307); 4 Edw. III, c.11 (1330); Y.B., 24 Edw. III, f.75, pl.99 (1351).

not have to be completed in order to impose criminal liability on the conspirators.³³ Sheer agreement between the parties creates the social endangerment and it is therefore sufficient to impose criminal liability. Even if the conspirators were apprehended before being able to complete committing the offense or even before beginning their attempt, the conditions for conspiracy are present as long as they banded together in an agreement to commit the offense.³⁴ The agreement endangers society even if it is not much more than a preparatory action.³⁵ Conspiracy was accepted as a general inchoate offense that may be applied to any severe offense, together with attempt and solicitation.

Inchoate offenses are instruments of criminal law that empower state police powers to fulfill their mission of protecting society from danger before it materializes.³⁶ A police officer does not have to wait until the potential offender shoots a bullet through the potential victim's heart. The officer is authorized to arrest the potential offender before the offense is completed, thereby preventing the crime. Inchoate offenses make it possible to impose criminal liability on the potential offender not merely as a potential offender but as an offender who completed the perpetration of the offense.³⁷

In the competition between social harm and social endangerment, social endangerment won.³⁸ It is not only the murderer who is convicted, but also the person who attempted to murder but missed his shot. This sounds fair. But it is not always that simple. What about a person who attempts to murder using a voodoo doll or a toy gun? If a person attempts to murder someone with a toy gun and really believes it will kill the intended victim, he is criminally liable for attempted murder. Although his conduct cannot possibly result in anyone's death, the desire to kill is

³³ *The Poulterers' Case*, (1611) 77 E.R. 813, 9 Co. Rep. 55b.

³⁴ *Timberley v. Childe*, (1660) 82 E.R. 974, 1 Sid. 68; *Le Roy v. Starling Alderman de London*, (1662) 82 E.R. 1039, 1 Sid. 174; *Le Roy v. Sr. Charles Sidley*, (1662) 82 E.R. 1036, 1 Sid. 168; *The Queen v. Daniell*, (1703) 87 E.R. 856, 6 Mod. 99; *Jones v. Randall*, (1774) 98 E.R. 706, Lofft 383.

³⁵ *R. V. Jones*, (1832) 110 E.R. 485, 4 B. & Ad. 345; *State v. Burnham*, 15 N.H. 396 (1844); *Pettibone v. United States*, 148 U.S. 197(1893); *Commonwealth v. Hunt*, 4 Mass. (1 Met.) 111 (1842); *Kamara v. Director of Public Prosecutions*, [1974] A.C. 104, [1973] 2 All E.R. 1242, [1973] 3 W.L.R. 198, 57 Cr. App. Rep. 880; Criminal Law Act, 1977, c.45 § 1(1), (2) as amended due to art. 5 of the Criminal Attempts Act, 1981, c.47.

³⁶ ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974); JONATHAN WOLFF, ROBERT NOZICK: PROPERTY, JUSTICE AND MINIMAL STATE (1981).

³⁷ David Lewis, *The Punishment that Leaves Something to Chance*, 18 PHIL AND PUB AFF 53 (1989); Sanford H. Kadish, *The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679 (1994); Leo Kats, *Why the Successful Assassin is More Wicked than the Unsuccessful One*, 88 CALIF. L. REV. 791 (2000); Paul H. Robinson, *Some Doubts About Argument by Hypothetical*, 88 CALIF. L. REV. 813 (2000).

³⁸ See, e.g., Robin Antony Duff, *Criminalizing Endangerment*, DEFINING CRIMES – ESSAYS ON THE SPECIAL PART OF THE CRIMINAL LAW 43 (Robin Antony Duff & Stuart P. Green eds., 2005); Markus Dirk Dubber, *The Possession Paradigm: The Special Part and the Police Power Model of the Criminal Process*, DEFINING CRIMES – ESSAYS ON THE SPECIAL PART OF THE CRIMINAL LAW 91 (Robin Antony Duff & Stuart P. Green eds., 2005).

regarded as being tantamount to killing (*voluntas reputabitur pro facto*).³⁹

Is this fair? To answer this question, we must address the concept of moral luck.⁴⁰ The shooter who misses his intended victim by two inches will probably try again and again until he succeeds. Although he missed the victim the first time, he remains dangerous to society because his desire is to hit, not to miss. If the police arrested the shooter immediately after he missed the intended victim, it was only a matter of luck that the intended victim escaped with his life. Luck is not legitimate grounds for evading criminal liability, and the shooter is criminally liable for murder (if the victim was actually shot) or for attempted murder (if the victim escaped).

The legal situation is the same with the shooter who uses a toy gun or a voodoo doll. Initially, the shooter thinks that the toy gun will cause death. After a few attempts, he understands that the device is incapable of causing death, but he still desires to kill the victim, and it is therefore likely that he will exchange the toy gun for a lethal device. When he eventually does so, the social endangerment quickly progresses to social harm. As long as the desire to murder exists, the road from a voodoo doll that does not accomplish the job to a lethal device that does is a short one. This justifies treating offenses that pose a danger to society as being more serious than those that cause harm to society.

The applicability of inchoate offenses as instruments of criminal law appears to be very broad. And yet, the current definitions of inchoate offenses are insufficient to incriminate those involved in the creation and establishment of a terrorist infrastructure. Let us examine why.

B. THE NEED FOR CHANGE

We have seen that inchoate offenses were accepted into modern criminal law following the adoption of the maxim *voluntas reputabitur pro facto*. When the *actus reus* requirement of an offense is not met, the strong and focused desire of the offender incriminates him under the relevant inchoate offense. But the maxim has not been applied sweepingly and was subordinated to another maxim, that of *nullum crimen sine actu* (“no crime without an act”). It is therefore still necessary to perform some act in order for an attempt, solicitation, or

³⁹ Jerome B. Elkind, *Impossibility in Criminal Attempts: A Theorist's Headache*, 54 VA. L. REV. 20, 33-34 (1968); John J. Yeager, *Effect of Impossibility on Criminal Attempt*, 31 KY. L. J. 270 (1943); Arnold N. Enker, *Impossibility in Criminal Attempts – Legality and Legal Process*, 53 MINN. L. REV. 665 (1969); David D. Friedman, *Impossibility, Subjective Probability, and Punishment for Attempts*, 20 J. LEGAL STUD. 179 (1991); Peter Westen, *Impossibility Attempts: A Speculative Thesis*, 5 OHIO ST. J. CRIM. L. 523 (2008); *Kunkle v. State*, 32 Ind. 220 (1869); *People v. Elmore*, 128 Ill. App. 2d 312, 261 N.E.2d 736 (1970); *State v. Smith*, 262 N.J. Super. 487, 621 A.2d 493 (1993).

⁴⁰ Nils Jareborg, *Criminal Attempts and Moral Luck*, 27 ISR. L. REV. 213 (1993); Benjamin C. Zipursky, *Two Dimensions of Responsibility in Crime, Tort, and Moral Luck*, 9 THEORETICAL INQ. L. 97 (2008); Russell Christopher, *Does Attempted Murder Deserve Greater Punishment than Murder - Moral Luck and the Duty to Prevent Harm*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 419 (2004).

conspiracy to be incriminating. The exact requirement is for an overt act that constitutes the specific inchoate offense.⁴¹ The overt act requirement is subordinated to the requirements of the factual element of the offense (*actus reus*) and it can also be expressed by omission (inaction while breaching a statutory duty⁴²).⁴³

This requirement affects efforts to incapacitate terrorism by destroying the terrorist infrastructure through application of the concept of the relativity of inchoation. Inchoate offenses are always relative to the complete perpetration of a given offense, even if the act that ends up being carried out constitutes some other offense. For example, if a person desires to murder someone by stabbing him, and carries out the premeditated plan, but the victim, although severely injured, survives, the action may constitute attempted murder if the intended offense was murder. If, however, the intended offense was not murder but assault or battery, the offense is considered to have been fully committed.

When the legal distance between the offense and the minimal requirement for constituting a related inchoate offense is great, the factual linkage between the inchoate offense and the offense becomes hazy, and the inchoate action may not necessarily be linked directly to the offense. For example, an offense that begins and ends in money laundering constitutes complete perpetration of the offense. If the investigating authorities discover that the final objective of the money laundering was to aid in the establishment of a terrorist infrastructure in order to commit terrorist attacks and murder innocent people, the relevant offense is murder. In this case, the legal question is whether person who committed money laundering can be convicted of attempted murder.

If indicted only for money laundering, it is likely that he would be convicted, but the legal linkage of that offense to terrorism would

⁴¹ See Clark Miller, *The Overt Act in Conspiracy*, 18 BROOK. L. REV. 263 (1952); N. C. Collier, *Criminal Conspiracy Needing an Overt Act to Make It Indictable*, 19 LAW STUD. HELPER 45 (1911); Elizabeth B. Wydra, *Is an Overt Act an Element of the Crime of Conspiracy to Commit Money Laundering*, 2005 PREVIEW U.S. SUP. CT. CAS. 146 (2005); Lindsey M. Vaughan, *Criminal Law - Indictment Specificity in Alleging Attempt Crimes - An Indictment for Attempted Illegal Reentry into the United States Is Not Defective because it Fails to Allege a Specific Overt Act*, 75 TENN. L. REV. 167 (2007); *State v. Heitman*, 262 Neb. 185, 629 N.W.2d 542 (2001); *State v. Ladd*, 210 W. Va. 413, 557 S.E.2d 820 (2001); *United States v. Shabani*, 513 U.S. 10 (1994); *State v. Carbone*, 10 N.J. 329, 91 A.2d 571 (1952).

⁴² Rollin M. Perkins, *Negative Acts in Criminal Law*, 22 IOWA L. REV. 659 (1937); Graham Hughes, *Criminal Omissions*, 67 YALE L. J. 590 (1958); Lionel H. Frankel, *Criminal Omissions: A Legal Microcosm*, 11 WAYNE L. REV. 367 (1965).

⁴³ See, e.g., Phil Palmer, *Attempt by Act or Omission: Causation and the Problem of the Hypothetical Nurse*, 63 J. CRIM. LAW 158 (1999); MODEL PENAL CODE (1962); *R. v. Gibbins & Proctor*, (1918) 13 Cr. App. R. 134, (1918) 82 J.P. 287, CCA; *R. v. Banks*, (1873) 12 Cox C.C. 393; *Commonwealth v. Willard*, 39 Mass. 476 (1839); *State v. Baldwin*, 291 N.W.2d 337 (Iowa 1980); *State v. McGrath*, 574 N.W.2d 99 (Minn. App.1998); *Commonwealth v. Flagg*, 135 Mass. 545 (1883); *State v. Blechman*, 135 N.J.L. 99, 50 A.2d 152 (1946); *State v. Ray*, 267 Mont. 128, 882 P.2d 1013 (1994).

probably not be addressed. Note that in most legal systems money laundering is not prohibited, whereas murder is. When the action committed is not prohibited, the only way the law can consider it incriminating is by linking it to the offense that was the perpetrator's final objective. This linkage is possible only through the legal instrument of inchoate offenses. If money laundering and other strategies used to fund terrorist activities are not considered to be illegal, these activities can be criminalized only by linking them to the offense that is the terrorists' ultimate objective, in this case, murder. And the question of how the factual element of a fundraising activity can become an "overt act" of attempted murder still remains to be answered.

The infrastructure of terrorism consists not only of activities prohibited by legislation. Many activities that support the terrorist infrastructure are not illegal, or not yet. Even if legislation is enacted outlawing some of the activities vital to the terrorist infrastructure, new tactics or strategies, that are not yet prohibited, will be devised and implemented, which are likely to be more efficient, easy, fast, and most important, considered legal. Outlawing these activities one by one through individual legislation brings us back to the disadvantages of this approach, as described above.⁴⁴

The most effective legal solution, therefore, would be to redefine inchoate offenses based on the principle of the relativity of inchoation, and formulate a comprehensive doctrine that would embrace all derivative situations that constitute social endangerment, including the establishment of a terrorist infrastructure and involvement with it. All social endangerment associated with terrorism should be incorporated in the new definition in order to incapacitate terrorism. Redefining inchoate offenses would not change the fundamental principles of criminal law or create legal exceptions to these principles, but it would comply with existing principles.⁴⁵

C. REDEFINITION AS SOLUTION

The redefinition of inchoate offenses would adhere to three major aspects of criminal liability: the general course of conduct of redefined inchoate offenses and their justification; the factual element requirement (*actus reus*) of the redefined inchoate offenses; and the mental element requirement (*mens rea*) of the redefined inchoate offenses. Together, these aspects complete the redefinition of inchoate offenses in conformity with the major fundamental principles of modern criminal law.

(i) *The Purposed Course*

The general course of conduct of an offense contains three consecutive stages: preparation, which is not punishable in most legal

⁴⁴ See *supra* Part II.B.

⁴⁵ Wayne McCormack, *Inchoate Terrorism: Liberalism Clashes with Fundamentalism*, 37 GEO. J. INT'L L. 1 (2005); A.H. Sherr, *The Law Commission Working Paper Number 50 on Codification of the Criminal Law, General Principles: Inchoate Offences*, 37 MOD. L. REV. 67 (1974); Note, *Reforming the Law of Inchoate Crimes*, 59 VA. L. REV. 1235 (1973); Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1 (1989).

systems, the criminal attempt, and the complete perpetration. Most legal systems consider the second and third stages punishable. The crucial question for our purposes is the following: Where exactly lie the legal borders between the three stages? Although some tests have been proposed, all failed to formulate an accurate distinction that provides the response sought by society to social endangerment. The proposed tests included the proximity,⁴⁶ the last act,⁴⁷ and the unequivocal test.⁴⁸

The first stage in the course of conduct of an offense is preparation, when the preliminary planning of the offense is performed and the criminal scheme or plan (*iter criminis*) is constituted. This is the stage when the criminal idea is formulated into a plan, which may or may not be operative, well planned, or detailed. Formulating the criminal plan involves nothing more than thoughts, and it should therefore not be punishable. When only one person is involved in the formulation of the criminal plan, the social endangerment, if any, is quite low.

The preparatory stage ends at a distinct point, when the planner makes the decision to carry out the criminal plan and commit the offense. The decision is mental and does not necessarily gain immediate expression in a particular activity. As a result, the decision itself is part of the preparation: it is the final stage of the preparation. Making the decision is not punishable, as it is still only preparation. But from that point onward, the person becomes a danger to society because he now intends to carry out his criminal plan and commit the offense. The precise point in time when the personal decision is made to execute the criminal plan is the moment when the person becomes a danger to society.

⁴⁶ See, e.g., in the United States: *Compare People v. Bracey*, 392 N.Y.S.2d 412, 360 N.E.2d 1094 (1977); *Sizemore v. Commonwealth*, 218 Va. 980, 243 S.E.2d 212 (1978); *People v. Mahboubian*, 544 N.Y.S.2d 769, 543 N.E.2d 34 (1989); *People v. Acosta*, 593 N.Y.S.2d 978, 609 N.E.2d 518 (1993); *People v. Warren*, 498 N.Y.S.2d 353, 489 N.E.2d 240 (1985); *Hyde v. United States*, 225 U.S. 347, (1912); and in the English Common Law: *Regina v. John Eagleton*, [1855] 169 E.R. 766, 6 Cox C.C. 559; *R. v. Button*, [1900] All E.R. 1648, [1900] 2 Q.B. 597, 69 L.J.Q.B. 901, 83 L.T. 288, 64 J.P. 600, 48 W.R. 703, 16 T.L.R. 525, 44 Sol. Jo. 659, 19 Cox. C.C. 568; *R. v. Robinson*, [1915] 2 K.B. 342; *with United States v. Desena*, 287 F.3d 170 (2d Cir. 2002); *Henderson v. The King*, [1948] 91 C.C.C. 97.

⁴⁷ *Compare United States v. Coplion*, 185 F.2d 629 (2d Cir. 1950); *Commonwealth v. Peaslee*, 177 Mass. 267, 59 N.E. 55 (1901), *with* ANTONY ROBIN DUFF, *CRIMINAL ATTEMPTS* 37-42 (1996).

⁴⁸ *Compare* J.W. Cecil Turner, *Attempts to Commit Crimes*, 5 C. L. J. 230 (1933); LEON RADZINOWICZ AND J. W. CECIL TURNER, *THE MODERN APPROACH TO CRIMINAL LAW* 279-280 (1948); *R. v. Barker*, [1924] NZLR 865, 874-875; *State v. Stewart*, 143 Wis. 2d 28, 420 N.W.2d 44 (1988); *Campbell and Bradley v. Ward*, [1955] NZLR 471, *with United States v. Cruz-Jiminez*, 977 F.2d 95 (3d Cir. 1992); *United States v. McDowell*, 714 F.2d 106 (11th Cir. 1983); *United States v. Everett*, 700 F.2d 900 (3d Cir. 1983); *Lemke v. United States*, 211 F.2d 73 (9th Cir. 1954); *State v. Mandel*, 78 Ariz. 226, 278 P.2d 413 (1954); *People v. Buffum*, 40 Cal. 2d 709, 256 P.2d 317 (1953); *Larsen v. State*, 86 Nev. 451, 470 P.2d 417 (1970); *People v. Downer*, 57 Cal. 2d 800, 372 P.2d 107 (1962); *Police v. Wylie*, [1976] 2 NZLR 167.

Many people fantasize from time to time about killing their adversaries, robbing a bank, or stealing something. This is part of human nature and does not necessarily pose a threat to society unless a decision is made to act on that fantasy and commit the offense.⁴⁹ Dreaming and fantasizing are legal and not punishable; making the dream or fantasy come true poses a danger to society if it involves an offense. The exact boundary between legitimate thoughts, dreams, and fantasies that pose no threat to society, and acting out those fantasies, which may pose a danger to society, lies in the decision to act on those fantasies and carry them out.

From the moment the decision has been made to carry out a criminal plan, any activity performed pursuant to the criminal plan poses a danger to society. It is no longer ascribed to the preparatory stage and constitutes part of the attempt to commit the offense. The attempt to commit an offense is not a fixed point on the time axis, but rather a range of conduct that can vary from case to case. The attempt, *per se*, is formed when the decision has been made to execute the criminal plan. The boundary between the preparatory stage and the criminal attempt reflects the borders of social endangerment.

From the moment the decision has been made to commit an offense, subsequent conduct is considered to fall within the range of criminal attempt, which is punishable. The criminal attempt continues until the offense has been perpetrated. When all the elements of the offense are present, an offense is considered to have been completely perpetrated. As long as even one element is still missing (whether it is the conduct, the circumstantial, or the consequential element), it is still regarded as an attempt.⁵⁰

If a person desires to rape a woman but discovers that he is temporarily impotent, the conduct element of the offense of rape is missing, and the offense is regarded as attempted rape. If a person tries to shoot someone in the dark and happens to kill the victim's dog instead, the circumstantial element of the specific offense of murder is missing, and the offense is deemed attempted murder. If a person tries to shoot someone in the street but misses, the consequential element of the murder is missing, and the offense is treated as attempted murder.

Whether or not an element is missing depends on the precise definition of the offense. The inchoation of a criminal attempt relates to the complete perpetration of the offense. An attempt to commit murder is always relative to the offense of murder. When an offense is completely perpetrated, it is no longer an attempt to commit the offense but the offense itself. In legal systems in which the attempt and the offense are punishable identically, there is no significant relevance to the classification of an activity as attempt or offense, and it is sufficient to

⁴⁹ See, e.g., *People v. Hawkins*, 311 Ill. App. 3d 418,723 N.E.2d 1222 (2000); *United States v. Doyon*, 194 F.3d 207 (1st Cir. 1999).

⁵⁰ Donald Stuart, *The Actus Reus in Attempts*, [1970] CRIM. L. REV. 505 (1970); Mark Thornton, *Attempting the Impossible (Again)*, 25 CRIM. L.Q. 294 (1983).

prove that the offender made the decision to commit the offense and acted accordingly.

This is the general course of conduct of individual offenses, but when more than one offender is involved, another inchoate offense becomes relevant: criminal conspiracy, the preparatory stage of joint perpetration or co-perpetration. The general course of conduct of offenses is applied whether it involves one offender or more, the only difference being that when more than one person is involved, criminal conspiracy may also be considered to be part of the preparatory stage.

The inchoate offense of conspiracy does not entirely replace preparatory action, and it does not replace the criminal attempt. Criminal conspiracy incriminates part of the preparatory stage when its commission is by more than one person. The criminal conspiracy is constituted when an agreement is reached between conspirators relating to the commission of an offense.⁵¹ Two persons chatting in a café about their fantasy to rob a bank is not considered a conspiracy. But if the two agree to carry out their fantasy by committing the offense of robbery, they become a danger to society and are culpable of criminal conspiracy. If commission of the criminal plan has been initiated but not completed, the offense is a joint attempt or co-attempt; when it is completed, it is considered to be full joint perpetration or co-perpetration.

A person who makes an agreement with himself to commit an offense, is making a decision to commit the offense. Conspiracy does not change the general course of conduct of inchoate offenses, but adapts it to situations in which more than one person is involved. The change is minor. Although the decision is not punishable when made by one person because it is still considered a preparatory stage, agreement between two or more persons is punishable as criminal conspiracy. In both cases, whatever preceded the decision or agreement is not punishable because it is still deemed a preparatory stage, but whatever comes after the decision or agreement is punishable because it is considered a criminal attempt. The only difference is in the decision or agreement: when made by one person it is not punishable (preparatory), but when made by two or more persons it is punishable (conspiracy).

The reason for this differentiation lies in the joint commitment that underlies the agreement between the conspirators to commit the offense. The joint commitment *per se* poses a danger to society even if the conspiracy to commit the offense is not carried out. This is the difference between a joint fantasy and an operative criminal plan, and it reflects a basis for a criminal organization between the offenders. This reason is at the core of incriminating complicity, and it explains why sentencing of conspirators is harsher than that of a sole offender. The

⁵¹ Theodore W. Cousins, *Agreement as an Element in Conspiracy*, 23 VA. L. REV. 898 (1937); Paul Marcus, *Conspiracy: The Criminal Agreement in Theory and in Practice*, 65 GEO. L.J. 925 (1977).

potential for actually committing the offense increases when more than one person pursues the same criminal objective.⁵²

According to the concept of the relativity of inchoation, an attempt to commit conspiracy is inevitable.⁵³ In most Anglo-American legal systems conspiracy is considered to be an offense, therefore when two or more parties attempt to agree about committing an offense, it is considered attempted conspiracy. For example, two people meet in the apartment of one of them to agree about committing a joint robbery, but before they agree the police arrest them. They attempted to conspire, but the conspiracy was not accomplished because of their arrest.

If the parties did not succeed to come to an agreement to commit the offense for reasons not under their control, it is likely that they will attempt it again until an agreement is reached. Therefore, the attempt to conspire poses no less of a danger to society than the conspiracy itself. The social harm may be different, but this is immaterial as long as the danger to society justifies incrimination for an inchoate offense, as is the case with attempted conspiracy.⁵⁴

In the case of solicitation the perpetrator persuades another person to commit an offense. Persuasion may be in the form of requests, threats, intimidation, encouragement, entreaties, etc. The general course of conduct of solicitation is identical with that of the offense and also has three consecutive stages: preparation, attempt, and perpetration. A person is culpable for attempted solicitation if he made a decision to solicit but the solicitation was not completed, as for example when the potential target is not convinced and does not intend to commit the offense, or when the solicitor is trying to say something but words fail him because of his excitement. If the potential target is solicited and intends to commit the offense, the solicitation is considered completed.

Solicitation poses no less of a danger to society than the offense itself. Although the solicitor does not commit the offense, he planted the criminal idea in the target's mind. Because solicitation is the cause of the perpetration, and the solicitor is considered the intellectual perpetrator (*auteur intellectue*) of the offense, not less dangerous to society than the actual perpetrator. Moreover, the solicitor can plant the criminal idea in more than one person's mind, posing far greater danger to society than the actual perpetrator.⁵⁵ The social harm caused by the solicitor and the perpetrator may be different, but this is immaterial as

⁵² For the different association theory behind that concept, *See* EDWIN H. SUTHERLAND & DONALD R. CRESSEY, *PRINCIPLES OF CRIMINOLOGY* 173 4th ed. 1947).

⁵³ Note, *Criminal Conspiracy*, 72 HARV. L. REV. 920 (1958-1959); Nick Zimmerman, Comment, *Attempted Stalking: An Attempt-to-Almost-Attempt-to-Act*, 20 N. ILL. U. L. REV. 219 (2000); Charles H. Rose III, *Criminal Conspiracy and the Military Commissions Act: Two Minds That May Never Meet*, 13 ILSA J. INT'L & COMP. L. 321 (2007).

⁵⁴ *See supra* Part III.A.

⁵⁵ *See supra* Part III.A.

long as danger to society justifies incrimination for an inchoate offense, as is the case with solicitation and attempted solicitation.⁵⁶

Naturally, solicitation to commit an attempted offense is inherent in the solicitation itself. The solicitor does not solicit a person to commit attempted murder but to murder the victim. If the perpetrator attempts to murder but the offense is not completed, this does not change the culpability of the solicitation. If a person solicits someone to intimidate a victim by shooting in his vicinity, the victim will reasonably think that this is an attempt to murder him. In reality, this is not solicitation to attempted murder but to intimidate, and failure of the potential perpetrator in committing the offense has no effect on the offense of solicitation. Therefore, solicitation to attempt an offense is already inherent in the solicitation itself.

To complete the argument in favor of redefining inchoate offenses, we now turn to the factual element (*actus reus*) and the mental element (*mens rea*) requirements of redefined inchoate offenses.

(ii) *The Actus Reus*

According to the general course of conduct of the redefined inchoate offenses, the critical point that differentiates between the non-punishable preparatory stage and the punishable stages of attempt and conspiracy is the moment when the decision is made to commit the offense. From that moment onward, any conduct performed according to the criminal plan (*iter criminis*) is already considered to be part of the attempted offense. The *actus reus* requirement of an attempted offense consists of a range of activities, and not of a single type of activity, as is required in most specific offenses. The question that remains to be answered is: What are the borders of the range of activities deemed “attempt”? This question contains two secondary questions, pertaining to the minimum and maximum factual requirements. The range of the *actus reus* requirement lies between the minimum and maximum requirements.

The minimum *actus reus* requirement is of great significance because it is also the factual border of criminality. The minimum requirement is the decision to execute the criminal plan and commit the offense, so that any type of conduct performed pursuant to the criminal plan becomes part of its execution. The conduct may be insignificant and negligible, but as long as it is part of the execution of the criminal plan, it is already considered an attempt and not mere preparation. Consider the case of a person who plans to murder someone, and according to the plan he must leave his house, buy a knife, ambush the victim, and stab him to death. If the person made the decision to murder the victim, and according to plan left his house, when the police arrest him based on intelligence information, the offense is already deemed attempted murder.

⁵⁶ See, e.g., Anthony LaCroix, *Attempted Online Child Enticement: Not Impossible, but Not That Simple*, 5 DARTMOUTH L.J. 97 (2007); Sam E. Fowler, Note, *Criminal Attempt, Conspiracy, and Solicitation under the Criminal Code Reform Bill of 1978*, 47 GEO. WASH. L. REV. 550 (1979).

Thus, from the moment a person made the decision to execute a criminal plan, the offense is no longer preparation. To enter the attempt stage, the execution of the criminal plan must be initiated. Leaving the home with the intent of buying a knife, thereby initiating the execution of the criminal plan, is already within the range of an attempt. Merely leaving one's home (and not having purchased any weapon) is not lethal *per se*, but when it is part of a criminal plan, which is in the process of being executed, it is considered to be part of the attempt to commit the offense.

This type of minimum conduct can also be expressed by acts or omissions.⁵⁷ When an intended offense is to be executed through an omission, the attempt to commit it is also carried out through an omission, as in the case of a parent who makes a decision to starve a child to death despite a legal parent's duty to attend to the child's health, and stops feeding the child. Eventually, the welfare authorities enter the apartment and feed the child. As long as the omission is committed according to a criminal plan and is part of its execution, it is considered attempted murder.

The full execution of the criminal plan is the commission of all factual elements of the offense. If even a small part of the *actus reus* is missing, it cannot be considered more than an attempt. For an offense to be considered an attempted offense, it is sufficient that it contains *almost* all the factual elements but not necessarily all of them. This is true whether the offense is planned to be committed through an action or an omission. In the above example, if the child had died of starvation as planned, the offense would have been complete perpetration of murder. If the child survives, the consequential element of the *actus reus* requirement is missing, and therefore the offense is attempted murder.

In the case of conspiracy, the range of the *actus reus* requirement for an attempt is not as wide. The *actus reus* requirement of conspiracy consists of the agreement between the parties. Any factual elements committed pursuant to that agreement are deemed to be part of the attempt (joint attempt or co-attempt). The factual question of conspiracy is a binary one: has there been an agreement between the parties or not? The agreement contains the criminal plan and the decision to execute it, therefore if there is an agreement between the parties it constitutes conspiracy. The agreement itself is not different from any other agreement in contract law, except for the fact that the subject of the agreement is the joint intention of committing an offense. If no agreement has been made between the parties, the action is not considered a conspiracy.⁵⁸

⁵⁷ This is the Model Penal Code approach, *See* sec. 2.01(3)-(4) of the MODEL PENAL CODE (1985); Herbert Wechsler, William Kenneth Jones and Harold L. Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 957 (1961).

⁵⁸ Theodore W. Cousins, *Agreement as an Element in Conspiracy*, 23 VA. L. REV. 898 (1937); Paul Marcus, *Conspiracy: The Criminal Agreement in Theory and in Practice*, 65 GEO. L.J. 925 (1977).

In the case of attempted conspiracy, the *actus reus* requirement is identical with the *actus reus* requirement of an attempt to commit any offense. In this case, the offense is conspiracy, which is factually expressed by an agreement. Making a decision to conspire and commit an offense is already within the range of attempted conspiracy, but as soon as an agreement is reached between the parties, the offense of conspiracy is complete and considered conspiracy.

The *actus reus* requirement of solicitation contains such activities as requests, threats, intimidation, encouragement, entreaties, etc. The exact method of soliciting is immaterial as long as the goal of solicitation is achieved. The goal of solicitation is to persuade the potential perpetrator to commit an offense, therefore solicitation contains a factual element of result. If the result is not achieved, it cannot be considered more than attempted solicitation because the result is not the commission of an offense by the perpetrator but merely an act of persuasion of the potential perpetrator to commit the offense. If, however, the potential perpetrator attempts but fails to complete the offense, this does not affect the criminal liability of the solicitor because the solicitor already fully completed his part.⁵⁹

(iii) The Mens Rea

According to the general course of conduct of the redefined inchoate offenses, the *actus reus* of the offense is the formulation of a criminal plan. Formulation of a plan to commit an offense, owing to the decision to do so, constitutes part of the execution of the criminal plan. Consequently, the acts of an inchoate offender cannot be committed negligently or without awareness of the criminal plan. The inchoate offender who formulates a certain plan must know about it, and his conduct must reflect the execution of the plan and the offense committed according to it. Negligence requires no knowledge, and therefore cannot be a sufficient mental element to constitute an inchoate offense.

If a criminal plan was executed accidentally or unwillingly, the conduct involves no social endangerment. If the offense was not completed, it involves no social harm either. Therefore, an inchoate activity that bears neither social endangerment nor harm is not punishable. Intent is required to maintain a substantial linkage between inchoate activity and social endangerment. Although knowledge is a necessary requirement for both recklessness and intent, intent and recklessness are insufficient requirements to constitute an inchoate offense.⁶⁰

Various inchoate offenses may have different objectives, but intent is the critical indication. In attempted offenses, the intent is the complete perpetration of the offense. A person who shoots at an intended victim but misses has not committed attempted murder unless he intended to murder the victim. The intent in attempted offenses is to carry out the criminal plan and completely perpetrate the offense. Any

⁵⁹ See *supra* note 57 and accompanying text.

⁶⁰ Kevin W. Saunders, *Voluntary Acts and the Criminal Law: Justifying Culpability Based on the Existence of Volition*, 49 U. PITT. L. REV. 443 (1988).

given offense may require less than intent, but the attempt to commit it requires intent. For example, in most jurisdictions some types of offenses of manslaughter require recklessness, whereas a deliberate attempt to commit those same types of offenses requires a minimum of intent (in order to complete the perpetration of the murder).

Conspiracy requires two subcategories of intent.⁶¹ One is the intent to agree,⁶² the other to achieve an objective.⁶³ In the case of conspiracy, the objective is the complete perpetration of an offense, which is also the objective of the agreement. The conspirators must intend to agree upon the commission of the offense, and as part of that agreement they must intend to carry out the conspiracy to commit the offense. Attempted conspiracy requires the same *mens rea* as the attempted offense. As far as the *mens rea* requirement is concerned, an attempt to commit conspiracy does not differ from an attempt to commit any other offense. In all types of attempts, there must be intent to carry out a criminal plan. Criminal plans may include specific offenses as well as conspiracy.

Solicitation requires intent to achieve the objective of prevailing upon the solicited person to commit the offense. When a person has no such intent, the danger to society is minor. When a person makes certain statements and as a result, because of his negligence or recklessness, some person is persuaded to commit some offense, the person who made the statement poses little danger to society, although there may be harm to society if the offense was actually committed. A person poses a danger to society only when he intends to solicit others to commit an offense and directs his actions accordingly. Accidental solicitation, negligent solicitation, and reckless solicitation do not reflect the minimum danger to society that is required to be considered incriminating.

Attempted solicitation requires the same *mens rea* as the attempted offense. As far as the *mens rea* requirement is concerned, the attempt to commit solicitation does not differ from the attempt to commit any other offense. In all types of attempt, there must be intent to carry out a criminal plan. A criminal plan may include specific offenses as well as solicitation. The basic *mens rea* requirement for all types of inchoate offenses is intent and nothing less.⁶⁴

⁶¹ Paul Marcus, *Criminal Conspiracy: The State of Mind Crime – Intent, Proving Intent, and Anti-Federal Intent*, 1976 U. Ill. L.F. 627 (1976); Albert J. Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624 (1941).

⁶² *State v. King*, 104 Iowa 727, 74 N.W. 691 (1898); *Rude v. State*, 851 P.2d 15 (Wyo. 1993); *Elkin v. People*, 28 N.Y. 177 (1863).

⁶³ *United States v. Childress*, 58 F.3d 693 (D.C. Cir. 1995); *State v. Toth*, 29 Conn. App. 843, 618 A.2d 536 (1993); *United States v. Gallishaw*, 428 F.2d 760 (2d Cir. 1970); *Salinas v. United States*, 522 U.S. 52 (1997).

⁶⁴ Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138 (1997); Herbert Wechsler, William Kenneth Jones & Harold L. Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571 (1961).

D. THE NATIONAL SECURITY CONTEXT

Let us return now to the example at the beginning of this article. A 23-year old student was arrested, and during interrogation he confessed that he had decided to carry out a suicide bombing on an American airplane. But when he was arrested, there was no bomb and no materials to construct one. He also confessed that he had not ordered any materials, nor had he chosen a flight or a date for the attack. Under the redefined inchoate offenses, criminal liability can easily be imposed on him. The charge would be an attempt to commit the relevant offense he had intended to commit (specifically, the offense of terrorism, murder, etc.).

The moment a person made a decision to commit the offense and acted accordingly, the attempted offense has been constituted even if it is still in the preliminary stages of the attempt. The prospective perpetrator became a danger to society when he made his decision. If he had not been caught at that point, he would have proceeded to commit the offense according to his criminal plan. If he is released after the investigation, it is likely that he will resume his criminal plan, unless the arrest itself deters him or rehabilitates him. The experience of national security authorities around the world shows exactly the opposite. In most cases, following arrest the urge to commit the offense intensifies.

Advancing the incrimination borderline between non-punishable preparation and punishable attempt, conspiracy, or solicitation to the point where the decision to commit an offense is redefined as an inchoate offense could play a major role in the legal fight against terrorism.⁶⁵ If the major objective of national security authorities in the legal fight against terrorism is to incapacitate terrorism, inchoate offenses can become the most important instrument of criminal law in this fight. Incapacitation of terrorism requires the destruction of the terrorist infrastructure; preventing individual terrorist attacks is not sufficient because the surviving infrastructure will continue to carry out additional attacks.

It is more difficult to create a terrorist infrastructure than to use it. In most cases, terrorism is totally incapacitated in the absence of an infrastructure to support it. Incapacitating terrorist organizations by legal means is possible only by redefining inchoate offenses in criminal law.⁶⁶ The terrorist infrastructure is a preliminary stage of terrorist attacks and poses a clear danger to society when it formulates a particular objective of committing a specific offense, embodied in a terrorist attack. Indication of that objective begins with the decision to

⁶⁵ Compare Kathy B. Weiman, *The Lawyers' War on Terrorism and Human Rights*, 53 BOSTON BAR J. 2 (2009), with Michael B. Mukasey, *The Role of Lawyers in the Global War on Terrorism*, 32 B. C. INT'L & COMP. L. REV. 179 (2009).

⁶⁶ William Hett, *Digital Currencies and the Financing of Terrorism*, 15 RICH. J.L. & TECH. 1 (2009); John McLoughlin, Georgy P. Noone and Diana C. Noone, *Security Detention, Terrorism and the Prevention Imperative*, 40 CASE W. RES. J. INT'L L. 463 (2009).

commit the offense. From that point onward, the offender becomes a danger to society.

The key to the criminalization of inchoate offenses is danger to society. Indeed, inchoate offenses are criminal because they pose a danger to society, which constitutes the fundamental grounds for modern legal and social justification to impose criminal liability.⁶⁷ By punishing offenses only if harm has been caused to society it is not possible to protect against future threats. To protect against future threats, it is necessary to punish offenses that pose a danger to society. Terrorist infrastructures pose an enormous danger to society, and the only way to eliminate that danger is to destroy the infrastructure.⁶⁸ Establishment and maintenance of the terrorist infrastructure is considered to be a preparatory activity preceding the actual terrorist attack, although it already includes the decision to commit a terrorist attack. If it did not include such a decision, there would be no purpose in establishing the terrorist infrastructure.

If inchoate offenses are redefined, all activities related to the terrorist infrastructure would become illegal. They could be considered attempted offenses, solicitation, or attempted solicitation when committed by one person. They could be considered attempted offenses, conspiracy, solicitation, attempted conspiracy, or attempted solicitation when committed by two or more persons. When a person makes the decision to become involved in terrorism, he becomes dangerous to society; following the proposed redefinition of inchoate offenses, his activities would be considered incriminating and he could be arrested, indicted, and punished on the grounds of the danger he poses to society, as reflected by his activities. His property, equipment, and devices could be confiscated, enabling the destruction of the terrorist infrastructure by legal means.

Our discussion applies to all circles of terrorism and terrorists. The funding of terrorist activities may be criminalized by specific offenses, and at the same time can also be considered inchoate terrorism. Funding of terrorism is associated with the intention of enabling terrorist attacks. The funding itself is part of the terrorist infrastructure and can be criminalized following the redefinition of inchoate offenses. The relativity of the concept of inchoation links the terrorist infrastructure with the intended terrorist attack itself by a specific and relevant inchoate offense (attempted offense, conspiracy, solicitation, attempted conspiracy, or attempted solicitation). It is no longer mere funding of terrorism but attempted murder (attempt, joint attempt, or co-attempt), conspiracy to commit murder, or attempted conspiracy to commit murder, solicitation of murder, or attempted solicitation of murder.

An additional question that needs to be addressed is the integration of inchoate offenses and complicity. If the financier merely

⁶⁷ A. D. Ullmann, *The Reason for Punishing Attempted Crimes*, 51 JUR. REV. 353 (1939); Ian H. Dennis, *The Rationale of Criminal Conspiracy*, 93 L.Q.R.39 (1977).

⁶⁸ Ben Saul, *International Terrorism as a European Crime: The Policy Rationale for Criminalization*, 11 EUR. J. CRIME CRIM. L. & CRIM. JUST. 323 (2003).

intended to assist the conspirators or the perpetrators by funding their activities, could he be incriminated if arrested before completing the assistance? There is no valid legal reason for preventing incrimination of attempted aiding and abetting, conspiracy to aid and abet, or solicitation of aiding and abetting. In the redefined scheme, the specific offense would be replaced by aiding and abetting: just as attempted murder is incriminating, and just as aiding and abetting in the commission of murder is incriminating, so is attempted aiding and abetting in the commission of murder. Legal systems worldwide already recognize such formulas.⁶⁹ Recognition of the linkage between inchoate offenses and complicity widens the net of criminal liability for the incapacitation of terrorism.

The redefined inchoate offenses should not be used only when there is no specific law prohibiting a given activity. The purpose of redefining inchoate offenses is to enable the law to play a greater role in the incapacitation of terrorism. Redefinition of inchoate offenses should be a strategic move in the war against terrorism, so that no it will no longer be necessary to predict exactly every possible human behavior relating to terrorism in order to criminalize it. Any danger posed to society that relates to terrorism should be incriminating as a result of the redefined inchoate offenses.

Terrorist infrastructure is inchoate terrorism, and inchoate terrorism should be criminalized under inchoate offenses.

IV. The Wider Context in Criminal Law

Inchoate offenses are general offenses that may be related to any offense, not only to terrorist attacks. The redefinition of inchoate offenses would affect the legal fight not only against terrorism but also against all types of delinquency. As an instrument of criminal law, the redefined inchoate offenses would mark a quantum leap in the destruction of the infrastructure of terrorism as well as of property crimes, human trafficking, sex trade, etc.⁷⁰ It might be argued that the extremely high severity of terrorist crimes justifies such a concept of inchoate offenses, but as a new general concept it creates an unjustified slippery slope.

Originally, in the Middle Ages, inchoate offenses were applied only to severe crimes. The transition from social harm justification to social endangerment justification was restricted only to the most severe of crimes. It was only in the 18th and 19th Centuries that the concept of inchoate offenses was expanded as a general one. And in some legal systems inchoate offenses are still restricted to felonies and crimes, and are not applied to misdemeanors or petty offenses because the social

⁶⁹ See, e.g., *State v. Tazwell*, 30 La. Ann. 884 (1878); *State v. Doody*, 434 A.2d 523 (Me. 1981); MODEL PENAL CODE (1962).

⁷⁰ See Jonathan Leiken, *Leaving Wonderland: Distinguishing Terrorism from Other Types of Crime*, 36 CASE W. RES. J. INT'L L. 501 (2004).

harm is considered crucial for incrimination, and social endangerment alone does not suffice.⁷¹

Protecting society from danger became the exclusive function of the state only with the adoption of the night-watchman state model, according to which the modern state must protect the public from danger, mostly before these dangers materialize. Protecting the public from future danger requires the state to consider the social endangerment posed by any given offense, because social harm has not yet occurred, and from the point of view of the state it is hoped that it will not occur at all. Social endangerment is embodied in every future commission of every possible offense. If society sees no social danger in a specific offense, the existence of such an offense is unjustified.

Even the future commission of petty offenses poses a danger to society, whether severe or minor. When an offense poses no danger to society it may be liable under torts law, contract law, property law, etc., but it is not liable under criminal law. Criminal law is not private law, and it is subject to social or public interest, the determinant factor of individual offenses being their social context.

Under modern criminal law, the social endangerment posed by inchoate offenses is not less severe than that of individual offenses.⁷² Attempted murder poses as great a danger to society as murder does. Naturally, an actual murder causes far greater social harm than an attempted murder, but the danger to society posed by an inchoate offense may be far greater than that posed by any single individual offense. When the inchoate offense creates an infrastructure to commit further offenses, it poses a greater danger to society than does the commission of an individual offense.

Social endangerment is not the exclusive domain of terrorist attacks. Various types of offenses reflect different types of social dangers, but *all* offenses endanger society. Property offenses constitute a danger to society's property rights and proprietary security. Transportation offenses constitute a danger to society's safe use of the roads. Therefore, if inchoate offenses reflect social endangerment to the same degree as individual offenses do, and if every offense poses a danger to society, then inchoate offenses related to *any* specific offense constitute social endangerment. Therefore, all inchoate offenses related to *any* specific offense can be legally and socially justified as posing a danger to society and imposing criminal liability.

The modern night-watchman state is mandated to protect the public from all danger, and not only from the dangers of terrorism. If the redefinition of inchoate offenses is justified in relation to terrorism, it is also justified in relation to other offenses. If the social endangerment of

⁷¹ See, e.g., C. PÉN. art. 121-4(2) (Fr.).

⁷² See *supra* Part III.A.

an inchoate offense may not appear to be sufficiently severe to be criminally liable, that offense should be abolished for the same reason.⁷³

The redefinition of inchoate offenses is not a slippery slope with regard to non-terrorist offenses. Inchoate offenses would be redefined unequivocally, not vaguely. The decision to carry out a criminal plan and commit a given offense is concrete. The redefinition of inchoate offenses would broaden their range and incorporate more types of offenses, but it would still remain a range with a well-defined scope. The redefinition of inchoate offenses is a new concept in inchoate offense doctrine, and the immediate need for it stems from the strategies being employed in the legal fight against terrorism. But there is no reason to restrict this statutory revision strictly to the legal fight against terrorism.

V. Conclusion

Terrorism is one of the gravest threats to modern Western society. The threat targets the core values of the Western world, such as freedom and equality. To defend against this threat, democracies must incapacitate terrorism. The incapacitation of terrorism includes various types of actions, including intelligence, technological measures, financial methods, and more. One of most critical fights takes place in the legal arena.

The most efficient way to incapacitate terrorism is to destroy the terrorist infrastructure used to prepare the attacks. Preventing one terrorist attack while leaving the terrorist infrastructure intact will not prevent future terrorist attacks by that same infrastructure. The terrorist infrastructure has been categorized as being part of the preparatory stage in the conduct of an individual offense. In most legal systems, this stage is not punishable. Specific offenses can be enacted that prohibit individual activities related to the creation of the terrorist infrastructure, but these offenses cannot cover every type of human behavior involved in the creation of a terrorist infrastructure.

An appropriate doctrinal solution is to redefine inchoate offenses and codify them under offenses that pose a danger to society, which is the legal justification for including them under criminal law. The inchoate offender becomes a danger to society from the moment he makes a decision to execute his criminal plan and commit an offense. From that moment onward, the offender's conduct is incriminating on the grounds of inchoate offenses. The concept of the relativity of inchoation enables the establishment of a linkage between an inchoate offense relating to a terrorist infrastructure and the final potential terrorist attack, which is generally liable under severe specific offenses, such as murder.

⁷³ However, in exceptional cases, if any, there can be exercised the *de minimis* defense if recognized in law. That defense enables court to exonerate the defendant if the social interest or the public interest was too lesser in the specific case. See, e.g., Vashon R. Rogers Jr., *De Minimis Non Curat Lex*, 21 ALB. L. J. 186 (1880); Max L. Veech & Charles R. Moon, *De Minimis non Curat Lex*, 45 MICH. L. REV. 537 (1947).

A doctrinal amendment of inchoate offenses is not exclusive to the legal fight against terrorism, and its application is intended to all types of offenses. Given the concrete definition of a statutory amendment, there is no social risk of a slippery slope that would cause human behavior to become excessively criminalized. Inchoate offenses could become a major legal instrument of criminal law in the legal fight against terrorism and against delinquency in general.

IN THE NAME OF NATIONAL SECURITY: THE CREPPY DIRECTIVE, AND THE RIGHT OF ACCESS TO SPECIAL INTEREST DEPORTATION PROCEEDINGS

JEFF D. HOLDSWORTH

I. Introduction

The history of U.S. immigration law reflects a paradox in public policy. Our professed faith in a ‘golden door’ through which the world’s downtrodden can pass on their journey to a new and better life continues to manifest itself in extremely generous immigration and asylum laws. Simultaneously, fear and prejudice have limited access to immigration and naturalization in ways that seem antithetical to our fundamental commitments to equality and justice.¹

The increasing frequency of terrorist attacks, in connection with anti-immigrant sentiment has fostered debate concerning the removal of un-wanted aliens from the United States.² In the aftermath of September 11, 2001, and in the course of its ongoing investigation, the government has discovered and detained numerous aliens in violation of the U.S. immigration laws, and subjected them to removal proceedings.³ Many of these aliens, who might have connections with, or information pertaining to terrorist organizations, or pose a national security risk, have been designated as “special interest” cases.⁴ In order to avoid disclosing information that might pose a security threat Michael Creppy, Chief Immigration Judge, issued a directive mandating the closure of all proceedings in such cases to the public.⁵

This Article has three sections.⁶ First, the background explains a brief history of the analysis set forth by the Supreme Court of the United States when determining whether there is a First Amendment right of access to court proceedings.⁷ Next, this article will explore the constitutional implications of the Creppy Directive as decided, simultaneously, by two separate Circuits of the United States Courts of Appeals.⁸ This article then advances the argument that the Creppy Directive is overbroad, and suggests that a case by case approach to the closure of special interest cases is a less

¹ Michael Scaperlanda, *Are We That Far Gone?: Due Process and Secret Deportation Proceedings*, 7 STANFORD L. & POLICY REV. 23 (1996).

² *Id.* (citations omitted).

³ *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 202 (3d Cir. 2002).

⁴ *Id.*

⁵ *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683-84 (6th Cir. 2002).

⁶ See *infra* notes 10-87 and accompanying text.

⁷ See *infra* notes 11-17 and accompanying text.

⁸ See *infra* notes 25-35 and accompanying text.

restrictive alternative that advances the goals of both opposing interests.⁹ Finally this article will conclude by providing a brief synopsis of the argument.¹⁰

II. Background

In the seminal case *Richmond Newspapers, Inc. v. Virginia*,¹¹ the Supreme Court of the United States decided whether the right of the public and press to attend criminal trials is guaranteed under the United States Constitution. In *Richmond*, in order to determine whether a First Amendment right of access existed, the Court set forth a two-part “experience and logic test;” examining “first, whether a particular proceeding has a history of openness”, and second, “whether openness plays a positive role in that proceeding.”¹² Under the first prong, the Court reasoned that “the historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open. This is no quirk of history; rather, it has long been recognized as an indispensable attribute of the Anglo-American trial.”¹³

Under the logic prong, the Court reasoned that, “the open processes of justice serve an important prophylactic purpose providing an outlet for community concern, hostility, and emotion.”¹⁴ The Court also stated, “to work effectively, it is important that society’s criminal process satisf[ies] the appearance of justice, and the appearance of justice can best be provided by allowing people to observe it.”¹⁵ Therefore, the Court ultimately held that, “the right to attend criminal trials is implicit in the guarantees of the First Amendment.”¹⁶ Although Justice O’Connor admonished that the decision in *Richmond Newspapers* was narrow and did not have “any implications outside the context of criminal trials,” a majority of the Court has since adopted Justice Brennan’s test of at least some broader application.¹⁷ However, courts have continued to struggle with the constitutional implications of closing its doors to the public.¹⁸

⁹ See *infra* notes 36-81 and accompanying text.

¹⁰ See *infra* notes 82-87 and accompanying text.

¹¹ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

¹² *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 200, 204, 206 (3d Cir. 2002) (articulating the two-part test set forth in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)).

¹³ *Richmond Newspapers, Inc.*, 448 U.S. 555, 569 (1980).

¹⁴ *Richmond Newspapers, Inc.*, 448 U.S. at 571.

¹⁵ *Id.* at 571-72.

¹⁶ *Id.* at 580.

¹⁷ *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 205-06 (3d Cir. 2002).

¹⁸ See e.g., *Press v. Enterprise Co. v. Superior Court*, 478 U.S. 1, 13, 106 S.Ct. 2735 (1986) (holding that there is a First Amendment right of access to preliminary hearings); *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002) and *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (determining whether pursuant to the Creppy Directive, deportation proceedings may be closed to the public).

In the immediate aftermath of the September 11, 2001 attacks, President Bush investigated worldwide those attacks and other related threats to this country.¹⁹ In response, on September 21, 2001, Judge Creppy issued an administrative directive to all U.S. Immigration Judges mandating the closure of cases deemed to be of special interest.²⁰ The “Creppy Directive” as it is commonly known, required that in special interest cases, Immigration Judges close the proceedings to the public, family members, friends, all members of the press, and anyone outside the immigration court.²¹ Under the directive, immigration judges are even precluded from confirming or denying whether a special interest case was before the court, or on its docket.²² The purpose for the mandate was to preclude the exposure of potentially sensitive information to parties that continued, and still continue to pose a security threat to the United States.²³ Shortly after the Creppy Directive was issued, two lodestar cases which were almost simultaneously decided show that the courts grappled with the constitutional implications of closing deportation proceedings to the public.²⁴

In *Detroit Free Press v. Ashcroft*,²⁵ Immigration Judge Elizabeth Hacker, conducting a hearing in a deportation proceeding for Rabih Haddad, closed the hearing to the public, including family and the press.²⁶ Haddad, several newspapers, and Congressman John Conyers, (“Newspaper Plaintiffs”) collectively sought declaratory judgment that the Creppy Directive violated their First Amendment right of access to deportation proceedings.²⁷ The District Court, using the *Richmond Newspapers* test, found a First Amendment right of access to the deportation proceedings.²⁸ The government subsequently appealed the decision to the United States Court of Appeals for the Sixth Circuit.²⁹ Utilizing the *Richmond Newspapers* test, the Sixth Circuit reasoned that, “deportation hearings, and similar proceedings, have traditionally been open to the public, and openness undoubtedly plays a significant positive role in the process.”³⁰ The Court then concluded that “there is a First Amendment right of access to deportation proceedings.”³¹

At roughly the same time, the United States Court of Appeals Third Circuit came to the opposite conclusion.³² In *North Jersey*

¹⁹ *North Jersey Media Group, Inc.*, 308 F.3d at 202.

²⁰ *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683-84 (6th Cir. 2002).

²¹ *Id.* at 684.

²² *Id.*

²³ 308 F.3d at 203.

²⁴ *See North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002); *See also Detroit Free Press v. Ashcroft*, 303 F.3d 681, (6th Cir. 2002).

²⁵ *Detroit Free Press*, 303 F.3d 681 (6th Cir. 2002).

²⁶ *Id.* at 684.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Detroit Free Press*, 303 F.3d at 685.

³⁰ *Id.* at 700.

³¹ *Id.*

³² *North Jersey Media Group, Inc.*, 308 F.3d 198, 205 (3d Cir. 2002).

Media Group, Inc., the court was reviewing a decision from an action brought by a collective of the press, seeking admission to special interest deportation proceedings for persons allegedly involved in the September 11, 2001 terrorist attacks.³³ Disagreeing with the reasoning of the Sixth Circuit in *Detroit Free Press*, and in disagreement with the lower court, the Third Circuit found that deportation proceedings do not meet the standard required by *Richmond Newspapers*.³⁴ The court reached its conclusion, explaining that, “there is also evidence that, in practice, deportation hearings have frequently been closed to the general public,” and “we ultimately do not believe that the deportation hearings boast a tradition of openness sufficient to satisfy *Richmond Newspapers*.”³⁵

III. Argument

Because the government has a compelling interest in protecting the public welfare of the nation closure in some special interest cases is necessary; but, because constitutional rights are at issue under the Creppy Directive, a less restrictive alternative, a case by case approach can advance both interests.³⁶ The First and Fourteenth Amendments prohibit the government from infringing on the freedom of speech, press, right to assemble, and right to request redress from the government.³⁷ Under these guaranteed freedoms, the First Amendment is interpreted to protect the right of every person to attend trials.³⁸ The First Amendment also prohibits the government from limiting the stock or source of information from which the public may gain access.³⁹ “What this means in context of trials is that the First Amendment guarantees of speech and press prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted.”⁴⁰ In other words, “the government may not close government proceedings which historically have been open unless public access contributes nothing of significant value to that process or there is a compelling state interest in closure and a carefully tailored resolution of the conflict between that interest and First Amendment concerns.”⁴¹

The court has explained that, “there is no fundamental right to attend government proceedings,... or right to attend deportation proceedings.”⁴² In essence, national security is a field in which courts have exercised great deference.⁴³

³³ *Id.* at 199.

³⁴ *Id.* at 202.

³⁵ *Id.* at 212.

³⁶ *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 227-228 (3d Cir. 2002) (Scirica, J., dissenting); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 693 (6th Cir. 2002).

³⁷ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980).

³⁸ *Id.*

³⁹ *First National Bank of Boston, v. Bellotti*, 435 U.S. 65, 783 (1978).

⁴⁰ *Richmond Newspapers, Inc.*, 448 U.S. at 576.

⁴¹ *North Jersey Media Group, Inc.*, 308 F.3d at 208.

⁴² *Id.*

⁴³ *Id.* at 219, (citing *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) (noting that “terrorism or other special circumstances” might warrant

After the majority in *Richmond* concluded that there is a First Amendment right to attend criminal trials, Justice Stewart contended that the Court's holding did not confer an absolute right upon the members of the public and press to attend civil and criminal trials.⁴⁴ Justice Stewart further contended that the right to attend proceedings was limited to rational time, place, and manner restrictions.⁴⁵ In a similar vein, Justices Brennan and Marshall agreed that the court's decision must be understood as holding that, "any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality."⁴⁶ In the aftermath of September 11, 2001:

a day on which American life changed drastically and dramatically, [a new era] dawned, and the war against terrorism that has pervaded the sinews of our national life since that day are reflected in thousands of ways in legislative and national policy, the habits of daily living, and our collective psyches.⁴⁷

It is fundamental to the preservation of this nation that each open deportation hearing consider the impact on national security.⁴⁸

While the Sixth circuit in *Detroit Free Press*, and the Third circuit in *North Jersey Media Group, Inc.*, both agreed that the *Richmond Newspapers* First Amendment right of access analysis applied in deportation proceedings, neither court came to the best possible result.⁴⁹ While there may be significant history of a right to attend criminal trials, there is no such history of unfettered access to political branch proceedings.⁵⁰ It was never the intent of the framers of the Constitution to grant an unqualified right of access to the political branches.⁵¹ Patrick Henry, an early leading opponent of government secrecy conceded that not all government action should be open to the public, particularly activities related, "to military operations or affairs of great consequence."⁵²

"heightened deference to judgments of the political branches with respect to matters of national security.").

⁴⁴ *Richmond Newspapers, Inc.*, 448 U.S. at 600 (Stewart, J., concurring).

⁴⁵ *Id.*

⁴⁶ *Id.* at 586 (Brennan, J., & Marshall, J., concurring).

⁴⁷ *North Jersey Media Group, Inc.*, 308 F.3d at 202.

⁴⁸ *Id.*

⁴⁹ *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 700 (6th Cir. 2002) (concluding that under the *Richmond Newspapers* test there is a First Amendment right of access to deportation proceedings); *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 204-05 (3d Cir. 2002) (concluding that the *Richmond Newspapers* analysis is proper, but there is no First Amendment right to attend deportation proceedings); See *infra* Notes 75-88 and accompanying text.

⁵⁰ *North Jersey Media Group, Inc.*, 308 F.3d at 209.

⁵¹ *Id.*

⁵² *Id.* (quoting 3 *Elliot's Debates* at 169-70 (J. Elliot ed. 1881)).

There is a long standing practice that the Senate at times gathers behind closed doors, and limits access to sensitive records.⁵³ Closed door proceedings also have been standard procedure in many administrative proceedings such as claims for Social Security disability, which are open exclusively “to the parties, and other persons that the administrative law judge in his discretion permits as necessary and proper.”⁵⁴ The Code of Federal Regulations prescribes other certain proceedings should be closed, for example, 22 C.F.R. § 51.87 requires hearings regarding adverse passport decisions “shall be private.”⁵⁵ Also, 5 C.F.R. § 2638.505(e)(2) provides, “the administrative law judge may order a hearing or any part thereof closed, on his own initiative or upon motion of a party or other affected person, where to do so would be in the best interest of national security.”⁵⁶

The strongest argument for the proposition that deportation proceedings have a history of openness is that at the time that the legislature first codified deportation proceedings, Congress exclusively closed ‘exclusion’ hearings however it did not close ‘deportation’ proceedings.⁵⁷ Proponents of openness argue that this creates the presumption that Congress expressly intended that deportation proceedings remain open to the public.⁵⁸ Additionally proponents of this view assuredly point to 8 C.F.R. § 3.27, which states that, “all hearings other than exclusion hearings, shall be open to the public.”⁵⁹ However, 8 C.F.R. § 3.27 creates an exception stating that an Immigration Judge may close the hearing, “for the purposes of protecting...the public interest.”⁶⁰

Perhaps the most notable values served by openness, are the, “promotion of the public perception of fairness,” and serving as a safeguard to corrupt practices and tactics.⁶¹ Advancing this theory, the court in *Detroit Free Press* stated, “Democracies die behind closed doors. The First Amendment, through a free press, protects the people’s right to know that their government acts fairly...in deportation proceedings. When the government begins closing its doors, it selectively controls information rightfully belonging to the people.”⁶² The Third Circuit responded, quoting Michael Kelly, political reporter and former White House correspondent, from an article he wrote in the Washington Post stating, “So they do, sometimes. But far more democracies have succumbed to open assaults of one sort or another—invasions from without, military coups and totalitarian revolutions from within—than from the usurpation

⁵³ *Id.* at 209-10.

⁵⁴ *North Jersey Media Group, Inc.*, 308 F.3d at 210.

⁵⁵ *Id.*

⁵⁶ 5 C.F.R. § 2638.505 (2012).

⁵⁷ *North Jersey Media Group, Inc.*, 308 F.3d at 211.

⁵⁸ *Id.*

⁵⁹ *Id.* at 212.

⁶⁰ *Id.*

⁶¹ *North Jersey Media Group, Inc.*, 308 F.3d at 217.

⁶² *Detroit Free Press v. Ashcroft*, 303 F.3d at 683.

by-in-camera-incrementalism.”⁶³ In fact, courts have traditionally realized a need for heightened deference when matters of national security or terrorism are implicated.⁶⁴

Clearly, since September 11, 2001, security measures have increased, infringing on some constitutional rights and privileges.⁶⁵ Such measures are necessary, to some extent, but they do not pose a real significant threat to democracy as we know it.⁶⁶ When matters of national security or terrorism are imposed, the government’s invested interest is exceedingly compelling.⁶⁷

Openness of some deportation proceedings can do more harm than good for the public interest.⁶⁸ Opening deportation proceedings in special interest cases would by necessity expose the government’s sources and investigative methods, providing pieces of evidence and valuable clues, thus helping the terrorists construct a mosaic of the investigation and enabling them to frustrate the government’s efforts.⁶⁹ Terrorists and other aliens would be able to piece together the mosaic of information, recognize patterns of entry, and other holes in the system, enabling them to exploit the weaknesses and slip through the cracks.⁷⁰ Open proceedings could also lead to accelerated attacks or attempts to destroy evidence, informants, and other witnesses.⁷¹ Finally, open proceedings might allow terrorists to realize potentially the United States does not know of a planned attack, thus precipitating devastation and destruction before intelligence officers can become aware.⁷²

While there is no hard evidence that an open deportation proceeding will have the feared effect, the closure of some special interest deportation proceedings is essential to advance the goals of national security; the risk is far too great to be second-guessed.⁷³ Because of the importance of the Constitutional rights involved, and the compelling interests of the government that are implicated in special interests deportation proceedings, if a less restrictive means exists to achieve its end, the government must utilize it.⁷⁴

Rather than the Creppy Directive, which essentially is a blanket-rule mandating the closure of all removal proceedings; an alternative approach that evaluates case by case is not only feasible,

⁶³ *North Jersey Media Group, Inc.*, 308 F.3d at 220.

⁶⁴ *Id.* at 219. (citing *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) (noting that terrorism or other special circumstances might warrant heightened deference to the judgments of the political branches with respect to matters of national security)). (Citations omitted).

⁶⁵ *North Jersey Media Group, Inc.*, 308 F.3d at 221.

⁶⁶ *Id.*

⁶⁷ *Id.* at 227.

⁶⁸ *Id.* at 217-18.

⁶⁹ *North Jersey Media Group, Inc.*, 308 F.3d at 218.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *North Jersey Media Group, Inc.*, 308 F.3d at 219.

⁷⁴ *Detroit Free Press*, 303 F.3d at 708.

it is also narrowly tailored.⁷⁵ Through a case by case approach, the government would be able to keep information and sophisticated intelligence confidential through protective orders and in-camera review.⁷⁶ Even under the Creppy Directive, a terrorist group with sophisticated intelligence would certainly be aware if one of its members were in custody.⁷⁷ Further, in light of the burden the government has in deportation proceedings, and with its near plenary power, the government can easily control what information or evidence it introduces.⁷⁸ The Creppy Directive is overbroad and indiscriminate.⁷⁹ Under the Creppy Directive, the government could effectively close any public or criminal hearing in the name of national security, claiming to prevent the risk of terrorists acquiring “mosaic intelligence.”⁸⁰

Perhaps the strongest argument against a case by case approach is that judges lack expertise in the area of national security, and are not equipped with all the intelligence to see the mosaic, therefore the discretion to close hearings should not fall to the court, but to the executive branch.⁸¹ However, when balancing the government’s interests of national defense and the public interest, with the fear of abusing the first amendment, a case by case approach advances the goals of the government in a narrowly tailored fashion.⁸²

IV. Conclusion

“Implicit in the term national defense is the notion of defending those values and ideals which set this nation apart.”⁸³ Closure of some special interest cases may be necessary for the protection of national security, but a blanket rule is overbroad.⁸⁴ The history of openness of deportation proceedings is quite limited, and does not support the requirement of openness to establish a First Amendment right of access as required by *Richmond Newspapers*.⁸⁵ The government’s interest in national security and preventing terrorism is certainly compelling.⁸⁶ The government believes that closing those special interest proceedings is necessary in advancing those interests.⁸⁷ However, there are concerns that the Creppy

⁷⁵ *Id.* at 708-09.

⁷⁶ *Id.* at 708.

⁷⁷ *Id.*

⁷⁸ *Detroit Free Press*, 303 F.3d at 709.

⁷⁹ *Id.* at 708.

⁸⁰ *Id.* at 709.

⁸¹ *North Jersey Media Group, Inc.*, 308 F.3d at 219.

⁸² *Detroit Free Press*, 303 F.3d at 710.

⁸³ *North Jersey Media Group, Inc.*, 308 F.3d at 227 (Scirica, J., dissenting).

⁸⁴ *Id.* at 227-28 (Scirica, J. dissenting).

⁸⁵ *Id.* at 220; see *supra* notes 10-12, 29, &34 and accompanying text (establishing that in a two-part test to determine whether there is a First Amendment right of access, the court must determine if such a proceeding has a history of openness).

⁸⁶ *Detroit Free Press*, 303 F.3d at 706.

⁸⁷ *North Jersey Media Group, Inc.*, 308 F.3d at 219.

Directive poses a real threat to democracy, and significantly infringes on Constitutional rights and privileges.⁸⁸

Given the importance of the constitutional rights involved, which must be vigorously guarded, and the compelling interests that the government has in protecting the public from the dangers and threats of terrorism in the post September 11th world, only a narrowly tailored approach can satisfy both demands. Because the Creppy Directive is overbroad it will necessarily infringe upon the rights provided in the Constitution. The case by case approach on the other hand is a less restrictive alternative, and will provide individualized measures such as protective orders, and in-camera review to safeguard and protect sensitive information while simultaneously providing a safeguard of our divinely inspired Constitutional rights.

⁸⁸ *See supra* note 65.

HOW CORN SUBSIDIES AND NAFTA ARE WEAKENING OUR BORDERS ONE KERNEL AT A TIME

AMANDA LYON

I. Introduction

The United States was founded on morals and ideals supporting and protecting agrarian society.⁸⁹ However, it has now become self-defeating in its national goals and policies due to short sided legislative actions that fail to evaluate long term effects.⁹⁰ President Obama in his inaugural address stated:

To the people of poor nations, we pledge to work alongside you to make your farms flourish and let clean waters flow; to nourish starved bodies and feed hungry minds. And to those nations like ours that enjoy relative plenty, we say we can no longer afford indifference to the suffering outside our borders, nor can we consume the world's resources without regard to effect. For the world has changed, and we must change with it.⁹¹

The goals set out by President Obama are clear: as Americans we will help fight world hunger, we will invest in sustainable agriculture, and we will stop environmental degradation.⁹² However, it would shock most Americans to learn that the piece of legislation standing in direct opposition to achieving this goal is before Congress to be reenacted for the sixteenth time.⁹³

This article will give an overview of how agricultural subsidies authorized in the U.S. Farm Bill generate poverty, illegal immigration, environmental degradation, loss of genetic diversity in crops, and drug smuggling in the United States.⁹⁴ It proceeds by briefly looking the history corn subsidies and the Farm Bill in America.⁹⁵ It will also look at the economic history of Mexico leading to its adoption of the North American Free Trade Agreement or "NAFTA".⁹⁶ This article then advances the argument that the very subsidies that are supposedly sustaining the health and vitality of our nation are in fact contributing to major issues of national security

⁸⁹ William S. Eubanks II, *A Rotten System: Subsidizing Environmental Degradation and Poor Public Health with Our Nation's Tax Dollars*, 28 STAN. ENVTL. L.J. 213, 217 (2009).

⁹⁰ *Id.*

⁹¹ Barack Obama, Inaugural Address (Jan. 20, 2009) (transcript available at <http://www.whitehouse.gov/blog/inaugural-address/>).

⁹² *Id.*

⁹³ See Agriculture Reform, Food, and Jobs Act of 2012, S. 3240, 112th Cong. § 2 (2012) (authorizing subsidies for major producers to support agricultural production and growth at maximum rates).

⁹⁴ See *infra* notes 50-51, 58-71, 76, 86 and accompanying text.

⁹⁵ See *infra* notes 11- 20 and accompanying text.

⁹⁶ See *infra* notes 21-39 and accompanying text.

and thus should be reduced while quotas and tariffs in poor countries are reinstated.⁹⁷ This article will also address objections that these policies are in fact fair and necessary to America's economic recovery.⁹⁸ Finally, this article will conclude with a brief synopsis of the article and the best solutions to remedy this serious situation.⁹⁹

II. Background

A. A BRIEF HISTORY OF THE FARM BILL IN AMERICA

The Farm Bill's initial enactment and goal was to stabilize the agricultural industry during the Great Depression in hopes of pulling the United States out of its economic down turn.¹⁰⁰ President Roosevelt accomplished this by stopping overproduction, paying farmers subsidies to make up the difference in lost income, and creating an infrastructure that could consume and use the surplus.¹⁰¹ Though the Farm Bill was enacted over seventy-nine years ago the Farm Bill continues to support producers with many of the same programs.¹⁰²

At the time the Farm Bill was enacted the average size of farms was approximately 147 acres.¹⁰³ The most recent Farm Census conducted by the United States Department of Agriculture estimated the average farm size in America is currently 418 acres.¹⁰⁴ Currently 125,000 farms out of the 2,204,792 in America produce seventy five percent of the value of US agricultural production.¹⁰⁵ These large monoculture operations are also receiving the largest amounts of government subsidies.¹⁰⁶ Corn producers receive the largest share of these subsidies receiving over four billion dollars a year from the Farm Bill alone.¹⁰⁷ This combined with the recent surge of government funding for ethanol through the Energy Policy Act of 2005 and the Energy Independence and Security Act of 2007, allow large agri-business to capitalize on high corn prices.¹⁰⁸

B. MEXICO'S ADOPTION OF NAFTA AND ITS EFFECTS

In 1933, corn surplus was given to school lunch programs or was eliminated by 'burning, dumping into rivers, or selling

⁹⁷ See *infra* notes 40-48 and accompanying text.

⁹⁸ See *infra* notes 53-57, 83-85 and accompanying text.

⁹⁹ See *infra* notes 95-106 and accompanying text.

¹⁰⁰ William S. Eubanks II, *A Rotten System: Subsidizing Environmental Degradation and Poor Public Health with Our Nation's Tax Dollars*, 28 STAN. ENVTL. L.J. 213, 221-222 (2009).

¹⁰¹ *Id.* at 219.

¹⁰² *Id.*

¹⁰³ S.COMM. ON AGRICULTURE, NUTRITION, AND FORESTRY 1825 – 1998. S. Doc. 105-24, at Chap 3 (1998).

¹⁰⁴ 2007 Census of Agriculture, Farm Numbers, USDA.

¹⁰⁵ *Id.* at 4.

¹⁰⁶ Eubanks, *supra* note 12, at 227.

¹⁰⁷ Zachary M. Wallen, *Far From A Can Of Corn: A Case For Reforming Ethanol Policy*, 52 ARIZ. L. REV. 129, 137 (2010).

¹⁰⁸ *Id.* at 137-138

overseas”.¹⁰⁹ The most common practice today is ‘dumping’ commodities on struggling economies through free trade agreements.¹¹⁰ Though large agri-business would classify this as selling overseas the undercutting of domestic prices in such large volumes is truly a ‘dumping’ of excess commodities.¹¹¹ “As of 2003, dumping margins for U.S. commodity crops supported under the Farm Bill included wheat exports at an average price of twenty-eight percent below the cost of production, corn at ten percent, and rice at twenty-six percent below the cost of production.”¹¹² This undercutting allows surplus to be economically disposed of with limited direct effects on domestic market prices.¹¹³ The North American Free Trade Agreement “NAFTA,” set up between the United States and Mexico in 1994, is an excellent example of an agreement that allows this type of profit scheme.¹¹⁴

From 1930 until 1982 Mexico had the economic strategy of import substitution industrialization (ISI).¹¹⁵ The Mexican government protected domestic agriculture through strong tariffs and quotas on imported goods as well as, “price supports, subsidies for agricultural inputs (such as fertilizers and machinery), credit, and insurance.”¹¹⁶ Then, in 1982, the debt crisis ruined the Mexican economy forcing it to seek loans from the World Bank and the International Monetary Fund.¹¹⁷ The conditions of these loans required Mexico to change its economic structure to export-oriented industrialization strategy.¹¹⁸ Further, they required Mexico to replace its strict tariffs and quotas with looser ones and to restructure its subsidies to go to large agro-exporters.¹¹⁹ Finally, they pushed Mexico to allow privatization of certain economic sectors including agriculture; which allowed for large American agricultural enterprises like Archer Daniels Midland and Cargill to come in and exploit cheaper labor markets.¹²⁰ This created the perfect storm for small Mexican producers as they were no longer protected from foreign large agri-business but rather they were forced to compete with them.¹²¹ Mexico continued to struggle for over a decade with its

¹⁰⁹ Eubanks, *supra* note 12, at 220 (quoting The Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31 (1933)).

¹¹⁰ *Id.*

¹¹¹ Karen Hansen-Kuhn, *Making U.S. Trade Policy Serve Global Food Security Goals*, 11 SUSTAINABLE DEV. L. & POL’Y 9 (2011).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *North American Free Trade Agreement Implementation Act of 1993*, Pub. L. No. 103-182, 1993 U.S.C.C.A.N. (107 Stat.) 2057..

¹¹⁵ Carmen G. Gonzales, *An Environmental Justice Critique of Comparative Advantage: Indigenous Peoples, Trade Policy, and The Mexican Neoliberal Economic Reforms*, 32 U. PA. J. INT’L L. 723, 745 (2011).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 745-746

¹¹⁸ *Id.* at 746.

¹¹⁹ Gonzales, *supra* note 27, at 746.

¹²⁰ *Id.* at 755.

¹²¹ *Id.* at 756

new economic structure and finally signed NAFTA in 1994 in hopes of finding economic stability.¹²²

In concept, NAFTA was supposed to encourage a shifting of farmers from large commodity crops being grown more efficiently other places in the world to growing specialty exports that they could really corner the market and capitalize on.¹²³ To do this NAFTA required that almost all agricultural tariffs and quotas be lifted over a fifteen year period to be complete by 2008.¹²⁴ The “tariff-rate quota” system specifically would allow a certain amount of corn to come into the country tariff free.¹²⁵ This tariff would then be expanded by three percent each year until the cutoff date.¹²⁶ During this period farmers would receive support and subsidies to transition their farms into different crops.¹²⁷

Instead the tariffs and quotas were all removed in just over two years, from January 1994 to August 1996.¹²⁸ This led to quadrupled exports of corn from the U.S. in to the Mexican economy severely undercutting the price and bankrupting of millions of subsistence farmers.¹²⁹ Very few farmers switched to other crops rather they attempted to compete with the new inventory.¹³⁰ One cash crop that farmers switched to was marijuana.¹³¹ Further, many of the urban centers did not see the necessary increase in industrialization and jobs economists promised NAFTA would create for migrant workers.¹³² Thus these workers were left with no choice but to try to immigrate legally or illegally to U.S. in hopes of escaping poverty.¹³³

After the attacks on September 11, 2001 the Department of Justice relinquished its control over the Immigration and Naturalization Service “INS” to the Department of Homeland Security “DHS” according to the Homeland Security Act.¹³⁴ This order gave DHS the tasks of securing and policing U.S. borders against illegal immigration.¹³⁵ It also granted DHS with the power to search people entering the country for any illegal substances like marijuana.¹³⁶

¹²² *Id.* at 755

¹²³ *Gonzales, supra* note 27, at 746.

¹²⁴ *Id.* at 747.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Gonzales, supra* note 27, at 746.

¹²⁸ *Id.* (noting this was 13 years faster than the farmers were originally promised.)

¹²⁹ *Id.* at 748

¹³⁰ *Id.* at 755.

¹³¹ *Gonzales, supra* note 27, at 755.

¹³² *Id.* at 752.

¹³³ *Id.*

¹³⁴ Lauren E. Sasser, *Waiting in Immigration Limbo: The Federal Court Split over Suits to Compel Action on Stalled Adjustment of Status Applications*, 76 *FORDHAM L. REV.* 2511, 2514 (2008).

¹³⁵ *Id.*

¹³⁶ *Id.*

III. Argument

When corn subsidies in the United States are used in combination with current free trade agreements they produce unanticipated and unwanted effects for the public while large agri-business expand their profit margins.¹³⁷ Since the enactment of NAFTA illegal immigration from Mexico has increased, as well as, the amount of drugs seized at the U.S.-Mexico border, both are obvious and serious national security concerns.¹³⁸ Other national security concerns that are not so obvious are environmental degradation, genetic diversity loss, and increased poverty.¹³⁹

The Farm Bill in combination with NAFTA is being used as a smoke screen by large agri-business to enjoy record profit margins while ignoring the destructive effects of these policies.¹⁴⁰ Agricultural lobbyists claim current policies are about saving small farmers when in fact the smallest farms numbering over two million receive no subsidies at all.¹⁴¹ Subsidies keep farming lucrative which allows for producers to maximize yields leading to surplus because the free market is not regulating price on a supply and demand model.¹⁴² This surplus became even more lucrative to produce when NAFTA demolished the quotas and tariffs that once protected Mexico's domestic corn production.¹⁴³ With no quotas and tariffs in place domestic unsubsidized corn from Mexico had to compete with the pricing of subsidized corn from the U.S. while the U.S. kept its protective quotas and tariffs in place.¹⁴⁴ The difference in price adversely affected all three classes of corn producers in Mexico, but did so in very different ways.¹⁴⁵

First, large scale farmers or agro-exporters tried to increase their yield by significantly increasing the use of fertilizers, pesticides, and irrigation water.¹⁴⁶ All three practices led to severe environmental degradation with the most serious being the extreme taxing of the already limited water supply.¹⁴⁷ Increased salinization of the soil, which is almost impossible to reverse, and an accumulation of chemicals in waterways were also seen.¹⁴⁸ Another

¹³⁷ William S. Eubanks II, *A Rotten System: Subsidizing Environmental Degradation and Poor Public Health with Our Nation's Tax Dollars*, 28 STAN. ENVTL. L.J. 213, 222 (2009).

¹³⁸ *Id.* at 238; Carmen Gonzales G., *An Environmental Justice Critique of Comparative Advantage: Indigenous Peoples, Trade Policy, and The Mexican Neoliberal Economic Reforms*, 32 U. PA. J. INT'L L. 723, 755 (2011).

¹³⁹ Nancy Ehrenreich, Beth Lyon, *The Global Politics of Food: A Critical Overview*, 43 U. MIAMI INTER-AM. L. REV. 1, 8, 9, 12, 13, (2011).

¹⁴⁰ William S. Eubanks II, *A Rotten System: Subsidizing Environmental Degradation and Poor Public Health with Our Nation's Tax Dollars*, 28 STAN. ENVTL. L.J. 213, 234 (2009).

¹⁴¹ *Id.* at 228.

¹⁴² *Id.* at 227.

¹⁴³ Gonzales, *supra* note 27, at 748.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 750.

¹⁴⁶ *Id.*

¹⁴⁷ Gonzales, *supra* note 27, at 750-51.

¹⁴⁸ *Id.*

serious side effect was an increased number of poisonings by fertilizers and pesticides in the workers and surrounding communities.¹⁴⁹

Intermediate farmers, who serviced regional and local markets, continued with their steady output but the large decrease in profits forced them to cut the number of laborers they could hire.¹⁵⁰ This directly affected the third group of farmers, small subsistence farmers, as they made up part of this work force.¹⁵¹ Further, time and labor intensive conservation practices such as terracing or planting were no longer an option.¹⁵² Increasing the amount of soil erosion from fields and forcing marginal lands to be brought into production.¹⁵³

The small subsistence farmers, ate most of what they produced and used excess to pay for household needs like education and health care.¹⁵⁴ They could not meet the prices of the new inventory and thus could not produce any income.¹⁵⁵ Many tried to expand their fields through massive slash and burn measures which led to increased deforestation, destruction of ecosystems, and loss of biodiversity and soil.¹⁵⁶ Ultimately many were forced to move to the urban centers closest to them separating families and increasing poverty.¹⁵⁷ However, the urban centers never developed in a way that could facilitate these major indigenous exoduses happening throughout Mexico.¹⁵⁸ This only increased the hardship and pushed immigration into stronger markets like US.¹⁵⁹

Since the enactment of NAFTA, immigration has steadily risen from 350,000 people a year to 500,000.¹⁶⁰ Reports estimate that 8 million of the 12 million current undocumented workers in the U.S. are NAFTA casualties.¹⁶¹ The U. S. goes further and further in debt each year fighting to keep its borders closed while spending billions to support one of the main causes for immigration from Mexico.¹⁶² Further, border patrol has confiscated double the amount of marijuana at the U.S. Mexico border since NAFTA passed.¹⁶³ Many of the farmers who could not compete with corn prices sought to find a

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 751.

¹⁵¹ Gonzales, *supra* note 27, at 751.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* (noting the group referred to as small subsistence farmers, was comprised of mostly indigenous people whose ancestors farmed the land for thousands of years before them.)

¹⁵⁵ Gonzales, *supra* note 27, at 751.

¹⁵⁶ *Id.* at 752.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Gonzales, *supra* note 27, at 752.

¹⁶⁰ *Id.* at 725.

¹⁶¹ *Id.* at 753.

¹⁶² *Id.* at 755.

¹⁶³ Gonzales, *supra* note 27, at 755.

different better paying crop, and the drug cartels seized the opportunity to step in where the government had failed.¹⁶⁴

Another major concern is the rapid rate at which genetic diversity in corn plants is being lost.¹⁶⁵ Mono-cultured crops are being bred for the highest yields under current climate and soil conditions.¹⁶⁶ However, as climate change continues drought and unseasonal flooding could potentially increase and destroy entire harvests.¹⁶⁷ Also, these policies have led to great civil unrest and conflict amongst the Mexican population.¹⁶⁸ One hundred thousand farmers marched on Mexico's capital in 2003 demanding the Mexican government change the terms of NAFTA.¹⁶⁹ Since then protests have involved creating massive traffic jams at rush hour, hunger strikes, and violent protests.¹⁷⁰

Large agri-business claims these subsidies and supports are essential to feeding the American public and fighting domestic poverty.¹⁷¹ They claim without the Governments involvement in price supports they would not be capable of doing their jobs and ensuring America's independence in times of food crisis.¹⁷² However, these price supports only support the production of five crops: corn, cotton, rice, wheat, and soybeans.¹⁷³ These products cannot sustain a healthy population and instead foster obesity and malnutrition.¹⁷⁴ Further the price supports for these crops do not also require that free trade agreements be written so inequitably.¹⁷⁵

The United States is already committed to goals and policies that require it to stop using NAFTA and other free trade agreements because of the economic disparity they cause.¹⁷⁶ "[F]ormal equality among nations with vastly unequal economic power will only reinforce the dominance of the North by failing to address the entrenched economic imbalances rooted in centuries of Northern colonial exploitation and decades of Northern protectionism."¹⁷⁷ The United States cannot pretend to be on equal terms with partners who do not have the economic strength and diversity it experiences.¹⁷⁸

¹⁶⁴ *Id.*

¹⁶⁵ Nancy Ehrenreich, Beth Lyon, *The Global Politics of Food: A Critical Overview*, 43 U. MIAMI INTER-AM. L. REV. 1, 12 (2011).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Gonzales, *supra* note 55, at 754.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Eubanks, *supra* note 49, 226.

¹⁷² *Id.*

¹⁷³ *Id.* at 227.

¹⁷⁴ *Id.* at 239.

¹⁷⁵ Karen Hansen-Kuhn, *Making U.S. Trade Policy Serve Global Food Security Goals*, 11 SUSTAINABLE DEV. L. & POL'Y 9, 11 (2011).

¹⁷⁶ *Id.* at 9.

¹⁷⁷ González, *Deconstructing the Mythology of Free Trade: Critical Reflections on Comparative Advantage*, 17 BERKELEY LA RAZA L.J. 65, 75 (2006).

¹⁷⁸ Hansen-Kuhen *supra* note 88, at 9.

Further, it cannot force these struggling countries to repeal tariffs and quotas and restructure their economies when it is not willing to do the same.¹⁷⁹ Encouraging legal precedent was set when Brazil brought suit against the United States for distorting trade prices through subsidies for cotton.¹⁸⁰ The World Trade Organization awarded Brazil \$3 billion dollars in damages in this case which has given hope to several others who have filed similar lawsuits against the U.S.¹⁸¹ Rulings like these will begin to force the United States to be honest about its practices and what effect subsidies are really having on global markets.¹⁸²

Domestic policy and legislative reform in the United States is necessary to undue the current system wrongs.¹⁸³ Those in power must be educated so they can see the causal links between these agreements and issues discussed.¹⁸⁴ “It is now time for the United States to accept the consequences of these actions by first recognizing the connection between our national policies and immigration and by then taking action to modernize the Farm Bill and other xenophobic national policies to eliminate trade distortion the severely disadvantages the developing world.”¹⁸⁵ In writing better policy and modernizing the Farm Bill one improvement would be exempting impoverished and food import dependent countries from being required to remove domestic agricultural protections like subsidies and tariffs¹⁸⁶. Also this would avoid mass rural exoduses to places unready to receive them and sharp increases in poverty.¹⁸⁷ Another improvement would be to require the USDA to slowly start removing subsidies from large monocultures and giving them to smaller more diverse farms that would not have the same dumping power.¹⁸⁸

IV. Conclusion

Corn subsidies put in place to protect America’s farmers through the Farm Bill have serious unexpected ramifications that are threatening our nation’s health.¹⁸⁹ These subsidies when combined with NAFTA have been directly linked to increased drug smuggling across the U.S. - Mexico border and illegal immigration.¹⁹⁰ Further, these policies are destroying the environment and causing genetic diversity loss which as resources become scarce due to global over use

¹⁷⁹ Gonzales, *supra* note 55, 759.

¹⁸⁰ Eubank, *supra* note 49, 235.

¹⁸¹ *Id.*

¹⁸² WTO, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, Cambridge Univ. Press, ©World Trade Organization 1999; hereafter referred to as *WTO Legal Texts*. Text of the Agreement on Agriculture is available online at http://www.wto.org/english/docs_e/legal_e/14-ag.pdf.

¹⁸³ *Id.* at 240.

¹⁸⁴ *Id.* at 226.

¹⁸⁵ *Id.* at 239.

¹⁸⁶ Gonzales at 748.

¹⁸⁷ *Id.* at 752.

¹⁸⁸ Eubanks, *supra* note 49, 228.

¹⁸⁹ *Id.* at 214, 215.

¹⁹⁰ Gonzales, *supra* note 55, 754.

will become a new type of threat to national security¹⁹¹. While agribusiness claims these subsidies are a necessary evil NAFTA and its anti-quota and tariff provisions are not.¹⁹²The scenario that played out in Mexico is doomed to repeat itself if U.S. subsidies are not reduced and trade agreements are not redrafted.¹⁹³

It is necessary to take a hard look at unintended effects of domestic policies when we hold ourselves out as a nation that is intolerant of inequity and injustice. If current domestic policies are creating the poverty we are seeking to eradicate we are only being self-defeating. Economically we also must look at the entire picture to see we are paying for so much more when we allow farmers of commodity crops to collect massive subsidies and then allow them to sell surplus for greater profit into economies that can't handle the inventory. The costs of fighting illegal immigration and the war on drugs are in the billions. Further the real costs of genetic diversity loss and environmental degradation has yet to be seen. Revisions of these policies make logical, moral, and economic sense.

¹⁹¹ Lyon, *supra* note 77, 12..

¹⁹² Hansen-Kuhn, *supra* note 88, 11.

¹⁹³ *Id.* at 13.

**NATIONAL SECURITY: THE IMPACT ON U.S.
FOREIGN POLICY ARISING FROM PRIVATE
ACTIONS INITIATED AGAINST FOREIGN
NATIONS FROM WITHIN THE UNITED
STATES.**

ROBERT M. TWISS

Abstract

This paper looks at the potential for private actions initiated from the United States and directed against foreign nations to have an effect upon the foreign policy of the United States. The paper looks at the obligations of a nation-state to prevent its sovereign territory to be used to stage private terrorist acts against a foreign nation. The paper summarizes the neutrality and anti-terrorism statutes of the United States which can be used to meet our obligations under international law. The paper then takes the position that the United States should enforce aggressively the domestic laws designed to prevent those private actions which are directed against foreign governments and their residents. The United States is required by international law to take steps to prevent such military and terrorist operations from originating in the United States, and a failure to do so can have an adverse effect on American foreign policy. In addition, it is in the best interests of the United States to aggressively enforce these laws. The paper takes a different position than those who argue that enforcement of neutrality and anti-terrorism laws involve impermissible anticipatory prosecutions which trespass on fundamental values of liberty or compromise the traditional role of culpability in criminal law.

**NATIONAL SECURITY: THE IMPACT ON U.S. FOREIGN POLICY
ARISING FROM PRIVATE ACTIONS INITIATED AGAINST
FOREIGN NATIONS FROM WITHIN THE UNITED STATES¹**

Assume, for a moment, that a group of foreign nationals gets together in a foreign country and agree among themselves to train for and then carry out an act of terrorism against the United States, such

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as the complete destruction of the World Trade Center in New York City, and in the process kill approximately 3,000 Americans. Assume also that the domestic intelligence and law enforcement agencies of the foreign nation in which the conspirators met and trained, and from which the conspirators launched their terrorist act, were aware of the terrorists' plans and took no steps whatsoever to disrupt and dismantle the terrorist group, or prevent their attack on the United States. We can anticipate that the United States would respond militarily against any nation, which provides safe harbor to terrorists and does nothing to prevent a terrorist attack about which the host government was aware.

Now assume, for the sake of argument, that a group of American citizens and permanent residents get together in the United States and formulate a plan to engage in a terrorist attack in a foreign county, intending to kill and maim citizens of that country, and destroy public and private property. Assume that the group engages in training and preparations for the foreign attack in the United States, ships arms and other materials to staging areas overseas, and then carries out the terrorist attack in a foreign country. Assume also that officials of the United States government had knowledge of the terrorist plot, its target and timelines, and took no steps to disrupt and dismantle the terrorist cell, or otherwise prevent the terrorist attack in the foreign nation.

Would the nation victimized by the terrorist attack in the second example have any different rights to retaliate against the United States than the United States would have had in the first example? The facts are exactly the same. Only the location where the training took place and from which the attack originated, and the country in which the attack took place are different.

Now, let's assume that it simply *appeared* to the victim country that officials of the United States had actual knowledge of the terrorist plot, and took no steps to prevent the terrorist attack, but in fact the United States did *not* have actual knowledge of the plot. Do perceptions become reality for the decision-makers in the victim country with regard to that country's posture militarily and diplomatically vis-à-vis the United States?

This paper looks at the potential for private actions initiated from the United States and directed against foreign nations to have an effect upon the foreign policy of the United States. The paper takes the position that the United States should enforce aggressively the domestic laws designed to prevent those private actions which are directed against foreign governments and their residents. It is in the best interests of the United States to aggressively enforce these laws. In addition, the United States is required by international law to take steps to prevent such military and terrorist operations from originating in the United States, and a failure to do so can have an adverse effect on American foreign policy.

International Law

The Restatement (Third) of Foreign Relations Law of the United States provides that international law is that which has been accepted by the international community of States². International law “arises from international conventions or agreements, international custom, general principles of law recognized by civilized nations, and judicial decisions and the teachings of the most highly qualified publicists of various nations. . . . Customary Law is made up of two distinct elements ‘general practice’ and ‘its acceptance as law.’”³

Prevention of Terrorist Attacks from Home Territory

A nation is expected to be able to exercise dominion and control over its sovereign territory and citizens. A nation has an “international responsibility of government to prevent its territory from being used as a base for launching terrorist attacks against other countries.”⁴

This is due to the normative principle that States have an obligation to other states based upon their ‘claim to territorial sovereignty.’ . . . [t]erritorial sovereignty... involves the exclusive right to display the activities of a State. This right has a corollary duty: the obligation to protect within the territory the rights of other States, in particular, their right to integrity and inviolability in peace and in war.’ It is well settled that a State is bound to use due diligence to prevent the commission within its dominions of criminal acts against another nation or its people.⁵

² See RESTATEMENT (THIRD) OF INTERNATIONAL RELATIONS LAW § 102(1) (1987) (stating:

(1) A rule of international law is one that has been accepted as such by the international community of states

(a) In the form of customary law;
(b) By international agreement; or

By derivation from general principles common to the major legal systems of the world.)

³ Mark Popiel, *Redrafting the Right of Self-Defense in Response to International Terrorism*, 6 GONZ. J. INT’L L. 1, 2 (2002-03), available at www.gonzagajil.org/content/view/91/26 (quoting Robert J. Beck and Anthony Clark Arend, “Don’t Tread on Us”: *International Law and Forcible State Responses to Terrorism*., 12 WIS. INT’L L. J. 153, 157 (1994).

⁴ *U.S. v. Duggan*, 743 F.2d 59, 74 (2d Cir. 1984) (citing S. Rep. No. 95-701, at 30 (1978)). See also *The Three Friends*, 166 U.S. 1, 5 (1897); *United States v. Johnson*, 952 F.2d 565, 572-73 (1st Cir. 1992); Jules Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, 24 HARV. INT’L L. J. 1, 6 (1982).

⁵ Popiel, *supra* note 3, at 12 (quoting Michael W. Reisman, “Symposium Legal Responses to International Terrorism: *International Legal Responses to Terrorism*,” 22 HOUS. J. INT’L L. 3, 50 (1999) (citing *Island of Palmas Case U.S. v. Netherlands*), 2 R.I.A.A. 829, 839 (1928) and *S.S. Lotus (Fr. v. Turk.)* 1927 P.C.I.J. (ser. A) No. 10, at 4, 88 (Moore, J., *dissenting*)).

The United Nations General Assembly and Security Council have repeatedly weighed in on the duty of States to ensure that their sovereign territory is not used by terrorists to plan attacks upon other nations.⁶ In 1985, the U.N. General Assembly indicated that it was the obligation of all member States to prevent the use of their territory to benefit terrorist acts. The General Assembly “[i]nvites all States to take all appropriate measures at the national level with a view to ... the prevention of the preparation and organization in their respective territories of (international terroristic) acts directed against other States.”⁷ General Assembly Resolution 40/61 also called upon all States to fulfill “their obligations under international law to refrain from ... acquiescing in activities within their territory directed towards the commission of such acts.”⁸

In 1987, the General Assembly enacted Resolution 42/159, which: Urges all States to fulfil their obligations under international law and to take effective and resolute measures for the speedy and final elimination of international terrorism and, to that end:

- (a) To prevent the preparation and organization in their respective territories, for commission within or outside their territories, of terrorist acts and subversive acts directed against the other States and their citizens;
- (b) To ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts.⁹

In 1992, the U.N. Security Council enacted Resolution 748, condemning Libya for not taking adequate and effective steps to prevent terrorism from originating in that country. In that Resolution, the Security Council affirmed that States have a duty to refrain from acquiescing in terrorist acts originating from its sovereign territory.¹⁰

In 2001, days after the al-Qaeda attack on September 11th, the United Nations Security Council enacted what it called a “Wide-Ranging Anti-Terrorism Resolution.”¹¹ The Security Council decided that States should prohibit their nationals or persons or entities in their territories from making assets available to terrorists, and that States must “take the necessary steps to prevent the commission of

⁶ See John Altenburg, *Terrorism, State Responsibility, and the Use of Military Force*, 4 CHI. J. INT'L L. 97, 105-06 (2003) and Popiel, *supra* note 3, at 17-22.

⁷ G.A.RES. 40/61 ¶ 5, U.N. Doc. A/RES/40/61 (Dec. 9, 1985).

⁸ *Id.* at ¶ 6.

⁹ G.A. Res. 42/159, ¶5(a)-(b), U.N. Doc. A/Res/42/159 (Dec. 7, 1987).

¹⁰ S.C. Res. 748, U.N. Doc. S/RES/748 (March 31, 1992) (*quoting* U.N. Charter art. 2, para. 4: Every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when such acts involve a threat or use of force. *Id.*).

¹¹ See S.C. Pres. Statement 2001/7158, U.N. Doc. S/PREST/2001/7158 (Sept. 28, 2001).

terrorist acts; deny safe haven to those who finance, plan, support, commit terrorist acts and provide safe havens as well.”¹² The Security Council also declared that States should ensure that anyone who has participated in financing, planning, preparation or perpetration of terrorist acts, or in supporting those terrorist acts is brought to justice, and that States should take steps to prevent and suppress terrorist acts.¹³

Several United States federal courts have held that the nation-states have an obligation under international law to ensure that its territory is not used by private terrorist organizations to initiate actions against a foreign nation.¹⁴ These courts recognized that States have an “international responsibility of government to prevent its territory from being used as a base for launching terrorist attacks against other countries.”¹⁵

To the extent that a private organization uses the territory of a nation-state, and receives the protection of that nation’s sovereignty to plan and organize military expeditions against another nation, an inference can be raised that the military operation either is sponsored by, or has at least the tacit approval of, the nation whose sovereign territory is being used to mount the expedition.¹⁶ The private venture has the potential to be seen as an act of war, sufficient to bring the host nation into armed conflict, or at least diplomatic difficulty, with the nation where the military action takes place.¹⁷

State of the World

There are a number of nations in the world today, which are either unwilling or unable to prevent terrorists and other private actors from using their territory to organize, plan, train, supply and initiate military style operations against the sovereignty and peoples of other nations. These include Sudan, Afghanistan, Algeria, the Palestinian Territories in Gaza and the West Bank, Lebanon, Syria, Iraq, Iran, and Pakistan.¹⁸

In several of these instances, the prevailing world view is that the host nation affirmatively is sponsoring the terrorist and military actions. All of those nations are in diplomatic difficulties with the nations which are victimized by the groups using their territory, and in some instances engaged in actual hostilities with the victimized nation. See, for instance, Israeli’s 1982 occupation of southern Lebanon to prevent that area from being used to launch rocket and

¹² *Id.*

¹³ S.C. Res. 1373, ¶ 2(b)-(e), U.N. Doc. S/RES/1373 (Sept. 28, 2001).

¹⁴ *Duggan, supra* note 4, 743 F. 2d at 74; *Johnson, supra* note 4, 952 F.2d. at 572-73.

¹⁵ *Duggan, supra* note 4, 743 F. 2d at 74.

¹⁶ *United States v. Chhun*, 2008 WL 793386, at 2 (C.D. Cal., March 20, 2008).

¹⁷ *Id.*

¹⁸ See Carlotta Gall and Eric Schmitt, *U.S. Questions Pakistan’s Will to Stop Taliban*, N.Y. TIMES, April 24, 2009, at A1, A8.

other terrorist attacks against northern Israel, and Israel's 2006 artillery and airstrikes in Lebanon in response to Hezbollah attacks on Israeli Defense Force positions in Northern Israel.¹⁹

The apparent failure of host nations to prohibit the use of their territories for terrorist activities is not limited to those states with which the United States has an adversarial relationship:

Yet Pakistani authorities deployed just several hundred poorly paid and equipped constabulary forces to Buner²⁰, who were repelled in a clash with the insurgents, The limited response set off fresh scrutiny of Pakistan's military, a force with 500,000 soldiers and a similar number of reserves."²¹

At the time of the above quoted article in 2009, the Pakistani response to actions of Taliban and *al Qaeda* operatives using its territory to train and harbor their military and terrorist forces set off scrutiny of the political leadership of Pakistan, and raised the risk of direct military intervention into Pakistan.²² Fast-forward two years to the direct military intervention of U.S. forces on Pakistani soil to neutralize Osama bin Laden.²³ In that instance, the United States took direct and unilateral military action within the territorial limits of a country with which it was and is at peace. Public opinion around the world is not uniformly supportive of U.S. actions in Pakistan, which in turn affects U.S. foreign policy and endangers U.S. national security.

At least one commentator has offered the opinion that the language in declarations of the United Nations "leaves open the possibility for terrorist actions to be imputed onto States that deliberately turn a blind eye to terrorist activities within their borders, since that may be held as acquiescence to such actions or otherwise as 'encouraging' these deeds."²⁴ Another commentator has suggested that "a variety of scholars and other writers have argued that substantial support of terrorists by a state can be sufficient to impute the actions of the terrorists to the supporting state."²⁵

When a government provides weapons, technical advice, transportation, aid and encouragement to terrorists on a substantial

¹⁹ See Scott Wilson, *Dual Crises Test Olmert as Leader* WASH. POST, Saturday, July 15, 2006; Charles J. Hanley, *Two Key Americans see 1982 in Lebanon 2006*, ASSOCIATED PRESS, July 23, 2006.

²⁰ Buner is an province in the Northern Territories of Pakistan, East of Peshawar and South of the Swat Valley. See Leon Panetta, Director of the CIA, remarks at the Pacific Council on International Policy (May 18, 2009).

²¹ Gall and Schmitt, *supra* note 18.

²² Gall and Schmitt, *supra* note 18, at A1 and A8.

²³ Peter Baker, Helene Cooper, and Mark Mazzetti, *Bin Laden is Dead*, N.Y. TIMES, May 5, 2011.

²⁴ Popiel, *supra* note 3 at 6.

²⁵ Altenburg, *supra* note 6.

scale it is not unreasonable to conclude that the armed attack is imputable to that government.²⁶

The United States Court of Appeals for the District of Columbia Circuit has observed that terrorist acts by private parties have been imputed to a number of different States.

State sponsors of terrorism include Libya, Iraq, Iran, Syria, North Korea, Cuba, and Sudan. These outlaw states consider terrorism a legitimate instrument of achieving their foreign policy goals. They have become better at hiding their material support for their surrogates, which includes the provision of safe havens, funding, training, supplying weaponry, medical assistance, false travel documentation, and the like.²⁷

In *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, the plaintiff's brother was an American citizen living and working in Beirut, Lebanon.²⁸ He was kidnapped by Hezbollah²⁹ and held hostage. While the American citizen was being held by Hezbollah, the United States engaged in airstrikes in Libya in retaliation for a Libyan attack on U.S. servicemen in Germany. Libya made it known that it wanted an American hostage to kill in retaliation for the airstrikes. The Arab Revolutionary Cell ("ARC"), which was tied to Libya, bought Kilburn from Hezbollah, tortured him and killed him. The D.C. Circuit actually went further than to merely impute ARC's actions to Libya. The Court found ARC to be an agent of Libya, such that the actions were not only those of private parties imputable to Libya, but actions by Libya itself.³⁰

In *Daliberti v. Republic of Iraq*,³¹ a district court judge in the District of Columbia also quoted the language in H.R. Rep. No. 104-383 to determine that acts of terrorism should be imputed to Iraq. The court noted that Iraq in the late 1990s "consider[ed] terrorism to be a legitimate instrument of achieving their foreign policy goals."³² The facts in *Daliberti* were somewhat different than in *Kilburn*. There were three sets of plaintiffs, but all three were seized by Iraqi border guards and subsequently imprisoned and treated poorly. In all instances, the Iraqi participants were government employees acting on behalf of the government of Iraq, so no imputation was necessary.

²⁶ *Id.* quoting Oscar Schachter, *The Lawful Use of Force by a State Against Terrorists in Another Country*, in Han, Henry H., Editor, Terrorism and Political Violence: Limits and Possibilities of Legal Control, p. 250 (Oceana 1993).

²⁷ *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1129 (D.C. Cir. 2004), quoting from H.R. Rep. No. 104-383 at p. 62 (1995).

²⁸ *Id.* at 1125.

²⁹ For an in-depth discussion and history of Hezbollah, see Norton, Augustus Richard, "Hezbollah," Princeton University Press, Princeton, NJ (2007).

³⁰ *Kilburn*, at 1130-1131.

³¹ *Daliberti v. Republic of Iraq*, 98 F. Supp.2d 38, 41 (D.C. Cir. 2000).

³² *Id.* at 52., quoting H.R. Rep. No. 104-383, at 181-83.

From the foregoing, it seems absolutely and unmistakably clear that all nations have a duty not only to refrain from sponsoring or supporting terrorist activities, but also to refrain from acquiescing in the use of its sovereign territory by terrorists to plan and prepare terrorist acts in other countries. This duty applies equally to the United States, as it does to Libya, Afghanistan, Sudan, Iraq, or other states.

Impact upon U.S. Foreign Policy

It also is clear that actions which are initiated from the United States, but executed against another state, have an impact upon American foreign policy. “[A] private individual’s involvement in an armed attack on a foreign nation could trigger hostilities, as the foreign nation that perceives the individual’s attack issuing from within the United States might conclude that it was sanctioned by the United States.”³³ Several United States Courts of Appeals also have held that private action within the United States has an impact on U.S. foreign policy.³⁴ The United States has taken the position in litigation that Congress’ intention in enacting the Neutrality Act³⁵ is “to prevent private citizens from interfering in foreign policy matters that were and are the exclusive domain of the government.”³⁶

In *United States v. Duggan, et al*, the evidence showed “defendants [to be] part of a network of men working clandestinely on behalf of [the Provisional Irish Republican Army] to acquire explosives, weapons, ammunition, and remote-controlled detonation devices in the United States to be exported to Northern Ireland for use in terrorist activities.”³⁷ The co-conspirators explained to a cooperating witness that they sought to purchase equipment for use against the British in Northern Ireland, including surface-to-air missiles (“SAMs”) in order to shoot down British helicopters.³⁸ The United States Court of Appeals for the Second Circuit specifically found that the national security interests of the United States are implicated by acts of terrorism conceived and planned within the United States for execution outside of the United States.³⁹

The government points out that if other nations were to harbor terrorists and give them safe harbor for staging terrorist activities against the United States, United States national security would be threatened. As a reciprocal matter, the United States cannot afford to give safe haven to terrorists who seek to carry out raids against other nations. *Thus, international terrorism conducted from the United States, no matter where it is directed, may well have*

³³ *United States v. Chhun*, 513 F.Supp 2d 1179 (C.D. Cal. 2008).

³⁴ *Duggan, supra* note 4, 743 F.2d at 74, *United States v. Johnson*, 952 F.2d 565, 572-73 (1st Cir. 1991).

³⁵ Expedition Against Friendly Nation, 18 U.S.C. § 960 (1984), discussed at length *infra*.

³⁶ *U.S. v. Chhun*, 513 F. Supp. 2d 1179, 1184 (C.D. Cal. 2007).

³⁷ *Duggan, supra* note 4, 743 F.2d at 65.

³⁸ *Id.*

³⁹ *Id.* at 74.

*a substantial effect on United States national security and foreign policy.*⁴⁰

The Second Circuit quoted language from Senate Report 95-701,⁴¹ pertaining to the enactment of the Foreign Intelligence Surveillance Act (“FISA”),⁴² in support of its position that domestic actions designed for foreign execution not only affect U.S. national security and foreign policy, but also that the United States has a legal obligation to prevent such activities.

The committee intends that terrorists and saboteurs acting for foreign powers should be subject to surveillance under this bill when they are in the United States, even if the target of their violent acts is within a foreign country and therefore outside actual Federal or State jurisdiction. This departure from a strict criminal standard is justified *by the international responsibility of government to prevent its territory from being used as a base for launching terrorist attacks against other countries. We demand that other countries live up to this responsibility and it is important that in our legislation we demonstrate a will to do so ourselves* (emphasis added).⁴³

A few years later, the United States Court of Appeals for the First Circuit adopted the Second Circuit’s analysis in *United States v. Johnson, et al.*⁴⁴ In *Johnson*, the defendant acted primarily in a workshop in his parents’ house in Harwich, Massachusetts. He “was engaged in the research and development of explosives for export to the Republic of Ireland and use by the Provisional Irish Republican Army (the PIRA) in its attacks against British civilian and military targets there.”⁴⁵ Johnson and his co-defendants were convicted of conspiracy to violate the Arms Export Control Act,⁴⁶ manufacturing and exporting of devices and materials for the discharge of bombs,⁴⁷ conspiracy to injure and destroy British military helicopters based at an RAF station in Northern Ireland,⁴⁸ and possession and control of property used for the intended destruction of British military helicopters in aid of the IRA.⁴⁹

The particular issue at hand in *Johnson* was the applicability of FISA to allegations that the defendants had engaged in domestic activities in Harwich, Massachusetts and other locations in the United States as part of a plan to engage in terrorist activities directed against personnel and property of the United Kingdom located in England and Northern Ireland. The First Circuit had no difficulty disposing of that issue, citing the Second Circuit’s decision

⁴⁰ *Id.* (emphasis added).

⁴¹ S. REP. NO. 95-701, at 3973 (1978).

⁴² 50 U.S.C. § 1801 (2010), *et seq.*

⁴³ S. REP. NO. 95-701.

⁴⁴ *Johnson*, 952 F.2d 565.

⁴⁵ *Id.* at 569.

⁴⁶ 22 U.S.C. § 2778(b)(2)&(c) (2010).

⁴⁷ *Id.*

⁴⁸ 18 U.S.C. § 956 (1996).

⁴⁹ 18 U.S.C. §§ 957 (1994).

in *Duggan*, and the applicable portion of Senate Report 95-701, holding that the “departure from a strict criminal standard is justified by the international responsibility of government to prevent its territory from being used as a base for launching terrorist attacks against other countries.”⁵⁰

The First Circuit also found that FISA surveillance of a United States citizen at locations within the United States was necessary to the ability of the United States to protect against international terrorism and to manage its foreign affairs.⁵¹ “International terrorism conducted from the United States, no matter where it is directed, may well have a substantial effect on United States national security and foreign policy.”⁵²

In *United States v. Elliot*,⁵³ the Southern District of New York observed: The court cannot help being aware of the delicacy of American foreign relations particularly in such areas as Africa. The offense charged, if consummated, clearly would have disrupted the economy of a nation. It is inconceivable that such an act, conceived in America and perpetrated by Americans, would not have seriously affected American relations with Zambia.⁵⁴

In *Elliot*, the defendants were charged with conspiring to destroy a railroad bridge in Zambia, and committing several overt acts in furtherance of the conspiracy within the United States. The destruction of the bridge would have halted the flow of Zambian copper on the world market, which was the defendants’ intention. The defendants would have profited economically from the copper shortage, which would have resulted from disabling the bridge.⁵⁵ Unlike many of the cases, the action to take place in the foreign country was not designed to accomplish any political result. Rather the action was intended for a business purpose.

Domestic Policy

There is a group of federal statutes designed to protect the United States from having its foreign policy and national security adversely affected by the actions of private persons. These statutes are collected under the heading of “Foreign Relations” in Title 18 of the United States Code.⁵⁶ In addition, a number of anti-terrorism and unlawful exportation laws⁵⁷ help fill any possible gaps in the foreign relations crimes in Chapter 45 of Title 18. Collectively all of these laws could be referred to as “neutrality laws,” because they are

⁵⁰ *Johnson*, 952 F. 2d at 572-573, *Duggan*, 743 F. 2d at 74, S. REP. NO. 95-701 at 3999.

⁵¹ *Johnson*, 952 F.2d at 573.

⁵² *Id.* citing *Duggan*, 743 F.2d at 74, S. REP. NO. 95-701 at 3999.

⁵³ 266 F. Supp. 318, 323 (S.D.N.Y. 1967).

⁵⁴ *Id.*

⁵⁵ *Id.* at 321.

⁵⁶ 18 U.S.C. §§ 951-970.

⁵⁷ 18 U.S.C. §§ 2331-2339(c), 22 U.S.C. § 2778 (2010).

designed to protect the foreign relations of the United States from private actions.

Enforcement of the United States' neutrality laws is strictly a matter of domestic foreign policy and domestic law.⁵⁸ The object of American neutrality laws is to prevent the appearance that the United States either sponsors or acquiesces in terrorist or military expeditions against the sovereign territory and people of other nations.

The statute was undoubtedly designed, in general, to secure neutrality in wars between two other nations, or between contending parties recognized as belligerents, but its operation is not necessarily dependent on the existence of such state of belligerency.⁵⁹

From the earliest days of the United States, it has been the policy of this country to prohibit private military or naval expeditions or enterprises planned, initiated or supported against nation-states or peoples with whom the United States is at peace.⁶⁰ The purpose behind the policy is now, and always has been, to prevent private parties from taking actions on their own initiative and for their own purposes which actions have the effect of embroiling the United States in conflicts with the nations against whom the private parties take action.⁶¹

The United States historically has been very aggressive in ensuring that private groups do not use the United States as a staging area for military expeditions against the governments of other countries. For instance, even with a large Irish-American population, and substantial domestic opposition to what is at least perceived to be oppressive treatment and discrimination against Catholics in Northern Ireland, the United States has been firm in not allowing its territory to be used by the Irish Republican Army and sympathizers to mount military or terrorist operations against the U.K. and the home government in Northern Ireland.⁶²

In *United States v. McKinley*, the defendants were convicted in the District of Arizona for a number of explosives related charges arising from their conspiracy to obtain weapons and explosives for the

⁵⁸ *Wiborg v. United States*, 163 U.S. 632, 648 (1896); *See Duggan*, 743 F.2d at 74.

⁵⁹ *Id.* at 647.

⁶⁰ George Washington, President of U.S., Annual Address to Congress (December 3, 1793) James D. Richardson, *Messages and Papers of the Presidents*, 1, 131 (1896), *see also The Three Friends*, 166 U.S. at 53.

⁶¹ *Chhun*, 513 F.Supp.2d at 1182-83, *see also Wiborg* 163 U.S. at 648, *O'Brien*, 75 F. 900 (C.C.N.Y. 1896), *United States v. Nunez*, 82 F. 599 (C.C.N.Y. 1896), Jules Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, 24 HARV. INT'L L. J. 1, 6 (1983).

⁶² *United States v. McKinley, et al*, 38 F.3d. 428 (9th Cir. 1994), *United States v. Molle*, 2006 U.S. District Lexus 48749 (E.D. V.A. 2006), *Johnson*, 738 F. Supp. 594 (D. Mass 1990).

Provisional Irish Republican Army.⁶³ They acquired 2,900 explosives detonators in Arizona, which then were shipped to the East Coast, and then on to the Provisional IRA in the United Kingdom.⁶⁴ At least 35 unexploded detonators were found at various bombsites in the UK. They also were charged in the Southern District of Florida with attempting to acquire Stinger Surface-to-Air missiles and .50 caliber firearms for use by the Provisional IRA.⁶⁵

In *United States v. Molle*,⁶⁶ the defendant attempted to purchase several firearms from undercover officers in Fairfax County, VA for use by the Provisional IRA in the United Kingdom.⁶⁷ He admitted that he previously shipped guns, ammunition, and bullet proof vests to the IRA.⁶⁸ Molle told officers that he specifically was looking for revolvers because the IRA preferred revolvers to semi-automatic handguns because revolvers don't leave shell casings behind.⁶⁹

In *United States v. Duggan* and *United States v. Johnson*, both discussed above, the defendants attempted to provide weapons and/or services to the Provisional IRA in the United Kingdom.⁷⁰ In each case, the activities originated in the United States and were intended to facilitate terrorist actions in the U.K. All of these cases demonstrate a commitment on behalf of the United States to prevent U.S. sovereign territory from being used as a staging area for terrorist attacks in foreign countries.

Foreign Relations and Anti-Terrorism Laws

The primary statutes used to prevent private actions from having an adverse impact upon U.S. foreign relations are Title 18, United States Code, § 956, conspiracy to kill, kidnap, maim, or injure persons or damage property in a foreign country; Title 18, United States Code, § 960, Expedition against Foreign Countries, more commonly known as the Neutrality Act; Title 18, United States Code, § 2339A, B or C, Providing Material Support to terrorists or terrorist organizations; Title 22, United States Code, § 2778, the Arms Export Control Law; and Title 18, United States Code, § 371, Conspiracy to violate one of the foregoing. There also are a large number of other firearms and explosives statutes in Chapter 40 of Title 18,⁷¹ and other foreign relations related statutes in Chapter 45 of Title 18,⁷² which

⁶³ *McKinley*, 38 F.3d at 429.

⁶⁴ *Id.*

⁶⁵ *Id.* at 429, citing *United States v. McKinley*, 995 F. 2d 1020 (11th Cir. 1993).

⁶⁶ *Molle*, 2006 U.S. District Lexis 48749 (E.D. V.A. 2006).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 4.

⁷⁰ *Duggan*, 743 F.2d 74, *The Three Friends*, 166 U.S. 1, *Johnson*, 952 F.2d 565, Lobel, *supra* note 16, *See supra* notes.

⁷¹ 18 U.S.C. §§ 841-848.

⁷² 18 U.S.C. §§ 951-970.

are used less frequently, or in combination with one of the major tools listed above.

Foreign Military and Terrorist Actions - 18 U.S.C., § 956

Perhaps the most prominent and useful statute to control private terrorist or military actions directed at foreign countries is Title 18, United States Code, Section 956. There actually are two separate crimes set forth in § 956. Sub-section (a) outlaws conspiracies to commit an act outside of the United States, which would constitute murder, kidnapping or maiming in the United States if any of the conspirators commits an act in furtherance of the conspiracy within the United States.

The full text of Title 18, United States Code, § 956(a)(1) is as follows:

Whoever, within the jurisdiction of the United States, conspires with one or more other persons, regardless of where such other person or persons are located, to commit at any place outside the United States an act that would constitute the offense of murder, kidnapping, or maiming if committed in the special maritime and territorial jurisdiction of the United States shall, if any of the conspirators commits an act within the jurisdiction of the United States to effect any object of the conspiracy, be punished as provided in subsection (a)(2).⁷³

The elements of a violation of § 956(a) are (1) agreement between two or more persons to commit murder (or kidnapping or mayhem) in a foreign country; (2) defendant joined the agreement with the intent to effectuate the agreement; (3) one of the co-conspirators committed at least one overt act in furtherance of the object of the conspiracy, and (4) at least one of the co-conspirators was in the United States when the agreement was made, or accomplished one overt act within the United States.⁷⁴

Subsection (b) of § 956 prohibits conspiracies entered into in the United States to damage or destroy property which belongs to a foreign government and which is located in a foreign country with which the United States is at peace, so long as at least one co-conspirator engages in at least one overt act in furtherance of the conspiracy within the United States. The full text of Title 18, United States Code, § 956(b) is as follows:

Whoever, within the jurisdiction of the United States, conspires with one or more other persons, regardless of where such other person or persons are located, to damage or destroy specific property situated within a

⁷³ 18 U.S.C. §§956(a)(1).

⁷⁴ *United States v. Wharton*, 320 F. 3d 526, 538 (5th Cir. 2003).

foreign country and belonging to a foreign government or to any political subdivision thereof with which the United States is at peace, or any railroad, canal, bridge, airport, airfield, or other public utility, public conveyance, or public structure, or any religious, educational, or cultural property so situated, shall, if any of the conspirators commits an act within the jurisdiction of the United States to effect any object of the conspiracy, be imprisoned for not more than 25 years.⁷⁵

There are several important differences between § 956(a) and § 956(b). First, § 956(a) pertains solely to actions against *people*, and not against property. The crime in § 956(b) pertains solely to actions against *property* and not against people. Second, the property involved in a violation of § 956(b) must belong to a foreign government or any subdivision thereof, or involve a railroad, canal, bridge, airport, public utility, public conveyance, public structure, or any religious, educational or cultural property. The clear focus of § 956(b) is on public property rather than private property. Third, and of some significance to cases involving § 956(b), the United States must be *at peace* with the country in which the impact of the action takes place, i.e., the bombing, damage, or destruction.

Killing, Maiming or Kidnapping - 18 U.S.C. § 956(a)

Title 18, United States Code, § 956(a) implements the strategy to prevent terrorism or private military expeditions abroad by specifically prohibiting and punishing the inevitable consequences of terrorism or of a private military or naval expedition or enterprise. In almost every instance, terrorism or a private military enterprise against a foreign government would result in the death of people under circumstances which would constitute murder, or the type of grievous, seriously disfiguring injury which constitutes mayhem. In addition, certain acts of terrorism as well as insurgent-type military actions frequently involve kidnappings.

Section 956(a)(1) is an incredibly broad statute, designed to include any murder, kidnapping or seriously disfiguring injury which results from a plan to accomplish that result in any foreign country for any reason whatsoever, so long as at least one overt act in furtherance of the agreement to murder, kidnap or maim took place within the United States.⁷⁶ The agreement itself doesn't need to be formed in the United States so long as there is at least one overt act performed here.⁷⁷ No killing, kidnapping or maiming need ever take place. The essence of the crime is the agreement to kill, kidnap or maim in a foreign country.⁷⁸ As pointed out above, the country where the event is to take place need not be a country with which the United States is at peace.

⁷⁵ 18 U.S.C § 956(b); *see also*, *Johnson*, 952 F. 2d at 575-576.

⁷⁶ *U.S. v. Hassoun*, 476 F.3d. 1181, 1183 (11th Cir. 2007).

⁷⁷ *Supra* note 73.

⁷⁸ *U.S. v. Elliott*, 266 F.Supp. 318, 323 (S.D.N.Y. 1967).

Among the cases brought pursuant to § 956(a) are the *United States v. Arnaout*⁷⁹, in which the defendants were charged with conspiring to assist *al-Qaeda*, *Hezb-e-Islami*, the Sudanese Popular Defense Force and others engaged in terrorist acts in Bosnia, Chechnya, and the Sudan.⁸⁰ The indictment alleged that the defendants knew that their assistance would result in murdering, kidnapping, and/or maiming of persons in a foreign country.⁸¹

In *United States v. Hassoun, et al*,⁸² the defendants were charged with conspiring to murder, kidnap, and maim persons outside the United States by “participating in a ‘support cell’ with the aim of ‘promoting violent jihad’ as espoused by a ‘radical Islamic fundamentalist movement’.”⁸³ In *United States v. Stewart, et al*,⁸⁴ the court found that the evidence was sufficient to sustain the conviction of the defendant charged with a violation of § 956(a), “especially in light of testimony establishing that [the defendant] attempted to undermine a unilateral cease-fire by an Egyptian terrorist organization and to draft a *fatwa* calling for, *inter alia*, the killing of ‘Jews and Crusaders’.”⁸⁵

While most of the § 956(a) cases are terrorism or military type operations with an apparent political motive, such a motive is not required for prosecutions under § 956(a). In *United States v. Wharton*,⁸⁶ the defendant entered into a scheme with his [future] wife (Webb) and an accomplice in an insurance company in Shreveport, Louisiana, to obtain a large life insurance policy on wife’s life, and then go to Haiti to obtain a fake death certificate in order to cash in the policy.⁸⁷ The parties accumulated approximately \$2 million in life insurance policies on wife’s life over an 18-month period, on which Wharton and the accomplice in the Shreveport insurance company were named as beneficiaries.

Wharton and Webb then were married in the Dominican Republic, and then arranged to travel to Haiti to locate a dead body for which they could acquire a false death certificate. After acquiring the false certificate attesting to Webb’s death, she then would go into hiding in the Caribbean. Apparently there was a change in plans and the wife actually was murdered in Haiti. The defendant was convicted of a violation of § 956(a) and his conviction was upheld on appeal.⁸⁸

⁷⁹ 236 F. Supp.2d 916, 917 (N.D. Ill. 2003).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² 476 F.3d 1181, 1183-84 (11th Cir. 2007).

⁸³ *Id.*

⁸⁴ 590 F.3d 93, 99 (2nd Cir. 2009), *cert. denied*, 130 S. Ct. 1924 (2010).

⁸⁵ *Id.* at 99.

⁸⁶ 320 F. 3d 526 (5th Cir. 2003).

⁸⁷ *Id.* All the facts outlining the scheme in Wharton are taken from the Fifth Circuit’s opinion.

⁸⁸ *Id.* at 537-538. Wharton also was convicted of mail fraud and wire fraud in violation of Title 18, United States Code, §§ 1341 and 1343.

United States v. Elliot,⁸⁹ although it is a § 956(b) case involving destruction of property rather than murder, kidnapping or mayhem under § 956(a), also demonstrates that the statute extends to activities with private economic motives rather than a motive to punish or effect change in a foreign government. As discussed above, in *Elliot* the defendants conspired to destroy a railroad bridge in the Republic of Zambia.⁹⁰ The motive was not to create a terrorist act in Zambia, or to overthrow or otherwise influence the government of Zambia, but rather to corner the world market in copper by eliminating the supply of new Zambian copper, which would have had to flow across the bridge in question in order to get to market. The defendant's motives were strictly economic, and in that regard differ from the *Arnaout*, *Hassoun* and *Stewart* cases discussed above.

The normal and intended use of § 956(a) is to prevent encroachment on U.S. foreign policy. It was enacted initially as part of the Neutrality Act of 1917, to "punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, ..." ⁹¹ The "economic motive" cases discussed above, however, demonstrate that the code section has sufficient flexibility and applicability to address any situation in which an actor might attempt to infringe on foreign policy issues through the use of force and violence.

Destruction of Foreign Public Property - 18 U.S.C. § 956(b)

Section 956(b) prohibits conspiracies to damage or destroy public property in a foreign country. The property must either be owned by a foreign government, or be that type of property which has a public, quasi-governmental purpose such as railroads, canals, bridges, airports, airfields, or public utilities or public conveyances, or religious, educational, or cultural institutions.⁹² The motive of the military expedition to a foreign nation is immaterial so long as (1) at least two people enter into an agreement, (2) to damage specified property of a foreign government in that foreign country, (3) the United States is at peace with that country, and (4) at least one co-conspirator takes at least one overt action in the United States to accomplish the object of the agreement.⁹³

Like § 956(a), this provision implements the strategy to prevent terrorism or private military expeditions by specifically prohibiting and punishing the inevitable consequences of terrorism or of a private military or naval expedition or enterprise. In almost

⁸⁹ *Elliot*, 266 F.Supp. 318.

⁹⁰ *Id.*

⁹¹ *United States v. Johnson*, 738 F.Supp. 591, 592 (D. Mass. 1990), *aff'd*, 952 F. 2d 565 (1st Cir. 1991), quoting the preamble of the Act at 40 Stat. 227 (1917).

⁹² 18 U.S.C. § 956(b)(1996).

⁹³ *Elliot*, 266 F.Supp at 323 (defendant conspired to destroy a bridge in Zambia in order to halt the supply of Zambian copper on the world market, and cause the defendant to profit economically in the ensuing copper shortage).

every instance, terrorism or a private military enterprise against a foreign nation would involve destroying or damaging buildings and/or property of the government against which the operation is directed, including railroads, canals, bridges, airports, airfields, or other public utilities, conveyances or structures, all of which specifically are within the scope of § 956(b).

Among the cases brought pursuant to § 956(b) are *United States v. Elliot*, *United States v. Johnson*, and *United States v. Chhun*.⁹⁴ As noted above, *Elliot* involved a plot to destroy a railroad bridge in Zambia for economic purposes. *Johnson* involved a plot to provide arms and services to the Provisional IRA. In *United States v. Chhun*, the defendants were alleged to have conspired to mount a military action against the government of Cambodia in order to conduct a *coup d'etat*.⁹⁵ While it is hypothetically possible to mount a military action to conduct a *coup d'etat* without damaging or destroying any public buildings, normally implicit in a *coup* attempt against a government is the intent to damage or destroy public buildings in the nation which is the subject of the *coup*. It is this damage or destruction of foreign government buildings and infrastructure that § 956(b) is designed to prevent and punish.

Challenges to § 956

There have been challenges to § 956 based upon allegations of vagueness and/or lack of specificity. In *United States v. Awan*,⁹⁶ the defendant claimed that the words “murder,” “maim,” and “kidnap” as used in § 956(a) were unconstitutionally vague.

The Court denied that claim, pointing out that the statute prohibits conspiracy to commit murder, mayhem or kidnapping if the facts were such that they would constitute those crimes “if ‘committed in the special maritime and territorial jurisdiction of the United States.’”⁹⁷ The United States Code applies to the special maritime and territorial jurisdiction of the United States, and all three of those offenses are defined in the United States Code.⁹⁸

“Murder” is defined in Title 18, United States Code, § 1111 as “the unlawful killing of a human being with malice aforethought.” “Mayhem,” or “maiming” is defined in Title 18, United States Code, § 114 as “whoever, ..., with intent to torture ..., maim, or disfigure, cuts, bits or slits the nose, ear, or lip, or cuts out or disables the tongue, or puts out or destroys and eye, or cuts off or disables a limb or any member of any person; or ... throws or pours upon another person, any scalding water, corrosive acid or caustic substance, ...” Kidnapping also is defined in the United States Code § 1201 as

⁹⁴ *Elliot*, 266 F.Supp. 318 (S.D.N.Y. 1967), *Johnson*, 952 F.2d 565 (1st Cir. 1991); *Chhun*, 513 F.Supp. 2d 1179 (C.D. Cal. 2007).

⁹⁵ *Chhun*, 513 F.Supp. 2d at 1180.

⁹⁶ 459 F.Supp. 2d 167 (E.D.N.Y. 2006).

⁹⁷ *Id.* at 181.

⁹⁸ *Id.*

“Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, carries away and holds for ransom or reward, ... “in one or more of five circumstances provided within that code section. Accordingly, those terms are amenable to definition with sufficient definiteness to meet Due Process muster.

In *United States v. Johnson*⁹⁹, the defendant was charged with violating § 956(b) by conspiring to destroy “specific property belonging to the government of the United Kingdom...to wit: one or more of a total of less than seventy military helicopters of the Lynx, Gazelle, Puma, Chinook and Wessex Class, based at the Royal Air Force Station at Aldergrove, Northern Ireland.” The defendants argued that the language in the indictment did not describe the property to be destroyed with sufficient particularity to meet the “specific property” requirement of § 956(b). The First Circuit affirmed the District Court’s decision finding that:

The specificity requirement in section 956 does not mean that the property which is the object of the conspiracy to destroy needs to be described in minute detail. Rather, consistent with the purpose and objective of section 956, ..., it is sufficient that the indictment state and describe the property definitely and with a reasonable degree of specificity.¹⁰⁰

The District Court went on to observe that to require the indictment to identify a piece of personal property by specific serial numbers or similar detail would render the statute meaningless.¹⁰¹

Lawful Combatant Immunity

“Lawful combatant immunity, a doctrine rooted in the customary international law of war, forbids prosecution of soldiers for their lawful belligerent acts committed during the course of armed conflicts against legitimate military targets.”¹⁰²

There is no “lawful combatant immunity” defense to most indictments alleging a violation of § 956 for at least two reasons. First, the killing, maiming or kidnapping in the case of a § 956(a) case, or the damage or destruction of property in a § 956(b) case, results from private action, not a state sponsored military expedition. Secondly, the defendants in a § 956 prosecution generally are not “legal combatants” as that phrase is used in international law.

⁹⁹ 952 F. 2d at 575.

¹⁰⁰ *U.S. v. Johnson*, 738 F.Supp. 591 (D. Mass. 1990), *aff’d*, 952 F.2d 565.

¹⁰¹ *Id.*

¹⁰² *U.S. v. Lindh*, 212 F.Supp. 2d 541 (E.D.Va. 2002), *see* Waldemar A. Solf & Edward R. Cummings, *A Survey of Penal Sanctions Under Protocol I to the Geneva Conventions of August 12, 1949*, 9 CASE W. RES. J. INT’L L. 205, 212 (1977).

In *United States v. Arnaout*,¹⁰³ the defendant alleged that he was immune from prosecution because he was alleged to have aided persons who were lawful combatants in Bosnia, Chechnya and the Sudan. The District Court found that there were no lawful combatants involved, citing *United States v. Lindh*,¹⁰⁴ which in turn cited the *Geneva Convention Relative to the Treatment of Prisoners of War*, August 12, 1949.¹⁰⁵ There are four criteria to achieving lawful combatant status under international law:

- (1) Hierarchical military structure;
- (2) Distinctive military uniforms or emblems recognizable at a distance;
- (3) Carrying arms openly; and
- (4) Operations conducted in accordance with the laws and customs of war.¹⁰⁶

The Court in *Arnaout* found that the evidence did not establish that the organizations which Arnaout assisted, i.e., *al-Qaeda*, *Hezb-e-Islami*, or the Sudanese Popular Defense Force, met those criteria.¹⁰⁷ In *United States v. Lindh*, the case cited by the court in *Arnaout*, the court found that the Taliban also did not qualify for lawful combatant immunity for the same reason.¹⁰⁸

“At Peace”

Section 956(b) requires a nexus to a nation with which the United States is at peace, which is not required for prosecutions under § 956(a). There is no clear statutory definition nor Supreme Court precedent controlling what constitutes “at peace” within the meaning of the *Neutrality Act*. In many of the cases brought under the *Neutrality Act*, or under Title 18, United States Code, § 856, there has not been any significant doubt regarding whether the United States was “at peace.”

In *United States v. Elliot*, the Southern District of New York found that the words “at peace” in § 956 “conveys definite warning as to the proscribed conduct when measured by common understanding and practices. ... Determining whether we are at peace with Zambia poses a problem no more difficult for a court or a citizen than that

¹⁰³ 236 F.Supp. 2d 916 (N.D. Ill. 2003).

¹⁰⁴ 212 F.Supp. 2d 541, 557 (E.D.Va. 2002).

¹⁰⁵ August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Art. 4(A)(2).

¹⁰⁶ *Arnaout*, 236 F.Supp. 2d at 917-918, *Lindh*, 212 F.Supp. 2d at 557, Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Art. 4(A)(2).

¹⁰⁷ *Arnaout*, 236 F.Supp. 2d at 917.

¹⁰⁸ *Lindh*, 212 F.Supp. 2d. at 557.

posed in understanding any statute dealing with complex behavior and concepts.”¹⁰⁹

In *United States v. Abdi*,¹¹⁰ the defendant asked the district court to take judicial notice that the United States was not “at peace” with Somalia at the times relevant to the prosecution. Abdi was charged with conspiracy to violate § 956 and to provide material support to terrorism, in violation of 18 U.S.C. §§ 371, 956 and 2339A. In the process, he had provided false information on a passport application to facilitate his travel to a terrorist training camp.

In response to Abdi’s request for judicial notice, the court found that there was no evidence in the record to support the conclusion that the United States was not at peace with Somalia. “There is no declaration of war against Somalia nor is there any other evidence of open hostility between the United States and that of Somalia. At oral argument, Defendant did not adequately supplement the record with information sufficient to show that the United States was ‘not at peace’ with Somalia.”¹¹¹ The court then found that it was not judicially noticeable that the United States was not at peace with Somalia.¹¹²

Historically, courts used to consider whether the United States was “at peace” to be a matter of law to be determined by the Court.¹¹³ In 1995, however, the Supreme Court in *United States v. Gaudin* held that all elements of an offense had to be found by the jury unanimously beyond a reasonable doubt.¹¹⁴ It now is without dispute that whether the United States is “at peace” with the nation involved in cases brought under §§ 960 and 956 is an element of those offenses, and that this issue must be submitted to the jury during trial unless conceded by the defendant by way of stipulation. There are a significant number of reported court decisions over the years which taken together have developed a definition of the term “at peace.”

The rule which has emerged from these cases is that the United States is “at peace” with another nation for the purposes of §§ 960 and 956 if (1) there is no declared state of war between the United States and that nation, and (2) there are no active military actions between the United States and that nation.¹¹⁵ Both conditions have to exist. If there is a formal state of war, then the United States is not “at peace” despite the absence of hostilities.

¹⁰⁹ *Elliott*, 266 F.Supp. at 322.

¹¹⁰ 498 F.Supp. 2d 1048, 1079-80 (S.D. Ohio 2007).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See *U.S. v. Terrell*, 731 F.Supp. 473, 475-478 (S.D. Fla. 1989), as well as most of the cases from the late 19th century cited in the previous section.

¹¹⁴ *Gaudin*, 515 U.S. 506, 511 (1995).

¹¹⁵ *Chhun*, 513 F.Supp. 2d 1179, 1184 (C.D. Cal. 2007), as expanded by the court’s subsequent order located at Case No. 2008 WL 793386, at 2 (C.D. Cal., March 20, 2008).

Likewise, the United States is not at peace if there are active military actions with a nation despite the absence of a declaration of war.

A declared war is relatively easy to identify. The President asks Congress for a declaration of war, and Congress votes yes or no. The First World War and the Second World War were wars that were formally declared by Congress. There are several military actions in the past 50 years or so without formal declarations of war for which there is uniform agreement that the United States was “at war,” and therefore not “at peace. These include the Korean War and Vietnam, neither of which had the benefit of a formal declaration of war.¹¹⁶ The Korean War did have the benefit of United Nations resolutions, however, and the Vietnam War did have the *Tonkin Gulf Resolution*.¹¹⁷ In the *Tonkin Gulf Resolution*, Congress specifically stated that it “approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression. ...The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in southeast Asia.”¹¹⁸

An undeclared war, where there exists a state of active military operation, is not as easy to identify. It is with regard to these operations that there is the most contention regarding whether the United States is “at peace.” The most recent reported case on this issue is *United States v. Chhun*¹¹⁹ from the Central District of California. In *Chhun*, the defendant was involved in a failed coup attempt against the Cambodian government in 2000. He was convicted of violations of Title 18, United States Code, §§ 960 and 956(b). Key issues in the *Chhun* case were whether the issue of “at peace” was a matter of law to be determined by the court, or an element of the offense to be determined by the jury, exactly what constitutes “at peace,” and what evidence could be presented on that issue to the jury.¹²⁰

The defendant in *Chhun* alleged that the United States was engaged in a covert war with Cambodia, and therefore the United States was not “at peace” with Cambodia so that the defendant could not be guilty as a matter of law. In furtherance of this approach, the defendant demanded discovery of secret government files regarding its military, intelligence and diplomatic relationship with Cambodia, and to introduce at trial evidence of alleged covert activities to establish the absence of peace with Cambodia. The United States sought to exclude evidence of covert action at trial as being irrelevant to the issue of being “at peace,” and to prohibit discovery of secret

¹¹⁶ *Terrell*, 731 F. Supp. at 475.

¹¹⁷ H.J. Res. 1145, 88th Cong. (1964).

¹¹⁸ *Supra* note 117.

¹¹⁹ *Chhun*, 513 F.Supp. 2d at 1184, as expanded by the court’s subsequent order located at Case No. 2008 WL 793386, at 2 (C.D. Cal., March 20, 2008).

¹²⁰ *Id.*

government files as being unlikely to lead to admissible evidence which was relevant to some issue at trial.

The district court in *Chhun II* held that a declared or undeclared war must be open and notorious to establish that the United States is not at peace with a foreign nation.¹²¹ “Active military operations are open and notorious. Covert activities, by definition, are not open and notorious. Therefore, the United States’ involvement in covert activities within a foreign nation does not establish a state of war such that the United States is not ‘at peace’ with the foreign nation.”¹²² As a result, the defendants were denied access to government files which might contain evidence of covert activities in Cambodia. Defendants also were denied authority to introduce evidence of alleged covert activities in Cambodia as being irrelevant to any issue in the case.¹²³

At first blush, there is a case from the Southern District of Florida which appears to be in conflict with the rule stated above. In *United States v. Terrell*,¹²⁴ the district court held that the United States was not “at peace” with Nicaragua in the 1980s, so the *Neutrality Act* was not applicable. Upon further examination, however, it is clear that *Terrell* actually falls within the scope of the rule outlined above.

The court in *Terrell* chose to analyze the issue in terms of “neutrality,” i.e., whether the United States is “at peace” with a nation is the same as whether the United States is politically “neutral.” “Neutrality” is a political term used in international relations theory to describe the status of alliances between states. Switzerland traditionally has been neutral, meaning not allied with any coalition in an international conflict. The question isn’t whether a nation is neutral. The question is whether the nation is “at peace” with another nation. A nation could maintain a position of political neutrality with regard to another nation, yet not be “at peace” with that nation.

Likewise, the United States is not a “neutral” nation. The United States is a member of NATO, has other treaty obligations, and is a member of United Nations peacekeeping operations. That does not mean that the United States is not “at peace” with nations that are not a member of NATO. No one would seriously allege, for purposes of the *Neutrality Act*, that the United States is not “at peace” with Russia and all the members of the former Warsaw Pact. Accordingly, neutrality is not the correct analysis.

The Southern District of Florida’s decision in *Terrell* otherwise is not in conflict with the Central District of California’s decision in *Chhun*. In *Terrell*, the United States was involved in open

¹²¹ Order Granting Mot. In Limine, Case No. 2008 WL 793386, at 2 (C.D. Cal., March 20, 2008).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Terrell*, 731 F.Supp. at 475-478 (S.D. Fla. 1989).

and notorious military activities against Nicaragua. It was in the newspapers and on network television every day. Congress was openly appropriating funds for operations against the Sandinista government. On at least three separate occasions those military operations specifically were authorized and funded by Congressional enactments. This is a very different situation than the relationship between the United States and other nations with whom we are not engaged in open and notorious military action. Therefore, the court in *Terrell* concluded that the United States was not “at peace,” with the government of Nicaragua.

In today’s world, the United States clearly is not at peace in Iraq or Afghanistan regardless of whether there has been a formal declaration of war. The United States is engaged in open and notorious military action in both countries; therefore, the United States is not “at peace” in Iraq or Afghanistan, and the *Neutrality Act* should not be held to be applicable regarding those countries.

Terrell also was decided before the Supreme Court’s decision in *Gaudin* in 1995, which clearly established that all elements of an offense have to be submitted to the jury, and found by the jury unanimously beyond a reasonable doubt. The court in *Terrell* took this issue away from the jury, and substituted its own judgment for that of the jury as required by the Supreme Court. Even so, however, the decision in *Terrell* is consistent with the decision in *Chhun* because the United States was involved in open and notorious military action in Nicaragua, which would have resulted in the same holding using the analysis set forth by the court in *Chhun*.

The analysis in *Chhun* is the approach which makes sense. The theory behind the *Neutrality Act* is that “a private individual’s involvement in an armed attack on a foreign nation could trigger hostilities, as the foreign nation ... might conclude that it was sanctioned by the United States.”¹²⁵ The risk that a foreign nation might attribute private action to the United States government and therefore initiate hostilities against the United States is eliminated if there already exists open and notorious military action by the United States against that foreign nation. “[I]t is the prerogative of the federal government, not private individuals” to take military action against a foreign nation.¹²⁶

The Central District’s decision in *Chuun* also is consistent with the Southern District of Ohio’s decision in *United States v. Abdi*. In *Abdi*, the court was looking for evidence of a declaration of war or hostilities, or open and notorious military action, and finding none concluded that there was no evidence that the United States was not at peace with Somalia.

¹²⁵ *Chhun*, 513 F.Supp. 2d at 1184, as expanded by the court’s subsequent order located at Case No. 2008 WL 793386, at 2 (C.D. Cal., March 20, 2008).

¹²⁶ *Id.* at 2.

There are two Supreme Court cases discussing “at war” and “at peace” that do not disturb the rule stated above, but should be mentioned to demonstrate why they do not control resolution of this issue. They are not applicable because they interpret different provisions of federal law which were promulgated by Congress for very different reasons than the *Neutrality Act*. In addition, one of them interprets the term “at war” rather than “at peace.”

“Congress in drafting laws may decide that the Nation may be ‘at war’ for one purpose, and ‘at peace’ for another. It may use the same words broadly in one context, narrowly in another.”¹²⁷ In *Lee v. Madigan*,¹²⁸ the Supreme Court interpreted a portion of the United States Code that provided that no person could be tried by court-martial for murder or rape committed within the geographic limits of the United States *in time of peace* (emphasis added). Defendant Lee was convicted by court-martial in 1949 of conspiracy to commit murder, well after the close of hostilities of the Second World War, but also well before the wars with Germany and Japan formally were terminated by Joint Resolutions of Congress dated October 19, 1951 and April 28, 1952, respectively.¹²⁹ The Supreme Court determined that the court-martial of Lee took place “in time of peace” for the purposes of this particular statute despite the fact that the United States technically was at war until the Congressional Joint Resolutions a few years later. The Court found that in practical terms the United States was in a time of peace in 1949, and the important constitutional right to trial by jury outweighed application of the Articles of War, most of which already had been repealed by 1949.¹³⁰ As a result, the conviction by court-martial was invalid, and the accused had to be convicted by a civilian court. The Supreme Court’s decision in *Lee v. Madigan* is consistent with the above discussion in that open and notorious military action had ceased in 1945, and the United States was “at peace” in the everyday interpretation of that phrase. More importantly, the Court was not interpreting provisions of the *Neutrality Act* or related statutes.

In *Ludecke v. Watkins*,¹³¹ the Supreme Court reached a seemingly inconsistent result in a case in which it interpreted a provision of the Alien Enemy Act¹³² authorizing the United States to deport an enemy alien dangerous to the public peace and safety of the United States in a time of war. Ludecke defended, saying that hostilities had ceased in 1945, and therefore the Alien Enemy Act no longer applied. The Supreme Court held that the authority began when war was declared but was not exhausted at the cessation of hostilities. A state of war technically still existed at the time of Ludecke’s deportation.¹³³ While Ludecke appears to be inconsistent with *Lee v. Madigan*, it is consistent with the *Neutrality Act* cases.

¹²⁷ *Madigan*, 358 U.S. at 231.

¹²⁸ *Id.*

¹²⁹ *Id.* at 279.

¹³⁰ *Id.*

¹³¹ *Ludecke v. Watkins*, 335 U.S. 160 (1948).

¹³² 50 U.S.C. § 21 (1918).

¹³³ *Ludecke*, 335 U.S. 160.

The most important factor to remember, however, is that the Supreme Court was interpreting a statute very different from the *Neutrality Act*.

Material Support for Terrorism – 18 U.S.C. § 2339

Title 18, United States Code, §§ 2339A, 2339B and 2339C prohibit providing material support for terrorism. While the general focus of these three statutes is upon preventing terrorism directed *at* the United States, these statutes also prohibit providing material support for terrorism originating in the United States and directed at foreign nations.

18 U.S.C. § 2339A

Section 2339A provides in material part –

(a) Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of [a number of sections of the United States Code, including 956,]¹³⁴ or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, [shall be punished as provided therein].

“Material Support or resources” is defined as “currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who maybe or include oneself), and transportation, *except medicine or religious materials*”¹³⁵

The primary application of § 2339A to U.S. citizens initiating terrorist acts or military enterprises in the United States for execution abroad is with reference to 18 U.S.C. § 956. Anyone who provides material support as defined above to another person who conspires with others to murder, maim or kidnap a third party outside of the United States, in violation of § 956(a), or to one who

¹³⁴ The full list of offenses referenced in § 2339A is as follows: 32, 37, 81, 175, 229, 351, 831, 842 (m) or (n), 844 (f) or (i), 930(c), 956, 1091, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332f, 2340A, or 2442 of this title [18 USC § 32, 37, 81, 175, 229, 351, 831, 842 (m) or (n), 844 (f) or (i), 930(c), 956, 1091, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332f, 2340A, or 2442], section 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2284), section 46502 or 60123(b) of title 49, or any offense listed in section 2332b(g)(5)(B) [18 USC § 2332b(g)(5)(B)] (except for sections 2339A and 2339B [18 USC §§ 2339A and 2339B]).

¹³⁵ 18 U.S.C. § 2339A(b)(2009).(emphasis added).

conspires with another person to damage or destroy public property in a nation with which the United States is at peace, in violation of § 956(b), is guilty of providing material support for terrorism in violation of § 2339A.

Section 2339A was enacted initially in 1994,¹³⁶ so it was not in existence at the time of the *Duggan*, *Johnson* and *Elliot* cases discussed above. Using those fact patterns as examples, however, we can see how § 2339A would apply to actions of U.S. citizens and residents acting within the United States to plan and initiate terrorist or military type operations in a foreign country. In *Duggan* and *Johnson*, the defendants collected weapons to be provided to the Provisional IRA to be used in Northern Ireland and England to murder, maim and/or kidnap people there, and to destroy government owned property of a nation with which we were and are at peace. In each case, the defendants provided weapons, lethal substances and explosives in aid of the conspiracy to murder and maim and/or to destroy public property of the U.K. At the time, the defendants knew that the weapons, explosives and other lethal substances were going to be used in violation of § 956. It is clear that the actions in *Duggan* and *Johnson* also meet the elements of § 2339A as it now exists.

In *Elliot*, it is clear that there was a conspiracy to destroy a rail road bridge in Zambia, and that the United States was at peace with Zambia. It is not clear from the reported decision whether the defendants provided explosives, currency or financial instruments to persons involved in the scheme to destroy the bridge, so it is impossible to tell if the actions in *Elliot* also would have violated § 2339A if it existed at the time.

In *United States v. Khan*¹³⁷, three defendants were convicted of violations of § 2339A in connection with a plan to assist an international terrorist organization known as *Lashkar-e-Taiba* (“LET”) to conduct military and terrorist activities in the Kashmir region of India and Pakistan. It was established at trial that the defendants had provided material support to a conspiracy to murder, maim or kidnap persons in a foreign country, in violation of § 956(a)¹³⁸. The defendants all lived in Fairfax County, Virginia, where they conducted war games training to prepare them to fight jihad in Kashmir. The defendants engaged in training exercises with paint ball guns, both before and after September 11, 2001. After 9/11, however, at least one member of the conspiracy openly advocated fighting for *al-Qaeda* and other militant Islamic groups in various areas of the world. Two of the conspirators actually went to *Lashkar-e-Taiba* training camps in Pakistan where they learned military and terrorist operations, and then returned to the United States and

¹³⁶ Pub. L. No. 103-322, Title XII, § 120005(a), 108 Stat. 2022.

¹³⁷ *U.S. v Khan*, 461 F.3d 477 (4th Cir. 2006), corrected, amended on other grounds, 2006 US App LEXIS 22748, (4th Cir. 2006), *appeal after remand, remanded on other grounds*, 2006 US App LEXIS 22791 (4th Cir. 2006), and *cert. denied*, 127 S Ct 2428, 167 L Ed 2d 1130 (2007), and *cert. denied*, 127 S Ct 2428, 167 L Ed 2d 1130(2007).

¹³⁸ *Id.*

resumed their military training.¹³⁹ Their challenges to conviction, based upon the argument that they merely were engaging in recreational paintball games, was rejected by the U.S. Court of Appeals for the Fourth Circuit.¹⁴⁰

In *United States v. Lakhani*,¹⁴¹ the defendant attempted to provide a shoulder fired “Stinger” missile to a Somali terrorist group named *Ogaden Liberation Front* (“OLF”), which conducted terrorist actions in the Middle East. Lakhani was put into contact with an FBI undercover operative who told him that he was a representative of the OLF, that the OLF was a terrorist group operating in the Middle East, and that OLF needed to acquire weapons.¹⁴² Lakhani travelled frequently to the Ukraine, where he attempted to locate Stinger missiles for the undercover operative.

At one point, an Israeli tourist flight was fired upon with a shoulder fired missile, and Lakhani congratulated the undercover operative based upon his mistaken assumption that attack was committed by the undercover operative and OLF.¹⁴³ In the process of consummating the Stinger deal, Lakhani laundered the down payment for the missile through a jeweler in New York and accounts in Hong Kong and Switzerland. Unfortunately for Lakhani, his search for missiles in the Ukraine drew the attention of the Russian Security Services, which then cooperated with the FBI and provided Lakhani with a fake Stinger missile.¹⁴⁴ Lakhani was convicted of attempting to provide material support to terrorists in violation of 18 U.S.C. § 2339A, illegal munitions brokering in violation of 22 U.S.C. § 2778, money laundering in violation of 18 U.S.C. § 1956, and attempted importation by means of false statements in violation of 18 U.S.C. § 542. He was sentenced to 47 years in prison.¹⁴⁵

There has been substantial litigation regarding the meaning and legitimacy of several terms contained within the definition of “material support or resources” in § 2339A, particularly “training,” “personnel,” and “expert advice or assistance.” In *Humanitarian Law Project v. Mukasey*¹⁴⁶, the plaintiffs sought an injunction prohibiting enforcement of the material support laws against them for activities they wished to perform to assist the Kurdistan Workers Party (“PKK”) and the Liberation Tigers of Tamil Eelam (“Tamil Tigers”).¹⁴⁷ This actually is a § 2339B case, but it is discussed here

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Lakhani*, 480 F.3d at 177-78.

¹⁴² *Id.* All the facts about the *Lakhani* case are taken from the published decision at 480 F. 3d 171.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Humanitarian Law Project v. Mukasey*, 552 F.3d 916 (9th Cir. 2007), *aff'd in part, remanded in part sub nom Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

¹⁴⁷ “The plaintiffs supporting the PKK wanted to train members of PKK how to use humanitarian and international law to peacefully resolve disputes, to engage in political advocacy on behalf of Kurds living in Turkey

because Congress adopted the definition of “material support or resources,” set forth in § 2339A when it enacted § 2339B.¹⁴⁸ After 11 years of litigation, during which this case went back and forth between the Central District of California and the Ninth Circuit several times,¹⁴⁹ the Ninth Circuit held in 2007 that the term “training” as used in §2339A(b) was unconstitutionally vague because the term could be read to include speech which is protected under the First Amendment.¹⁵⁰ The Court also held the term “specialized knowledge or assistance” was unconstitutionally vague because its definition included the phrase “other specialized knowledge” which could encompass protected speech.¹⁵¹ The Court held the phrase “service” to be unconstitutionally vague because its definition included the phrases “training” and “specialized knowledge or assistance,” which it already had held to be unconstitutionally vague.¹⁵² The plaintiffs’ claim that the statute was facially overbroad was denied by the Ninth Circuit.¹⁵³

The Supreme Court granted *certiorari* under the name of *Holder v. Humanitarian Law Project*¹⁵⁴ and reversed the Ninth Circuit, holding that § 2339A is constitutional as applied to the particular defendants in the case.¹⁵⁵ The Supreme Court found that the plaintiffs were not “asking us to interpret § 2339B, but to revise it.”¹⁵⁶ In addressing the plaintiffs’ vagueness allegation, the Supreme Court affirmed that the applicable test is whether “the statute under which [the conviction] is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.”¹⁵⁷

In applying that test to the actions in which the plaintiffs wished to engage, the Supreme Court found that the terms were

and teach PKK members how to petition various representative bodies such as the United Nations for relief.”

Plaintiffs supporting the [Tamil Tigers] want to train members to present claims for tsunami related aid to mediators and international bodies, to offer their legal expertise in negotiating peace agreements between the [Tamil Tigers] and the Sri Lankan government, and engage in political advocacy on behalf of Tamils who live in Sri Lanka.” 552 F.3d at 921, fn. 1.

¹⁴⁸ See 18 U.S.C. § 2339B(g)(4).

¹⁴⁹ See *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1205 (C.D. Cal. 1998), *aff’d* in an unpublished decision, and remanded to the district court, then re-affirmed by the C.D. Cal. at 2001 U.S. District Lexis 16729 (C.D. Cal. 2001), then *Humanitarian Law Project v. Ashcroft*, 309 F. Supp. 2d 1185 (C.D. Cal. 2004), *aff’d* 352 F. 3d 382, *vacated*, 393 F. 3d 902 (9th Cir. 2004), *en banc review granted*, 382 F. 3d 1154, *remanded for further proceedings*, 393 F. 3d 902 (9th Cir. 2004), then 380 F. Supp. 2d 1134 (C.D. Cal. 2005).

¹⁵⁰ *Reno*, 552 F.3d at 929.

¹⁵¹ *Reno*, 552 F. 3d at 930.

¹⁵² *Id.*

¹⁵³ *Id.* at 932.

¹⁵⁴ *Holder v. Humanitarian Law Project*, 557 U.S. 966, 130 S. Ct. 48 (2010).

¹⁵⁵ *Holder*, 130 S. Ct. at 2712.

¹⁵⁶ *Id.* at 2718.

¹⁵⁷ *Id. citing Williams*, 553 U.S. at 304 (2008).

sufficiently clear to give them fair notice of what was prohibited. In reversing the Ninth Circuit, the Supreme Court held that the lower court had violated the rule “that a plaintiff cannot complain of the vagueness of the law as applied to the conduct of others.”¹⁵⁸ In other words, just because there might be a hypothetical situation unrelated to the facts in the plaintiffs’ case in which the terms could be construed to be vague, that does not invalidate the statute as applied to plaintiffs in a situation in which the statute clearly is not vague.

In *United States v. Farhane*¹⁵⁹, the Second Circuit found that the phrases “training,” “personnel,” and “expert advice and assistance” were neither void for vagueness nor overly broad as applied to the defendants in that case. One of the defendants in *Farhane*, a medical doctor named Sabir, agreed to provide medical assistance to members of *al-Qaeda* who were wounded in Saudi Arabia.¹⁶⁰ Sabir and his friend Tarik Shah agreed that they would join *al-Qaeda* as a team, with Shah providing instruction in martial arts using deadly weapons and lethal fighting techniques and Sabir providing medical services to wounded *al-Qaeda* members. Sabir travelled to Saudi Arabia regularly, working at a Saudi military hospital in Riyadh, Saudi Arabia.

Sabir and Shah met with an undercover FBI agent in New York City while Sabir was home, and the undercover agent told them that, “our war ... our jihad is to [e]xpel the infidels from the Arabian peninsula...”¹⁶¹ Sabir and Shah then swore allegiance to *al-Qaeda*:

Sabir and Shah then participated in *bayat*, a ritual in which each swore an oath of allegiance to *al-Qaeda*, promising to serve as a “soldier of Islam” and to protect “brothers on the path of *Jihad*” and “the path of *al-Qaeda*.” The men further swore obedience to “the guardians of the pledge,” whom [the undercover agent] expressly identified as “Sheikh Osama,” i.e., Osama bin Laden, and his second in command, “Doctor Ayman Zawahiri.”¹⁶²

Sabir alleged that the statutory terms of “training,” “personnel,” and “expert assistance and advice,” were too vague to provide the notice required by due process.¹⁶³ The Second Circuit found that such a general claim was foreclosed by the Supreme Court’s decision in *Holder v. Humanitarian Law Project*. The Second Circuit also found that the terms were not vague as applied to Sabir’s conduct.

¹⁵⁸ *Holder*, 130 S.Ct. at 2719.

¹⁵⁹ *U.S. v. Farhane*, 634 F.3d 127 (2d Cir. 2011), *cert. denied sub nom Sabir v. U.S.*, 132 S. Ct. 833 (2011).

¹⁶⁰ All of the facts pertaining to the *Farhane* case are taken from the Court of Appeals decision, 634 F. 3d. 127.

¹⁶¹ *Id.* at 133.

¹⁶² *Id.* (internal citations deleted).

¹⁶³ *Id.* at 140.

First, Sabir and Shah agreed to jointly provide services to *al-Qaeda*, including Shah's martial arts training. There could be no doubt that a person of "ordinary intelligence" would understand that providing martial arts training to *al-Qaeda* fell within the definition of "training" as used in § 2339A. In addition, Sabir agreed to provide medical service to terrorists wounded during the execution of terrorist acts, in effect becoming the "Surgeon-General" of *al-Qaeda*. "No reasonable person with a common understanding of *al-Qaeda*'s murderous objectives could doubt that such material support fell squarely with the prohibitions of § 2339B."¹⁶⁴

Sabir also alleged that he fell within the "medical or religious materials" exception to the definition of "material support or resources" definition in §2339A. The Second Circuit found that the "medicine" exception applied only to the medicine itself, and not to the practice of medicine.¹⁶⁵ The Court quoted the House conference report pertaining to the legislation, which stated that the "word 'Medicine' should be understood to be limited to the medicine itself, and does not include the vast array of medical supplies."¹⁶⁶ In addition, in 1996 Congress amended the definition of "material support or resources" by striking the phrase "but does not include humanitarian assistance to persons not directly involved in such violations," and substituting in its place "except medicine or religious materials."¹⁶⁷ The legislative history, combined with the 1996 amendment, make it clear that Congress intended to exempt only the medicine and the act of distributing the medicine, and not the practice of medicine.

In *Rux et al. v. Republic of Sudan*,¹⁶⁸ the plaintiffs were survivors of sailors killed in the *al-Qaeda* attack on the U.S.S. Cole in Aden Harbor, Yemen in 2000. They sued the Republic of Sudan for providing a "safe harbor" for *al-Qaeda* to train, plan and initiate the attack on the Cole.¹⁶⁹ Sudan defended the suit, arguing that the allegations were "not sufficient to state material support under the 'safehouses' provision because the term should be limited to discrete buildings or structures."¹⁷⁰ The Fourth Circuit disagreed, and quoted language from the District Court for the District of Columbia in another case involving the Republic of Sudan:

[I]nsofar as the government of the Republic of Sudan affirmatively allowed and/or encouraged *al-Qaeda* and Hizbollah to operate their terrorist enterprises within its borders, and thus provided a base of operations for the planning and execution of terrorist attacks... Sudan provided a "safehouse" within the meaning of

¹⁶⁴ *Id.* at 141.

¹⁶⁵ *Id.* at 143.

¹⁶⁶ *Id.* quoting H.R. CONF. REP. NO. 104-518, at 144 (1996) (Conf. Rep.).

¹⁶⁷ *United States v. Abu-Jihad*, 600 F.Supp. 2d 362 (D. Conn. 2009), *aff'd* 630 F.3d 102 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 3062 (2011).

¹⁶⁸ 461 F.3d 461 (4th Cir. 2006).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 470.

18 U.S.C. § 2339A, as incorporated in 28 U.S.C. § 1605(a)(7).¹⁷¹

Courts uniformly have been willing to apply everyday common-sense interpretations of the words contained in § 2339A in order to effectuate the Congressional intent to prevent people from assisting terrorist organizations carrying out their missions.¹⁷²

18 U.S.C. § 2339B

Section 2339B provides, in material part: Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so [will be punished as provided]. ... To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization [...], that the organization has engaged or engages in terrorist activity, [...] or that the organization has engaged or engages in terrorism.¹⁷³

Section 2339B, which is entitled “Providing Material Support or Resources to Designated Foreign Terrorist Organizations,” was enacted in 1994 to supplement § 2339A, which was enacted two years before.¹⁷⁴ Section 2339B was designed to fill the gap for those persons who contributed, or otherwise provided aid, to a terrorist organization, but there was no proof that they actually intended to aid any particular terrorist act.¹⁷⁵

[T]he legislative history indicates that Congress enacted § 2339B in order to close a loophole left by § 2339A. Congress, concerned that terrorist organizations would raise funds “under the cloak of humanitarian or charitable exercise,” sought to pass legislation that would severely restrict the ability of terrorist organizations to raise much needed funds for their terrorist acts within the United States. As § 2339A was limited to donors intending to further the commission of specific federal offenses, Congress passed § 2339B to encompass donors who acted without the intent to further federal crimes (internal citations omitted).¹⁷⁶

The primary difference between §§ 2339A and 2339B is that § 2339A requires proof of a specific intention to assist in the violation of

¹⁷¹ *Rux et al v. Republic of Sudan*, 461 F. 3d at 471, quoting *Owens v. Republic of Sudan*, 412 F.Supp. 2d 99, 108 (D. D.C. 2006).

¹⁷² Robert Chesney, *Beyond Conspiracy: Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425 (2007).

¹⁷³ Anti-terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 303, 110 Stat. 1214, 1250 (1996).

¹⁷⁴ *Farhane*, 634 F 3d 127, at 135, n.6., see Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 12005(a), 108 Stat. 1796, 2022 (1994).

¹⁷⁵ Tom Stacy, *The “Material Support” Offense: The Use of Strict Liability in the War Against Terror*, 14 KAN. J.L. & PUB. POL’Y 461, 462 (2005).

¹⁷⁶ H.R. Rep. No. 104-383, at 43 (1995), quoting *U.S. v. Assi*, 414 F.Supp. 2d 707, 722 (E.D. Mich. 2006).

another anti-terrorism statute, whereas § 2339B does not require such a specific intent. Section 2339A requires that the government prove that a defendant provided material support which he/she knew would be used in connection with a violation of a specified violation, such as 18 U.S.C. § 956. Section 2339B requires only that the government provide that a defendant knowingly provided material support to an organization which has been designated by the Secretary of State as a foreign terrorist organization, or which the defendant knew had engaged in terrorist acts.

It is not necessary for the government to prove in the context of a § 2339B prosecution that the defendant intended to assist the terrorist organization in any terrorist act.¹⁷⁷ It is necessary, however, for the government to prove beyond a reasonable doubt that the defendant had personal knowledge that the organization at issue had formally been designated by the Secretary as a “foreign terrorist organization,” or that the organization was engaged in or had engaged in “terrorist activity” or “terrorism” as defined by law.¹⁷⁸

A “designated terrorist organization” is an organization designated as a terrorist organization under section 219 of the Immigration and Nationality Act.¹⁷⁹ The Secretary of State is granted the authority to designate an entity as a “foreign terrorist organization” pursuant to Title 18, United States Code, § 1189(a)(1) and (d)(4). “She may, in consultation with the Secretary of the Treasury and the Attorney General, so designate an organization upon finding that it is foreign, engages in ‘terrorist activity’ or ‘terrorism,’ and thereby ‘threatens the security of United States nationals or the national security of the United States.’”¹⁸⁰ “National security” means the national defense, foreign relations, or economic interests of the United States.¹⁸¹ An entity designated as a foreign terrorist organization may seek review of the Secretary’s designation before the United States Court of Appeals for the District of Columbia Circuit within 30 days of the designation.¹⁸²

“Terrorism activity” and “terrorism” are defined in § 212(a)(3)(B) of the Immigration and Nationality Act,¹⁸³ and § 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989.¹⁸⁴ “Terrorism” is defined in 22 U.S.C. § 2656f(d)(2) to mean “premeditated, politically motivated violence perpetrated against non-combatant targets by subnational groups or clandestine agents.”¹⁸⁵ “Terrorist activity” is defined in 8 U.S.C. § 1182, and says

¹⁷⁷ *U.S. v. Chandia*, 514 F.3d 365, 371 (4th Cir. 2008).

¹⁷⁸ *Farhane*, 634 F. 3d at 135, *citing Holder*, 130 S. Ct. at 2709.

¹⁷⁹ 18 U.S.C. § 2339B(g)(6) (codified at 8 U.S.C. § 1189).

¹⁸⁰ *Holder*, 130 S. Ct. at 2713, *see also, U.S. v. Afshari*, 426 F.3d 1150, 1153-54 (9th Cir. 2005), *U.S. v. Marzook*, 383 F.Supp. 2d 1056 (N.D. Ill. 2005).

¹⁸¹ 18 U.S.C. § 1189(d)(2)(2004).

¹⁸² *Supra* note 181, *see also Holder*, 130 S. Ct. at 2713.

¹⁸³ 8 U.S.C. § 1182 (2010).

¹⁸⁴ 18 U.S.C. § 2339B(a)(1), *see also* 22 U.S.C. § 2656f(d)(2) (2004).

¹⁸⁵ 22 U.S.C. § 2656f(d)(2).

in substance that “terrorist activity” is any act which either is or would be unlawful under the laws of the United States or any state which involves:

1. Highjacking or sabotage of a conveyance;
2. An act of extortion involving the seizing or detaining, or threatening to kill or injure someone;
3. A violent attack on an internationally protected person described in 18 U.S.C. § 1116(b) (essentially a foreign official or member of his or her family);
4. An assassination;
5. The use of any nuclear, biological, or chemical weapon, or explosive, firearm or other dangerous device to endanger the safety of one or more persons or to damage property; or
6. A threat, attempt or conspiracy to do any of the foregoing.¹⁸⁶

The terms “material support or resources” have the same meaning as set forth in § 2339A.¹⁸⁷ The definition of “material support or resources” was amended in 2001 by the USA PATRIOT Act¹⁸⁸ and in 2004 by the Intelligence Reform and Terrorism Prevention Act (“IRTPA”).¹⁸⁹ The definition of “personnel” was modified to read, “Personnel (one or more individuals who may be or include oneself).” In addition, IRTPA modified § 2339B (but not § 2339A) to provide no one could be prosecuted for providing “personnel” unless that person has:

¹⁸⁶ 8 U.S.C. § 1182(a)(3)(I)(3)(B)(iii) (2010). The full text is as follows:

(iii) "Terrorist activity" defined. As used in this Act, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following: (I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle). (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained. (III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18, United States Code) or upon the liberty of such a person. (IV) An assassination. (V) The use of any-- (a) biological agent, chemical agent, or nuclear weapon or device, or (b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property. (VI) A threat, attempt, or conspiracy to do any of the foregoing.

¹⁸⁷ 18 U.S.C. § 2339B(g)(4) (2009).

¹⁸⁸ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 805, 115 Stat. 272, 377 (2001).

¹⁸⁹ Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6603(b), 118 Stat. 3638 (2004).

[k]nowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control.¹⁹⁰

The term "personnel" is used in both §§ 2339A and 2339B as part of the definition of "material support or resources" set forth in § 2339A, which then was incorporated in § 2339B, but Congress added the limitation in § 2339B(h) only to § 2339B, but not in § 2339A. The reasonable inference to be drawn is that Congress intended to limit the scope of § 2339B, but not § 2339A.¹⁹¹

Both Congress and the courts have determined that any contribution to an organization which has been designated as a foreign terrorist organization by the Secretary is so harmful to the national interests of the United States that all knowing contributions are illegitimate, have no valid public purpose, and should be treated as a crime. "[F]oreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct. Terrorist organizations use funds for illegal activities regardless of the intent of the donor, and Congress thus was compelled to attach liability to all donations to foreign terrorist organizations."¹⁹²

Material support meant to "promot[e] peaceable, lawful conduct," can further terrorism by foreign groups in multiple ways. "Material support" is a valuable resource by definition. Such support frees up other resources within the organization that may be put to violent ends. It also importantly helps lend legitimacy to foreign terrorist groups – legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds – all of which facilitate more terrorist attacks. "Terrorist organizations do not maintain organizational 'firewalls' that would prevent or deter ...sharing and co-mingling of support and benefits." (internal citations omitted)¹⁹³

¹⁹⁰ 18 U.S.C. § 2339B(h) (2009).

¹⁹¹ *U.S. v. Abu-Jihaad*, 600 F.Supp. 2d 362, 399 (D. Conn. 2009), *aff'd* 630 F. 3d 102 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 3062 (2011), *Assi*, 414 F. Supp. 2d at 723 (E.D. Mich. 2006).

¹⁹² *Boim v. Quranic Literary Inst. and Holy Land Found. for Relief and Dev.*, 291 F. 3d 1000, 1026-27 (7th Cir. (2002), *see also* Pub. L. 104-132, § 301, *U.S. v. Hammoud*, 381 F. 3d 316, 329 (4th Cir. 2004), *Assi*, 414 F. Supp. 2d at 713 (E.D. Mich. 2006), *Marzook*, 383 F. Supp. 2d at 1063 (N.D. Ill. 2005).

¹⁹³ *Holder*, 130 S. Ct. at 2725, *see also Abdi*, 498 F. Supp. 2d at 1058.

Section 2339B does not prohibit the *mere association* with a designated terrorist organization, or an organization which the defendant knows has engaged in terrorist acts. What the statute prohibits is the conduct of providing material support to such an organization.¹⁹⁴ “The statute does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group. ... What [§ 2339B] prohibits is the act of giving material support.”¹⁹⁵ The Seventh Circuit has been even more explicit in what conduct is outside the scope of § 2339B: A defendant “may, with impunity, become [a] member of Hamas, praise Hamas for its use of terrorism, and vigorously advocate the goals and philosophies of Hamas.”¹⁹⁶ But, the Seventh Circuit continued, “there is no constitutional right to provide weapons and explosives to terrorists, nor is there any right to provide the resources with which the terrorists can purchase weapons and explosives.”¹⁹⁷ In *United States v. Assi*,¹⁹⁸ the defendant attempted to provide night vision goggles, global positioning satellite modules, and a thermal imaging camera to Hezbollah.¹⁹⁹ His First Amendment freedom of speech argument was rejected on appeal.²⁰⁰

Defendants in a § 2339B prosecution are not entitled to litigate whether the designated foreign terrorist organization actually is a terrorist organization. The defendant is only entitled to hold the government to its burden of proving that the organization has been designated as a foreign terrorist organization by the Secretary of State. “[A] criminal defendant’s inability to challenge the [Foreign Terrorist Organization] designation does not violate his constitutional rights because ‘the *fact* of an organization’s designation as an FTO is an element of § 2339B, but the *validity* of the designation is not.”²⁰¹ (emphasis in original).

Attempts by defendants to challenge the Secretary’s designation in the context of their own criminal cases have uniformly been rejected by the courts. “Congress clearly chose to delegate policymaking authority to the President and Department of State with respect to designation of terrorist organizations, and to keep such policymaking authority out of the hands of United States Attorneys and juries. ... If defendants provide material support for an organization that has been designated a terrorist organization

¹⁹⁴ *Chandia*, 514 F. 3d at 371, citing *Hammoud*, 381 F.3d at 329, see also, *Farhane*, 634 F. 3d at 138.

¹⁹⁵ *Holder*, 130 S. Ct. at 2730, quoting the Ninth Circuit in its earlier decision in this case, 205 F.3d 1130, at 1133 (9th Cir. 2000), *Marzook*, 383 F.Supp. 2d at 1063.

¹⁹⁶ *Boim*, 291 F.3d at 1026.

¹⁹⁷ *Id.*

¹⁹⁸ *Assi*, 414 F.Supp. 2d at 713.

¹⁹⁹ *Id.* at n. 11, see 62 Fed. Reg. 52650 (Oct. 8, 1997), 68 Fed. Reg. 56860-61 (Oct. 2, 2003).

²⁰⁰ *Id.*

²⁰¹ *Chandia*, 514 F.3d at 371.

under § 1189, they commit the crime, and it does not matter whether the designation is correct or not.”²⁰²

18 U.S.C. § 2339C

Section 2339C prohibits the financing of terrorism. It provides, in relevant part, that whoever, ... by any means, directly or indirectly, unlawfully and willfully provides or collects funds with the intention that such funds be used, or with the knowledge that such funds are to be used, in full or in part, in order to carry out--

A. An act which constitutes an offense within the scope [of one of severally specifically listed international treaties], or

B. Any other act intended to cause death or serious bodily injury to a civilian, or [a non-combatant], when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act, Shall be punished as prescribed....²⁰³

It is not required that the funds actually be used to carry out one of the predicate acts.²⁰⁴ The maximum penalty for a violation of this section is either imprisonment for 20 years, or imprisonment for 10 years, depending upon whether the violation is of the substantive charge or of concealing the substantive charge, respectively.²⁰⁵ This section became effective on June 25, 2002, except the extra-judicial applications set forth in §§ 2339C(b)(1)(D) and (2)(B), which did not become effective until the date the International Convention for the Suppression of Financing of Terrorism became law in the United States.²⁰⁶

There are very few reported cases under this statute, and all those cases are civil cases between private litigants. In *Linde v. Arab Bank, PLC*,²⁰⁷ terrorist victims’ families successfully alleged that the defendant bank knowingly and intentionally agreed to provide services to organizations which it knew to be terrorist organizations, and that the families were injured as a result. In *Goldberg v. UBS AG*,²⁰⁸ the Eastern District of New York found that a civil action could be brought against a foreign bank pursuant to §§ 2339B and 2339C because the foreign bank was a large, sophisticated company with a full time active service within the United States. The court also found that the bank knew that the ultimate recipient of the money was a foreign terrorist organization.

²⁰² *Afshari*, 426 F.3d at 1155-56.

²⁰³ 18 U.S.C. § 2339C(a)(1) (2006). *See* Pub. L. No. 107-177, Title II, 116 Stat. 727.

²⁰⁴ 18 U.S.C. § 2339C(a)(3) (2006).

²⁰⁵ 18 U.S.C § 2339C(d) (2006).

²⁰⁶ *See* the statutory history contained in 18 U.S.C.A. § 2339(C) (2002).

²⁰⁷ 384 F.Supp. 2d 571 (E.D.N.Y. 2005).

²⁰⁸ 660 F.Supp. 2d 410 (E.D.N.Y. 2009).

18 U.S.C. § 2339D

Section 2339D prohibits receiving of military-type training from a foreign terrorist organization. The statute provides, in material part:

Whoever knowingly receives military-type training from or on behalf of any organization designated at the time of the training by the Secretary of State [...] as a foreign terrorist organization shall be [...] imprisoned for ten years[....]To violate this subsection, a person must have knowledge that the organization is a designated foreign terrorist organization, [...], that the organization has engaged or engages in terrorist activity, [...], or that the organization has engaged or is engaged in terrorism....²⁰⁹

The terms “terrorist activities” and “terrorism” in § 2339D have the same definitions as outlined above. There is extraterritorial jurisdiction for this statute.²¹⁰

This statute was enacted in 2004,²¹¹ and appears to be designed to resolve the question raised in §2339A or 2339B cases whether an individual who personally engaged in training in a foreign terrorist organization’s training camp provided “material support or resources” within the meaning of those statutes. As of January 2012, there were no reported cases under this code section.

Arms Export Control Act - 22 U.S.C. § 2778

The Arms Export Control Act²¹² gives the President the authority to designate items which are considered to be “defense articles and defense services” and to promulgate regulations governing the export and import of such items.²¹³ The President, acting through the U.S. Department of State, promulgated a regulation establishing the U.S. Munitions List.²¹⁴ In 1979, Congress passed the Export Administration Act,²¹⁵ which authorized the

²⁰⁹ 18 U.S.C. § 2339D(a) (2004).

²¹⁰ 18 U.S.C. § 2339D(b) (2004). *See also* “Military-type training” includes training in means or methods that can cause death or serious bodily injury, destroy or damage property, or disrupt services to critical infrastructure, or training on the use, storage, production, or assembly of any explosive, firearm or other weapon, including any weapon of mass destruction. 18 U.S.C. § 2339D(c) (2004).

²¹¹ Pub. L. No. 108-458, Title VI, Subtitle G, § 6602, 118 Stat. 3761 (2004).

²¹² Pub. L. No. 90-629 (1968) (codified 22 U.S.C. §§ 2751, *et seq.* (1997)).

²¹³ 22 U.S.C. §2778(a)(1)(2008).

²¹⁴ 22 C.F.R. 121.1 *et seq.* (2009).

²¹⁵ Pub. L. No. 96-72, 93 Stat. 503 (1979) (codified at 50 U.S.C. App. §§ 2401, *et seq.*). The regulations promulgated by the Secretary of Commerce are located at 15 C.F.R. §§ 730.1 *et seq.*

President, acting through the Secretary of Commerce, to place additional commodities on the U.S. Munitions List.

No defense article or defense service designated by the President and included on the U.S. Munitions List can be exported or imported without a license issued pursuant to the Act.²¹⁶ Violation of the export provisions set forth in 22 U.S.C. §§ 2778 or 2779, or the regulations promulgated pursuant to the Act is punishable by imprisonment for twenty years.²¹⁷

The Munitions List covers approximately 45 pages of federal regulations, and is both very lengthy and very specific. There are 21 different categories²¹⁸ of defense articles contained in the Munitions List, and include many of the things which immediately would come to mind: automatic weapons, howitzers, mortars, cannons, ammunition for military weapons, rockets and rocket propelled grenades, Stinger missiles, warships, tanks, fighter planes and bombers, body armor, night visions scopes, spacecraft, submarines, directed energy weapons, and all classified material.²¹⁹ The last category on the Munitions List covers all miscellaneous articles not specifically included in the Munitions List, but “which has substantial military applicability and which has been specifically

²¹⁶ 22 U.S.C. § 2778(b)(2)(2008).

²¹⁷ 22 U.S.C. § 2778(c)(2008).

²¹⁸ See 22 C.F.R. § 121.1 et seq (*listing* the following categories of munitions:

Category I- Firearms, Close Assault Weapons and Combat Shotguns

Category II- Guns and Armament

Category III- Ammunition/Ordnance

Category IV- Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, etc

Category V- Explosives and Energetic Materials, Propellants, Incendiary Agents

Category VI- Vessels of War and Special Naval Equipment

Category VII- Tanks and Military Vehicles

Category VIII- Aircraft and Associated Equipment

Category IX- Military Training Equipment and Training

Category X- Protective Personnel Equipment and Shelters

Category XI- Military Electronics

Category XII- Fire Control, Range Finder, Optical and Guidance and Control Equipment

Category XIII- Auxiliary Military Equipment

Category XIV- Toxicological Agents, including Chemical, Biological and associated Equipment

Category XV- Spacecraft Systems and Associated Equipment

Category XVI- Nuclear Weapons, Design and Testing Related items

Category XVII- Classified Materials, Technical Data and Defense Services not otherwise Enumerated

Category XVIII- Directed Energy Weapons

Category XIX- Miscellaneous Equipment

Category XX- Submersible vessels, Oceanographic and Associated Equipment

Category XXI- Miscellaneous Articles).

²¹⁹ See *supra* note 218 for the full list of categories on the Munitions List.

designed, developed, configured, adapted, or modified for military purposes.”²²⁰

Conviction of a violation of § 2778 requires proof that the defendant knowingly and willfully exported, or attempted to export articles included on the U.S. Munitions List.²²¹ The government must prove the defendant’s specific intent to export munitions without a license. “It is not necessary, however, for the munitions to reach a point of irrevocable commitment to cross a national border in order to be guilty of the section.”²²² The intent can be proved circumstantially, such as by the defendant using a circuitous shipment route for replacement parts for military aircraft.²²³

There have been a number of § 2778 cases over the years challenging the sufficiency of circumstantial evidence of the defendant’s intent. In *United States v. Muthana*,²²⁴ the defendant had told employees who prepared the waybill that the parcels contained only honey, when in fact they contained ammunition, and the employee asked the defendant to check the waybill for accuracy after it was prepared at defendant’s direction. In *United States v. Covarrubias*,²²⁵ the defendant concealed weapons in the gas tank of a truck which he owned and which crossed the border to Mexico at least five times, where there were large signs detailing the requirements for export of munitions to Mexico. In *United States v. Pulungan*, 569 F.3d 326 (7th Cir. 2009),²²⁶ the defendant’s conviction was reversed because the evidence was insufficient to show that he knew that the rifle scopes that he shipped were “defense articles” that required export licenses.

Whether or not the President acted correctly in placing a particular item on the Munitions List has been held to be a “political question,” and therefore non-justiciable.²²⁶

Neither the courts nor the parties are privy to reports of the intelligence services on which this decision, or decisions like it, may have been based. The consequences of uninformed judicial action could be grave. Questions concerning what perils our nation might face at some future time and how best to guard against those perils are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to

²²⁰ United States Munitions List, 22 C.F.R. § 121.1 Category XXI(a)(2009).

²²¹ *U.S. v. Oriz-Loya*, 777 F.2d 973 (5th Cir. 1985).

²²² *Id.*

²²³ *U.S. v. Malsom*, 779 F.2d 1228 (7th Cir. 1985).

²²⁴ *U.S. v. Muthana*, 60 F.3d 1217 (7th Cir. 1995).

²²⁵ *U.S. v. Covarrubias*, 94 F.3d 172 (5th Cir. 1996).

²²⁶ *U.S. v. Martinez*, 904 F.2d 601 (11th Cir. 1990), *U.S. v. Helmy*, 712 F.Supp. 1434, 1429-30 (E.D.CA. 1989), *aff’d on other grounds*, 951 F. 2d 988 (9th Cir. 1992), *cert. denied*, 504 U.S. 945 (1992). *See also*, *U.S. v. Zhen Shou Wu*, 680 F.Supp. 2d 281 (D. Mass. 2010), making a similar determination about decisions of the Secretary of Commerce placing commodities on the U.S. Commodities Control List pursuant to the Export Administration Act, 50 U.S.C. App. §§ 2501, et seq.

the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.²²⁷

As a result, criminal defendants charged with violations of the Arms Export Control Act cannot challenge the administrative action placing a particular item on the Munitions List.²²⁸

The Arms Export Act and the Export Administration Act clearly are tools created to assist in preventing private actions within the United States from having an adverse impact of U.S. foreign policy and national security. Congress made a specific finding that the Arms Export Act was intended to be “[i]n furtherance of world peace and the security and foreign policy of the United States...”²²⁹

The Neutrality Act – 18 U.S.C. § 960

The *Neutrality Act*, 18 U.S.C. 960, prohibits any military or naval expedition which is planned, supported or initiated from the United States against any nation with whom the United States is at peace. The predecessor to the modern Neutrality Act was passed in 1794 as a response to protests of the French and British governments that the United States was not taking steps to prevent raids on foreign government assets by Americans.²³⁰ The full text of Title 18, United States Code, § 960 is as follows:

Whoever, within the United States, knowingly begins or sets on foot or provides or prepares or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined under this title or imprisoned for not more than three years, or both.²³¹

A violation of the *Neutrality Act* is a felony, for which the maximum penalty is imprisonment for three years and a fine of \$250,000.²³² The federal conspiracy statute, 18 U.S.C. § 371,

²²⁷ *Martinez*, 904 F. 2d at 602. (internal citations deleted).

²²⁸ *Id.*

²²⁹ *Id.* at n. 2, citing 22 U.S.C § 2778 (2010).

²³⁰ *The Three Friends*, 166 U.S. at 52 (1897).

²³¹ 18 U.S.C. § 960 (1948).

²³² *Id.* Although § 960 specifies that the maximum fine is \$3,000, the alternative fines provision of Title 18, United States Code, § 3571 provides that except where Congress passes a statute after 1984 either increasing the existing fine, or imposing a new fine, the statutory fine for any felony will be \$250,000. Congress is able under § 3571 to increase the fine for any given section above \$250,000, or to pass a new statute with a fine above \$250,000, but in the absence of such action all fines for felonies included in the United States Code as of 1984 were increased to \$250,000.

prohibits any agreement to violate the *Neutrality Act*, or any other provision of federal law, so long as at least one overt act to effect the violation of federal law takes place somewhere within the United States.²³³ It is not necessary that a military expedition actually be mounted against a foreign country. It only is necessary to form the agreement to engage in such an enterprise and take a single overt act to accomplish the mission.²³⁴

The original statute was passed on June 5, 1794, and is almost verbatim with the current wording of §960. The full text of the relevant portion of § 5 of the Act of June 5, 1794 is as follows:

Sec. 5. Every person who, within the territory and jurisdiction of the United States, begins or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on thence against the territory and dominions of any foreign prince or State, or of any colony, district or people, with whom the United States is at peace, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years.²³⁵

Of importance, both the 1794 statute and the current version of the statute incorporate the language “with whom the United States is at peace.”²³⁶

There are two primary legal issues involving the Neutrality Act. The first is what constitutes “any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state...”²³⁷ The second is what constitutes “with whom the United States is at peace...”²³⁸ Traditional legislative principles provide that when Congress uses words of art in a new statute, or uses the same words in two different code sections, particularly if they are enacted the same day or are located in the same chapter of the same title of the United States Code, that those words have the same meaning in both places. Legislative drafting principles, as well as the reported cases, establish that the words, “with whom the United States is at peace,” have the same meaning in § 956(b) as they do in § 960. Accordingly, the discussion above regarding the “at peace” element of 18 U.S.C. § 956(b) is equally applicable with regard to the Neutrality Act.

²³³ See 18 U.S.C. § 371. The full text of § 371, in part, is as follows: “If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned for not more than five years, or both.”

²³⁴ *Jacobsen v. U.S.*, 272 F. 399, 402 (7th Cir. 1920).

²³⁵ § 5 of the Act of June 5, 1794.

²³⁶ *Id.*

²³⁷ 18 U.S.C. § 960 (1948).

²³⁸ *Id.* See also 18 U.S.C. § 956(b)(1948).

Military or Naval Expedition or Enterprise

This issue is not as clear as one may think. For instance, it is not a violation of § 960 in and of itself to travel to a foreign country by one's self for the purpose of taking part in an existing insurgency against a government with which the United States is at peace.²³⁹ Likewise, it is not a violation of § 960 in and of itself to ship arms to a foreign country to assist an insurgency in that country.²⁴⁰

That is not to say that it always is legal to ship arms to a foreign country; it's just not a violation of 18 U.S.C., § 960. Congress filled this gap by implementing the Arms Export Control Act and the Export Administration Act discussed above to prohibit shipping certain items such as automatic weapons, hand grenades, rocket propelled grenades, Stinger missiles, etc., or weapons grade technology, to a foreign country without an export permit from the Department of Commerce or Department of State.

What then is a "military expedition or enterprise?"

A military expedition is a journey or voyage by a company or body of persons, having the position or character of soldiers, for a specific warlike purpose; also the body and its outfit; and that a military enterprise is martial undertaking, involving the idea of a bold, arduous, and hazardous attempt.²⁴¹

In *Wiborg v. United States*²⁴², the defendant was a Danish National who was the captain of a Danish merchant vessel. He entered into an agreement in Philadelphia to deliver a small company of men and ammunition to Cuba to fight in the Cuban Revolution against the Government of Spain. He sailed out the Delaware River and turned north into international waters off the coast of New Jersey. There he met with another merchant vessel in international waters, and took on board men and boxes of rifles and ammunition and two small boats. He then turned south and sailed to Cuba, along the coast of which he sailed for several days, before proceeding to Jamaica. While along the coast of Cuba, Wiborg off-loaded the company of men, along with the rifles and ammunition which were in the boxes, in the two boats which he took on-board off the coast of New Jersey. Wiborg was convicted, and his conviction upheld by the United States Supreme Court.²⁴³

The Court in *Wiborg* held that "For the purposes of this case, it is sufficient to say that any combination of men organized here to go to Cuba to make war upon its government, provided with arms and ammunition, we being at peace with Cuba, constitutes a military

²³⁹ *U.S. v. O'Brien*, 75 F. 900, 903 (C.C.S.D.N.Y. 1896), *Nunez*, 82 F. 599.

²⁴⁰ *Id.* at 907, *U.S.v.Nunez*, 82 F. 599.

²⁴¹ *Wiborg*, 163 U.S. at 650 (1896).

²⁴² *Id.*

²⁴³ *Id.*

expedition.”²⁴⁴ Several other criminal cases arose from this endeavor.²⁴⁵

In *Jacobsen v. United States*,²⁴⁶ a group entered into an agreement in Chicago to assist Germany against the United Kingdom in the First World War by inducing a revolution in India against the authority of the British government. In *Jacobsen*, one co-conspirator went from Chicago to Japan to buy arms and ammunition to be taken to India.²⁴⁷ Other co-conspirators went to India via Manila and Southeast Asia to train troops in India.²⁴⁸ The defendants were convicted of conspiracy to violate the *Neutrality Act*, and their convictions upheld on appeal.

In *United States v. Khan*,²⁴⁹ the defendants organized a military style training operation in the United States using paintballs as a tool to practice military tactics. The group planned to go to Kashmir and fight against the Indian government. Khan and at least two co-conspirators went to Pakistan and trained in a camp operated by Lashkar-e-Taiba (“LET”). Khan and others were convicted of violations of the *Neutrality Act* for their agreement to train and go to Kashmir as a team and engage in military actions against India. Their convictions were upheld on appeal.²⁵⁰

The resolution of what constitutes “a military expedition or enterprise” is an extremely fact-intense determination. See for example, Mr. Justice Harlan’s dissent in *Wiborg*, in which he concluded that the operation was not a military enterprise because it had no commanding officer; was a small group of people, no one of which was recognized as having authority over anyone else; and had the objective of reaching Cuba as individual people, not as a body, to engage in the civil war then ongoing.²⁵¹

Federal trial and appellate courts have fleshed out somewhat the criteria to determine what constitutes a military or naval expedition. In *United States v. Nunez*,²⁵² the district judge stated that, “the essential features of military operations are evident enough. They are concert of action, unity of action, by a body organized and acting together, by means of weapons of some kind,

²⁴⁴ 163 U. S. at 655. See also, *U.S. v. Sander*, 241 F. 417 (S.D.N.Y. 1917).

²⁴⁵ See *U.S. v. Hughes*, 75 F. 267 (U.S.D.C., D. S.C. 1896), *U.S. v. Hart*, 78 F. 868 (U.S.D.C., E.D. PA 1897). But see, *O’Brien*, 75 F. at 903 (C.C.S.D.N.Y. 1896) (jury not able to agree on a verdict of guilty); *Nunez*, 82 F. 599 (C.C.S.D.N.Y. 1896) (jury not able to agree on a verdict of guilty).

²⁴⁶ 272 F. at 402, see also, *U.S. v. Chakraberty*, 244 F. 287 (U.S.D.C., S.D.N.Y. 1917) (Co-defendant of Jacobson prosecuted in the Southern District of New York rather than the Northern District of Illinois).

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ 461 F.3d 477 (4th Cir. 2006).

²⁵⁰ *Id.*

²⁵¹ *Wiborg*, 163 U.S. at 661-662.

²⁵² 82 F. at 601.

acting under command, leadership.”²⁵³ The most comprehensive summary may be in *United States v. Murphy*.²⁵⁴

Where a number of men, whether few or many, combine and band themselves together, and thereby organize themselves into a body, within the limits of the United States, with a common intent or purpose on their part at the time to proceed in a body to foreign territory, there to engage in carrying on armed hostilities, either by themselves or in cooperation with other forces, against the territory or dominions of any foreign power with which the United States is at peace, and with such intent or purpose proceed from the limits of the United States on their way to such territory, either provided with arms or implements of war, or intending and expecting and with preparation to secure them during transit, or before reaching the scene of hostilities, such case all the elements of a military enterprise exist.²⁵⁵

Conclusion

In the American constitutional form of government, the President is charged with conducting foreign affairs,²⁵⁶ and the Congress is charged with the responsibility to raise Armies, to provide and maintain a Navy, and to declare war.²⁵⁷ The President and Congress cannot allow the foreign policy of the United States to be determined by private parties, organizations and groups, or to allow those private parties to take actions, which have the potential to commit the United States to war.

The potential for private parties to affect the foreign policy of the United States has been apparent from the earliest days of the Nation. President George Washington called upon Congress on December 13, 1793²⁵⁸ to enact legislation to prohibit such private actions.

Where individuals shall, within the United States, array themselves in hostility against any of the powers at war, or enter upon military expeditions or enterprises within the jurisdiction of the United States, ..., these offenses cannot receive too early and close an attention, and require prompt and decisive remedies.²⁵⁹

Congress responded on June 5, 1794, by enacted what has come to be known as the *Neutrality Act*.

²⁵³ *Id.*

²⁵⁴ 84 F. 609, (U.S.D.C., D. Del. 1896).

²⁵⁵ See also *United States v. The Mary N. Hogan*, *United States v. The City of Mexico*, *United States v. The Laurada*, and *United States v. The Carondelet* for a discussion of cases forfeiting merchant vessels for having engaged in violations of the Neutrality Act.

²⁵⁶ U.S. CONST. art. II, §§ 1-2.

²⁵⁷ U.S. CONST. art. I, § 8.

²⁵⁸ *Supra* note 60.

²⁵⁹ *Id.*

Not all commentators are happy with the public policy to use the code sections discussed above²⁶⁰ as a tool to minimize adverse effects on U.S. national security and foreign policy arising from private actions within the United States.²⁶¹ “The prevention paradigm, along with its centerpiece, the conspiracy charge, challenges the rule of law in significant ways that the celebration [of successful anti-terrorism prosecutions] overlooks.”²⁶² Some argue that use of the neutrality and anti-terrorism laws results in “anticipatory” prosecutions before the crime actually is completed, and as a result, “begin[...] to trespass on fundamental values of liberty”²⁶³ and “compromise the traditional role of culpability in criminal law.”²⁶⁴

It is important to keep in mind the distinction between a completed crime and a completed terrorist act. There certainly will be one or more crimes committed when the terrorist act has been consummated. It does not follow, however, that crimes will not be completed and finalized before the consummation of the terrorist act. There are some who argue that the crimes which have been completed should not be prosecuted unless and until they are followed by a consummated terrorist act.

The civilian jury plays an extraordinary role in our constitutional form of government. These neutrality and anti-terrorism cases do not involve unilateral governmental action. The United States must prove to a civilian jury, unanimously, beyond a reasonable doubt that the defendant actually had entered into an agreement to mount a military expedition and taken steps to carry out that agreement, or actually intended that persons be killed or maimed in a foreign country, or intended that a terrorist act actually be carried out. If the jury is not convinced unanimously beyond a reasonable doubt that the defendant actually was engaged in the activity involved, then the defendant is not guilty. On the other hand, if the evidence does convince a civilian jury unanimously

²⁶⁰ I.e., 18 U.S.C. §§ 371, 956, 960, 2339A, B, C, & D, and 22 U.S.C. § 2778 and 2779.

²⁶¹ See Tom Stacy, *The “Material Support” Offense: The Use of Strict Liability in the War Against Terror*, 14 KANSAS L.J. & PUB. POL’Y 461 (2005); Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. NAT’L SECURITY L & POL’Y 5 (2005); Peter Margulies, *Guantanamo By Other Means: Conspiracy Prosecutions and Law Enforcement Dilemmas after September 11*, 43 GONZAGA LAW REVIEW 513 (2007).

²⁶² See Margulies, *Guantanamo By Other Means*, *supra* at 514.

²⁶³ Abrams, *The Material Support Terrorism Offenses*, *supra* at 7. “The government is also using these offenses as a basis for early intervention, a kind of criminal early-warning and preventive-enforcement device designed to nip the risk of terrorist activity in the bud. Yet we need to ask whether and to what extent the residual and preventive uses of these sections are beginning to trespass on fundamental values of liberty.”

²⁶⁴ Stacy, *The “Material Support” Offense*, *supra* at 462. “By establishing what is essentially a strict liability offense carrying a very grave punishment, the material support offense compromises the traditional role of culpability in the criminal law.”

beyond a reasonable doubt that the defendant was actually engaged in the terrorist conduct, then what public policy objective would be served by not convicting the defendant?

An argument can be made that statutes such as 18 U.S.C. § 2339B, 18 U.S.C. § 956, or 22 U.S.C. § 2778 don't actually address criminal conduct, but rather are prophylactic measures to prevent real terrorist crimes. Those arguments simply evidence a policy disagreement with Congress, however. Congress has decided, as a matter of national security policy, to make the knowing contribution to foreign terrorist organizations, or knowingly conspiring to kill or maim civilians in a foreign country, or the knowing export of items on the U.S. Munitions list without a license, or conspiracy to mount a military expedition against a foreign government, to be crimes.

Congress has determined that anyone who contributes any money to a foreign terrorist organization aids the terrorist objectives of that organization even if the contributor does not personally support acts of terrorism. Those acts also endanger U.S. national security and adversely affect U.S. foreign policy and foreign relations.

Providing foreign terrorist groups with material support in any form also furthers terrorism by straining the United States' relationships with its allies and undermining cooperative efforts between nations to prevent terrorist attacks. ... The material support statute furthers this international effort by prohibiting aid for foreign terrorist groups that harm the United States' partners abroad: A number of designated foreign terrorist organizations have attacked moderate governments with which the United States has vigorously endeavored to maintain close and friendly relations," and those attacks "threaten the social, economic and political stability" of such governments.²⁶⁵

What sense does it make to not prosecute criminals, who have finalized their criminal acts, until after they add to their existing crimes by consummating a terrorist act? It is correct that *after* the terrorist act we would have confirmation of the primary actor's intent, and we may even have additional evidence which could enhance the likelihood of conviction. How do we tell the parents or spouses or children of the people who are killed in the terrorist act, however, that "yes, we knew the terrorists were planning an act; we knew generally when and where they were going to commit the act; and yes, we knew that people were going to be killed, but we didn't intervene because we wanted to strengthen an already provable case against the terrorists?" How would Americans react if we were to receive this explanation from a foreign government after the execution of a terrorist act on our soil?

The federal statutes discussed above are among the tools which the United States uses to implement its national security strategy. The United States must be committed to war only when

²⁶⁵ *Holder v. Humanitarian Law Project, supra*, 130 S. Ct. at 2726 (2010), quoting the affidavit of a State Department Official.

authorized by Congress pursuant to its power under Article I, Section 8 of the Constitution. U.S. foreign policy should be determined by the President. The United States should enforce the neutrality and anti-terrorism statutes very aggressively in order to ensure that private parties do not embroil the United States in foreign adventures for their own private interests and motives.

U.S. NATIONAL SECURITY REQUIRES A LEGALLY BINDING INTERNATIONAL DEFINITION OF TERRORISM: DOES A BROADER DEFINITION OF TERRORISM PUT US IN THE PROPER CONDITION TO PUNISH THOSE WHO CHALLENGE OUR NATIONAL SECURITY?

MICHAEL WALLACE

I. Introduction

The term national security includes many principles.¹ One of the fundamental principles of national security is deterrence and putting ourselves in a “proper condition to punish”² those who might challenge our national security. The creation of a legally binding international definition for terrorism will give us the strongest footing for deterrence, retribution, retaliation, and punishment of those who would threaten our national security. “Preserving the national security of the United States requires safeguarding individual freedoms and other U.S. values, as well as the laws and institutions established to protect them.”³ “[I]n essence, national security encompasses the protection of the fundamental values and core interests necessary to the continued existence and vitality of the state.”⁴ In many cases, the definition of national security is, “asserted to mean physical security,” which is, “defined as the protection against attack on the territory and people of the United States in order to ensure survival with fundamental values and institutions intact; promotion of values; and economic prosperity.”⁵

Arguably terrorism is simply an attack against the very nature and security of a nation’s values and institutions.⁶ Therefore it is necessary that the international community remain vigilant in its pursuit of a legally viable and sustainable definition of terrorism because the social values, infrastructure, and economic prosperity are all affected by our national pursuit of terrorists and terrorism as it is currently defined by the international community. We must always ask ourselves, in the context of national security, whether “a particular policy further[s] U.S. security or economic interests while preserving the U.S. Constitution.”⁷ At the essence of this principle are questions of the rule of law, under the U.S. Constitution and the

¹ AMOS A. JORDAN, ET AL., AMERICAN NATIONAL SECURITY (6th ed. 2009).

² See *infra* note 121 (Referring to Thomas Jefferson’s quote on the principles of deterrence and national security).

³ See Jordan, *supra* note 1, at 4.

⁴ *Id.*

⁵ *Id.*

⁶ THOMAS X. HAMMES, THE SLING AND THE STONE (2004).

⁷ See Jordan, *supra* note 1, at 4.

social and economic costs incurred when a nation pursues terrorism, poorly defined, at great costs to its own national security and vitality.

Terrorism can only be defined as aggression of a non-state actor against a nation state.⁸ “[For] a state enemy, if determined on violence, has no alternative but to turn to terrorism . . . Thus for all enemies of liberal democracies - whether state, group, or individual - terrorism is a likely recourse . . . [Terrorism] is now established as a method of violence against liberal states.”⁹

“The historical difficulty of democracies, which is rooted in a healthy abhorrence of war and a mirror imaging of the good faith motives of others, is placed under particular stress when aggressive attack is concealed . . . But, more often in the contemporary international system aggressors rely on sophisticated and secret support for terrorist attacks . . . By denying these attacks, the aggressors seek to compound the problem of the world community in responding to them and to receive the protection of the very system of world order they are attacking. This strategy of secret warfare [terrorism] is destroying the very fabric of the international system against aggressive attack.”¹⁰

Essential to our international system’s ability to hold responsible and prosecute these secret attackers is a viable, workable, and sustainable legal definition of terrorism, “in international criminal law, violations of customary international law may produce individual criminal responsibility. But then, the crime must be clearly defined and must be included by international agreement in the subject matter jurisdiction of the international criminal tribunal [for] the perpetrator is to be brought to justice.”¹¹ Therefore, “[a] key aspect to resolving international disputes is customary international law.”¹² This customary international law provides much of the foundation for any determination of criminality by an individual or group. Customary international law has not yet defined or criminalized terrorism beyond the laws for war crimes, and terrorism is not expressly included or defined in the subject matter jurisdiction of the International Criminal Court (ICC).¹³ “[I]nternational law does

⁸ See generally OMAR MALIK, ENOUGH OF THE DEFINITION OF TERRORISM (2000).

⁹ *Id.* at XI-X.

¹⁰ John Norton Moore, *The Nicaragua Case and the Deterioration of World Order*, 81 AM. J. INT’L L., 151, 151 (1987).

¹¹ Johan Van der Vyver, *Prosecuting Terrorism in International Tribunals*, 24 Emory Int’l L. Rev. 528, 531 (2010).

¹² ELLEN S. PODGOR & ROGER S. CLARK, UNDERSTANDING INTERNATIONAL CRIMINAL LAW. 7 (2d ed. 2008).

¹³ See Van der Vyver, *supra* note 11, at 531-32.

not outlaw terrorism per se, but only prohibits certain types of violence (which in some instances include acts of terror violence).¹⁴

The fact that similar non-direct asymmetrical warfare tactics have been used by terrorist groups, freedom fighters, and liberation armies does not change the essential nature of these deeds; regardless of the nobility of the cause, some means and methods must be outlawed.¹⁵ This truism argues for a robust definition of terrorism that should be presented before the International Criminal Court (ICC). Yet, “[t]errorism was deliberately omitted from the subject matter jurisdiction of the ICC and is not expressly mentioned as a crime that can be prosecuted in the ICTY (U.N. International Criminal Tribunal for the former Yugoslavia).”¹⁶ The U.N. has set some precedent in this regard because “[terrorism] is mentioned by name in the jurisdictional provisions of the Statute of the International Criminal Tribunal for Rwanda (ICTR) and the Statute of the Special Court for Sierra Leone.”¹⁷ Yet, “[t]he events of September 11th, [2001], perhaps more than anything else, underscored the need to bring terrorism within the jurisdiction of the ICC.”¹⁸

Generally, “throughout the years, international tribunals have allowed for the prosecution of conduct that requires international condemnation.”¹⁹ The tribunals have been created under the powers of the United Nations Security Council’s powers for the maintenance of international peace and security.²⁰ Many of the “special courts [have been established] to handle crimes of an international magnitude.”²¹ These included the Nuremberg Trials, the Tokyo Tribunal, the ICTY, the ICTR, and the Special Court for Sierra Leone mentioned above.²² Nevertheless, one of the most important and “famous aphorism[s] [about the interplay of international criminal law came out of the Nuremberg Trial], it asserted that: crimes against international law are committed by [persons] not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”²³ “In reality... both . . . the State and the individual may be responsible for breaches of international law. . . . Indeed, the significant conceptual breakthrough in the Nuremberg analysis was the understanding that responsibility of the State did not preclude responsibility of the individual.”²⁴ “This intellectual [jurisprudential] move is at the [foundation] of all the subsequent exercises in punishing international crimes outside the domestic judicial

¹⁴ *Id.* at 533.

¹⁵ *Id.* (paraphrasing Judge Greve’s quote).

¹⁶ *See* Van der Vyver, *supra* note 11, at 534.

¹⁷ *Id.*

¹⁸ *Id.* at 540.

¹⁹ *See* Podgor and Clark *supra* note 12, at 205.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *See* Podgor and Clark, *supra* note 12, at 207.

²⁴ *Id.* at 207-8.

apparatus.”²⁵ The principles of the Nuremberg Trial, “served an important role in the drafting of later international documents . . . [on genocide] and [human rights].”²⁶ “The Nuremberg Principles issued by the International Law Commission in 1950 provided that individuals could be held liable for crimes in international law, irrespective of whether the conduct was [already defined] as a crime under international law.”²⁷ Individuals could be held accountable for crimes against, “peace, war crimes, and crimes against humanity” under international law.²⁸ The legal reasoning of the Nuremberg Trials for individual culpability was also applied with regards to genocide at the Tribunals for Yugoslavia (ICTY), Rwanda (ICTR) and the Special Court of Sierra Leone.²⁹ This jurisprudential reasoning was continued and applied during the Special Tribunal for Lebanon in 2007.³⁰ The Special Court for Lebanon also included the subject matter jurisdiction for terrorism, a definition of terrorism, and the “power to try *in absentia* where the accused has... not been handed over to the tribunal by the State authorities concerned.”³¹

These developments which were codified by the U.N. between 1998 and 2002 led to the development of the ICC and began to bridge the gap in international law that has created our present day conundrums and inefficiencies regarding an internationally agreed upon and legally sustainable definition for terrorism.³² Also, it can be shown that international criminal law as supported by the Rome Statute, which came into force on July 1, 2002 supports prosecution of terrorist acts like that of September 11th, 2001 since it stated in “The Preamble, “the need for universal jurisdiction to proceed as a united front to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes . . . The independent permanent International Criminal Court is established to have jurisdiction over the most serious crimes of concern to the international community as a whole.”³³

As will be discussed later, our national security apparatus is most resilient when we are in a “condition to punish”³⁴ those that have threatened our national security. A robust definition of terrorism which is firmly held and legally sustainable under the principles of Nuremberg Trial, the International Law Conventions, subsequent U.N. Tribunals, and the Rome Statutes that created the ICC may give the international community the force, consistency, and legal efficiency to create sustainable deterrence against transnational criminal terrorist actors.

²⁵ *Id.* at 208.

²⁶ *Id.* at 210.

²⁷ *See* Podgor and Clark, *supra* note 12, at 207.

²⁸ *Id.*

²⁹ *See generally* Podgor and Clark, *supra* note 11, at 215-18.

³⁰ *See* Podgor and Clark *supra* note 11, at 222.

³¹ *Id.* at 222.

³² *Id.* at 229.

³³ *Id.* at 229-30.

³⁴ *See infra* note 121 (Referring to Thomas Jefferson’s quote to John Jay).

II. Background

Though the concept of terrorism has been around for centuries, the modern definition of terrorism has evolved into a very pliable and malleable legal construct. A malleable legal construct is a problem for legal scholars and practitioners because the law demands consistency. Legal consistency creates confidence in practitioners and fosters credibility among the citizenry where the law is applied. When a malleable legal definition for terrorism is applied across the globe the result is inconsistent legal application. This inconsistency undermines the confidence of our international legal system. The inconsistency of legal definitions for terrorism also creates tremendous inefficiencies for our legal systems. The inefficiencies of our international legal systems create substantial and unrecognized costs because of the inconsistencies in the modern definition of terror. The economic costs and lost opportunity costs created by a malleable and amorphous definition of terrorism are arguably too expensive given the many other challenges to our national and global infrastructure. A consistent legal definition for terrorism will limit inefficiencies and costs to our national and global economic systems and infrastructures.

This paper endeavors to discuss: 1) the recent uses of the term terrorism, 2) a brief history of the uses of the term terror, 3) the historical legal imperatives that demand constancy of legal principles, 4) a discussion of terrorism under legal penal law theories, 5) the current problems in defining terrorism, 6) a view of terrorism as a military means, 7) the costs of too broadly defining terrorism, and 8) the recent U.S. Supreme Court Cases' definitions of terrorism. The discussions are chosen to show that a malleable and amorphous definition of terrorism may seem prudent at the onset when a nation-state has been recently assaulted by terrorism and its actors but this approach is tremendously inefficient and ultimately very costly to national and global legal systems, infrastructures, legal consistency, and citizenry confidence.

Ultimately, with this paper, I hope to offer a rationale to clarify and give certainty to our legal definitions of terrorism and the terrorists that commit these acts, and to begin a discussion of the costs and inefficiencies that can potentially dismantle the confidence in our national and global legal systems. The esteemed Harvard professor, Richard Baxter once noted, "We have cause to regret that a legal concept of 'terrorism' was ever inflicted upon us. The term is imprecise, it is ambiguous, and above all it serves no operative legal purpose."³⁵ Our political and social fetish with terrorism and terrorists is extremely costly to our nation's financial resources, infrastructure, and international political capital. Ultimately, this obsession fueled by such an imprecise legal definition, undermines the national security, liberty, and common good that arguably a broader definition of terror has desperately tried to defend.

³⁵ International and Transnational Criminal Law, 669 (2010), citing, Richard R. Baxter, *A Skeptical Look at the Concept of Terrorism*, 7 Akron L. Rev. 380, 380 (1974).

III. The Recent Uses of the Term Terrorism Have Broadened the Definition

The role of the terrorist in modern international political power has continued to grow. This growing role for terrorism in the international political landscape has increased the interest on the part of states to broaden the definitions of terrorism for the expressed good of stability and security of society. Arguably, the broader definitions give nation-states greater flexibility and allow for pursuit and prosecution of terrorists' acts across the globe. Even the slightest connections to terrorism or acts of terror can be legally pursued as the definitions of terrorists' acts have broadened to encompass a wider range of activity and a greater number of persons.³⁶

The problems with the premise of broadening the definition of terrorism is that a broader definition means detaining, interrogating, and trying more terrorists, and risking a definition that grows so broadly it loses its meaning. The impacts of these two problems are: firstly, that the current legal system is already overburdened and the immigration courts and detention facilities are bursting at the seams within the already strained American penal system; and secondly, that the stated interests in stability and national security are actually greatly threatened by an imprecise definition of terrorism because the resources necessary to contain such an expanding definition would have to be equally limitless. Even when some of the short term interests of the various nation-states that wish to pursue these terrorist threats are met, the expanding definitions of terrorism have become very burdensome in terms of economic costs, lost opportunity costs, strain on the penal system's infrastructure, and social costs to international good will and the elemental principals of liberty such as due process.

IV. A Brief History of the Word Terrorism and its Uses

The efforts to define and limit terrorism over the centuries have been noble but extremely challenging because societies have used sporadic acts of violence to control and influence political decisions and powers for millennia. Authors like Walter Laqueur, the noted international terrorism scholar, have predicted that a working definition of terrorism will always continue to elude the international community.³⁷ Yet, "the inability to secure a working definition of terrorism makes it more difficult to secure the [international] cooperation . . . necessary to deal [effectively] with global political violence . . . and [challenges] liberal societies to learn to protect themselves at a cost that is not so great as to destroy their very

³⁶ See 18 U.S.C. § 2709(b)(1), (2) (2010) (The USA Patriot Act, in which Congress broadened the scope of investigations and relevant categories necessary to protect against international terrorism. The U.S. Code gives expanded legal, interpretive authority to FBI officials in relation to international terrorism).

³⁷ See Malik, *supra* note 8, referencing generally WALTER LAQUER, THE AGE OF TERRORISM (1987) and his other works.

values.”³⁸ “There is always hope that terrorism as a political force will end but the stark reality is that “[c]onflict is an immutable part of human nature and terrorism is a present method.”³⁹

Actually, the first uses of the term *terror* in the western political lexicon began with *The Reign of Terror* during the French Revolution of the 1700’s. *The Reign of Terror* actually referred to the swift and decisive force used by the state of France to quell the rebellious, insurgent forces. The only commonality that this use of the term terror has with our current use of the term is that it was a means of political force, and this political force was used in a manner that usurped and disrupted the existing rule of law. The French government, during *The Reign of Terror*, sought quick non-legal remedies to resist the attacks on its “legitimate” sovereignty. The original use of the term terror in the western lexicon was for political purposes. The French government usurped the legal principles of the rule of law and due process by force to quell an insurgency. The original use of the term terror is also directly connected to the dismantling and undermining of an existing rule of law for the purposes of establishing political power and expediency.

Since the attacks on American soil on September 11, 2001 that were led by the Muslim transnational group al-Qaeda, the definitions of terrorism have become increasingly broad.⁴⁰ After the attacks on U.S. soil by al-Qaeda on September 11, 2001, “the legal approach to terrorism... [became one of] ‘forward-leaning’.”⁴¹ The President’s speech following the attacks of 9/11 stated that “full resources would be used to bring those responsible to justice, [and that] no distinction would be made between terrorists who committed these acts and those that harbor them.”⁴² This position was vigorously supported in Ron Suskind’s book, *The One Percent Doctrine*, in which he carefully explained that “even the most minimal chance of a manifested terrorist activity must be acted upon as if it were of the greatest certainty.”⁴³ This is to say that previously held definitions of terrorist acts and actors would be amended as necessary to protect the urgent security needs of the nation.⁴⁴ The U.S. administration became more aggressive with those identified or connected to the acts of 9/11. Many nations followed the U.S.’s lead regarding the identification, detention, and interrogation of any

³⁸ William Hopkinson, *Foreword* to OMAR MALIK, ENOUGH OF THE DEFINITION OF TERRORISM (2000).

³⁹ *Id.* at *Preface*.

⁴⁰ DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, 172 (2009).

⁴¹ *Id.* at 172.

⁴² President George W. Bush, Speech to Address the Nation After the Attacks of 9/11 (Sep. 11, 2001).

⁴³ RON SUSKIND, THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA’S PURSUIT OF ITS ENEMIES SINCE 9/11, 62 (2006).

⁴⁴ Peter Margulies, *The Ivory Tower at Ground Zero: Conflict and Convergence in Legal Education’s Responses to Terrorism*, 60 J. Legal Educ. 373, 385 (2011), citing 18 U.S.C. § 2709(b)(1), (2) (2010), *The USA Patriot Act*

person tangentially connected with the attacks of 9/11, as the following quote denotes:

Increasingly, questions are being raised about the problem of the definition of a terrorist. Let us be wise and focused about this: terrorism is terrorism . . . what looks, smells and kills like terrorism is terrorism.⁴⁵

The assumptions of our national and international leaders, with respect to terrorism, seem to be founded on the principle that using the broadest definition will produce better results. Better results have generally meant that western nations can detain, attack, and quell disruptive insurgent efforts within and outside of their borders under the umbrella of efforts in support of the global war on terror and national security.

This broadened approach to defining terrorism was created during the crisis and aftermath of 9/11. A definition of terrorism that was broadened in response to an attack on American soil and nurtured by a nation in crisis could ultimately have negative effects and consequences on our ability to maintain core legal principles. The principles of law that undergird our social dependence on the rule of law must be firmly rooted in coherency and consistency. Coherency and consistency are necessary elements for the solid legal framework that precedes the unlimited force of the state to punish the offense.⁴⁶ It seems in the midst of the debate, anxiety, and turmoil of post 9/11 on American soil, we have cast our proverbial nets by defining terrorism too broadly, and now we run the risk of pulling everything from the sea of this global turmoil and unrest onto our American boat because of this overly broad definition of terrorism.⁴⁷

V. Historical Legal Imperatives on the Principles and Purposes of Law

Through the centuries, societies have debated the origins and purposes of law. Nevertheless, a stable, working society, in which individual rights and corporate concerns are balanced, is a beginning to understanding the purposes of law, social contract, and governance.⁴⁸ We must be cognizant of the fact that definitions are powerful and tend to serve the agendas of those who have invested in the definition.⁴⁹ Definitions involve an exercise of power and can set the political agenda.⁵⁰ Therefore, an internationally recognized and

⁴⁵ Alex Schmid, *Terrorism - The Definitional Problem*, 36 Case W. Res. J. Int'l L. 375 (2004), quoting, Sir Jeremy Greenstock (British Ambassador to the United Nation), Post 9/11 Speech to the U.N. (2001).

⁴⁶ See generally Thomas Hill Green, *Anglo-American Philosophies of Penal Law*, 1 J. AM. INSTITUTE CRIMINAL L. & CRIMINOLOGY 19 (1910).

⁴⁷ See generally Malik, *supra* note 8, at xix.

⁴⁸ JOHN RAWLS, *A THEORY OF JUSTICE* (1972).

⁴⁹ PETER SEDERBERG, *TERRORISTS, MYTHS, ILLUSIONS, RHETORIC, AND REALITY* (1989).

⁵⁰ *Id.*

legally binding definition must comport with grandest notions of the purposes for the law.

In The Law, by Frederic Bastiat, he stated that the purpose of law was a collective organization of individuals' natural rights into lawful defenses of these rights.⁵¹ This collective organization cannot exist for the sole purpose of destroying or subjugating an individual right. In The Path of Law, Oliver Wendell Holmes stated that "a legal duty... is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court."⁵² Holmes took great care in his statements on the law to distinguish between morality and the law, but the core of his thesis was predictability of the courts.⁵³ According to Holmes, Justice is premised on predictability. Therefore, for a court to properly administer justice, as an arm of the state, it must be consistent and predictable in its interpretation of the laws and its offenders. The justice of a court of law cannot adequately be achieved without a consistent legal framework and rules for legal interpretation.

LEGAL THEORIES ON PENAL LAW AS A LENS INTO DEFINING TERRORISM

The principles of law and legal reasoning found in Bestiat and Holmes are continued by other legal theorists on penal law and punishment theory. In Thomas Hill Green's writings on social contract and penal law, he asserts that the right to 'free life' is elementary to almost every developed legal tradition.⁵⁴ From this individual freedom derives the basic premise of our social contract with the state. The state defends and protects its citizens under the precepts of this agreement. The power of the state is derived from associated groups. This gives the state the right to prevent actions which interfere with the social good.⁵⁵ This right that belongs to the group eliminates the need for private retribution or vengeance.⁵⁶ Retribution and "regulation of private vengeance" belong to the state.⁵⁷ Although, "the state cannot be supposed capable of vindictive passion."⁵⁸ The state must be governed by higher principles of the common good.⁵⁹ "The concept of vengeance is [a] quite inappropriate...action of . . . the state on the criminal."⁶⁰ The basic principles of international law, criminal law, and punishment theory are violated when the definitions of a crime are modified, abridged, changed, or broadened after the offensive act. The power and

⁵¹ FREDRICK BASTIAT, *THE LAW*, 6 (1850).

⁵² Oliver Wendell Holmes, Jr., *The Path of Law*, 10 HARV. L. REV. 457, 457 (1897).

⁵³ *Id.*

⁵⁴ Thomas H. Green, *supra* note 46.

⁵⁵ *Id.*

⁵⁶ *Id.* at 20.

⁵⁷ *Id.*

⁵⁸ Green, *supra* note 46, at 22.

⁵⁹ *Id.*

⁶⁰ *Id.* at 22.

credibility of the state must remain above the moral pining of the populace. This ensures credibility. The state's response to an offense should always, "be prospective rather than retrospective."⁶¹ Crimes and offenses against the state are not supposed to be defined *ex post facto*. This is a violation of basic international and legal norms.

The lack of international unity and cooperation in the age of terrorism [has] naturally led to today's diverse processes by which states prosecute and punish suspected transnational terrorists. The different legal standards that states use to try transnational terrorists are as divergent as domestic legal systems throughout the world. . . . Such varying legal processes make it difficult to prevent and eliminate future terrorist attacks. . . [and] introduces doubt to the legitimacy of those judicial proceedings. Altogether, these separate state solutions to terrorism often fail to respect principles of international law.⁶²

Based on the above assertion by the author Joseph Anzalone, the international legal community has failed to concretize a definition of terrorism. This failure to create a legal definition causes great harm to the credibility of the system, fails to support to proper pursuit of terrorism, and disables any possibility for true coordinated deterrence of terrorism. Successful deterrence is one of the most commonly held principles of penal law.⁶³ Therefore, failure to have an internationally agreed definition of terrorism destabilizes the international legal community, creates greater unattended costs, and diminishes efficiency toward a greater common good.

VI. Defining Terrorism

Most every group that has tried to define terrorism over the last century has dissolved without a legally solid definition. The League of Nations initially attempted to define terrorism at the beginning of the Cold War. After the formation of the United Nations, various committees have been formed throughout the years for the prohibition and definition of terrorism, but no internationally agreed upon standard could be resolved.⁶⁴

Currently, there are well over 200 definitions of terrorism used throughout the world.⁶⁵ This reality exists because, "countries disagree on how to define 'terrorism' and who should be identified as terrorists."⁶⁶ Therefore, "[d]efining terrorism has remained a major

⁶¹ *Id.* at 31.

⁶² Joseph Anzalone, *Extraordinary Times Demand Extraordinary Measures: A Proposal to Establish An International Court for the Prosecution of Global Terrorists*, 16 U.C. DAVIS J. INT'L L. & POL'Y 273, 274-75 (2010).

⁶³ Green, *supra* note 46, at 31.

⁶⁴ Schmid, *supra* note 4,5 at 387.

⁶⁵ Alexander Spencer, *Questioning The Concept of New Terrorism, Peace and Conflict Development Issue 8* (2006), 3, <http://www.peacestudiesjournal.org.uk/dl/Feb%2006%20SPENCER%20version%202.pdf>, quoting Jeffery Simon.

⁶⁶ Roberta Smith, *America Tries to Come to Terms With Terrorism: The United States Ant-Terrorism and Effective Death Penalty Act of 1996 v.*

block to reaching international agreement on terrorism.”⁶⁷ This major block has increased international economic and social cost, and reduced judicial efficiencies. “[S]ome commentators...argue that [a] definition [of terrorism] is both technically impossible and/or undesirable on policy grounds.”⁶⁸ Nevertheless, “terrorism remains a political term describing various acts and methods of political violence.”⁶⁹ Yet, “[t]he problem of finding [a] consensus on a universal definition [of terrorism] is, at this stage, more a political than a legal or semantic problem.”⁷⁰ The most useful legal definitions of terrorism should not be developed in crisis by nation-states that have recently experienced asymmetric or insurgent transnational attacks. This will only create a politicized and shifting definition of terrorism, and a definition of terrorism without legal authority. Nonetheless, it should never be the state of the legal community to allow *ad hoc* definitions of international crimes or mercurial definitions that meet the whims and agendas of political ends.

In 1996, the U.N. formed an Ad Hoc Committee to address the proliferation of terrorism. The biggest hurdle for this committee was the definition of terrorism.⁷¹ The Ad Hoc Committee reformed after the September 11, 2001 attacks on the U.S. by al-Qaeda. The U.N. discussion after 9/11 came very close to a mutually agreeable definition, but Israeli occupation of Palestine and subsequent discussions of differences between terrorists, freedom fighters, and state-sponsored acts of violence seemed to derail the measurable progress toward a definition of terrorism.⁷²

Prior to the Ad Hoc Committee’s progress following the al-Qaeda attacks of 9/11, the U.N. Committee actually created an informal working definition of terrorism in 1996: Table 9: United Nations Ad Hoc Committee on Terrorism: Informal Text of

Art. 2 of the Draft Comprehensive Convention:

Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally causes:

- (a) Death or serious bodily injury to any person; or
- (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or

British Anti-Terrorism Law and International Response, 5 CARDOZO J. INTL. COMP. LAW 249, 249 (1997).

⁶⁷ Smith, *supra* note 66, at 254.

⁶⁸ Ben Saul, *Defining ‘Terrorism’ to Protect Human Rights*, The University of Sydney Law School Legal Research Paper No. 08/125, 1 (2008).

⁶⁹ *Id.* at 2.

⁷⁰ Schmid, *supra* note 45, at 390.

⁷¹ *Id.* at 388.

⁷² *Id.*

(c) Damage to property, places, facilities, or systems referred to in paragraph 1 (b) of this article, resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.⁷³

The problem with almost any comprehensive definition of terrorism is that the range of actions, causes, and motives is almost unreasonably broad.⁷⁴ “The description [of] ‘terrorist’ has been applied across a wide spectrum, which has included Winston Churchill for his bombing of German cities in the Second World War . . . [to] Saddam Hussein for his chemical extermination of [the] Kurds...The academic study of terrorism has encompassed the whole and extensive spectrum of activities...The approach has been to trawl the sea for all its inhabitants and to dissect them in search of common characteristics...[A] more fruitful approach is to identify those...that pose the [greatest] problem, and to confine attention to them.”⁷⁵ This is to say our emphasis should be on defining terrorists’ actions for political violence against international democratic states during times of peace.⁷⁶

THERE ARE LEGAL PROBLEMS ASSOCIATED WITH DEFINING
TERRORISM AS A MILITARY MEANS TO A POLITICAL
OBJECTIVE

The struggle of the international community to define terrorism over the last several generations and through the development of the United Nations only serves to highlight the necessity of a proper legal framework. A solid legal framework for terrorism gives support for the proper investigation, prosecution, and rendered justice for terrorism and its actors. Yet, the necessity for this legal framework still begs the question whether terrorism properly defined is a crime, a military means, or a political ends. The U.N.’s definition favors defining terrorism as an international crime. There are several pros and cons to that approach since each state has vastly different criminal law, but on the other hand, any definition that shows terrorism as a means to a political end lends support to the argument that some terrorists could be seen as enemy combatants under the United Nations’ definition for Armed Conflict under Common Article 3.⁷⁷

To define terrorism as a means to a political end gives greater credibility to the terrorist actor and serves to legitimate the

⁷³ See Schmid, *supra* note 45, at 387-88. (referencing U.N. Information Draft Definition of Terrorism).

⁷⁴ Malik, *supra* note 8, at 2. (discussion of the most comprehensive terrorist definition to date that was completed by ALEX P. SCHMID AND ALBERT J. JORGNMAN, POLITICAL TERRORISM: A NEW GUIDE TO ACTORS, AUTHORS, CONCEPTS, DATA BASES, THEORIES AND LITERATURE (1988).).

⁷⁵ Malik, *supra* note 8, at xviii.

⁷⁶ *Id.*

⁷⁷ See *generally* Geneva Conventions (GC), United Nations Common Article 3 (1949).

illegitimate and criminal use of force by illegal transnational groups. This may add to the burden of the state to legally prove its legitimate legal interests and may create a shift in the burden of proof for the state.⁷⁸ If the illegal terrorist act is actually a means to a politically motivated end then the act begins to look and sound a lot like warfare. This is not necessarily a favorable position for developed western states because the U.N. provides certain legal protections and relaxations under its international laws of armed conflict to freedom fighters and enemy combatants.⁷⁹

Carl Von Clausewitz, the great 18th Century Prussian military theorist and savant on political rhetoric and use of force, stated in his treatise On War that:

We maintain . . . that war is nothing but a continuation of political intercourse, with a mixture of other means. We say, mixed with other means, in order thereby to maintain at the same time that this political intercourse does not cease by the war itself, is not changed into something quite different, but that, in its essence, it continues to exist, whatever may be the form of the means which it uses, and that the chief lines on which the events of the war progress, and to which they are attached, are only the general features of policy which run all through the war until peace takes place.⁸⁰

To further this concept of warfare as an extension of political agenda, American military author Thomas X. Hammes, in his book The Sling and The Stone, addresses the changing face of warfare over the centuries and discusses how smaller, less developed nations have continued to use increasingly less direct methods of warfare because they are facing the “goliaths” of western imperialism.⁸¹ Hammes states, that “[this newly developed generation of warfare] uses all available networks – political, economic, social, and military - to convince the enemy’s political decision makers that [victory is] either unachievable or too costly. . . . like all wars, [this new form of warfare] uses [all] available weapon systems [means] to [change the enemy’s political position].”⁸²

⁷⁸ See recent Supreme Court case discussions: *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007); *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010).

⁷⁹ See generally Geneva Conventions (GC), United Nations Common Article 3 (1949). The determination of the proper categories for freedom fighters and enemy combatants is a very detailed process under the laws of war and first generally requires an analysis of the type of conflict. International laws of war may not always apply. See also discussion Gary Solis, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* (2010). The U.S. is not a signatory to GC additional protocol 2 which provides exceptions for freedom fighters.

⁸⁰ CARL VON CLAUSEWITZ, *ON WAR* (1832).

⁸¹ THOMAS X. HAMMES, *THE SLING AND THE STONE* (2004).

⁸² *Id.* at 2-3.

Though Hammes traces the lineage of the modern terrorism tactics through Mao Tse-tung⁸³, many military leaders have employed similar indirect military tactics throughout history to effect political change. This paradigm for a new generation of warfare allows for smaller nations and transnational groups to forward their political agendas through the use of indirect attacks on the political stability of nations they may perceive as a threat or as the aggressor against the transnational group's political will. To echo this point, from the fields of terrorism scholarship, Laqueur notes, "the new terrorism is different in character, aiming not at clearly defined political demands but at the destruction of society and the elimination of large sections of the population."⁸⁴

Hammes' concept of *David versus Goliath* in The Sling and The Stone is problematic because it adds to the broadness of the definition of terrorism and may lessen our legal defenses. This broader definition of terrorism is further complicated when Hammes' concept of emerging warfare is read through the lens of political conflict as posited by Clausewitz, which argues that warfare is simply an extension of political discourse. If terrorism is a legitimate means of warfare by a defenseless and inferior opponent then terrorism becomes more difficult to prosecute as an international crime.

If Hammes is correct on any level, then the objective and goals of terrorist organization's insurgency have been achieved, because "their agenda was never military victory but the disruption of the social fiber and stability of the [state] superpower."⁸⁵ If the legal scholars Holmes and Bastiat are correct in their assertions of the purposes of law, then a stable, working social system is largely founded in a strong adherence to and consistency of the rule of law. It is highly improbable that we can continue on the path to global security and international continued cooperation without a coherent development and definition of the legalities and illegalities of terrorist acts as a means of legitimate political discourse, warfare, or international crime.

Terrorism currently lacks the precision, objectivity and certainty demanded by legal discourse. Criminal law strives to avoid emotive terms to prevent prejudice to an accused, and shuns ambiguous or subjective terms as incompatible with the principle of non-retroactivity. If the law is to admit the term, [an] advanced definition is essential on grounds of fairness, and it is not sufficient to

⁸³ Hammes, *supra* note 81, at 3. (Hammes traces the development of this new generation of warfare from Mao Tse-tung People's War during China's Revolution. Mao's tactics exploited the few advantages that a small revolutionary movement have against a state's power with a large and well-equipped army. People's war strategically avoids decisive battles, since a tiny force of a few dozen soldiers would easily be routed in an all-out confrontation with the state. Instead, it favors a three stage strategy of protracted warfare, with carefully chosen battles that can realistically be won).

⁸⁴ Spencer, *supra* note 65, citing Walter Laqueur, *THE NEW TERRORISM: FANATICISM AND THE ARMS OF MASS DESTRUCTION* (1999).

⁸⁵ Hammes, *supra* note 81.

leave [the] definition to the unilateral interpretations of States. [A proper] [l]egal definition could plausibly retrieve terrorism from the ideological quagmire, by severing an agreed legal meaning from the remainder of the elastic, political concept. Ultimately it must do so without criminalizing legitimate violent resistance to oppressive regimes – and becoming complicit in that oppression.⁸⁶

These principles challenge us to understand that there are social, political, and economic costs associated with each of the various “lines on which the events of the war progress.”⁸⁷ The enemy’s goal is to convince his adversary that the costs of conflict are too great.⁸⁸ Whether terrorism is best defined within the scope of military means or not, the objectives of terrorism and warfare are similar in terms victory, deterrence, and maintenance of the underlying social infrastructure that we endeavor to protect. These are all costs, and we must be mindful of them because the terrorist enemy is quite mindful of our perceived and real costs and the effects of these costs have on the underlying stability of our democratic social structures.⁸⁹

VII. The Costs and Limits of Defining Terrorism Too Broadly

Implicit in the edicts of any country to battle its enemies at all costs, is the question of whether there exists a balance between the rule of law and the security of the state. Some political scholars argue that there is always an inherent tension between the rule of law and national security. The question is whether one principle should be held and lauded over the other, or should the principles be balanced. The great Roman leader Cicero stated that “during war the laws are silent.” Yet, his classic refrain does not consider the costs to a society when the rule of law is broken. This precept of a Roman emperor and conqueror does not discuss the consequences from which a modern democratic society may not easily repent when the rule of law is broken without regard for the economic, social, moral, and jurisprudential costs associated with such an attack on the basic principles of the rule of law. Though, we must also consider that maybe the Roman statesman’s precept is simply admonishing us to limit the scope and time period which our laws are silent, because to do otherwise has great and indelible consequences.

After 9/11 in the U.S., the following position was formed and written in support of an abridgement of the rule of law in support of the war on terrorism: “Enemies, unlike criminals, are out to destroy us. They must be fought and crushed, not pursued and punished.”⁹⁰ This clear clarion call that our nation should engage in war against

⁸⁶ Saul, *supra* note 68, at 11. (internal quotation omitted).

⁸⁷ See Clausewitz, *supra* note 80.

⁸⁸ Hammes, *supra* note 81.

⁸⁹ See Spencer, *supra* note 65. (citing Walter Laqueur’s comments).

⁹⁰ Anne-Marie Slaughter, *Beware the Trumpets of War: A Response to Kenneth Anderson*, 25 HARV. J.L. & PUB. POL’Y 965, 965 (2002), citing Kenneth Anderson, *What to do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL’Y 591, 611 (2002).

terrorists and terrorism is enticing and in many ways satisfying, yet it is a position that does not speak of costs. There is no balancing in this assertion. The principles are simple: there has been an attack at or near the main battery of the U.S. social and economic infrastructure, this attack was committed with intent, malice and aforethought, the attack caused great damage to innocent civilians and took civilian lives. These principles set the moral ground for a full and complete retaliation of the greatest U.S. military force. For anyone who agreed with this position, the al-Qaeda attacks of 9/11 demanded full military force and retribution as the only reasonable response.

We must neutralize terrorists *before* they strike. To respond to this threat of terrorism, the Department has pursued an aggressive and systematic campaign that utilizes all available information, all authorized investigative techniques, and all legal authorities at our disposal. The overriding goal is to prevent and disrupt terrorist activity by questioning, investigating, and arresting those who violate the law and threaten our national security . . . we will not permit, and we have not permitted, our values to fall victim to the terrorist attacks of September 11.⁹¹

It is not the intent of my paper to show disagreement with this aforementioned proposition, or to vilify the proponents of the necessity of military response, but simply to add to the discussion an element of costs, and to assert that costs should as often as possible be an element of our social calculations.⁹² It is an unsustainable position to continue to broaden our legal definitions in hopes of “catching” more conspirators to terror.⁹³ We cannot fight and crush every opponent of the U.S. American ideology across the globe regardless of distance, adequacy of reach, or practicality.⁹⁴ To wage a complete battle against global terrorism in its broadest forms assumes that we have unlimited capacity and resources.⁹⁵ Even for one of the greatest free nations in history and one of the most competent and capable military forces on the globe, this type of hubris can itself become a costly arrogance and have tremendous deleterious effects on our nation’s resources, its military, economy, and legal systems. The current U.S. national debt is more than \$15 trillion dollars.⁹⁶ In 2000 the national debt was \$5 trillion dollars.⁹⁷

⁹¹ Viet D. Dinh, *Freedom and Security After September 11*, 25 HARV. J.L. PUB. POL’Y 399, 401 (2001)(discussion of Department of Justice policies following 9/11).

⁹² MICHAEL GORDON AND BERNARD TRAINOR, COBRA II: THE INSIDE STORY OF THE INVASION OF IRAQ (2006)(Many within the Bush administration were tremendous heralds for a more balanced approach and cost benefit analysis as the Global War on Terror began).

⁹³ See generally Malik supra note 8.

⁹⁴ Philip Gordon, *The End of the Bush Revolution*, 58 Foreign Affairs No.4 (2006) at 75.

⁹⁵ *Id.*

⁹⁶ Jill Schlesinger, 12 Scary Debt Facts for 2012 at <http://finance.yahoo.com/news/12-scary-debt-facts-for-2012.html> (2012).

⁹⁷ TreasuryDirect.Gov at http://www.treasurydirect.gov/govt/reports/pd/histdebt/histdebt_histo5.htm

The national debt was \$8 trillion and rising in 2006.⁹⁸ This deficit rose from an annual surplus of \$200 billion dollars in 2001 to an annual deficit of \$400 billion dollars by 2006.⁹⁹ This deficit happened during just the first five years U.S. National Security Strategy focused the defense budget¹⁰⁰ on the Global War on Terrorism. Invectives which encourage our nation to attack transnational terrorism in all its forms and manifestations across the globe, potentially unravel the developments in international progress toward rule of law agreements, and “turn back the clock on one of the most important legal developments over the past half-century [which is] the individualization of international law . . . [these invectives] betray our deep commitment to the rule of law as part of our national identity, by substituting vengeance for punishment.”¹⁰¹

Notably, the greatest political minds have disagreed on this very point of tension between radical and passionate pursuit of our enemies, and patience and insistence on the rule of law. Benjamin Franklin reminded his fellow colonists that “[anyone] that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.”¹⁰² For Franklin, liberty was the supreme good, and a people capable of surrendering its freedoms in exchange for security were not fit for self-governance, or even safety.¹⁰³ A century later, Abraham Lincoln appeared before Congress to justify his unilateral decision to suspend the writ of habeas corpus. “Are all the laws, but one...to go unexecuted, and the government itself go to pieces, lest that one be violated?”¹⁰⁴

Edmund Burke, the great British politician and political philosopher once commented in his political manifesto that civil liberties cannot exist unless a state exists to vindicate them: “[t]he only liberty I mean is a liberty connected with order; that not only exists along with order and virtue, but which cannot exist at all without them.”¹⁰⁵ Burke’s sentiments highlight Franklin’s thesis and echo the principles of justice which cannot rightfully be acquired by quiet usurpations of our civil liberties and due process or a muffling

⁹⁸ Gordon *supra* note 94 at 80.

⁹⁹ *Id.*

¹⁰⁰ The Heritage Foundation.org at <http://www.heritage.org/research/reports/2011/08/what-people-are-saying-about-national-security-defense-spending-and-the-debt>. *See also* Senate Budget Committee Testimony, The Heritage Foundation (March 6, 2012), available at <http://www.heritage.org/research/testimony/2012/03/defense-budget-when-national-security-becomes-last-priority?query=Defense+Budget:+When+National+Security+Becomes+Last+Priority>

¹⁰¹ Slaughter *supra* note 90 at, 966.

¹⁰² Dinh, *supra* note 91, at 399, quoting Benjamin Franklin, HISTORICAL REVIEW OF PENNSYLVANIA (1759), quoted in THE OXFORD DICTIONARY OF POLITICAL QUOTATIONS 141 (Anthony Jay ed., 1996).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Dinh, *supra* note 91 at, 400, quoting Edmund Burke, and citing ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE (1996).

of the rule of law. Ironically enough, Burke's retort to avoid excess, passion, and retribution as a means to lawful order was developed in the context of and in response to the *Reign of Terror* in France during the late 1700's, and Franklin's command was fashioned during our nation's *Revolutionary War*. Arguably, these two statesmen knew something of the false balancing of liberties and national securities during times of war and its potential social costs.

Throughout history leaders have struggled to balance national security and human rights. Yet, "[t]he dichotomy between freedom and security is not new, but it is false."¹⁰⁶ The proposition that liberty and national security are competing or mutually exclusive positions should be challenged. "In the article *The Corruption of Civilizations*, Professor Timothy Kuhner denies that security and liberty are competing sides in a zero-sum game . . . 'Our security is often best served by adhering to our political values and cultural influences.'¹⁰⁷ Therefore, any premise that asserts that our national security is best served by disruption of our commonly held domestic legal principles, or widely held international law principles must be challenged directly on the foundation of legal history, the principles of human rights, and social utility.

VIII. Principles the U.S. Supreme Court's Decisions on Terror and the Rule of Law and the Effects on Efficiency

As the war on terror continues the U.S. courts have tried nobly to defend the principles of law under the constitution. The U.S. federal courts have resisted attempts to undermine the consistency of judicial review and the rule of law. The courts have upheld the protections of Due Process for foreign nationals in the United States, in cases like *Al-Marri v. Wright*, 487 F.3d 160 (2007), where a legal resident of the U.S. was unlawfully declared an enemy combatant, detained and transferred to military custody under the Military Commissions Act (MCA). The case held that the President did not have inherent constitutional authority to order seizure and indefinite military detention of a civilian.

The question of efficiencies and economy should derive naturally from the facts of the family of cases similar to *Al-Marri v. Wright*. In *Al-Marri* the defendant was held for more than four years without criminal charge or due process.¹⁰⁸ "He was initially taken from his home [in the U.S. and detained], although the Government has never alleged that he is a member of any nation's military, has fought alongside any nation's armed forces, or has borne arms against the United States anywhere in the world . . . he has been so held, without acknowledgement of the protection afforded by the

¹⁰⁶ *Id.*

¹⁰⁷ Peter Margulies and Laura Corbin, *Introduction: The Emerging Power of Context Over Conventional Wisdom in Scholarship on Law and Terrorism*, 13 ROGER WILLIAMS U. L. REV. 342, 432 (2008), quoting Timothy K. Kuhner, *The Corruption of Civilizations*, 13 ROGER WILLIAMS U. L. REV. 349, 371 (2008).

¹⁰⁸ *Al-Marri v. Wright*, 487 F.3d 160, 163 (2007).

Constitution.”¹⁰⁹ The court held in Al-Marri that, “the president of the United States did not have inherent Constitutional authority ... to order... indefinite military detention of legal resident[s] who had not been shown to fit the legal definition of ‘enemy combatants’, [since Congress] strictly limited summary detentions of ‘terrorist aliens’, and also contravened legal residents’ uncontestable due process rights.”¹¹⁰ The illegal detention of Al-Marri a legal resident and citizen of Qatar was reversed and remanded, but there were real calculable financial, resource and infrastructure costs that that were paid for by our nation’s citizens because of these decisions. For our nation to arrest, interrogate, and hold an infinite number of detainees without legal cause is extremely costly in a number of areas. Yet, the policy is justified by the “The One Percent Doctrine”,¹¹¹ which in principle avoids any discussion of cost or risk analysis as its major premise.

In Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010), nearly opposite facts lead to an opposite determination by the court. The defendant is a Yemeni citizen, not an American legal resident and the defendant fought with the Taliban in Afghanistan. He petitioned the U.S. District Court for the District of Columbia for a writ of habeas corpus.¹¹² The District Court found that, “international laws-of-war carried no authority in United States courts because they had not been implemented into domestic law by the political branches.”¹¹³

The question is not simply whether the court correctly decided the cases under the proper legal precedent, but whether this process of detaining and prosecuting the widest number of possible affiliates to various transnational political groups that are misaligned to the American politic should be given trial and appeal under the limited resources of our already overly-burdened Immigration, Military, and Federal court systems. To use the words of author Omar Malik, we are guilty of broadly “trawling the [terrorist waters] for all of its inhabitants.”¹¹⁴ It is futile for the courts to dissect these terrorists cases in search of commonality when there are no legally agreed upon definitions of terrorism. This is an economically unfeasible, legally unreasonable, and socially unsustainable proposition upon which we have embarked.

IX. Conclusion

The current use of the term terrorism is too broad to be legally useful. The international legal community is rendered less efficient because of the lack of usefulness of the increasingly broad

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 161.

¹¹¹ See Suskind, *supra* note 43.

¹¹² J. Taylor Benson, *International Laws-Of-War, What Are They Good For? The District of Columbia Circuit in Al-Bihani v. Obama Correctly Clarified That International Laws-Of-War Do Not Limit The President’s Authority to Detain Enemy Combatants*, 44 CREIGHTON L. REV. 1277, 1278, citing Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010).

¹¹³ *Id.* at 1278.

¹¹⁴ Malik, *supra* note 8, at xix.

definitions of terrorism and terrorists. Because of this inefficiency in our legal processes regarding terrorism, the U.S. has been hit directly with immeasurable, unaccounted, and nearly insurmountable costs to our financial institutions, infrastructure, and national security resources.

After hundreds of attempts to define the term in legally meaningful ways, the international community is consistently stalled by roadblocks and fundamental disagreements of policy. The values of a stable definition before the law are numerous, but the stability of an efficient legal system and proper due process must be counted among these as most highly valued. Without the stability and credibility of our legal system, the essential trust and credibility of our legal process necessary for government begin to erode. "Giving in to the urge to combat terrorism before trying to understand or define it...[can only be done at] the expense of [great social] frustration."¹¹⁵

It is imperative that the legal community continue to harden our definitions of terrorism so that we can firmly fasten to it our indelible legal principles of penal law and international law to include due process. The reasoning principles of the legal community must give consistency to the terms and processes for prosecuting global terrorism and help resist the emotive tendency to define terrorism in increasingly inflammatory, politically, and internationally incendiary terms.

Carrying enormous emotional freight, terrorism is often used to define reality in order to place one's own group on a high moral plane, condemn the enemy, rally members around a cause, silence or shape policy debate, and achieve a wide variety of agendas . . . Terrorists became the mantra of our time, carrying a similar negative charge as communist once did. Like that word, it tends to divide the world simplistically into those who are assigned the stigma and those who believe themselves above it. Conveying criminality, illegitimacy, and even madness, the application of terrorist shuts the door to discussion about the stigmatized group or with them, while reinforcing the righteousness of the labelers, justifying their agendas and mobilizing their responses.¹¹⁶

These inflammatory labels and ideologies have no place in our legal lexicon.

To varying degrees, the concepts and principles of "terror" for the ends of political purposes have been apparent throughout history. These means of political influence through violence have been used from Babylon through the period of the Greeks and Romans. The Peloponnesian Wars, the fall of Rome, Sun Tsu, and other great military and political leaders of history have all captured the ideas of power, fear and "terror" as a thesis to gaining, usurping, or

¹¹⁵ *Id.* at xviii.

¹¹⁶ See Schmid, *supra* note 45. (citing PHILLIP HERBST, TALKING TERRORISM: A DICTIONARY OF THE LOADED LANGUAGE OF POLITICAL VIOLENCE, 163-64 (2003)(internal emphasis omitted).).

maintaining power. “Kill one - Frighten ten thousand.”¹¹⁷ Therefore, arguably whenever the force is applied in an atypical manner and whenever the force applied is unexpected or unpredictable; the force applied to achieve the political end is often defined as “terror”. This is not reason enough to silence our rule of law. We cannot allow to thrive the concept of “one man’s terrorist is another man’s freedom fighter.”¹¹⁸ We cannot allow our nation to undermine due process and the rule of law because this gives terrorists and terrorism the success of its main objectives, which is to destroy our peace and stability.¹¹⁹

Since the end of the Cold War and the reduction in nation-state supported terrorism, the potential for leakage WMD material and expertise to transnational terrorist groups has increased.¹²⁰ Given this reality, the extremely high global costs of failing to deter terrorism because we do not have a sustainable definition has now been added to all of the other previously mentioned social, systemic, and opportunity costs, because of this stalled international process. The total costs of a failed and excessively broad definition of terrorism are excessively high. Our nation cannot afford the social costs of inadvertently legitimizing international terrorism, nor can this nation afford to lend support to state actors who may be inclined to use a broadened definition of terrorism as an umbrella under which they may perform acts of war that cannot be attributed to the state. It is in our nation’s best interest, and in the best interest of the international community to be extremely specific and particular about our definitions of terrorism and terrorist groups. These terms should not be diluted or broadened under the premise that a wider net will catch more fish, or that a greater outline will cast a wider shadow against the backdrop of our enemies. The sharpest, most concise and most direct definition will always serve the legal profession the best because of the greater efficiency of time, resource, and effort.

“The justest dispositions possible in ourselves will not secure us against [war].

It would be necessary that all other nations were just also. Justice indeed on our part will save us from those wars which would have been produced by a contrary disposition. But how to prevent those produced by the wrongs of other nations? By putting ourselves in a condition to punish them. Weakness provokes insult and injury, while a condition to punish it often prevents it.”¹²¹

¹¹⁷ Quote attributed to SUN TSU, THE ART OF WAR.

¹¹⁸ Comment often attributed to Yasir Arafat.

¹¹⁹ See generally Omar Malik, *supra* note 8. See also Hammes discussion, *supra* note 81.

¹²⁰ Malik, *supra* note 8, at xi.

¹²¹ John Norton Moore, National Security Law Syllabus, also available at <http://faculty.virginia.edu/jnmoore/pdf/Moore-National-Sec-Law-Vol->

[01S.pdf](#), citing Thomas Jefferson, *The Papers of Thomas Jefferson: Letter to John Jay*, August 23, 1785.

Foreword

**2012 LATCRIT SOUTH-NORTH EXCHANGE
ON THEORY, CULTURE AND LAW: *THE
CHANGING FACE OF JUSTICE: ACCESS TO
THE INTER-AMERICAN SYSTEM OF HUMAN
RIGHTS***CHARLES R. VENATOR-SANTIAGO¹

In recent years individuals, non-governmental organizations (NGO), legal clinics, protest groups, and other non-state actors successfully managed to influence international human rights forums, which have otherwise remained the sole realm of nation-states. Non-state actors have successfully represented civic society in the pursuit of social justice in international human rights forums such as the Inter-American Commission on Human Rights. They continue to push international human rights in strategic ways to challenge various forms of nationalist and transnational discrimination. The 2012 LatCrit South-North Exchange on Theory, Culture, and Law (SNX) sought to create a forum anchored on the experiences of the global South to examine, compare, and contrast cases that exemplify the these debates.²

The LatCrit South-North Exchange is designed to foster and sustain a trans-national, cross-disciplinary and inter-cultural dialogue on current issues in law, theory and culture that are of common interest across the Americas. This Exchange consists of two parts: an annual encounter in a global South country and, afterward, a scholarly publication based on the live proceedings.³ Both the "live"

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² For more information on LatCrit and the South-North Exchange, please visit: www.latercrit.org.

³ See, e.g., The South-North Exchange on Theory, Culture, and Law (2003 SNX), *Proceedings from the South-North Exchange*, 38 Rev. Jurídica U. Inter. P.R. 1 (2003); The South-North Exchange on Theory, Culture, and Law (SNX 2003), *Law, Culture, and Society: LatCrit Theory and Transdisciplinary Approaches* 16 Fla. J. Int'l. L. 539 (2004); The South-North Exchange on Theory, Culture, and Law (2004 SNX), *Law, Culture And Indigenous People: Comparative And Critical Perspectives* 17 Fla. J. Int'l. L. 1 (2005); The South-North Exchange on Theory, Culture, and Law (2006 SNX), *Free Market Fundamentalism: A Critical Review of Dogmas and Consequences*, 5 SJSJ 497 (2007). The proceedings for the 2011 SNX will be forthcoming in the *Revista Jurídica de la Universidad Interamericana de*

and published versions of the Exchange aim to bring to bear on a contemporary issue or topic the combined specialties of the Exchange participants. Ideally, this annual Exchange will help to build networks of knowledge that, over time, will help to foster social justice awareness and activism, and help to inform public discourse and policymaking nationally, hemispherically, and globally. To do so, each year the Exchange examines a topical general theme, and participants "exchange" views, ideas, experiences and work through a series of interactive plenary sessions.

This year's South-North Exchange brought together scholars, activists, policy makers, and state-actors from a wide array of disciplines and countries to Costa Rica, the home of the Inter-American Human Rights Court (IAHRC). The Exchange's participants addressed a wide range of issues and debates centered on the intersection of human rights and justice, ranging from debates over strategic litigation, substantive notions of vertical and horizontal rights, and contemporary political debates about the meaning of the left in a post-modern world. The contributions included in this volume embody the core objectives of the LatCrit South-North Exchange.

Central to this year's Exchange was the concern with emerging human rights norms and their impact on the rights of subjects in domestic or national settings. Alma Beltrán y Puga's contribution, *Paradigmatic Changes in Gender Justice*, examined the Inter-American Human Rights jurisprudence and reports addressing the reproductive rights of women in Latin America. She examines some of the ways in which this jurisprudence can be used for strategic litigation in places like Mexico to address egregious forms of gender violence and human rights violations more generally. In contrast, Lynsay Skiba's "*Asilo Americano' and the Interplay of Sovereignty, Revolution and Latin American Human Rights Advocacy*" how emerging human rights norms helped to reframe prevailing notions of diplomatic asylum in Chile and Argentina. Primarily focusing on the case of Argentina, she documents how human rights advocates sought to use the Inter-American Commission on Human Rights, NGOs, and other international forums to provide an alternative "safety valve" for

Puerto Rico (Summer 2012) and the NOVA *ILSA Journal of International and Comparative Law* (Summer 2012).

activists fleeing the tyranny of the Chilean General Augusto Pinochet's regime and Operation Condor more generally. Both contributions offer critical insights on how Inter-American human rights norms can be used for strategic purposes to address various forms of state violence.

Human rights norms, most participants noted, have also influenced domestic or national rights debates. Wilmai Rivera-Pérez' *What the Constitution got to do with it?* explains how human rights law has shaped horizontal notions of rights in national legal systems. Drawing on a comparative discussion of Argentina's law of the *amparo*, Colombia's law of the *tutela*, and the 1952 Puerto Rican constitution's bill of rights, Rivera-Pérez demonstrates some of the ways that human rights norms have influence domestic changes in constitutional law in Latin America. Alternatively, in *Empowering the Global Movement of Bodies*, Patricia S. Mann invokes LatCrit and human rights norms to challenge prevailing United States immigration law and policy. Her contribution calls for an opening of draconian immigration law and policy used to detain and regulate the mobility of immigrant workers. Like other contributions, both of these articles explain how international human rights norms can be used to revisit national constitutional law.

The final contributions included in this special issue address the relationship between representation and democracy. Wesley Gibbings' *Freedom of Expression in the English Speaking Caribbean* provides an overview of the development of media regulation laws criminalizing and censoring some forms of speech. Although presently only a small number of Caribbean countries have adopted these types of laws, Gibbings describes how other countries in the region are starting to embrace more restrictive regulations. In contrast, in *Theater of International Justice*, Jessie Allen explores how performative notions of theater and entertainment can explain the functions of international courts. More precisely, Allen invokes the narratives related to the notion of a theater production to provide a more accessible description of court procedures. Both articles emphasize the need for more democracy. In Gibbings case, he argues for less regulation and more freedom of speech, whereas Allen emphasizes how the analogy of the theater can create a more accessible and democratic understanding of international courts and its procedures.

In sum, the contributions included in this special issue provide a critical overview reminiscent of the LatCrit South-North Exchange project. The contributions denounce various forms of injustice while seeking to rescue interpretations of law and society that can offer alternative forms of social justice. For the most part, these contributions are also not centered on traditional global north interpretations, but rather capture a wide array of perspectives. More importantly, in one way or another, all the contributions invoke emerging interpretations of human rights to justify more democracy and social justice in the Americas.

THEATER OF INTERNATIONAL JUSTICE

JESSIE ALLEN¹

*Legal interpretation must be capable of transforming itself into action.*²

In this essay I defend international human rights tribunals against the charge that they are not “real” courts (with sovereign force behind them) by considering the proceedings in these courts as a kind of theatrical performance. Looking at human rights courts as theater might at first seem to validate the view that they produce only an illusory “show” of justice. To the contrary, I will argue that self-consciously theatrical performances are what give these courts the potential to enact real justice. I do not mean only that the courts’ dramatic public hearings make injustice visible and bring together a community committed to building human rights, although those are certainly important effects. My claim goes more directly to the issue of enforcement. After all, no court enforces its own judgment. Nor does enforcement happen automatically or by magic. The question then is how enforcement comes about. I will argue that the performance of formal judicial process in international human rights courts enacts a version of the role-based, conventionally structured process that all courts employ to trigger enforcement of their orders by government officials. International courts of human rights do not *substitute* spectacle for enforcement. Their success *as* law courts is dependent on that spectacle. The theater of human rights courts is what makes them real courts of law.

International courts of human rights are perennially subject to the criticism that they are not really courts of law. For those who see sovereign command and violent enforcement as necessary legal attributes, the work of these courts looks questionable. Even for those of us willing to expand our definitions of law beyond strict positivist bounds, the meanings and effects of international human rights courts present a puzzle. We want to understand whether – and how – the proceedings of these courts can actually remedy rights violations, bring violators to justice, and alter the state practices that the courts have judged to imperil human rights.

These worries are sometimes articulated by comparing international human rights courts to theater. With no international

¹ Assistant Professor, University of Pittsburgh School of Law. For comments on drafts and other critical contributions of knowledge thanks are due to Elena Baylis, Deborah Brake, David Herring, Bernard Hibbitts, Charles Jalloh, Peter Rush, Frank Valdez, Sheila Velez-Martinez, Patricia Williams and Lucy Winner. I am grateful to Melbourne Law School’s Institute for International Law and the Humanities and to Lat Crit’s 2012 North-South Exchange, where the essay began.

² Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1617 (1986).

army or police force behind them, are the judgments of these tribunals just a public expression of ideas about justice? Or, worse, are their proceedings a false show of justice that distracts our attention from the real injustices perpetrated off-stage by the governments whose officials appear before those tribunals? In this essay, I argue that taking the theatrical analogy seriously can illuminate these courts' potential for effecting real change.

This essay proceeds in three parts. Part I first outlines the persistent doubts that international courts of human rights have authentic legal power, and the critique of these tribunals as a theatrical sham. Then, I focus on a hearing of the Inter-American Court of Human Rights and confirm its self-conscious emphasis on creating a formal presentation for an audience. Part II introduces the idea that the Inter-American Court's hearings can be viewed as a particular kind of performance aimed at a particular audience effect, namely, generating government enforcement. To do this, I revisit Robert Cover's famous essay, *Violence and the Word*.³ There Cover sought to reveal the necessary link between legal interpretation and government force that is forged through judicial process. Cover argued that viewing a court proceeding as a "civil event where interpretations of fact and legal concepts are tested and refined" hid the way judicial process was made to trigger government force.⁴

I see the charge that human rights courts are unreal because they lack enforcement power as the mirror image of Robert Cover's charge that domestic courts create the illusion of force-free justice. As Cover showed, in the ordinary course of justice, courts' interpretations are enforced when government officials are induced to perform institutional roles that overcome their individual resistance to committing acts of violent enforcement. In the Inter-American Court hearing, the court's desire to trigger that redressive violence is anything but hidden. In fact, the court's attempts to induce government enforcement becomes a theme of the performance.

In Part III of the essay, I analyze the Inter-American Court hearing as a performance aimed at producing the transformation Cover described. The hearing mobilizes different techniques and capabilities of performance to make visible the violence suffered by victims and to overcome the resistance of government officials to forcefully redressing that violence. Without denying the ability of judicial theater to *fake* human rights, my goal in analyzing the hearing as a performance is to see what Dwight Conquergood calls "the efficacy of theatricality," the performative potential of court rituals to *make* human rights, or at least, to make human rights a bit more real.⁵ My analysis looks to see how the Inter-American Court

³ Cover, *supra* note 2 *passim*.

⁴ *Id.* at 1607 note 17.

⁵ Dwight Conquergood, *Performance Theory, Hmong Shamans, and Cultural Politics*, in CRITICAL THEORY AND PERFORMANCE 41, 51 (Janelle G. Reinelt & Joseph R. Roach, eds., 1992) (describing Shamanic healing rituals as "performance as making, not faking", quoting VICTOR TURNER, FROM RITUAL TO THEATRE: THE HUMAN SERIOUSNESS OF PLAY 93 (1982)). *See also*

performs the characteristic business of all courts—transforming its words into deeds of governmental force.

I. International Human Rights Courts' Theatrical Justice

A. INTERNATIONAL HUMAN RIGHTS COURTS' AUTHENTICITY PROBLEM

International law today is arguably more prominent and more vexed than ever before. The last several decades have seen a remarkable flowering, especially in the area of human rights.⁶ We have new statutes, new courts, and a greatly increased volume of widely publicized practice in transnational human rights litigation.⁷ But that growth has not resolved questions about the value of adjudicating rights claims against sovereign governments in international tribunals.

The idea that some legal rights transcend sovereignty has a long history. Rights based on universal, natural or divine law were once assumed to run through Western countries' legal systems.⁸ And the basic concept that it can be lawful to intervene to prevent a government from mistreating its own citizens has been around since at least the seventeenth century.⁹ In the twentieth century, reactions to the horrors of World War II led to a renaissance of international rights concepts and institutions. The Universal Declaration of Human Rights was signed, the first formal international war crimes trials took place at Nuremberg, and new international conventions and courts developed to adjudicate human rights claims and render judicial decisions on the validity of nations' use of sovereign force.¹⁰

Despite their long timeline and recent proliferation, however, international human rights still evoke skepticism. One need not be a committed legal positivist to see official enforcement as a crucial feature of a legal system.¹¹ Indeed, in some ways, the problem of international human rights courts' legal status is just as acute for a believer in natural law. As Robin West points out, for the natural

Judith Resnik, *Bring Back Bentham: "Open Courts," "Terror Trials," and Public Sphere(s)*, 5 LAW & ETHICS HUM. RTS. 2, 7 (2011), arguing that as 18th century court spectators began to see themselves as critical observers and to interpret their role as judging the fairness of those proceedings, "Rites' turned into 'rights' as rulers lost discretion to close off their courts, to fire their judges, and to preclude all persons from rights-seeking."

⁶ See Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261 (2002).

⁷ For example, International Convention for the Protection of All Persons from Enforced Disappearances, G.A. Res. 61/177, U.N. Doc. A/RES/61/177 (Dec. 20, 2006); Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 90, 37 ILM 1002; International Criminal Tribunal for Rwanda.

⁸ Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2604-10 (1997)

⁹ Grotius, Humanitarian intervention.

¹⁰ Koh, *supra* note 8, at 2614-15.

¹¹ Thus the humor in the poster I once saw with an image of an apple hitting someone in the head and the legend: "Gravity – it's not just a good idea, it's the law!"

lawyer, legal interpretation entails both “virtue and power.”¹² The natural law critique of unjust positive law is that it is force without reason. But reason without force is just as bad, or at least just as legally incomplete and incapable of producing genuine justice. The basic questions, then, are whether international human rights law is really law at all when it appears not to be backed by coercive force, and whether international adjudications of human rights can bring about the kind of regulation and transformation that counts as legal change.

From both the positivist and natural law perspectives, then, human rights courts are problematic. For positivists, courts without sovereign force are a fake – a dangerous pretense of legality.¹³ For natural lawyers, such courts are impotent – morally good, but powerless.¹⁴ For the positivist the absence of violent government coercion suggests that these courts operate instead through trickery, putting on a false show that threatens real justice, while in the natural law vision courts without sovereign force present a kind of saintly ineffectuality.¹⁵ In both views, courts without official enforcement power have no ability to really alter behavior.¹⁶ On the one hand, international law is seen as ineffective. In this view, when states accept the judgments of international human rights courts, they do so only to the extent those judgments are perceived to serve their self-interest. So, for instance, Jack Goldsmith and Eric Posner argue that governments never *really* submit to the authority of international courts.¹⁷ They simply calculate that it is sometimes in their own strategic interest to participate in international tribunals.¹⁸ On the other hand, international law is seen as harmful, because by *seeming* to constrain it provides an appearance of legality that gives states cover for pursuing their political interests. In other words, the lack of effect becomes positively harmful by giving an appearance of legality to lawless behavior. As Nicola Lacey points out, “Meeting formal criteria of legitimacy . . . by observing elaborate legal procedures . . . can provide a crucial gateway to international recognition and hence to all sorts of material benefits.”¹⁹ From this perspective, international adjudications of human rights are a tool of national governments’ dominance, rather than a restraint on that power.

¹² Robin West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145, 160 (1985).

¹³ Nicola Lacey, *Philosophy, Political Morality, and History: Explaining the Enduring Resonance of the Hart-Fuller Debate*, 83 N.Y.U. L. REV. 1059, 1084-85 (2008).

¹⁴ *Id.* at 1082-84.

¹⁵ *Id.* at 1084-85. Note how in each case, the lack of violent enforcement leads to a classic feminized image, one half of the virgin/whore duality.

¹⁶ See, e.g., Jack L. Goldsmith & Eric A. Posner, *THE LIMITS OF INTERNATIONAL LAW* (2005).

¹⁷ *Id.* at 13.

¹⁸ *Id.* at 225.

¹⁹ Lacey, *supra* note 13, at 1085.

Besides the overall cloak of legitimacy cast by the forms of legal process, public adjudication in international courts may give states an opportunity to rationalize particular acts of violence. Adjudication invites, indeed requires, opposing parties to construct public narratives to explain and justify their claims and conduct, and frames that conduct within a spectacle of obedience to law. In the process, governments may be able to produce an official story that acknowledges some causal responsibility and gains the seal of legal approval without accepting moral or political accountability for the events that triggered legal action in the first place. For example, Başak Çali argues that the international rights adjudications that arose from the destruction of Kurdish villages in Turkey “helped to normalize large-scale violent events.”²⁰ The Turkish government paid the compensation ordered by the European Court of Human Rights, but used the adjudication process to reframe the deaths and disappearances that gave rise to those judgments as a kind of unintentional harm.²¹

You might think that the acid test of legal power would be compliance with international court judgments. If governments do what international courts tell them to do, doesn't that mean those courts produce a real international rule of law? Perhaps, but both critics and supporters of international human rights adjudication insist the issue is more complicated.

There is general agreement that national governments do what international courts say much of the time. But the significance of that fact is deeply disputed. Skeptics argue that what looks like compliance is really just strategic self-interest. Just because governments act in accordance with court orders does not mean that they are really submitting to legal judgment. They simply may be doing what they view as beneficial to their political power. At least one pattern in government responses to international judgments seems to support that view. While governments are very likely to pay money judgments, and are sometimes willing to modify policies prospectively, they have often refused to comply with orders to investigate human rights violations and identify and punish perpetrators.²² While paying compensation is certainly not painless for governments with limited resources, and changing domestic policies can be politically costly, both are far less dangerous to governmental power than launching investigations that are likely to result in those governments having to accept public blame for atrocities.²³

²⁰ Başak Çali, *The Logics of Supranational Human Rights Litigation, Official Acknowledgement, and Human Rights Reform: the Southeast Turkey Cases Before the European Court of Human Rights, 1996-2006*, 35 LAW & SOC. INQUIRY 311, 313 (2010).

²¹ *Id.*

²² Morse H. Tan, *Upholding Human Rights in the Hemisphere: Casting Down Impunity Through the Inter-American Court of Human Rights*, 43 TEX. INT'L L.J. 243, 271-72 (2008).

²³ *Id.*

Even those who view international human rights optimistically, and emphasize the overall high rate of compliance with international law, are sensitive to the question, “Why do nations obey international law?”²⁴ Paul Berman points to the work of “legal consciousness scholars” in studying the interaction between official norms and the way individuals “deploy, transform, or subvert official legal understandings and thereby ‘construct’ law on the ground.”²⁵ These theorists are, in Harold Koh’s words, looking for “the ‘transmission belt,’ whereby norms created by international society infiltrate into domestic society.”²⁶

Often analyses from this perspective seem to give up on the idea that international human rights courts can trigger sovereign force through their own proceedings. Instead proponents of international rights institutions develop other theories that explain how international norms and adjudicative processes “permeate and influence domestic policy.”²⁷ So, for example, Berman suggests that international law “may slowly change attitudes in large populations, effecting shifts in ideas of appropriate state behavior.”²⁸ There is much analysis of what institutional structures and relationships make human rights courts effective. For instance, Laurence R. Helfer and Anne-Marie Slaughter have suggested a range of institutional factors that contribute to an international human rights court’s effectiveness.²⁹ These include a court’s composition, caseload, independent fact-finding capacity, awareness of audience, neutrality, and demonstrated autonomy from political interests.³⁰ But the performance of formal court processes is oddly absent from these analyses. Even the “awareness of audience” factor in Helfer and Slaughter’s study is discussed mainly in terms of the court’s written judgments. The question I want to consider, then, is whether human rights tribunals’ public performances are part of the “transmission belt” that makes human rights a legal reality and, if so, how.

B. INTERNATIONAL HUMAN RIGHTS ADJUDICATION AS THEATER

1. *The Performative Nature of Courts in General*

The view that an institution or event is inauthentic or ineffective is sometimes expressed by likening it to theater. International courts of human rights, are no exception.³¹ No doubt

²⁴ Koh, *supra* note 8; Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEXAS L. REV. 1265 (2006); Tan, *supra* note 22, at 272-76.

²⁵ Berman, *supra* note 24, at 1283.

²⁶ Koh, *supra* note 8, at 2651.

²⁷ Koh, *supra* note 8, at 2654.

²⁸ Berman, *supra* note 24, at 1266.

²⁹ Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L. J. 273 (1997).

³⁰ *Id.*

³¹ See, e.g., Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT’L L. 39, 46 (2007) (when international criminal law “distracts from prophylactic strategies or excuses failure to take prompt action in the face of [human rights] crises, it emerges as no more than a ‘cynical theater.’”); David Kennedy, *The International*

sometimes the comparison is simply a metaphor for superficiality or false pretenses, intended to communicate the basic criticism that these courts are unable to deliver real change. In fact the simile would hardly be worth pausing over, were it not for two facts. First, operating as they do through public performances, all courts resemble theaters, including the 'real' domestic tribunals to which the international human rights courts are being unfavorably compared. And, second, at least some human rights courts seem more centrally focused on public presentation and audience impact than most domestic courts.

From time to time, across several centuries, observers have noted courts' theatrical aspects. Jeremy Bentham's eighteenth-century critique of English common law includes the observation—the accusation, really — that the common law courts are a form of judicial theater.³² Jeremy Bentham mocked the English common law courts as a “theatre of justice.”³³ For Bentham, the courts' theatricality meant both that the performances of legal actors were insincere and that the justice they produced was illusory. For instance he described judges' expressions of sympathy for convicted defendants as “one of the common-places of judicial oratory — of judicial acting, upon the forensic theatre.”³⁴ In Bentham's view, courtroom theater was an elaborate drama of legal techniques that amounted to a false show of justice, rather than providing reasonable procedures through which citizens might vindicate their legal rights.

Other observers have a more optimistic view of the histrionic nature of courtroom process. In the early twentieth century, the American legal realist Thurman Arnold analyzed criminal trials as dramatizations of cultural values and the ideal of justice.³⁵ Arnold argued that the formal performed nature of trial process makes it a powerful shaper of cultural values. For Arnold, the performative nature of judicial process was central to courts' ability to enact justice. He believed, for example, that recognizably unfair trial process contributed to increased procedural fairness because the public performance of an unjust court “rouses persons who would be left unmoved by an ordinary nonceremonial injustice.”³⁶ Bentham's and Arnold's observations combine, then, to articulate the dual dramatic effect I am ascribing to courtroom theater -- its ability to both falsify and reconstruct the nature of justice outside the courtroom.

Human Rights Movement: Part of the Problem?, 15 HARV. HUM. RTS. J. 101, 111 (2002).

³² Jeremy Bentham, “Rationale of Judicial Evidence,” in THE WORKS OF JEREMY BENTHAM, vol. VI, 354 (John Bowring ed., 1843).

³³ Bentham, *supra* note 32.

³⁴ Jeremy Bentham, Rationale of Judicial Evidence, Book III, Chapter V, in THE WORKS OF JEREMY BENTHAM, vol. VI, 286 (Edinburgh: William Tait Bowring, ed., 1838-1843).

³⁵ THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT (1935).

³⁶ *Id.* at 142.

To be sure, one can also find repudiations of judicial theater: “A courtroom is not a stage; and witnesses and lawyers, and judges and juries and parties, are not players. A trial is not a drama.”³⁷ So declared Erwin Griswold, then dean of Harvard Law School. For Griswold, apparently, any concern with expression and appearance, that is, with audience, corrupted the true purpose of law. A trial held “for public delectation, or even public information” would interfere with “the solemn purpose of endeavoring to ascertain the truth.”³⁸ Griswold made these comments in opposing television cameras in U.S. courts. The introduction of broadcast media was sure to distort trial proceedings, he argued, because it would have “an inhibiting effect on some people, and an exhilarating effect on others.”³⁹ Basically, he feared that the trial’s participants would begin playing to the audience.

Upon consideration, however, the courts’ awareness of their audience seems an important, even necessary, element of any trial. Courts are quintessentially public operations shaped by their public character.⁴⁰ It is not as though the public is simply invited to peek into a courtroom to see something that would be happening in exactly the same way whether they are there or not. The action of a trial unfolds the way it does *for* public viewing. Public court hearings are not, for instance, like the work of the paleontologists at Pittsburgh’s museum of natural history, where white coated technicians labor in a lab set behind a plexiglass wall. Museum visitors watch the excavation of fossils as though their lab was one more diorama in which life goes on as usual, oblivious of our observation. Behind the glass the paleontologists go about their work apparently heedless of the onlookers. Presumably they follow the same steps they would if they were alone in the lab (at least, that is how it *appears* to viewers).

In contrast, lawyers, litigants, judges and other courtroom personnel acknowledge through their courtroom behavior, that their work has a public aspect, and that their words and actions are directed for audience effect. True, their primary audience at any

³⁷ Erwin Griswold, *The Standards of the Legal Profession: Canon 35 Should not Be Surrendered*, 48 A.B.A. J. 615, 616 (1962), quoted in Bernard J. Hibbitts, “De-scribing Law: Performance in the Constitution of Legality” 2nd Annual Performance Studies Conference, Northwestern University, Evanston, IL (March 1996). Interestingly, Dean Griswold made his anti-theatrical avowal in the context of opposing the introduction of television, radio and photography into U.S. courts. Many theater professionals, and drama critics, would be quick to point out that recording and broadcasting court proceedings would not necessarily make them more “theatrical.” Indeed, there is a strong argument that this kind of documentation and electronic dissemination waters down the dramatic power of live performance.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Resnik, *supra* note 5, *passim*; see also Judith Resnik, *Courts: In and Out of Sight, Site, and Cite*, 53 VILL. L. REV. 771, 772-73 (2008). See also *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 564-577 (1980) (tracing the development of trials as public proceedings and describing one public communal function of trials as “catharsis.” *Id.* at 571).

given time may not be the general public, but rather other trial participants, most obviously the judge and the jury. But even if no member of the general public is present to witness the action of the trial, its proceedings are consciously geared for public viewing, and for preserving a publicly available record. Courtroom architecture is designed for public participation. As Judith Resnik has pointed out, part of our very concept of a court is its openness to the public. Paleontologists in labs that are not on public view are surely still doing paleontology, but it is at least highly questionable whether a court with no public access would still qualify as a real court anymore than a theater without an audience would still remain a real theater.⁴¹

In performance theory terms, the theatrical nature of courts is not only their openness to public view. It is a function of their reliance on what Richard Schechner calls “restored behavior,” that is, acts, speech, and gestures that do not originate entirely with individuals who do and say these things.⁴² This separation of at least some aspect of the words and actions from the individuals who are speaking and acting is arguably “the main characteristic of performance,” and what separates performance from real life.⁴³ From Broadway plays to religious rituals to standard exchanges between psychoanalysts and patients, we recognize this dual form of separation or distancing, first between actor and action, speaker and speech, and then between the whole sequence of behavior or the event in which numerous sequences occur and the rest of our everyday world. And another feature of these separations, because the sequences or “strips” of behavior, are recognizably not a part of the spontaneous, naturally occurring ongoing reality, they “can be stored, transmitted, manipulated, [and] transformed.”⁴⁴

Like theatrical performances, much of courtroom hearings and trials unfolds in familiar sequences that might be actually scripted (“hear ye, hear ye,” “Raise your right hand and repeat after me . . .,” “objection”) or that might incorporate improvised particulars into well known stock bits. A trial always begins with the judge’s speech to the jury, followed by opening statements by the opposing attorneys, followed by the case in chief and the defense, closing statements, the judge’s charge to the jury, and the reading of the verdict. Judicial theater has a recognizably standard cast of characters – the judges, parties, defense attorney, prosecutor, witnesses, every bit as generic as the dramatis personae of a Broadway show’s leading man and lady, or the personnel at the local church or temple. It is also understood that within that standard

⁴¹ Resnik, *supra* note 5, at 69 (Secret military proceedings created to establish the guilt of “suspected terrorists” try to capture some of the legitimacy of public trials, without engaging in the public access that makes trials arguably constrain government power, by calling the institutions that preside over these proceedings “closed military courts.”)

⁴² Richard Schechner, *BETWEEN THEATER AND ANTHROPOLOGY* 35-55 (1985).

⁴³ *Id.* at 35.

⁴⁴ *Id.* at 36.

format, much of the particular content of any given trial has been planned in advance and often rehearsed. Attorneys work with witnesses ahead of time, for instance, and develop a planned set of questions. Opening statements and summations, or parts of them, are often written down and memorized.

At the same time, of course, theater is many things that law is not supposed to be. Theater is entertaining and playful, while law is deadly serious. Theater is designed to stir up sympathy and passion, while legal decision makers are supposed to set feelings aside, in order to render rational, rule-bound judgments. Theater is defined by artifice and acting, masks and illusion. In a legal culture that equates integrity with transparency, and defines adjudication as a search for truth, we shrink from locating courts' work in the theatrical realm where appearance and audience effect are paramount. As Bernard Hibbitts observes, "legal performance is a legal embarrassment."⁴⁵ Hibbitts has drawn attention to both the performance aspects of law and the extent to which legal performance is "marginalized and deprecated," in mainstream legal analysis and education. Law school's relentless focus on analyzing written judicial opinions, and modern litigation's focus on documents obscures courtroom theater in the "blind spot of our professional perceptions."⁴⁶

Nevertheless, there are those who celebrate the theatricality of courtroom process – and its ability to affect social attitudes because of its dramatic techniques. In the 1930s, Thurman Arnold described criminal trials as "drama" that publically aired conflicts between important social values.⁴⁷ Unlike Jeremy Bentham, Arnold saw value in judicial theater. He thought courtroom drama spurred public discussion of "all the various contradictory attitudes about crime and criminals, since these different roles are all represented by the various persons connected with the trial, with tremendous dramatic effect."⁴⁸ Half a century later, Milner Ball compared American law to theater in a style still more laudatory than Arnold's vision, contending that "it is the theatrical character of courts that makes them spaces of freedom, human places . . ." ⁴⁹ More concretely, Ball pointed out that although courts lack a stage, curtain, and footlights, "the design and appointment of the courtroom, enhanced by costuming and ceremony, do create a dramatic aura."⁵⁰ Both Arnold and Ball stressed that in addition to producing decisions that

⁴⁵ Hibbitts, *supra* note 37. Doubtless that sense of embarrassment about the contradictory values of playmaking and lawmaking is one reason we do not have more developed serious criticism of courtroom theater.

⁴⁶ Note, however, that the general public does not share that blindness, as demonstrated by the apparently endless iterations of television shows and movies that leverage courtroom drama for popular entertainment. See Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM. J.L. & ARTS 91 (2005).

⁴⁷ Thurman W. Arnold, *THE SYMBOLS OF GOVERNMENT* (1935).

⁴⁸ *Id.* at 147.

⁴⁹ Milner S. Ball, *THE PROMISE OF AMERICAN LAW* 57 (1981).

⁵⁰ *Id.* at 43-44.

regulated the parties' rights, courts were in the business of manufacturing images "played to the public at large."⁵¹

Most recently, Judith Resnik has written extensively on the importance of adjudication as a public performance of justice and rights. In her view, the "odd etiquette entailed in public adjudication under democratic legal regimes imposes obligations on government and disputants to treat each other – before an observant and oftentimes critical public—as equals."⁵² Thus the courtroom performance of human dignity becomes real, at least for the duration of the performance itself.

2. *The Drama of the Inter-American Court of Human Rights*

Observing a video of a hearing of the Inter-American Court of Human Rights confirmed that the Inter-American Court is institutionally focused on presenting, preserving, and making widely available a formal performance of legal process.

The Inter-American Court was established in 1979 by the Organization of American States to interpret and enforce the American Convention on Human Rights.⁵³ The court, which consists of seven judges, sits to hear cases brought against states that have both ratified the convention and officially submitted to the Court's jurisdiction.⁵⁴ Private citizens cannot bring cases to the court. Instead, an aggrieved individual or group must lodge a complaint with the Inter-American Commission on Human Rights, an institution based in Washington, D.C. The Commission investigates and issues a recommendation to the accused state. If the Commission finds a human rights violation, *and* the state found to have violated rights fails to follow the Commission's recommendation, the Commission may file a case in the Inter-American Court. After paper briefs have been submitted, the court sets a hearing date. At the hearing, which is open to the public, representatives of the Commission present the case and representatives of the state respond. Although only the Commission has standing to prosecute the case, the court at the discretion of the court's President can also hear from victims, and their representatives.

⁵¹ Ball, *supra* note 49, at 62; Arnold, *supra* note 33, at 129.

⁵² Resnik, *supra* note 5, at 3.

⁵³ Scott Davidson, *THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 1 (1992).

⁵⁴ Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela are signatories to the convention and have formally submitted to jurisdiction. The United States signed the convention but never ratified the treaty. The judges elected to six-year terms by the general assembly of the OAS. No member state may have more than one judge serving on the Court at any given time. If a member state is brought before the court when that country has no judge currently on the court, the state may appoint an ad hoc judge to join the court for that case. Currently the judges are from Peru, Argentina, Costa Rica, Jamaica, Dominican Republic, Uruguay and Chile. The Peruvian judge is the president of the court. Two of the judges are women.

After the public hearing, the court deliberates in private and eventually issues a public, written judgment. If the court finds a violation, it will often order the state to make financial reparations to the victims' families, and sometimes to investigate the circumstances of the crimes, prosecute individuals responsible, and change government policies identified as contributing to the violation. Low caseloads, and low rates of judgment have been a perennial problem for the Inter-American Court.⁵⁵ In 2008, the Inter-American Court produced nine final judgments, compared with the 1,881 judgments of the European Court of Human Rights.⁵⁶ Even by the standards of the shrinking caseload of the U.S. Supreme Court, this is extremely low.⁵⁷ The low rates of judgment may affect the significance of court hearings in complex ways. Because the power and legitimacy of the court is questioned due to the low caseload, hearings of those cases may be likewise deprecated as the work of a court with little influence. On the other hand, in a court that issues few final judgments, but sits publically to hear cases much of the time, those hearings arguably take on increased cultural significance in their own right, even if they do not lead instrumentally to more written judgments.

The court has a well-developed website (that runs in Spanish and English), on which judgments, court documents, calendars and videos of all the court's hearings are accessible.⁵⁸ I watched the hearing in the case of *Gudiel Álvarez y otros (Diario El Militar) vs. Guatemala* via video from this website. The hearing took place on April 23, 2012, during one of the court's sittings away from its home base, in Guayaquil, Ecuador. Many of the court's sittings take place "on the road" away from the court's permanent home in an upscale neighborhood in Costa Rica's capitol, San Jose. When the court travels, hearings are set up in facilities that accommodate a large audience.

The hearing I watched showed that the court is very conscious of its performance aspect, and that its procedures are designed to accommodate both the live public presentation of court hearings and documentation for future viewings on the web. The video opened with a long shot of a raised platform, set with a dais and chairs, for the court.⁵⁹ Three tables were set on another platform, on a slightly

⁵⁵ Davidson, *supra* note 53, at 3; Alexandra Huneeus, Rejecting the Inter-American Court, in *CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA*, 118 (Javier A. Couso et al. eds., 2010).

⁵⁶ Huneeus, *supra* note 55, at 118.

⁵⁷ The United States Supreme Court issued 75 merits judgments in 2008. SCOTUSblog, <http://www.scotusblog.com/2009/06/end-of-term-super-stat-pack/> (last visited Nov. 15, 2012).

⁵⁸ Corte Interamericana de Derechos Humanos [Inter-American Court of Human Rights] (last visited Nov. 15, 2012) <http://www.corteidh.or.cr/index.cfm?&CFID=487586&CFTOKEN=78136649>.

⁵⁹ Corte Interamericana de Derechos Humanos [Inter-American Court of Human Rights], *Audiencia Pública. Caso Gudiel Álvarez y otros (Diario El Militar) Vs. Guatemala*. Partes 1, 2, 3 (April 7, 2012) <http://vimeo.com/41501741>.

lower level, behind which lawyers and witnesses sat facing the dais with their backs to the live public audience, facing the judges, just as lawyers would sit at council tables in a regular courtroom. In front of the platform with the bench and tables, many rows of chairs were set for a large audience. Behind the dais, a large brightly colored banner projection announced this event as “45 Periodo Extraordinario de Sesiones, Corte Interamericana de Derechos Humanos, Guayaquil-Ecuador, 23-27 abril 2012.” Very bright lights hung from a grid above the platform on which the court and advocates sat, giving it an even more stage-like quality, and creating good lighting for the video production. In fact the scene in the video looked in some ways more like a stage set for a television show than a courtroom.

It was immediately apparent that a good deal of planning and resources go into the court’s video production. There are several different cameras, and the tape available on the website switches back and forth between long shots and close ups of the judges, the advocates, witnesses and audience. The court also self-consciously accommodates other forms of documentation. At the beginning of the hearing, after the President of the court had called the court to session, there was a three-minute pause for photographers and videographers to walk around the stage and audience taking pictures.

Moreover, in a shift from other courts I have observed, public spectators –both live in the courtroom and later watchers of the video – were positioned as the recipients of the evidence that was being presented. At certain points in the hearing images were projected on screens to the side of and *behind* the judges. For instance, reproductions of the Military Journal that allegedly documents the fate of “disappeared” victims appeared on the screens facing the live audience and completely filled the frame of many parts of the video. In contrast, in many if not most, domestic courts, evidence is presented to the jury or judge in ways that are obscured from the gallery of spectators. If you are seated outside the bench and jury area, you may have trouble hearing the testimony. Finally, at least in most U.S. courts, videos of court proceedings are decidedly afterthoughts. Typically, a single camera holds a fixed long shot, that might or might not be intercut occasionally by cameras on the head and shoulders of arguing advocates. But in the Inter-American Court video, the camera followed the visual evidence in close up and lingered on the images as though presenting them to the viewer for evaluation. The cameras sometimes zoomed in on a witness, advocate or judge who was speaking, making them the focus of the shot for some time. This had the effect of giving the video audience a privileged view – in some ways more advantageous than the perspective of the live hearing audience or even the judges.

In the Inter-American Court video, the camera selects varying points of focus. This means viewers do not have to work to pick out the most important person or viewpoint in any given moment. It also means that the video of the hearing bears a strong resemblance to videos we watch for entertainment – perhaps a documentary that has had a commercial or public television release. Sometimes, as in a

video meant for entertainment, images are paired with spoken words that do not simply describe or recapitulate the visuals, but combine to create a more complex layered expression. For instance, during a lengthy – about 25 minutes long – statement by one of the attorneys for the victims, slides of pages of the Military Journal with victims' names and pictures, and black and white photos of victims and their families appeared on the courtroom screens in a continuous sequence. On the video, the cameras cut back and forth between a medium shot of the lawyer who was speaking from her table, long shots of the courtroom and close-ups of the projected photos on the screens.

The choice to spend nearly half an hour screening a series of grainy monochromatic photos of victims while a lawyer spoke about the state's failure to discover their bodies or indict their killers was obviously aimed at affecting an audience beyond the judicial decision makers. This is, after all, a case about people who *disappeared* over 30 years ago, and whose abductions and deaths were long denied by the government. Now the victims' images are appearing in a courtroom, larger than life, while their lawyer accuses the current government of Guatemala of failing to do what is necessary to identify and prosecute the people responsible for the disappearances and to locate the victims' bodies. The presence of the victims' images in the courtroom evokes both their irreversible absence in the real world and the court's power to bring the victims back to memory, if not back to life, and to make visible the crimes that were committed against them and the need for redress.

At another point, however, the hearing confronted the court's questionable power to generate the official acts needed to do more than recover images of the victims. For instance, one judge, Margarette McCauley of Jamaica, questioned a lawyer for the Guatemalan government regarding the state's readiness and will to investigate and prosecute those responsible the atrocities described by the victims who testified in court.

J. McCauley: From what is being said here it is clear the prosecutor's office does not have the resources to do this job – this very large task. . . . I don't understand the answer you gave, that the prosecutor may appoint a prosecutor or not. You are the state. You are representing the state here in this court, so with all due respect I think you have to assist us by telling us that the state can and will provide the human resources necessary to move the investigation forward. But I understand your answer to be opposite to that – could you explain for me please?

State Attorney: The government can't decide what the judicial branch can do or the legislative branch. . . . The executive branch has given the Department of Justice its own budget; it's autonomous. And it has the number of attorneys it has. If the attorney general wants to assign resources, so be it. But the executive branch has nothing to do with it. If the attorney general needs more budget, we can help

J. McCauley: Um. Interesting, that. Another question for you please. . . . in relation to the evidence of the witness that there . . . was in existence a policy not to question members of the armed forces even those who are suspects . . . I understand the state to be saying that what the witness said was incorrect and that there will be an investigation as to why the witness said this. . . . If my understanding is correct, I trust that no adverse result will fall on that witness for that evidence which must be the truth, because he took an oath to tell the truth, and there should be no adverse consequences to evidence given in this court. But I was concerned that the state was saying, well, we will investigate that, but I didn't hear any such urgency in relation to the investigation of the tragic facts that we are here dealing with today. So please help me understand your position.

State Attorney: . . . It has been thirty years. And in the judicial branch there have been proceedings, and the Attorney General's office has to promote the investigation in the judicial branch. But the executive branch – there's nothing for us to do We can't give what we don't have or can't find There's no policy to hide or destroy any information. The documents in the executive branch have been handed over. The police documents were not destroyed. Any other file, there's no policy to keep it hidden. The state is going to participate when it has to do so.

J. McCauley: Thank you Will the state then actively pursue or see that investigations are pursued by taking oral statements from person who were in the armed forces at the time to give assistance as to where these people were taken, what happened to them, whether they were buried somewhere, to find out the spots where they were buried? These have been done before in other cases, so will the state do that, because if you lack written documentary evidence, you can take oral evidence from the people who were there. So are you going to see that that is done?

State Attorney: An attorney or interested party has the right to request discovery within the process. If the district attorney compels any government representative, he can appear. . . . The government can't obstruct anyone who has been forced to appear. So the state cannot obstruct any evidence, and that is not the will of the executive branch.

J. McCauley: If the prosecutor can summon these people and get oral evidence, I did not hear from you whether anyone had been summoned from the relevant time till today Could you tell me please whether anyone has been summoned to give oral evidence in this way in order to advance what the court needs to know?

[pause]

Young Assistant State Attorney: At the moment, no one has been summoned other than the families of the victims. But the state hereby states its commitment to the internal investigation. To advance . . . rights.

J. McCauley: Uhm hm. By that I take it it's your undertaking that members of the armed forces will be called to give oral statements, and if so, thank you.⁶⁰

It seems that in this exchange, the judge has taken a considerable risk. Confronting the state directly about its failure to investigate and prosecute human rights violations makes the problem visible. The exchange thus helps fulfill the court's role in exposing the ongoing legacy of human rights violation and building community support for the victims and for redress. But in the process, the court's weakness is also exposed. Now if the state fails to respond to the judge's direct admonition to investigate, that failure gives credit to the view that the Inter-American Court is toothless and unable to bring about the results it purports to demand. Then again, the exchange between the judge and the attorney does not constitute a formal judgment or order from the court. Formally it remains a matter of representations, not a question of a legal injunction to be obeyed or ignored. And even as a matter of representation the judge leaves room for ambiguity at the end of the exchange. She first asserts her understanding that the young assistant state attorney has just committed the government to subpoena military witnesses. But at the very end she reopens the possibility that no such commitment for official state action has been made: "*if so*, thank you."

II. Performing Authentic Legal Power

The exchange between Judge McCauley and the attorneys for Guatemala points out how important it is to think practically about the role of enforcement in legal power. In particular, as Judge McCauley's questions to the state attorneys demonstrate, the question is how a court acquires and deploys the power to get government officials to enforce its orders and the role, if any, of the court's public process in that power. The question of how courts trigger enforcement was addressed from another perspective in Robert Cover's famous 1985 essay, *Violence and the Word*.⁶¹

Cover criticized analyses of legal process that focused on judicial interpretations of the law and ignored governments' violent enforcement of those interpretations.⁶² According to Cover, it was "misleading" ⁶³ to locate judicial authority in the logic or persuasiveness of the judges' legal analysis. Instead, he argued, what distinguishes authoritative judicial interpretation is its ability to trigger deeds of violence to enforce the judge's decision.⁶⁴ Ordinarily, as Cover pointed out, judges are privileged to take for granted "the structure of cooperation that ensures" that enforcement and it remains invisible.⁶⁵ The visible lack of cooperation between the Inter-American Court and the government officials who could enforce its

⁶⁰ *Id.*

⁶¹ Cover, *supra* note 2, at 1609.

⁶² *Id.* at 1601.

⁶³ *Id.* at 1602.

⁶⁴ *Id.* at 1607-08.

⁶⁵ *Id.* at 1618.

judgment is like a negative image of the link to enforcement that Cover exposed in all legal interpretation. As Cover showed, *all* courts must find a way to use the expressive, role-based, signifying techniques available to them to generate violent enforcement of their verbal judgments. The Inter-American Court's hearing process, then, can be studied as that court's public medium of the characteristic performative job of transforming judicial words into violent legal enforcement.

Cover himself recognized the performative nature of the transformation he exposed. Indeed, he characterized judges' ability to trigger violence by other officials in the legal hierarchy as "a violent mechanism through which a substantial part of [the court's] *audience* loses its capacity to think and act autonomously."⁶⁶ Turning to social psychology to flesh out the role-based process he was analyzing, Cover offered as an example the infamous Milgram experiment. There, participants were induced by instructions from the scientists to administer what they believed were painful electric shocks to individuals they believed were other experimental subjects.⁶⁷ Milgram explained the participants' willingness to commit violent acts as a reaction to the scientists' authority within the context of the experimental setting.⁶⁸ The subjects acted out of a "sense of obligation to the experimenter"⁶⁹ and "the tendency to obey those whom we perceive to be legitimate authorities."⁷⁰

Note that in both the Milgram example, and in the legal enforcement process Cover is describing, the willingness to act violently in response to authoritative commands comes about not through any threat of physical violence.⁷¹ That is, the individuals charged with carrying out the violence that enforces the experimental protocol or the court judgment fulfill their violent task not because they fear that they would suffer violence themselves if they refused to enforce the orders against others. There is no legal threat for nonperformance. True, in the legal context there is some economic pressure – enforcers who refused to use force might well lose their jobs. But Cover insisted that legal process mobilizes violent enforcement at least in part through the performance of institutional roles. Government officials must be induced to play institutional roles as agents of government force, despite their personal reservations. Courtroom marshals with normal human inhibitions against causing pain will tie a defendant to a chair and force a gag into his mouth when a judge tells them to, wardens will lead a condemned prisoner to the electric chair, because they are responding to a performance of institutional authority and performing their own institutional role. They participate in a performance in a hierarchical institutional setting that induces them to shift from

⁶⁶ *Id.* at 1615 (emphasis added).

⁶⁷ Cover, *supra* note 2, at 1614-15.

⁶⁸ Stanley Milgram, *Behavioral Study of Obedience*, 67 J. AB. & SOC. PSYCH. 371 (1963).

⁶⁹ *Id.* at 377.

⁷⁰ *Id.* at 378.

⁷¹ Milgram, *supra* note 68, at 376.

“autonomous behavior to agentic behavior cybernetically required to make hierarchies work.”⁷²

Cover’s insight is not merely that a psycho-social structure exists to carry out legal enforcement. He insists that that structural link is somehow specifically created and recreated in the performance of legal process. The practice of interpreting law within the institutional context of a legal system creates the link to violent enforcement through “considerations of word, deed, and role.”⁷³ In this light two things appear: (1) Whatever other effects are produced by the Inter-American Court hearing, the hearing must be engaged to some extent in creating this very link between the court’s judgments and government enforcement, and, (2) the performative nature of that creation does not distinguish the Inter-American Court from domestic courts that can take for granted the link to sovereign force. In other words, the self-consciously theatrical nature of the Inter-American Court does not make it any less legal or less real than domestic courts that can ignore or obscure the way they go about connecting their interpretations with enforcement. The Inter-American Court simply must expend more resources and make more obvious its efforts to generate the relationship that Cover exposed as central to all judicial process. Indeed, what was a provocative idea when Cover applied it to *all* authentic judicial interpretation seems self obviously to describe the Inter-American Court hearing. As Cover put it, “[l]egal interpretation is (1) a practical activity, (2) designed to generate credible threats and active deeds of violence, (3) in an effective way.”⁷⁴

III. Performing to Trigger Enforcement

The “trigger” for enforcement that Cover describes comes about through the response of government officials to the total effect of the judicial process, not as a conscious individual decision in response to legal argument. Cover explains that “[o]n one level judges may appear to be, and may in fact be, offering their understanding of the normative world to their intended audience.”⁷⁵ That kind of deliberative choice is not the mechanism Cover means to explain with his comparison to the Milgram experiments. He is rather concerned to explain how judges induce official enforcement through a process in which, “a substantial part of their audience loses its capacity to think and act autonomously.”⁷⁶ Such a result is not a matter of logic or even conscious persuasion, but rather the total effect of the performance of legal interpretation in the full context of the legal-governmental-judicial role hierarchy.

In performance theory terms, the phenomenon Robert Cover is describing is “emergence.” As explained by anthropologist Edward Schieffelin, the concept of emergence aims to capture the effects of

⁷² *Id.* at 1615.

⁷³ *Id.* at 1618.

⁷⁴ *Id.* at 1610.

⁷⁵ *Id.* at 1616.

⁷⁶ Cover, *supra* note 2, at 1615.

performance as a whole, “what happens *by virtue of* performance.”⁷⁷ The term describes “an irreducible change in quality of experience or situation of the participants that comes about when the performance ‘works.’”⁷⁸ In Cover’s view, official enforcement of judicial orders does not come about through the autonomous decisions of the enforcing officials or in isolation from the interpretive process. Rather, enforcement is induced *by virtue of* the performance of legal interpretation in the context of judicial hierarchy. Judges perform, and if the performance *works* the judgment is enforced. Cover criticized tendency of domestic courts and academic styles of legal interpretation to obscure the links between judicial interpretation and violent enforcement. As he pointed out, characterizing a trial as “a joint or communal civil event where interpretations of facts and legal concepts are tested and refined,” obscured the fact that “control over the defendant’s body lies at the heart of the criminal process.”⁷⁹ In the Inter-American Court hearing, however, the need for control over some as-yet-unidentified defendants’ bodies is glaringly obvious. And the court’s efforts to induce that control becomes a central theme of the entire proceeding.

To be sure, the Inter-American Court hearing has other performance themes and goals besides triggering government enforcement. On a more familiar level, the performance of the Inter-American Court succeeds if it makes visible to the public both in Guatemala and abroad the hidden violence suffered by the victims and empowers a community committed to redressing and preventing human rights violations in Guatemala. In Harold Koh’s terms, the Inter-American Court’s performance would be successful if it served as part of a process of cultural transmission “whereby norms created by international society infiltrate domestic society.”⁸⁰

Spectacle is a well-recognized mechanism for cultural transmission and empowerment. Dwight Conquergood has pointed out that the empowering effect of performance comes about through the same “relationship between gaze and power” that underwrites Bentham’s panopticon and that forms the basis for much of Michel Foucault’s work on criminal punishment.⁸¹ As Conquergood observes of performance generally, this kind of community building and empowering effect is not really about demonstrating anything, or convincing skeptics. And in the Inter-American Court context, the audience for this sort of human rights community building already believes in the reality of the violations, the suffering of the victims and the need for redress. “[I]t is not so much that seeing is believing.” Rather, watching the evidence unfold in the hearing “situates the observers in a power relationship over that which is

⁷⁷ Edward Schieffelin, *On Failure and Performance: Throwing the Medium Out of the Séance*, in *THE PERFORMANCE OF HEALING* 59, 64 (Carol Laderman & Marina Roseman, eds., 1995).

⁷⁸ *Id.*

⁷⁹ Cover, *supra* note 2, at 1607, footnote 17.

⁸⁰ Koh, *supra* note 8, at 2651.

⁸¹ Conquergood, *supra* note 5, at 45. Foucault, *DISCIPLINE AND PUNISH* (1975).

watched, inspected, surveyed.”⁸² As an advocate for the victims put it at the hearing, “The fact that [the victims and their families] can observe this proceeding is justice in itself because in Guatemala there is impunity.”

There is much more to be said about these sorts of empowering and community generating effects of performance and their role in the development of human rights norms and practices. But that is not the focus of my analysis. I am focusing on the performative effects of the Inter-American Court hearing on a specific audience, namely Guatemalan government officials. I have argued that the performance of the hearing contributes to inducing official enforcement by triggering the sort of “agentic” relationship Cover described between the court and government officials. In the remainder of this essay, I want to consider some moments, aspects and techniques of the hearing’s performance that might contribute toward making the performance effective in this second sense.

It might seem ridiculous to claim that officials of a recalcitrant government that has avoided human rights enforcement for 30 years would be moved by courtroom drama to give up that resistance and mobilize state power to bring criminals to justice. But it may not seem so absurd if we consider, as Robert Cover has shown, that a similar process is the very mechanism through which all judges everywhere trigger enforcement. In this light, the Inter-American Court’s performative methods are not essentially different from the methods domestic courts use to transform judicial words into enforcement. It is not that domestic courts rely any less on role performance to accomplish that transformation. It is simply that the political/cultural context of the Inter-American Court means that its performance has more to overcome in order to trigger official force. For one thing there is a much less clearly established chain of command between the international court and the officials of a national government. Perhaps even more significant, those officials themselves might face actual acts of violence if they were to enforce the court’s judgment. In other words, what is different is not the court’s method of triggering enforcement by virtue of performance, but rather the unusually high barriers the Inter-American Court’s performance must overcome to work, that is to successfully trigger enforcement.

Second, to the extent that the Inter-American Court’s performance can overcome these obstacles to trigger enforcement, of course that trigger does not occur because of a single hearing, but over time. Induced enforcement would come about through multiple courtroom performances in the total context of the international human rights institutional structure. Some of the government participants in the hearing I observed are probably repeat players, who appear for the state in multiple proceedings.⁸³ Certainly some state officials observe multiple hearings, in person and via the video

⁸² Conquergood, *supra* note 5, at 45.

⁸³ This was pointed out to me by Elena Baylis.

on the Internet. To understand how those officials might be affected, then, we have to think of their participation in, and observation of, multiple judicial hearing performances as part of a complex social process that unfolds over a period of years. It is in that kind of long-term process that performance develops a social transformational capacity as “practices cumulatively interact and develop through time, reconstituting agent and agency and reconfiguring context.”⁸⁴

Explaining how judges trigger enforcement, Robert Cover stresses the importance of “institutional roles.”⁸⁵ His basic theory, following Milgram, is that playing a role has the potential to change personal attitudes and overcome individual behavior. Enforcement occurs through role play, because in the context of a legal system, government officials who “occupy preexisting roles, can be expected to act, to implement, or otherwise to respond in a specified way to the judge’s interpretation.”⁸⁶ The central task of the judicial performance, then, is to induce government officials to play institutional roles. In the video I observed three aspects of the hearing that might contribute to inducing that role performance.

A. FRAMING ENFORCEMENT AS THE RESTORATION OF LOST MOTHERS

Besides the basic human inhibition on behaving violently that Cover stressed, government prosecutors of political crimes may face an additional role conflict. Victims of political crimes are often cast as social activists and revolutionaries, antagonists of the very government order that produces the prosecutor’s role. Thus a performance to move officials to redress political crimes needs to represent the victims as harmless and deserving of protection. In the hearing I watched, the individuals whose torture, kidnapping and murder were the subject of the proceedings were sometimes described as political activists. But throughout the hearing these victims were also repeatedly cast in a common alternative role as lost mothers.

The first victim-declarant to testify was a woman introduced as Wendy Santizo Mendez. As announced by the secretary of the court, she was there to testify about her mother’s disappearance when she was still a child. But one of the first questions her lawyer asked was: Do you have children? She does – a six-year-old son. In the lengthy examination that follows, Wendy (as she is called by her lawyer and the judges), will be asked to describe not only her memories of her mother and her loss of her mother but the way her mother’s absence has affected her own experience of motherhood – for instance when her mother was not there to help her learn how to breastfeed and care for her infant son.

Wendy was nine years old when her mother was kidnapped. Early in her testimony, she is asked to describe that day:

Attorney: What is your last memory of your mother?

⁸⁴ *Id.* Conquergood, *supra* note 5, at 41.

⁸⁵ Cover, *supra* note 2, at 1615.

⁸⁶ *Id.* at 1611.

Wendy: March 8, 1984 [smiling ruefully] International Day of Women. Soldiers held me and my brother while we watched them torture my mother. They took the nails off with a tool. . . . We were kidnapped with her. . . . I was raped. . . . We had electric shock to our bodies; we had to watch them torture her more. . . . Her last words to us were “be strong.”

In addition to her own horrific childhood experience of her mother’s torture, Wendy recounts the fate of her eleven-year-old brother who was kidnapped along with Wendy and her mother and who suffered a mental breakdown as a result. She describes how for months after their kidnapping and her mother’s disappearance, after she and her brother returned home, he would sit outside the house waiting, he said, for their mother to come home from shopping at the market.

Wendy also explains how she initially believed that the injuries from her rape would prevent her from having children. When that turned out not to be the case, the loss of her mother and the trauma of her attack nevertheless made it more difficult for her to mother her son in a number of ways that she details. Of course her mother’s disappearance also caused her son to lose his grandmother.

As Wendy recounts her experience of kidnapping and torture as a nine-year-old child and its later effects on her life, she appears somewhat distanced from the events she recounts. She tears up once, however, near the end of her testimony, when her lawyer asks, “What does that nine-year-old girl want to say”?

Wendy: When I was raped I had no idea that could even be done. That rape was used as a weapon of war. That girl was hopeful that I could say this to this tribunal because then I was defenseless but now I think that this court can defend me.

Note that the lawyer’s question asks Wendy the witness both to distance herself from and to represent the desires of “that nine year old girl” who was raped and lost her mother. When Wendy responds, she talks about herself in both the first and the third person. It may not be too much of a stretch to suggest that the lawyer’s question asks Wendy to perform the role of her own mother – understanding and translating the feelings and desires of her child.

In Wendy’s testimony, then, we have not just the story of one lost mother and child. In fact there is an almost dizzying multiplication of lost mothers and children who have suffered those losses. The theme of lost mothers continues with the second declarant, Efran Garcia, even though he is elderly man whose childless daughter was murdered. After he finishes his testimony, one of the judges asks him whether his daughter had children. No says the man, she was single and she died too young – she was going to university. Ah, but if she had lived, persists the judge, do you expect that she would have married and given you grandchildren – she would have had children? Oh, yes, he says.

In this way, the hearing reconstructs the characters of the victims. Recasting the disappeared victims as mothers might help to counteract official antipathy for prosecuting crimes against anti-government activists. Moreover, dramaturgically, lost mothers seem like ideal characters to trigger protective role responses in state officials. Through the shaping of the witnesses' testimony, the lawyers and judge recharacterize the enforcement action called for from prosecuting political murders to finding and restoring lost mothers.

B. MODELING THE STRUGGLE BETWEEN SELF AND ROLE

The fact that institutionalized role behavior can overtake individual impulses does not mean that performing a role is easy. In fact, as Richard Schechner points out, one thing that all sorts of performance share is a certain rigor: "Performance behavior isn't free and easy. Performance behavior is known and/or practiced behavior."⁸⁷ Because of this, the performed role never "wholly 'belongs to' the performer."⁸⁸ Individuals may experience profound conflicts between their own emotions and the behavior appropriate for the role they are expected to perform. The government attorneys who would take on the institutional role of investigating and prosecuting the crimes detailed in the Inter-American Court also need to overcome personal feelings in order to carry out that role. They might, for instance, feel skepticism about the victims' innocence and fear that they would be ostracized by social peers, or even suffer violent reprisals for exposing government complicity in the crimes. It was therefore striking that the hearing featured a 'scene' in which another attorney – one who represented the victims – struggled with and mastered personal feelings that threatened to undermine her professional role.

Near the end of the hearing, one of the attorneys for the victim-declarants gave a lengthy statement. She talked for approximately 25 minutes, about the state's failure to develop evidence and prosecute the perpetrators of the atrocities, and the desperate desire of the families to find the victims' bodies. As she began to wrap up she paused, then said:

I want to thank the families . . .

But here she began to lose her ability to speak. She appeared to be trying to stop herself from crying. Choking she spoke very softly

. . . I'm not going to be able to do it . . . I can't . . . Sorry judges, I just can't . . .

Then there was more silence and fumbling, before the lawyer continued, obviously struggling to get the words out.

⁸⁷ Schechner, *supra* note 42, at 118.

⁸⁸ *Id.*

I have one hundred twenty nine clients. I want to thank Wendy, Efran Garcia . . . and the ones at the foundation offices watching for the opportunity of being able to represent them. It has been a honor and a privilege to bring my grain of sand. I'm sorry Mr. President . .

After a pause, she began to regain her composure and asked the court for additional time for the president of the victims' foundation to speak.

Some time later, near the close of the hearing, Justice McCauley addressed the attorney, acknowledging and praising her show of feeling:

I seemed to sense that you were a little bit embarrassed by your show of emotion, and I just wanted to say to you don't be embarrassed. Wear it as a badge of honor, because when you stop being affected by these things, then you have become dehumanized. All of us, when we stop being affected we become dehumanized. So be brave, and wear it as a badge of honor.

You might think that the lawyer would be quick to take up the judge's characterization of her show of emotion as a show of humanity. This is after all a court of *human* rights. Moreover this could have been taken as an opportunity to further dramatize the horror of what her clients have suffered. But the attorney was not buying it -- at least not completely. Instead, she responded equivocally:⁸⁹

Thank you so much for those words. I do wear my emotion with a badge of honor. In addition to being a lawyer I am a professor and I have four students here with me. Emotion is part of who I am, but I don't want that to interfere with my capability of representing my clients adequately. I never want my emotions to interfere with my representation of my clients.

The lawyer's response might be read as a warning to the judge not to allow the hearing to lose its grounding in the cultural-institutional practices of law. If the court were to lose the buttoned down formality of a typical court proceeding, it might become less like a court and more like a traveling stage show -- and consequently be less able to generate the legal institutional role behavior this attorney was seeking. To be sure, such a show would be emotionally compelling, and stir sympathy for the victims and perhaps anger with the state. But without maintaining the restrictions of the classic legal form, the performance would lose some of its potential to evoke not just sympathy, but a feeling that the victims' harms could or should be vindicated legally. Even a court of human rights cannot afford to be too human without losing some of its legal authority. Moreover, the lawyer's careful reaction to the judge could be taken as

⁸⁹ (First in English, then in Spanish overlapping and repeating some phrases)

an indication of her focus on a specific audience, namely, government officials who are potential prosecutors of the human rights violations she has brought to the court. For the public at large, and perhaps for the victims and their families, her show of sympathy might well evoke humanity. But Guatemalan officials are likely to be skeptical of such a show of emotion and to read it as evidence that they are not dealing with a real legal performance but some kind of 'bleeding heart' show.

On another level, in rejecting the judge's absolution for her show of personal feeling, the attorney modeled for those prosecutors the successful dominance of the kind of "agentic" role Cover described (and the Milgram experimenters observed) over her individual emotional responses. In both struggling for self-control, and refusing to wholly accept the judge's approbation for her feelings, the lawyer modeled a triumph of institutional role behavior. Her emotional struggle dramatized her self-sacrificial acceptance of that role. At the same time, the lawyer's emotional display reflected the power of the victims' story. Like the tears of the wooden cigar store Indian, the attorney's controlled outburst signaled both that the victims' suffering is so extreme that it elicits sympathy from a figure ordinarily incapable of human feeling and that the feeling must not be allowed to dissolve the rigid role requirements. Thus the hearing enacted a struggle between personal sympathies and institutional role requirements. Ultimately the person who fought with her individual feelings to carry out her institutional role emerged as a kind of hero whose choice to maintain her role performance was further sanctified by her refusal to fully accept the judge's sympathy. Such a performance might contribute to the hearing's capacity to induce "agentic" role performances from government prosecutors participating in or watching the hearing.

C. THREATENING ROLE REVERSAL

Finally, there was a sense in which the entire dramatic structure of the Inter-American Court hearing seemed designed to push Guatemalan government officials into institutional roles as human rights prosecutors in order to avoid being cast as human rights violators. In the absence of concrete evidence identifying the perpetrators of the offenses detailed by the victim-declarants, the focus of the hearing often shifted from investigating the 30-year-old crimes to investigating current official failure to prosecute the crimes.

As the exchange recounted in Section I between Justice McCauley and the attorneys for the Guatemalan government, the hearing sometimes involved direct confrontations that required state officials to defend their actions or inaction. The Guatemalan government attorneys were clearly not inclined to acquiesce to the judge's demands that the state become more active in its investigation. But even if they were not persuaded by the judge's direct demands, the structure of the hearing may tend to move them toward a prosecutorial role. After all it is one thing to decline an official prosecutorial role when the alternative is no role in the performance. It is quite another when the choice is between playing a prosecutor or a defendant. I am not suggesting that the Guatemalan

attorneys had any reason to anticipate being prosecuted themselves. But at the same time in the context of the performance, it must have been uncomfortable to find themselves cast in the unfamiliar roll of the accused.

IV. Conclusion

It is relatively easy to articulate the way the performance of justice in human rights courts may obscure injustice in the real world. The public performance of a government submitting to international adjudication brings the appearance of some legitimacy – no matter what government officials continue to do – or refuse to do – outside the courtroom. The spectacle of justice being done – of human rights violators being brought to justice – distracts and fools us into believing that spectacle is reality. The appearance of formal justice substitutes for the unseen reality of injustice. We see state officials deferring to the judgment of the court and treating human rights victims as equals, being made to listen to complaints from victims and relatives of victims. The victims are represented with equal dignity to the government officials, and the officials are made to contain any reaction and forced to listen and treat those individuals with respect. So we may be tricked into believing that the appearance of the officials listening, submitting, and treating individuals with respect is reality, when it is only appearance. The performance distracts us from continuing injustice and violations outside the courtroom.

It is likewise apparent that – as performance – human rights tribunals can contribute to broader public support for human rights norms. Videos available on the Internet bring dramatic public hearings to the general public in the states being called before the court, and to the world at large. The hearings feature victim declarants and expert witnesses who recount terrible acts of violence. Testimony and documentary evidence reveal acts of state violence that were effectively hidden for many years, call government officials to account, and affirm the experiences of those who suffered and their right to redress. The court performances make a record that can be used to support individual claims and provide a public focal point where victims, families of victims, and political and social reformers can come together to organize for change.

It is far less easy to conceive and describe how international court performances may help trigger government enforcement that gives human rights norms the force of law. I have tried to explore as concretely as possible some of the ways judicial process in a particular human rights tribunal may approach that institutional goal through performance. In my view the theatrical nature of the court's process is not at odds with its potential for authentic legal power. Indeed, I have argued that it is only by virtue of a performative process that any court achieves its status as an authentic legal institution. But I want to emphasize that in no sense do I mean to claim that the performance of justice in the Inter-American Court of Human Rights is devoid of illusion, or of the power

to deceive its audiences about the realities of injustice in the world. Like all performance, the theater of international justice is both a charade *and* a socially constitutive ritual, a trick and a potentially transformative experience.

PARADIGMATIC CHANGES IN GENDER JUSTICE: THE ADVANCEMENT OF REPRODUCTIVE RIGHTS IN INTERNATIONAL HUMAN RIGHTS LAW

ALMA BELTRÁN Y PUGA¹

I. Introduction

Reproductive rights are an emergent topic in international human rights law. This essay will explore how reproductive justice has been addressed by the Inter-American Human Rights System (IAS) through case law, hearings and thematic reports. Its objective is to analyze trends within the Inter-American doctrine and case law regarding reproductive health and freedom and present strategies to improve strategic litigation and increase access to justice for women and girls who suffer violations in these spheres.

The article will begin by describing the historical context in which reproductive rights have been framed as human rights in the international sphere and the importance of the democratic consolidation in Latin America in this process. The next section will present a series of landmark cases admitted and resolved in the Inter-American System, both in the Inter-American Commission and the Inter-American Court, relating to violations in the field of reproductive choices and gender-based violence illustrating common arguments and international human rights standards advanced in the case law. Here, I will argue that the new developments of the IAS jurisprudence on the elimination of gender-based violence in human rights law are relevant and can inform strategic litigation undertaken as an advocacy tool for the recognition and justiciability of reproductive rights.

Finally, in the concluding section, current opportunities and challenges will be indentified, taking into account the human rights framework and paradigms of international litigation outlined in the quest for reproductive justice and transformative equality faced by advocates.

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II. A Brief History of Reproductive Rights' Recognition in the International Sphere

With the rising of democratic governments in Latin America has come an increased attention to sexual and reproductive health services as human rights and social justice issue.² The struggle for democracy in the continent and the recognition of women's rights (including reproductive rights) as human rights was catalyzed by the United Nations (UN) Decade for Women (1975-85) and the development of specific international human rights instruments to recognize women's equality and eliminate all forms of gender-based violence.³

Although international human rights law was not initially developed to address violations of women's human rights and women were generally excluded from participating in the creation of international human rights law, the UN General Assembly's adoption of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1979 and of the Declaration on the Elimination of Violence against Women in 1993, marked the placement of women's rights on the human rights agenda and international legal discourse.⁴ At the regional level, the Organization of American States (OAS) adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belém do Pará") in 1994. These international human rights instruments have been key in the recognition of women's rights as human rights, being broad-based, comprehensive documents that highlight the obligations of the States to promote gender equality and guarantee a life free of violence for women both in the public and private spheres.

However, these instruments only vaguely address sexual and reproductive rights. Only the CEDAW Convention commands States to "take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis for equality of men and women, access to health care services, including those related to family planning."⁵ Nevertheless, the CEDAW Committee, an international body created to supervise the proper implementation of the Convention, has understood this obligation broadly, considering that States have a duty to ensure access to reproductive health services free from discrimination.⁶

² REBECCA J. COOK ET AL., *REPRODUCTIVE HEALTH AND HUMAN RIGHTS: INTEGRATING MEDICINE, ETHICS, AND LAW* 155 (2003).

³ JANE S. JAQUETTE ED., *FEMINIST AGENDAS AND DEMOCRACY IN LATIN AMERICA* 5 (2009).

⁴ Elissavet Stamatopoulou, *Women's Rights and the United Nations*, in *WOMEN'S RIGHTS, HUMAN RIGHTS* 36 (Julie Peters & Andrea Wolper, eds. 1995).

⁵ *See* Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), art. 12, U.N. General Assembly Resolution 34/180, Dec. 18th, 1979.

⁶ *See* Committee on the Elimination of Discrimination against Women (CEDAW Committee), General Recommendation No. 24 "Women and

Historically, the human right to health described in other general human rights instruments, such as the International Covenant on Social and Economic Rights (1966), has excluded women's reproductive health and their needs in obtaining health-related services.⁷ As L. Cabal notes: "In this context, reproductive health was relegated to the fields of population and development, and notions of reproductive rights as human rights were non-existent. The blatant exclusion of the pillars of reproductive rights – the rights to reproductive health care and to reproductive self-determination – from the human rights framework was revealing in that it exposed the biased lens with which human rights have traditionally been interpreted."⁸ As a result, violations of women's human rights in the reproductive sphere, such as obstructions to accessing legal abortion, contraception, HIV and uterine cancer treatments, forced sterilizations and female genital mutilation were not considered as human rights violations.

The 90's brought a new shift to this vision with the UN International Conference on Population and Development (El Cairo, 1994) and the Fifth World Conference on Women (Beijing, 1995). Thanks to women's rights groups' timely advocacy, sexual and reproductive health was recognized from a human rights-based perspective at both Cairo and Beijing. Cairo's Program of Action described the international consensus that emerged from the Conferences: reproductive rights embrace certain human rights that are already recognized in national laws and international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the

Health", (1999),
[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/77bae3190a903f8d80256785005599ff](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/77bae3190a903f8d80256785005599ff).

⁷ Luisa Cabal and Jaime M. Todd-Gher, *Reframing the Right to Health: Legal Advocacy to Advance Women's Reproductive Rights*, in REALIZING THE RIGHT TO HEALTH 120 (Andrew Clapham & Mary Robinson eds., 2009).

⁸ *Id.*

right to attain the highest standard of sexual and reproductive health.⁹

Since then, women's rights movements have strongly advocated to enforce Cairo and hold States accountable for their international commitments towards the improvement of reproductive health services within their countries, as well as for the enforcement of human rights law to protect women's reproductive choices.

Conceptualizing reproductive rights as human rights – related to equality, freedom and autonomy— rather than framing them as social or “second generation rights” is relevant to understanding the scope of the States' obligations regarding the achievement of reproductive self-determination. Women's rights groups have promoted the international interpretation of human rights instruments to underscore not only the importance of States' legal duty to respect reproductive rights by eliminating obstacles women face in exercising those rights, but also their positive obligations to guarantee their fulfillment through appropriate legislative, judicial, administrative and budgetary measures.¹⁰

In addition, feminist scholars have insisted on framing the issues of sexual and reproductive rights within the umbrella of citizenship.¹¹ The claim is that the sexual division of labor within the private sphere (family) restrains women's development as citizens in the public sphere (work and government), since the majority of their time is invested in family and domestic tasks. Thus, the exercise of reproductive rights cannot be separated from the democratization of the family and the State.¹²

III. From Treaties to Practice: International Litigation of Reproductive Rights

Positive advances in the recognition of reproductive rights within the human rights framework have not been sufficient to effectively redress the inequalities and disadvantages to which women are subjected in their daily lives. As noted by R. Cook, this “failure” of human rights law to fulfill its promise of universality in the case of women is complex and is due to several factors, including a “lack of understanding of the systemic nature of the subordination of women,

⁹ Programme of Action of the International Conference on Population and Development, Cairo, Egypt, 5–13 September 1994, U.N. Doc. A/CONF.171/13/Rev.1, at para. 7.3.

¹⁰ Rebecca Cook et. al, *supra* note 2, at 156.

¹¹ SILVIA LEVÍN, DERECHOS AL REVÉS ¿SALUD SEXUAL Y REPRODUCTIVA SIN LIBERTAD? 78 (2010).

¹² See *generally* MALA HTUN, SEX AND THE STATE: Abortion, Divorce, and the Family Under Latin American Dictatorships and Democracies (2003).

failure to recognize the need to characterize the subordination of women as a human rights violation, and lack of state practice to condemn discrimination against women.”¹³ Consequently, a new paradigm emerged in the last decade of the 20th century: strategic litigation of reproductive cases before international human rights bodies.

Struggling for the international recognition of reproductive rights, women’s groups became aware of the potential of international human rights law to defend women’s rights. Thus, in addition to the capacity building, legislative and public policy advocacy strategies, efforts have been made to litigate cases both nationally and before international human rights bodies.¹⁴ There has also been an increasing interest within human rights organizations with regard to reproductive rights topics.¹⁵

Although feminist advocates and scholars recognize the limitations of a rights-based strategy and are aware that its effectiveness varies depending on the cultural context, the importance of integrating women’s experiences of injustice and subordination when developing international human rights law has also been a major concern.¹⁶ The international litigation of cases continues to be a paradigmatic strategy for women’s rights organizations in the 21st Century.

Consequently, several landmark cases regarding reproductive rights have been presented before international human rights bodies, both within the UN System and at the regional level, for example, the Inter-American System (composed of the Inter-American Commission and Court). The following analysis will concentrate on the Inter-American System.

Historically, the majority of cases resolved in the IAS have focused on gross-violations of human rights, such as arbitrary executions, massacres and forced disappearances due to the prevalence of authoritarian regimes and dictatorships in Latin America in the first half of the 20th Century. The rising of democratic

¹³ REBECCA J. COOK ED., HUMAN RIGHTS OF WOMEN 3 (1994).

¹⁴ See, e.g., the Center for Reproductive Rights (CRR), a women’s rights NGO integrated by human rights lawyers whose mission is to use “the law to advance reproductive freedom as a fundamental human right that all governments are legally obligated to protect, respect and fulfill.” <http://reproductiverights.org/en/about-us/mission>; The Information Group on Reproductive Choice (GIRE), a Mexican NGO whose aim is “to promote and defend women’s reproductive rights, within the context of human rights.” http://www.gire.org.mx/index.php?option=com_content&view=article&id=392&Itemid=1115&lang=en.

¹⁵ See, e.g., Human Rights Watch, “Sexual and Reproductive Health” in their website: <http://www.hrw.org/topic/health/sexual-and-reproductive-health>; Amnesty International, “Women’s Lives, Women’s Rights” addressing maternal mortality as a global reproductive health issue: <http://www.amnesty.org/en/campaigns/demand-dignity/issues/maternal-mortality>

¹⁶ See Rebecca J. Cook, *supra* note 13, at 4-5.

governments and relative political stability in the region has promoted analysis by the Inter-American Commission and Court of discriminatory practices suffered mainly by disadvantaged groups due to their race, ethnicity or gender.¹⁷

In this context, the Inter-American Human Rights Commission (“IAHRC or the Commission”) has recently issued two thematic reports on reproductive rights issues: *Access to Maternal Health Services from a Human Rights Perspective* (2010) and *Access to Information on Reproductive Health from a Human Rights Perspective* (2011).¹⁸

Also, the IAHRC has analyzed several petitions regarding reproductive rights in the last two decades. Three landmark cases regarding access to legal abortion, forced sterilization of women and adolescent pregnancy in schools are: Paulina Ramírez Jacinto (Mexico), María Mamérita Mestanza (Peru) and Mónica Carabantes Galleguillos (Chile).¹⁹ It is worth noting that all three cases were resolved as *friendly settlements*, meaning the Commission didn’t issue a merits report on the case but served as a mediator between the victims and the State to reach an agreement.²⁰

In the case of Mónica Carabantes, a petition was filed against the State of Chile arguing the decision of that country’s courts not to punish abusive interference in the private life of Mónica Carabantes Galleguillos. Carabantes Galleguillos had filed a suit against the private school that expelled her for becoming pregnant, arguing that this violated her honor and dignity as recognized in Article 11 of the American Convention on Human Rights (hereinafter “the American Convention”), and the right to equal protection of the law (Article 24). A friendly agreement was signed in 2001, where the State committed to cover higher education costs for Mrs. Carabantes, secondary and higher education costs for her daughter and carry out a public act of redress.²¹

¹⁷ Victor Abramovich, *From massive violations to structural patterns: new approaches and classic tensions in the inter-american human rights system*, SUR INTERNATIONAL JOURNAL ON HUMAN RIGHTS, 11 (2009), http://www.surjournal.org/eng/conteudos/getArtigo11.php?artigo=11,artigo_01.htm

¹⁸ Inter-Am.C.H.R., *Access to Maternal Health Services from a Human Rights Perspective*, OEA/Ser.L/V/II. Doc. 69 (2010); Inter-Am.C.H.R., *Access to Information on Reproductive Health from a Human Rights Perspective* OEA/Ser.L/V/II. Doc. 61 (2011).

¹⁹ *Paulina Ramírez v. Mexico*, Inter-Am.C.H.R, Friendly Settlement, Report 21/07, (2007); *María Mamérita Mestanza Chávez v. Peru*, Inter-Am.C.H.R, Friendly Settlement, Report 71/03, (2003); *Mónica Carabantes Galleguillos v. Chile*, Inter-Am.C.H.R, Friendly Settlement, Report 33/02, (2002).

²⁰ After a petition is admitted by IACHR and observations are made by the State presumed responsible of the human rights violations, the Commission issues a merits report on the case or requests the State and the petitioners to sign a friendly settlement. See Inter-American Convention on Human Rights, Article 48(1) (f).

²¹ See IACHR, *Monica Carabantes v. Chile*, *supra* note 19.

In the case of María Mamérita Mestanza, a Peruvian 33 year old woman who suffered forced sterilization by public health authorities under Fujimori's regime, the petitioners alleged that the Peruvian State had violated Mrs. Mestanza's rights to life, personal integrity, and equality based on Articles 4, 5, 1, and 24 of the American Convention, as well as violations of Articles 3, 4, 7, 8, and 9 of the Convention of Belém do Pará"), Articles 3 and 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (hereinafter "the Protocol of San Salvador") and Articles 12 and 14(2) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).²²

The Peruvian State recognized its international responsibility in a friendly agreement and offered economic compensation to Mrs. Mestanza's family as reparation. It also promised to make a thorough investigation of the facts and apply legal sanctions to any person determined to have participated, and modify national legislation and public policies on reproductive health and family planning to eliminate discrimination and respect women's autonomy.²³

In the case of Paulina Ramírez, a petition was filed against the State of Mexico for violating the human rights of Paulina, a young girl from Baja California who became pregnant as a result of a rape and was prevented, by the state authorities, from exercising her right to terminate that pregnancy as provided for in Mexican law. According to the complaint, the Mexican State was internationally responsible for violating rights protected in Articles 1, 5, 7, 8, 11, 12, 19, and 25 of the American Convention, Articles 1, 2, 4, 7, and 9 of the Convention of Belém do Pará, as well as Article 10 of the Protocol Protocol of San Salvador, the right to health protected in Article 12 of the CEDAW, and the rights protected in Articles 19, 37, and 39 of the Convention on the Rights of the Child.²⁴

The parties signed a friendly agreement where the State of Mexico committed to publicly recognize its international responsibility for the violation of Paulina's human rights and carry out reparation of damages. These included payment of judicial expenses, economic compensation, psychological and health care services for Paulina and her son, as well as an education scholarship, clarification of local laws to promote access to legal abortion services and enforcement of national public policies to provide medical assistance for women victims of sexual abuse.²⁵

The only reproductive rights cases in which the Commission has issued merits reports are the *Baby Boy case (US)* and the *X and Y case v. Argentina*. In the first case, the Commission analyzed the rulings of the United States Supreme Court and the Court of Massachussets (upholding women's right to abortion) that

²² See IACHR, *María Mamérita v. Peru*, *supra* note 19.

²³ *Id.*

²⁴ See IACHR, *Paulina Ramírez v. Mexico*, *supra* note 19.

²⁵ *Id.*

presumably violated article 4 of the American Convention which protects right to life, in general, from the moment of conception. The Commission considered the U.S. had not breached its international obligations since the *travaux préparatoires* reflected the intention of the States parties to respect abortion laws in the region, as finally established in the provision to protect life *in general* from the moment of conception in Article 4 of the Convention.²⁶ In the second case, regarding vaginal inspections conducted by prison authorities on the women visitors of the Federal Penitentiary Service in Argentina, the Commission found the Argentinian State responsible for imposing an unlawful condition to female visitors for prison visits lacking appropriate legal and medical guarantees.²⁷ The Commission concluded the State of Argentina had thus violated the rights to personal integrity, privacy and family life of Ms. X and her daughter Y, as guaranteed in Articles 5, 11, 17 of the American Convention, in relation to the general obligation established in Article 1.1 which requires the Argentinian State to respect and guarantee the full and free exercise of all provisions recognized in the Convention, as well as the rights of children protected in article 19 of the same instrument.²⁸

The Commission has also admitted cases regarding illegal conditions in the detention of pregnant women in Ecuador, discrimination of adoptive mothers in their right of maternity leave in Brazil and sterilization without informed consent in Bolivia.²⁹ The common alleged violations in these cases have been the rights to personal integrity and humane treatment (Article 5.1), judicial protection and effective resources (Articles 8.1 and 25) protected in the American Convention, and the obligation of the State to act with due diligence to prevent, investigate and sanction violence, as established in Article 7 of the Convention of Belem do Pará.

As for pending cases in the Inter-American Court of Human Rights (Inter-American Court or “the Court”), a paradigmatic resolution is expected this year on *in vitro* fertilization in Costa Rica. The Court is currently analyzing whether the prohibition on the assisted reproductive technique known as *in vitro* fertilization, in place since 2000 following a ruling by the Constitutional Chamber of the Costa Rican Supreme Court, respects International human rights standards.

In its merits report of the case, the Commission found that this absolute prohibition violated the human rights of infertile couples protected in articles 11(2), 17(2) and 24 of the American

²⁶ *Baby Boy Case*, Resolution 23/81(United States), Case 2141, Inter-Am. Com. H.R., OEA/Ser.L/V/II.54, Doc. 9 rev. 1 (1981).

²⁷ *Ms. X v. Argentina*, Case10.506, Inter-Am. C.H.R., Report 38/96, (1996) at para. 116.

²⁸ *Id.*

²⁹ *Karina Montenegro and Others v. Ecuador*, Inter-Am.Com.H.R., Report No. 48/07 (2007); *Fátima Regina Nascimento de Oliveira and Maura Tatiana Ferreira Alves v. Brasil*, Inter-Am.Com.H.R., Report No. 7/10, (2010); *I.V. v. Bolivia*, Inter-Am.Com.H.R., Report No. 40/08, (2008).

Convention, considering it constituted an arbitrary interference in the right to private and family life and the right to found a family.³⁰ The Commission also found that the prohibition violated the victims' right to equality since the State had denied them access to a treatment that would have enabled them to overcome their disadvantage with respect to fertile couples in their ability to have biological children, and that it had a disproportionate impact on women.³¹

Without diminishing the relevance of reproductive rights violations being discussed in the IAS, it is worth noting that the majority of these cases lack a broad analysis of the claims of structural and gender-based discrimination embedded in the lack of reproductive health services and obstructions to women's autonomy. Since three of the landmark cases have been resolved through friendly settlements (*María Mamérita*, *Paulina Ramirez* and *Monica Carabantes*), the opportunity has been lost to address the context and patterns of gender-based discrimination represented by these three cases (victims of sexual violence denied abortion services, marginalized women sterilized against their will and adolescent girls expelled from schools for becoming pregnant). For example, in the case of Mrs. Mestanza, the petitioners argued that it was "one more among a large number of cases of women affected by a massive, compulsory, and systematic government policy to stress sterilization as a means for rapidly altering the reproductive behavior of the population, especially poor, Indian, and rural women."³² Similarly, Paulina's case was claimed to be "indicative of those of a countless number of girls and women forced into motherhood after being raped and after being prevented by state authorities from exercising a legitimate right enshrined in Mexican law."³³

Even in the merits report of the *X and Y case*, the Commission dedicated the report to analyzing whether the vaginal inspections were preventive measures adopted by the State authorities for an objective purpose (the maintenance of public order and security), and concluded that they were not acceptable restrictions to the Convention's provisions and not reasonable under the circumstances of the case.³⁴ The petitioners' argument that these searches constituted a discriminatory practice against women was not discussed.

Nevertheless, the Commission has argued before the Inter-American Court in the *in vitro fertilization* case that the absolute ban of this assisted reproductive technique is discriminatory and disproportionately affects women.³⁵ It is now up to the Court to

³⁰ *Gretel Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica*, Case No. 12.361, Inter-Am. C. H.R.; Inter-American Commission on Human Rights, July 29, 2011. <http://www.cidh.oas.org/demandas/12.361Eng.pdf>.

³¹ *Id.*

³² See *María Mamérita v. Peru*, *supra* note 19, at para. 9.

³³ See *Paulina Ramírez v. México*, *supra* note 19, at para. 14.

³⁴ See *Ms. X v. Argentina*, *supra* note 27, at paras. 72, 116.

³⁵ See "*In Vitro Fertilization*", *supra* note 30.

determine whether or not the prohibition of in vitro fertilization constitutes gender-based discrimination.

Also, in recent cases, the Commission seems to be identifying a close nexus between violence and reproductive rights violations, or at least considering this aspect of the petitioners' claims when further analyzing the merits of the case. For example, in the case of *I.V. v. Bolivia*, the Commission considered that forced sterilization committed by public officers, the consequences of the intervention (both physical and psychological), as well as the delay in due process against the perpetrators can be considered violations of Art. 7 of Convention Belem do Pará.³⁶ And in its admissibility report of the *Karina Montenegro and Others* case, the Commission considered that the illegal detention of pregnant women and elders and the conditions in which the pregnancy occurred, can be considered violence against women (articles 7 and 4 of Belem do Pará).³⁷

In contrast to the emergent doctrine on discrimination and violence in reproductive rights cases, the Inter-American Commission and Court's decisions on ground-breaking cases regarding pervasive manifestations of violence against women, such as feminicides, domestic and sexual violence, have underscored the close nexus between discrimination and gender-based violence. In this respect, the Inter-American Court has issued noteworthy resolutions addressing structural discrimination caused by cultural stereotypes and social inequalities that prevent women from full realization of their human rights.³⁸

For example, in the *Cotton Field Case*, regarding the murders and disappearances in Ciudad Juárez, Mexico, the Court analyzed the particular context of the city in which the violence occurred and expressed concerns regarding the culture of discrimination ("machismo") affecting women.³⁹ One significant finding of the Court in this case was the prevalence of discriminatory stereotypes, particularly in the justice system, relating to the context of widespread violence against women. In this landmark decision, the Court delivered a comprehensive interpretation of the Belem do Pará Convention, examining its applicability and conducting a thorough review of the due diligence obligation of States to prevent, investigate and punish violence against women.⁴⁰

³⁶ See *I.V. v. Bolivia*, *supra* note 29.

³⁷ *Karina Montenegro and Others v. Ecuador*, *supra* note 29.

³⁸ *The "Las Dos Erres" Massacre v. Guatemala*, Inter-Am.Ct.H.R. Series C., No. 211 (2009); *González et al. ("Cotton Field") v. Mexico*, Inter-Am. Ct.H.R. Judgment, Series C No. 205 (2009), *Rosendo Cantú and Others v. México*, Inter-Am.Ct.H.R. Judgment Series C. No. 216 (2010); *Fernandez Ortega and Others v. Mexico*, Inter-Am. Ct. H.R. Judgment (Ser. C) No. 215. (2010).

³⁹ The Court concluded that violence against women in Ciudad Juarez follows a systemic pattern of discrimination and in this situation "an obligation of strict due diligence arises in regard to reports of missing women, with respect to search operations during the first hours and days." See *Cotton Field*, *supra* note 38, at para. 283.

⁴⁰ See generally *Cotton Field*.

In light of the discriminatory context in which feminicides occurred, the Court went beyond the concept of integral reparations and ordered the Mexican State to implement *transformative reparations* to modify discriminatory practices and pervasive cultural stereotypes against women in Ciudad Juárez. Reparations should be crafted aspiring not only for restitution and redress of damages, but for the transformation of the situation of violence, designed to identify and eliminate the factors that cause discrimination; and adopted from a gender perspective, bearing in mind the different impact that violence has on men and on women.⁴¹

In the *Rosendo Cantú* and *Fernandez Ortega* cases, the Inter-American Court also expressed its concern about the “institutional violence” that women face when there is a large military presence.⁴² In both rulings, the Court considered that sexual violence is a paradigmatic form of violence against women with consequences that transcend the victim,⁴³ characterizing it as a form of torture when committed by State agents and aggravated in cases of indigenous women.⁴⁴ Sexual violence and violations of women’s personal integrity had been analysed by the Court in the context of systemic patterns of violence in previous rulings.⁴⁵

The Inter-American Commission has considered domestic violence to be a form of gender-based discrimination, finding States responsible for violating women’s rights to personal integrity and effective judicial protection due to discriminatory judicial passivity (overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors) and insufficient commitment to take appropriate action to address domestic violence.⁴⁶

IV. What Can We Learn From these Cases?

Considering the positive developments made in the Inter-American System to advance women’s rights, there have been significant advances in framing violence as gender-based discrimination and international human rights standards regarding access to justice for victims of violence that are useful in defending reproductive rights cases.

⁴¹ *Cotton Field*, *supra* note 38, para. 451.

⁴² *Fernandez Ortega and Others v. Mexico*, at para. 109.

⁴³ *Id.* at para. 118. Judge Cecilia Medina dissented on this argument in *Cotton Field*, arguing that also private actors can commit torture. *See Cotton Field supra* note 38, at para.132, Dissenting Vote of Judge Medina Quiroga at para. 2-3.

⁴⁴ *Rosendo Cantú and Others v México* Inter-Am. Ct. H.R. Series C. No. 216 (2010) at para. 71. *Fernandez Ortega and Others v. Mexico*, Inter-Am. Ct. H.R. Judgment (Ser. C) No. 215. (2010).

⁴⁵ *See The “Las Dos Erres” Massacre v Guatemala*, Inter-Am.Ct.H.R. Series C. No. 211 (2009), at para. 141.

⁴⁶ *See Maria Da Penha Fernandes v Brazil*, Inter-Am. Com. H.R., Report No. 54/01 (2001); *Jessica Lenahan (González) and Others v United States*, Inter-Am. Com. H.R., Report No. 80/11, Case 12.626 (2011).

In cases involving gender-based killings, including feminicides, crimes of sexual violence and intimate partner violence,⁴⁷ the Inter-American jurisprudence as well as the Special Rapporteur on Violence Against Women, its Causes and Consequences have outlined the following standards regarding access to justice and due diligence obligations of States:⁴⁸

- a) Conduct effective investigations of the crime, prosecute and sanction acts of violence perpetrated by the State or private actors, especially when these acts are tolerated by the State and demonstrate a pattern of systemic violence towards women;
- b) There is an obligation of judicial impartiality which includes the requirement to treat women victims and their relatives with respect and dignity throughout the legal process;
- c) Guarantee *de jure* and *de facto* access to adequate and effective judicial remedies;
- d) Ensure comprehensive and integral reparations for women victims of violence and their relatives, including measures designed to address institutional and social violence;
- e) Adopt public measures to modify cultural patterns based on discriminatory stereotypes that promote unequal treatment of women in societies; and
- f) Identify certain groups of women as being at particular risk for acts of violence, including women belonging to ethnic, racial and minority groups.

As noted by R. Celorio, the international human rights standards elucidated upon in recent case law addressing gender-based violence were “geared toward shedding light on the content of the States’ obligation to organize their structure - including the work of all sectors such as justice, health, and education - to prevent, investigate,

⁴⁷ See *Raquel Martín de Mejía v. Peru*, Case. 10.970, Inter-Am. Com. H.R., Report No. 5/96, OEA/Ser.L/V/II.91, doc. 7 rev. (1996); *Ana, Beatriz and Celia González Pérez v. Mexico*, Case 11.565, Inter-Am. Comm’n H.R., Report No. 53/01, OEA/Ser.L/V/II.111, doc. 20 rev. (2001); *Maria da Penha Maia Fernandes v. Brazil*, Case 12.051, Inter-Am. Com.H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 rev. (2001); *The “Las Dos Erres” Massacre v Guatemala*, Inter-Am.Ct.H.R. Series C., No. 211 (2009); *González et al. (“Cotton Field”) v Mexico*, Inter-Am. Ct.H.R. Judgment, Series C No. 205 (2009), *Rosendo Cantú and other v México*, Inter-Am.Ct.H.R. Judgment Series C. No. 216 (2010); *Fernandez Ortega and Others v. Mexico*, Inter-Am. Ct. H.R. Judgment (Ser. C) No. 215. (2010).

⁴⁸ *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo*, UN Human Rights Council, 23th Sess., at 116.U.N. Doc. A/HRC/20/16, (May 23, 2002).

sanction, and offer reparations for acts of violence and discrimination against women in different settings and sociopolitical contexts.”⁴⁹

V. The Way Forward: Opportunities and Challenges in Advancing Reproductive Rights

Taking into account that some reproductive rights violations are perpetrated in the context of structural discrimination and/or gender-based violence, women’s rights advocates should take advantage of the developments of the Inter-American System to address gender-based violence when framing reproductive rights cases. Although the jurisprudence on reproductive rights is still emerging from the shadows of international human rights law, reproductive health and self-determination are rights protected in human rights instruments.

States have positive obligations to protect, respect and guarantee reproductive rights and are obligated to carry out comprehensive reparation if public officials deny access to reproductive health services, treatments and scientific advances. Moreover, according to international human rights law, States have the duty to ensure informed choices in this field by: acting with due diligence to eliminate discriminatory practices and gender-based violence that undermines reproductive freedom; guarantee access to justice to victims denied of these rights; adopt appropriate legislative, judicial and administrative measures to *transform* discriminatory practices and cultural stereotypes restricting women’s reproductive choices.

In this sense, the concept of *transformative equality* is embodied in international human rights law. As scholars have noted, the formulation of this concept “sees full and genuine equality as likely to be achieved only when the social structures of hierarchy and dominance based on sex and gender are transformed.”⁵⁰ When litigating cases for women’s rights advocacy, it is crucial to take into account the context of structural discrimination and violence in order to identify patterns in the human rights violations analyzed and seek transformative justice.

Aside from increasing national and international litigation of reproductive rights cases, women’s rights groups should use other international human rights mechanisms to make visible the common patterns and contexts of subordination in which reproductive rights violations take place. Therefore, the constant monitoring of the situation of discrimination and violence against women in the Americas, including sexual and reproductive health issues, conducted by the Inter-American Commission’s Rapporteurship on the Rights of

⁴⁹ Rosa Celorio, “The Rights of Women in the Inter-American System of Human Rights: Current Opportunities and Challenges in Standard-Setting”, 65 U. MIAMI L. REV. 819, 821 (2011).

⁵⁰ Marsha A. Freeman et al eds., COMMENTARY, *THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN*, 55 (2012).

Women is an open window to request regional hearings, country visits, and collaborate with thematic reports on these issues.

The justiciability of reproductive rights at the international level is necessary for the determination of international human rights standards in this sphere and the enforcement of States' obligations to ensure reproductive rights. Nevertheless, access to the international "theater" of justice is very expensive and a long journey to vindicate rights violations. Considering the limited economic and human resources that women's rights organizations generally have in Latin America, international litigation represents a costly and technical endeavour that not everyone can undertake.

On the other hand, a significant current challenge in combating reproductive injustice, as well as gender-based violence, is the implementation of existing human rights standards to ensure that the root causes and consequences of violence and discrimination against women are tackled at all levels, from the home to the transnational arena.⁵¹ Thus, the implementation of human rights rulings and recommendations of International bodies continues to be the "elephant" in the room.

The Inter-American System has mechanisms to monitor the compliance of reports and rulings issued in human rights cases such as: requesting information and submission of reports by the State, as well as expert opinions and observations to those reports by the victims or their legal representatives; holding hearings and adopting other measures that deems appropriate.⁵² Nevertheless, the IAS has not been effective in ensuring States' fulfilment of their obligations as outlined in human rights instruments and promises of integral reparations to victims of gender-based violence and reproductive violations. Impunity to investigate crimes and sanction perpetrators continues to be rampant in the region. Despite the significance of international jurisprudence addressing violence against women and reproductive rights issues for their recognition in the human rights framework and discourse, the language issued in international rulings has become very sophisticated (structural discrimination, institutional violence, gender stereotypes) and is difficult for local judges to understand and integrate domestically.

VI. Conclusion

Reproductive rights have been significantly integrated, at least in a formal sense, in the human rights framework and in the interpretation of international human rights bodies. The cases regarding abortion, forced sterilization, intimate searches in prison,

⁵¹ See Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, Conclusions and Recommendations, *supra* note 48, at paras. 103-104.

⁵² See Article 48.1 of the Rules of Procedure of the Inter-American Commission establishing follow-up measures and Article 69 of the Rules of Procedure of the Inter-American Court establishing the Procedure for Monitoring Compliance with Judgments and Other Decisions of the Court.

and reproductive techniques reviewed and pending in the IAS are proof of this. The emergent case-law on reproductive rights needs to be informed by recent international human rights standards on gender-based violence, particularly in the resolution of pending cases and the framing of new petitions before the IAS. A broad interpretation of the Inter-American human rights instruments to include controversial issues, such as access to legal abortion, emergency contraception and reproductive techniques will be a key factor in the realization of gender equality.

EMPOWERING THE GLOBAL MOVEMENT OF BODIES: AN IMMCRT JURISPRUDENCE

PATRICIA S. MANN

I want to say how happy I am to be here at CIAPA, and how grateful I am to be included for a second time in this great LatCrit South North Exchange. Last year my presentation focused on the draconian discretionary powers of US Immigration agencies to detain and deport noncitizens, regardless of their length of residence, and familial connections, often contrary to international law norms.¹

This year I'd like to call upon LatCrit's own intellectual tradition, and renew an argument for re-thinking the basic foundations of immigration law first made by Kevin Johnson, an early member of LatCrit, and now Dean of UC Davis Law School.

In a 2003 article in the UCLA Law Review, entitled "Open Borders," Johnson emphasized that US immigration law is founded on the idea that it is "permissible, desirable, and necessary to restrict immigration into the US, and to treat a border as a barrier to entry rather than as a port of entry."² Despite passionate scholarly critiques of the plenary power doctrine giving the political branches free reign to enforce our borders, immigration lawyers have, for the most part, accepted the necessity of restricting entry to the US.³

Noting that the very mention of 'open borders' has long been taboo within the field of immigration law, Johnson pointed out that liberal political theorists, Joseph Carons, and others, have seen a major conflict between a commitment to the inalienable human rights of individuals, and national sovereignty-based restrictions on free migration.⁴ Asserting that our borders should be legally permeable to

¹ Patricia S. Mann, *Contingencies of Prosecutorial and Immigrant Agency*, 46 REV. JURIDICA U. INTER. P.R. 777 (2012).

² Kevin R. Johnson, *Open Borders*, 51 UCLA L. REV. 193, 196 (2003-2004).

³ See also Kif Augustine-Adams, *Plenary Power Doctrine After September 11*, 38 U.C. DAVIS L. REV. 701, 734 (2005) (pointing out the inherent difficulty in identifying a principled basis for distinguishing between citizens and non-citizens without the plenary power doctrine.).

⁴ Johnson, *supra* note 2, at 196, 207-8. See Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. OF POL. 251, 270 (1987). Carens argued that restrictions on immigration in Western democracies protect unjust privilege, acting as feudal barriers to mobility. In accord with liberal ideals of equal moral worth, we should permit those who want to sign our social contract to do so. Johnson and Carens also remind us that classical and neoclassical economists have also always supported free labor migration, and Johnson cites the Wall Street Journal, *In Praise of Huddled Masses*, WALL ST. J., July 3, 1984, at 24, proposing a five word amendment, "There shall be open borders." Johnson, at 234. Two decades after that Wall Street Journal article, Johnson argues that free labor migration should be seen as a logical extension of our globalizing economy. Johnson, at 239.

people as well as to goods, services, and capital in a time of globalization, Johnson proceeded to offer a series of moral, political, economic, as well as policy arguments for re-thinking the exclusionary premises of US immigration law. He expanded on these arguments in a 2007 book ironically entitled, Opening the Floodgates.⁵

Kevin Johnson's substantive arguments for opening up our borders are compelling; an ImmCrit analysis emphasizes the dynamic political economic foundations upon which his arguments rest. Furthermore, I think that an argument for open borders can be helpful in re-framing current controversies, with hopes of seeing beyond them. Reaching back to one of LatCrit's foundational documents, Roberto Unger's 1983 analysis in The Critical Legal Studies Movement, I want to highlight Unger's discussion of what he called Deviationist Doctrine. According to Unger, there are times of transformative social conflict when a re-thinking of institutional forms and ideals, whether of the market or of democracy, or other basic concepts becomes necessary. At such a moment, deviationist doctrine takes the authoritative, normative materials as the starting point, and then through expanded doctrine attempts to integrate the explicit controversy, which is really a conflict over the right and feasible structure of society into the analysis.⁶

Neither the market nor democracy had changed radically in the 1980s when Unger was writing his insightful essay; but they have now, and confusion reigns. As part of a larger theoretical project, I will suggest that a critical re-thinking of the foundations of both immigration theory, as well as of democratic theory is necessary in order to begin making sense of our unstable and conflicted world

⁵ Kevin R. Johnson, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS, (2007). As Carens emphasizes, no modern liberal state restricts internal mobility. Insofar as the distinctiveness of NYC or New York State, or California is not compromised by the freedom of movement between states, there is little reason to think that the moral distinctiveness of the nation-state as a form of community justifies restricting freedom of movement across national borders. Carens, *supra* note 4, at 267. For a contrary view, maintaining that community membership and rights to self-determination imply exclusion rights. See Michael Walzer, SPHERES OF JUSTICE, 33, 45-8, 5-61 (1983). Johnson rejects this communitarian ideal of national identity as based upon what will inevitably be discriminatory forms of exclusion. *Id.* at 93-5. Yet while U.S. immigration restrictions are typically justified in utilitarian terms as required on economic or national security grounds, Johnson's historical review of U.S. immigration law demonstrates that our laws have been written and implemented in a discriminatory manner, in terms of race, national origin, the poor, the disabled, and so on. *Id.* 87-130. Thus, in suggesting the "inevitability of permeable borders" Johnson is attempting to provide a rationale and a vision for reforming U.S. immigration laws to bring an end to "rampant civil and human rights violations" resulting from the enforcement of our immigration laws. *Id.* 200, 205, 211.

⁶ Roberto Mangabeira Unger, THE CRITICAL LEGAL STUDIES MOVEMENT 16-22 (1986).

today. I will call these critical engagements, these deviationist doctrines, ImmCrit and DemCrit.

While this article will not develop the DemCrit analysis in any depth, problems of democratic accountability within the U.S., developing over several decades, but heightened since the global economic crisis of 2008, provide a significant context for any discussion of current immigration policies. Campaign finance laws currently enable corporate money to effectively buy elections, and multi-national corporations exert huge, often determinative influence over both Congress and Executive decision-making and policy enactment between elections through lobbying efforts, with the consequence that representative democracy has become increasingly dysfunctional in the US.⁷

Of course, this is the critical perspective that inspired Occupy Wall Street, suggesting that we of the 99% bracket our traditional faith in the democratic provenance of laws and policies, recognizing the particular corporate sponsorship they may reflect.⁸ For example, harsh and frequently unjust policies of detention and removal of noncitizens are defended as articulations of our national interest, required for national security purposes. However, a DemCrit analysis cautions that immigration enforcement has become a growth industry for large multinational corporations, and ironically, these transnational corporate interests play a significant role in

⁷ The author agrees with legal and political commentators who rue the state of our campaign finance laws, and in particular the series of Supreme Court decisions holding that money is speech, and that corporations wishing to spend money in support of issues must be treated as persons wishing to exercise freedom of speech. See *Buckley v. Valeo*, 424 U.S. 1 (1976); *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978); *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010); *Ariz. Free Enter. Club's PAC v. Bennett*, 131 S.Ct. 2806 (2011). See also Patricia S. Mann, *Health Care Justice and Political Agency 2011*, MEDICINE AND SOCIAL JUSTICE: ESSAYS ON THE DISTRIBUTION OF HEALTH CARE 201 (Rosamond Rhodes et al., 2d ed. 2012), examining the mystifying disappearance of Middle America's support for Medicare extension in the 2009-2010 healthcare debate. But in contrast with those who argue for domestic reforms, such as a constitutional amendment decreeing that corporations are not people, a DemCrit analysis concludes that the challenges to representative democracy are global, and that the power of transnational corporations and financial institutions exceeds the grasp of domestic laws and regulations. See Jeffery D. Clements, *CORPORATIONS ARE NOT PEOPLE: WHY THEY HAVE MORE RIGHTS THAN YOU DO AND WHAT YOU CAN DO ABOUT IT* (2012); See David C. Korton, *WHEN CORPORATIONS RULE THE WORLD* (2d ed. 2001). A DemCrit analysis advocates forms of participatory democracy to accomplish shared goals such as a transformation in our energy regime from fossil fuel-based energy to sustainable green energy forms. See Jeremy Rifkin, *THE THIRD INDUSTRIAL REVOLUTION: HOW LATERAL POWER IS TRANSFORMING ENERGY, THE ECONOMY AND THE WORLD* (2011).

⁸ This critique of the corrupting influence of corporate power has recently been taken up by many mainstream political and economic scholars. See Joseph Stiglitz, *Separate and Unequal: The Price of Inequality*, N.Y. TIMES, Aug. 3 2012; Lawrence Lessig, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS- AND A PLAN TO STOP IT* (2011).

Congressional funding of detention and removal policies targeting insufficiently documented noncitizens.⁹

In this talk, I want to begin to develop the notion of an ImmCrit jurisprudence, a deviationist critical engagement, founded on a rethinking of immigration law's conception of national borders as barriers to entry. It is important to remember that our country thrived for over a century with a policy of open borders. It was only in the 1880s that the federal government began making laws restricting entry to this country. In response to a severe economic downturn in California, fears spread that Chinese immigrants were taking jobs from U.S. citizens, and the government enacted a series of laws, the Chinese Exclusion Acts, seeking to deny entry to Chinese workers.¹⁰ In 1889, in *Chae Chin Ping v. US*, the Supreme Court first articulated what has become known as the Plenary Power doctrine, ceding relatively unlimited discretion to the political branches of Congress and the Presidency, to enact and administer immigration laws in the interests of national sovereignty.¹¹ The huge and complex

⁹ Corrections Corporation of America (CCA) and the Global Expertise in Outsourcing, Inc. (GEO Group) (previously Wackenhut Corrections) are dominant players currently in the prison industry, and immigrants are the cash crop of choice; See David Shapiro, *Banking on Bondage: Private Prisons and Mass Incarceration*, American Civil Liberties Union, Nov. 2011, www.aclu.org/files/assets/bankingonbondage_20111102.pdf; See Detention Watch Network, *The Influence of the Private Prison Industry in the Immigration Detention Business*, 1 May 2011, <http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/PrivatePrisonPDF-FINAL%205-11-11.pdf>; See Alexandra Cole, *Prisoners of Profit: Immigrants and Detention in Georgia*, American Civil Liberties Union of Georgia, May 2012; See Judith Greene & Sunita Patel, *The Immigrant Gold Rush: The Profit Motive Behind Immigration Detention* (submitted to the U.N. Special Rapporteur on the Human Rights of Migrants, 2007).

¹⁰ See Gabriel J. Chin, *Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power*, IMMIGRATION LAW STORIES 7 (David A. Martin & Peter H. Schuck eds., 2005); Johnson, *supra* note 2, at 52. See also Aristide R. Zolberg, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA 1-195* (2008) for a very detailed account of evolving forms of immigration regulation imposed by states between 1776 and 1982, when the Chinese Exclusion Act was passed as the first federal immigration law.

¹¹ In *Chae Chan Ping v. U.S.*, 130 U.S. 581 (1889), the Supreme Court upheld the retroactive application of the Chinese Exclusion Act of 1888, holding that a returning Chinese non-citizen could be excluded if Congress determined that his race was undesirable, or for any other reason. Four years later, in *Fong Yue Ting v. U.S.*, 149 U.S. 698 (1893), a Supreme Court majority upheld the Geary Act of 1892, holding that law abiding Chinese non-citizens could be deported as well as excluded because of their race, or for any other reason, based on what the Court articulated as an inherent, unlimited plenary power of the political branches over decisions about immigration. See Chin, *supra* note 10, at 7, 12, 18-20. See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 3-6 (2002) (contrasting the conventional wisdom that our national government is one of limited, enumerated powers granted to it by the constitution, with regard to internal affairs, with the doctrine of inherent plenary powers of the political branches over foreign affairs, an authority granted to all sovereign nations by customary international law.).

body of restrictive immigration law that has developed since the 1880s presumes that people reside most naturally in the sovereign nations within which they were born, and that sovereign nations have enforceable borders. *The intense controversies we are all familiar with today are over the quality of enforcement of U.S. borders, not over the existence of laws and policies aimed at enforcing those borders.* Contrary to the foundational presumptions of immigration law and those who teach it and practice it, I want to suggest that it is not the quality of enforcement, but enforcement itself that must be interrogated.¹²

Challenging the restrictionist set of presumptions directly, an ImmCrit jurisprudence posits that our borders are not enforceable against individuals, and efforts to enforce our borders, to deny free movement of individuals today in the context of a globalizing economy is misguided and wrongful. Insofar as goods, services, and capital flow with relative freedom across our borders based on the sponsorship of multinational corporations, individuals seeking to enter our country should not be turned away unless they pose some explicit form of national security risk, and once individuals have entered our country, they should be allowed to remain for as long as they choose, again, unless they pose some immediate and real national security risk.¹³

What could once be identified as a domestic U.S. economy has become a global marketplace dominated by multinational corporations, acquiring capital, resources and labor wherever these are most readily and cheaply obtained, producing goods wherever production costs are lowest, and selling the products in multiple countries. Capital, goods and services circulate freely across borders in the context of various multinational corporations. Longstanding “American” corporations like General Motors and Ford Motor Company presume a global workplace and a global workforce, outsourcing jobs, closing factories and laying off workers in the US in order to move production to factories in countries with cheaper labor and production costs. Corresponding with the global reach of corporate agency, regarding the production and selling of goods, global flows of workers have also become normal rather than exceptional. A recent Gallup World Poll found that one in four workers would like to move to a different country for work.¹⁴

¹² For a compelling recent critique of the quality of enforcement, see Daniel Kantstroom, *AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA* xi (2012). While Kantstroom seeks a major shift in our thinking about deportation, he emphasizes that he is not calling for open borders or questioning the need for any border restrictions.

¹³ See Johnson, *supra* note 2, at 213; and note 5, at 40.

¹⁴ See Susan J. Matt, *The New Globalist Is Homesick*, N.Y. TIMES, (March 21, 2012), <http://www.nytimes.com/2012/03/22/opinion/many-still-live-with-homesickness.html?pagewanted=all>. (stating “according to a recent Gallup World Poll, 1.1 billion people, or one-quarter of the earth’s adults, want to move temporarily to another country in the hope of finding more profitable work.”)

Half a million Mexicans flowed across our southern borders annually seeking work until the economic crisis in the US diminished the expectation of a well paying job. But workers from everywhere continue to migrate across our southern and northern borders, compelled by global economic forces rendering them unable to support themselves and their families in their countries of origin.¹⁵ The internet and electronic communications have created a global web of information and cultural exchange that have contributed to the normalizing of these global flows of bodies, enabling and encouraging individuals to migrate seeking better working conditions. Due to climate change and the rapidly developing global environmental crisis, these global flows of people will have a second basis – with increasing numbers of people leaving homes and environments and countries where residence is no longer possible.¹⁶ An ImmCrit jurisprudence emphasizes the normalizing of global flows of people across borders in the past few decades, and the implications for efforts to impede or control these flows.

In response to the needs of powerful multinational corporations and financial institutions, private international law has developed to enable corporations and financial institutions to legally move capital, goods, services (and people whenever it wishes) across borders. Insofar as they remain relevant in the context of the international flows of capital and goods, borders become ports of entry rather than barriers to entry - on behalf of corporate interests. While transnational capitalism has produced a transnational workplace and transnational workers, and directly led to the existence of transnational families in every small town across the U.S., private international law does not, for the most part protect their interests, insofar as they are individuals, not corporate entities. Public international law, developed in the context of the United Nations and international human rights conventions and agreements since WWII, articulates the rights of transnational workers and families in various contexts. However, public international law, and even specific findings by international courts regarding the rights of particular groups of individuals, has little authority to demand that its judgments regarding human rights of particular groups of individuals be followed within particular nations.¹⁷ *Transnational*

¹⁵ See Kirk Semple, *In a Shift, Biggest Wave of Migrants is Now Asian*, N.Y. TIMES, (June 18, 2012) http://www.nytimes.com/2012/06/19/us/asians-surpass-hispanics-as-biggest-immigrant-wave.html?_r=0. See JEFFREY PASSEL & D'VERA COHN, Pew Hispanic Center, *U.S. Unauthorized Immigration Flows Are Down Sharply Since Mid-Decade* 3 (Sept. 1, 2010).

¹⁶ Carmen Gonzalez, Seattle School of Law, presented a paper entitled *Climate Change-Induced Migration in the Americas*, on May 12, 2011, at last year's LatCrit South-North Exchange, Migratory Currents in the Americas, at UNIBE, in Santo Domingo, Dominican Republic, providing dramatic details regarding on-going and predicted sites of forced environmental migration.

¹⁷ Public international law is the set of rules generally regarded as binding in relations between states. But insofar as International law is consent-based governance, a state member of the international community is not obliged to abide by international law unless it has expressly consented to a particular regime. Even then, there is no enforcement mechanism if a

workers without sufficient documentation are part of a relentless, inexorable global flow that traditional immigration law is incapable of respecting, and public international law is incapable of protecting.

An ImmCrit analysis seeks to provide the larger geopolitical context for what I will call the current Immigration Enforcement War. The dramatic global economic downturn in 2008, the effects four years later in 2012, enduring and even worsening for U.S. wage earners, homeowners, small businesses, and state and local governments, provides the immediate economic context.¹⁸ Restrictive U.S. border policies began back in the 1880s with an economic downturn in the American West, and fears that Chinese workers were taking scarce jobs from U.S. citizens. Similarly, the current Enforcement War has developed in the context of shrill claims that Latina/Latino workers, particularly Mexicans were taking scarce jobs from American workers, also in the American West, and South.

What I am referring to as the current Immigration Enforcement War has been building since immediately after the September 11, 2001 attack on the World Trade Center. The Patriot's Act was passed in October 2001, seeking to enhance government tools for identifying and disabling terrorist networks. The Homeland Security Act was passed in 2002, transferring functions of the former Immigration and Naturalization Service (INS) which had been

powerful state like the U.S. chooses not to adhere to a "generally accepted" legal rule or the findings of an international body such as the IACHR. See MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* (HERSCH LAUTERPACHT MEMORIAL LECTURES) (1st ed. 2001). See JENNIFER MOORE, *HUMANITARIAN LAW IN ACTION WITHIN AFRICA* (2012), for a recent account of the possibilities and aspirations of public international law.

However, there are indications that the UN is increasingly compromised by corporate lobbying in its ability to address environmental, social and economic problems, unable or unwilling to hold corporations accountable for problems they have created. See Friends of the Earth International, *Reclaim the UN From Corporate Capture* (2012) (providing evidence for what the report calls a "corporate takeover of the UN....[with] the emergence of an ideology among some UN agencies and staff that what is good for business is good for society." *Id.* at 4.). The report details how large corporations with a long history of human rights violations and environmental pollution - Dow Chemicals, Coca Cola, Shell, Exxon and Rio Tinto - have become prime sponsors of UN events or project partners with individual UN agencies, demonstrating that these relationships have become the norm rather than an exception. The report shows how these relationships, and the UN's increasing reliance upon private corporate funding undermines the UN's capacity to represent or even continue to properly recognize the interests of global civil society regarding issues of sustainability, biodiversity, agriculture and food policy, water policy.

¹⁸ See Paul Krugman, *END THIS DEPRESSION NOW!* (2012) for a progressive mainstream economic accounting of this context of suffering. See also Donald Bartlett & James Steele, *THE BETRAYAL OF THE AMERICAN DREAM* (1st ed. 2012) (emphasizing the effects of multi-national corporate power in Washington politics.).

located in the Justice Department, to a newly created Department of Homeland Security (DHS). Despite the fact that numerous previous acts of domestic “terrorism” such as the 1995 “Oklahoma City Bombing,” had been carried out by U.S. citizens, the dramatic “otherness” of those taking responsibility for the 9/11 attacks allowed the Bush Administration to connect the goal of disabling terrorist networks in Afghanistan, Iraq and other Middle Eastern venues, with the goal of protecting the U.S. “homeland.” Heightened efforts to exclude unwanted aliens on behalf of national security in the “homeland” were the domestic complement to military invasions of Afghanistan and Iraq in the early 2000s. After 9/11, funding was dramatically increased for a nation-wide crackdown on removable aliens, and a separate agency within DHS, Immigration and Customs Enforcement (ICE), was given primary responsibility for heightened enforcement of the laws against removable aliens, many of whom had been living in the U.S. as productive residents for decades.¹⁹

Despite the new focus on enforcement, as late as 2006 there remained serious hopes for what was called Comprehensive Immigration Reform, bills introduced by Senators Edward Kennedy, John McCain and others, offering a ‘path to legalization’ for millions of undocumented immigrants. In succeeding years, new bills were introduced seeking Comprehensive Immigration Reform, but each year the path to legalization became more onerous, excluding more of the currently undocumented, and ever harsher enforcement components were included as preconditions for legalization plans. Each year since then billions of dollars more have been appropriated for both border enforcement (building a physical fence and policing it), as well as internal enforcement, ICE (“Immigration and Customs Enforcement”) raids on homes and businesses, traffic stops, arrests, detentions and removals of hundreds of thousands of immigrants based on old removal orders, lack of a path to legalization, or criminal convictions. Congress now provides funding for the Department of Homeland Security (“DHS”) to arrest, detain and deport about 400,000 insufficiently documented noncitizens each year.²⁰

¹⁹ The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, (USA PATRIOT Act), Pub. L. No. 107-56, signed into law on October 26, 2001, was Government’s immediate response to the attacks of 9/11. The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, created a new Department of Homeland Security (DHS), transferring most immigration agency functions from the Justice Department to the new DHS. The functions of the previous Immigration and Naturalization Services (INS) were assumed by a new Immigration and Customs Enforcement (ICE) and the federal government commenced a nation-wide crackdown on removable immigrants. In June 2003 it adopted a new strategic plan called “Operation Endgame,” with the goal of removing 100% of removable aliens” by 2012. *See* Cole, *supra* note 9 at 21.

²⁰ *See* Immigration and Customs Enforcement Fact Sheets, Nov 15, 2011. “In FY 2011, ICE operated under a year-long continuing resolution that provided funding of more than \$5.8 billion.” <http://www.ice.gov/news/library/factsheets/budget-fy2011.htm#>. And in fiscal year 2011, ICE removed 396,906 insufficiently documented non-citizens.

As Congressional immobility has become evident, hopes for comprehensive immigration reform have waned. Enforcement has become the only response to the newly inexorable global flows of workers, perceived as a problem of illegal immigration. After appointing Janet Napolitano, the former governor of the border state, Arizona, as the head of DHS, the Obama administration has continued to increase funding and support for all forms of enforcement. The huge inflow of Mexicans across our southern borders has waned dramatically in the past couple of years, largely due to the dramatic decline in economic opportunities in the U.S. Attempted illegal entries have fallen drastically, as have absolute numbers of those in the US without documentation. Nevertheless, the drumbeat for heightened enforcement has only kept rising. What's going on?

In our period of extended economic crisis, when so many are struggling to maintain themselves in the face of layoffs, foreclosures, bankruptcies, fears about the dire economic situation for everyone provide the fuel for scapegoating of immigrants. The actual flow of undocumented immigrants is irrelevant to such fears. As Professor Bill Ong Hing explains, hysteria and media-induced fear and misinformation are primary bases for popular support for extreme enforcement measures today.²¹

An ImmCrit deviationist jurisprudence emphasizes unforeseen ramifications and tensions caused by an unthinking faith in border restrictions justified in terms of national sovereignty/security. The U.S. border is a shifting legal construct today, no longer tightly fixed to territorial benchmarks. Immigration regulatory agencies have been breaking new ground, technologically, in attempting to gain control over the cross border movements of citizens and noncitizens alike in an age of increasing economic interdependence and national security concerns. The U.S. government has enhanced and expanded its immigration enforcement authority through technologies that allow border controls to be applied anywhere within the territorial boundaries of the US, and sometimes far beyond them. With smart chips embedded in our passports, the regulatory state is policing and monitoring the movement of citizens as well as noncitizens.²²

One of the most controversial components of the current Enforcement War is the government's so called "Secure Communities"

<http://www.ice.gov/removal-statistics/>; In 2009, ICE detained more than 442,000 individuals, at a cost to taxpayers of \$5.5 million per day. See Nina Bernstein, *Immigration Detention System Lapses Detailed*, N.Y. TIMES Dec. 2, 2009, at A25.

²¹ Bill Ong Hing, *Thinking Broadly About Immigration Reform by Addressing Root Causes*, in LEGAL BRIEFS ON IMMIGRATION REFORM FROM 25 OF THE TOP LEGAL MINDS IN THE COUNTRY (Mona Parsa & Deborah Robinson, eds., 2011).

²² See Ayelet Shachar, *Symposium: Immigrant's Rights & Critical Perspectives on Immigration Reform, February 10, 2007: The Shifting Border of Immigration Regulation*, 3 STAN. J. C.R. & C.L 165 (2007).

(S-Comm) program. Enabled by a huge investment in data bank development, S-Comm is an information sharing system between local law enforcement officers, the FBI, and ICE. Local police officers have a longstanding practice of checking the fingerprints of anyone who is arrested or booked against FBI databases. S-Comm mandates that local officers also check the fingerprints against ICE databases. Noncitizens with old removal orders, old criminal convictions or current outstanding criminal matters, including DUI's, are apprehended at traffic stops, detained when there is an ICE hit, and placed in removal proceedings.²³ Various states and localities have attempted to opt out of this program over the past year, but DHS Secretary Napolitano has refused to allow opt outs.²⁴ When DHS's own appointed Task Force recommended terminating or limiting S-Comm, Secretary Napolitano refused to take its recommendations.²⁵ This vast new system of technological monitoring, justified as a necessary component of border enforcement, has implications beyond the current Enforcement War, for citizens and noncitizens alike.

Arrest and extended detention of noncitizens who are deemed potentially removable, is a major component of the current Enforcement War. The INS historically detained very few noncitizens, but in the decade since 9/11, detention rates have jumped more than five fold.²⁶ Several multinational corporations, Corrections

²³ For a basic description of the Secure Communities program, see the website of Immigration and Customs Enforcement: http://www.ice.gov/secure_communities/. See also *Misplaced Priorities: The Failure of Secure Communities in Los Angeles County*, by Edgar Aguila-socho, David Rodwin, and Sameer Ashar, of the University of California Irvine, School of Law, Immigrant Rights Clinic, January 2012, for a historical and critical review of its operations.

²⁴ See *The Secure Communities Program: Unanswered Questions and Continuing Concerns*, Immigration Policy Center, November 2011 update, Michele Waslin, for a discussion of the August 5, 2011 Opt Out Denial by DHS. See angry responses: Press Release, Amnesty International USA, Secure Communities Expansion a Draconian Step: Will Undermine Crime Prevention and Further Marginalize Groups Who Are Already at Risk, Says Amnesty International (Aug. 5, 2011); Press Release, Coalition for Humane Immigrant Rights of Los Angeles, ICE Rams Poison Pill down Americans' Throats: Unfair and opaque "Secure Communities" fishing net expands all over U.S. (Aug. 5, 2011); Press Release, Illinois Coalition for Immigrant and Refugee Rights, ICE v. Illinois: Rogue Agency Blocks State Exit from "Secure Communities" Dragnet Program (Aug. 5, 2011); Press Release, National Immigration Law Center, Showing Its True Colors, Department of Homeland Security Comes Clean with its Mass Deportation Agenda (Aug. 5, 2011); Press Release, New York Immigration Coalition, DHS Terminates Secure Communities Agreements with States; Says States Must Comply Regardless (Aug. 5, 2011).

²⁵ See National Immigration Law Center *Another Missed Opportunity: How the Long Awaited S-Comm "Reforms" are Designed to Fail*, May 2012 (<http://www.nilc.org/scommresponse.html>).

²⁶ See Removal Statistics, *supra* note 20. See also Mary Dougherty, Denise Wilson, and Amy Wu, Immigration Enforcement Actions: 2004 (Annual Report) (www.dhs.gov/xlibrary/assets/.../AnnualReportEnforcement2004.pdf). By contrast in 2001, removals totaled 178,026. *Id.* In 1994, total removals were

Corporation of America (CCA) and the Global Expertise in Outsourcing, Inc. (GEO), are heavily invested in detention facilities, and the growth of detention facilities in the U.S. today. Crime has declined over the past decade (at least below the corporate level), and states do not have money or interest in continuing the draconian drug law enforcement of the '80s that produced a huge expansion in the African American prison population in the 1980s and 1990s.²⁷ Immigration enforcement has been taking up much of the slack in the U.S. prison industrial complex, with a continuing racial component as the Latino/Latina population is targeted in border states today. It has become a growth industry for the two multinational corporations who dominate this field, CCA and GEO, who buy up existing detention facilities, as well as building new ones, welcomed by local economies where renewed prison employment is appreciated.²⁸ Justified as a necessary new feature of the Enforcement War, this vast new gulag of immigrant detainees, clustered with particular density across the state of Texas, appears a function of corporate capture and racial scape-goating, rather than any national security interest.²⁹

Finally, the Enforcement War has spawned draconian anti-immigrant laws in many states, with Arizona's Support Our Law Enforcement and Safe Neighborhoods Act (SB 1070), the model for laws in Alabama, Georgia, Indiana and other states. The Supreme Court granted *certiorari* to the federal government's challenge to four provisions of SB 1070, which established an official state policy of "attrition through enforcement." In oral arguments before the Supreme Court in April 2012, Arizona defended the four harsh provisions of SB 1070 - criminalizing the failure to carry a state alien registration document, criminalizing the act of seeking work or working without authorization, authorizing state officers to arrest without a warrant anyone suspected of being removable, and requiring state officers to make a reasonable attempt to determine the immigration status of any person they stop, detain, or arrest on some other legitimate basis. Arizona portrayed these as desperate efforts to enforce federal immigration laws that the federal government has been unwilling or unable to properly enforce.³⁰

45,674. *Id.* See Margaret H. Taylor, *The Story of Demore v. Kim: Judicial Deference to Congressional Folly*, IMMIGRATION LAW STORIES, 543,546 (David A. Martin & Peter H. Schuck eds., 2005).

²⁷ See Michelle Alexander, *THE NEW JIM CROW: MASS INCARCERATION IN THE DAY OF COLORBLINDNESS* 6 (2012), pointing out that the U.S. penal population exploded from 300,00 to 2 million in the decades after President Reagan announce a war on drugs in 1982.

²⁸ See Chris Kirkham, *Arizona Immigration Law Ruling May Mean Boon For Private Prison Business*, HUFFINGTON POST, June 25, 2012 (http://www.huffingtonpost.com/2012/06/25/arizona-immigration-law-ruling-private-prisons-_n_1625998.html). See also Greene & Patel, *supra* note 9, at 5; Shapiro, *supra* note 9, at 10-12, 21-3.

²⁹ See a map of the extensive detention facilities at Detention Watch Network's site: <http://www.detentionwatchnetwork.org/dwnmap>.

³⁰ *Arizona v. U.S.*, 132 S. Ct. 2492 (2012). See also Lyle Denniston, *Argument Preview: Who controls Immigrants' Lives?*, SCOTUS BLOG (Apr.

While the flow of undocumented immigrants across the border from Mexico has declined, huge numbers of insufficiently documented immigrants continue to live and work in Arizona, frequently married to U.S. Citizens or permanent residents, with U.S.C. children. SB 1070's harsh provisions seek to make life so unbearable for such immigrants that they choose to self-deport. The Supreme Court was ruling upon four specific provisions of the Arizona law that lower courts had enjoined from taking immediate effect, but their concern was not with the impact of these provisions on undocumented immigrants or their families, or even upon legal residents and citizens who may be caught up in the racial profiling encouraged by the laws, but solely with whether these provisions conflict with federal enforcement efforts. ***The desirability of enforcing the federal immigration laws was a basic premise agreed upon by both parties.*** The only question before the Supreme Court was whether the Arizona had a right to legislate its own enforcement measures, exercising its police powers in the interests of what it identifies as public safety, in self avowed cooperation with federal enforcement efforts.³¹

Congress began criminalizing particular immigration offenses twenty five years ago with the Immigration Reform and Control Act (IRCA) of 1986. But it was only after the passage of two harsh laws in 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Responsibility Act (IIRIRA), that commentators began referring to the criminalizing of immigration law more generally.³² Despite the fact that federal laws are civil statutes, warrantless arrests, extended periods of detention, racial profiling, denial of the right to work, have all become basic components of federal enforcement policy, within the broad parameters of what is referred to as "prosecutorial discretion," as it

20, 2012, 2:42 PM), <http://www.scotusblog.com/2012/04/argument-preview-who-controls-immigrants-lives/>.

³¹ See Linda Greenhouse, *The Lower Floor*, Opinionator, (May 2, 2012, 9:00 PM), <http://opinionator.blogs.nytimes.com/2012/05/02/the-lower-floor/> (stating a perceptive critical account of the oral arguments, contrasting the legal issues of preemption before the Court, with the civil rights issues that were not addressed and the national security issues which were taken for granted.).

³² See Daniel Kantstroom, *United States Immigration Policy at the Millennium Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889,1891 (2000) (pointing to a "rather complete convergence between the criminal justice and deportation systems" as a result of AEDPA and IIRIRA); Nora Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the "War" on Terrorism?*, 51 EMORY L.J. 1059, 1060 (2002) (noting that after 9/11, immigration law had become an adjunct and a tool of criminal investigations); Margaret Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1133 (2002) (recommending the elements of a more fair and efficient merger of sentencing and deportation decisions); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 384 (2006).

operates on a daily basis.³³ Following Arizona's 2010 enactment of SB 1070, and modeled on its harsh provisions, there has been a rash of copycat state laws, each making explicit the criminalizing of noncitizens that has remained implicit in federal detention and removal policies.³⁴ There is a sense in which these boldly harsh state laws constitute a *reductio ad absurdum* of federal immigration enforcement today.³⁵

The Supreme Court's measured decision in *Arizona v. United States*, on June 25, 2012, striking down three of the four contested provisions of SB 1070 as preempted by federal law, reasserted federal authority over immigration enforcement as "well-settled," insofar as "immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation..."³⁶ In reinstating Section 2(B), the controversial "show your papers" provision, requiring state police officers to check the immigration status of those who are stopped for other legitimate purposes, the Supreme Court was aware that the federal S-Comm program already authorizes and directs local police officers to check the immigration status of those who are stopped, detained or arrested. By contrast with the three other challenged provisions of SB1070, Section 2(b) adds no new criminal penalties, and no new forms of authority to state and local policing.

³³ For helpful discussion of this elusive concept in its role in enforcement of the immigration laws, see Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243 (2010); Hiroshi Motomura, *Prosecutorial Discretion in Context: How Discretion is Exercised Throughout our Immigration System*, Immigration Policy Center, April 2012.

³⁴ Utah, Indiana, Alabama, Georgia, South Carolina, have all enacted copycat legislation, with Alabama's HB 56, signed into law June 2011, considered even tougher than SB 1070. The Supreme Court's decision in *Arizona v. United States* preempting three sections of SB 1070 will make similar provisions of these copycat state laws impermissible, as well.

³⁵ See *Insecure Communities, Devastated Families: New Data on Immigrant Detention and Deportation Practices in New York City*, NYU School of Law Immigrant Rights Clinic, Immigrant Defense Project, Families for Freedom, July 23, 2012 (<http://immigrantdefenseproject.org/wp-content/uploads/2012/07/NYC-FOIA-Report-2012-FINAL.pdf>); *Immigrants Behind Bars: How, Why, and How Much?* National Immigration Forum, March 2011 (http://immigrationforum.org/images/uploads/2011/Immigrants_in_Local_Jails.pdf); Human Rights First, *Jails and Jumpsuits: Transforming the U.S. Immigration Detention System: A Two Year Review*, October 2011 (<http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf>) (documenting ways in which the U.S. immigration detention system is inconsistent with human rights law and standards); Amnesty International, *Jailed Without Justice: Immigration Detention in the USA*, March 25, 2009 (<http://www.amnestyusa.org/research/reports/usa-jailed-without-justice?page=show>).

³⁶ *Supra* note 30, *Arizona v. United States*, Justice Kennedy's Opinion for the Court, Part II(A). The Court held that Section 3, criminalizing failure to comply with federal alien registration requirements, was preempted as inconsistent with federal law; while Section 5(C), criminalizing an unauthorized alien's employment or efforts to find employment, and Section 6, authorizing state officers to make warrantless arrests, were preempted as obstacles to achieving Congressional objectives. *Id.*, Part IV(A)(B)(C).

Indeed, in conditionally reinstating 2(B), subject to Arizona's demonstration that this provision can be implemented in a constitutionally sound manner, the Supreme Court presumably recognized potential implications for the legality of the federal government's sweeping S-Comm program, affecting all 50 states.³⁷

Conclusion

An ImmCrit jurisprudence asks how much longer we can continue to pretend that the harsh detention and deportation policies associated with the current immigration enforcement regime has anything to do with upholding our national interests. It asks how much longer we can continue to believe that fundamental American values of equality and justice for all are not compromised by border restrictions that justify deporting individuals who have arrived on America's shores as members of a systemically displaced multinational workforce and risen to the challenge of making the US their home. In an era of corporate-led globalization, the claims of universal human rights laws have never been more relevant, challenging all of us involved in immigration law to re-think our assumptions about the requirements for national sovereignty and citizenship.

³⁷ See *supra* notes 23-25.

WHAT'S THE CONSTITUTION GOT TO DO WITH IT? EXPANDING THE SCOPE OF CONSTITUTIONAL RIGHTS INTO THE PRIVATE SPHERE

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This article explores the role that the international human rights discourse has had in the adoption and development of the direct application of constitutional norms to relations arising from disputes between private parties, otherwise known as direct horizontal effect. The scholarship on this subject has largely ignored the study of Latin American jurisdictions, despite the fact that fourteen Latin American countries have adopted some form of direct horizontal effect. The comparative study of Argentina, Colombia and Puerto Rico demonstrates that, at the domestic level, international human rights law has impacted traditional ideas about the functions of constitutional rights, opening the door to a conceptualization that substantially reduces the perceived and long-established distinction between infringements arising from private conduct on the one hand and state action on the other.

This study adds a new dimension to the analysis of the horizontal effect doctrine and sheds light with regards to the changes that traditional constitutionalism is going through; hinting at a shift in the way national constitutionalism is understood with regards to fundamental constitutional rights. Although the work is constrained to specific countries in Latin America, the comparative study of other new constitutional orders tied to transitional processes that were prompted and articulated by the use of the human rights discourse could use this work to better understand transformations of how fundamental constitutional rights are perceived.

I. International Human Rights Law and Its Impact in the Horizontal Application of Constitutional Rights

The scope of the application of constitutional rights has recently received profound attention among legal scholars, mostly from a comparative perspective. The idea that constitutional guarantees are shields only against state intervention is being challenged by the horizontal application of constitutional rights. To

be clear about the concept, the phrase “horizontal effect” is used to describe the application of constitutional norms to adjudicate legal conflicts arising from relations between private individuals. The concept is employed to denote the geography of the rights within the legal structure conveyed by the paradigm of liberal constitutionalism. The term horizontal represents the relations among private individuals, in opposition to a vertical relation between the state and the individual. Although the term horizontal effect is useful to create a visual division of the scope of the application of constitutional rights, it hides one of the rationales behind its foundation.

A vertical relation evokes the concept of subordination, and thus the necessity of creating norms that can be used to oppose those who have the power to create, execute and interpret norms. In contrast, the concept of horizontality suggests relations between equally positioned parties, and as such, without the need to oppose constitutional rights between each other. However, one of the reasons used to justify the necessity for the application of constitutional rights between private actors is precisely the acknowledgment that private individuals or institutions can exert power similar to that of the state.

The critique of the liberal conception of rights, the blurry division between what is public and what is private, and the processes of de-regulation or privatization of governmental activities (especially those that were established under the rubric of the welfare state) have resulted in a serious discussion about the necessity to protect fundamental rights in relations between private actors.

The protection of rights is not a new phenomenon. After all, the modern liberal states were born due to the necessity of creating a central power that could protect individuals from absolutism. When the modern state is created, power is deposited in it, so the state can ensure that private individuals will respect the rights of other individuals. The state regulates the conduct of private individuals by creating minimal norms that, under classical liberal theories, do not impinge upon individual liberty. Because the power to regulate was deposited in the hands of the state, liberal constitutions were conceived to regulate that concentrated power now in the hands of the state.¹

What is new about the protection of fundamental rights in contemporary constitutional debates is the appropriateness of the use of constitutional texts to adjudicate conflicts arising from relationships between private individuals. This notion directly

¹ See CONSTITUTIONALISM: THE PHILOSOPHICAL DIMENSION 4 (Alan S. Rosenbaum ed., 1988); Michael J. Horan, *Contemporary Constitutionalism and Legal Relationships Between Individuals*, 25 INT’ & COMP. L.Q. 848 (1976); Thomas B. McAfee, *Restoring the Lost World of Classical Legal Thought: The Presumption in Favor of Liberty over Law and the Court over the Constitution*, 75 U. CIN. L. REV. 1499, 1502 (2007). See also Andrew S. Butler, *Constitutional Rights in Private Litigation: A Critique and Comparative Analysis*, 22 ANGLO-AM. L. REV. 1 (1993).

challenges the traditional conception of liberal constitutionalism and the function of rights. From this challenge a variety of avenues open up for new descriptions as well as theorizations with regards to the purposes, functions and content of rights and the role of the governmental apparatus as a mediator between private parties.

At the international level individual rights or human rights come to the scene after 1945 in response to the atrocities committed immediately before and during the Second World War, transforming how rights were conceptualized. Ruti Teitel has described the transformation in the following terms:

International human rights, as both a postwar and post-totalitarian movement, was a radical departure from the prevailing rights theorizing assumptions about the state. A creature of postwar circumstances, the new paradigm was said to mean new rights and a departure from the contractarian tradition associated with pre-existing rights theorizing.²

This departure was needed in order to justify a radical change in how international law was to be conceived.

Before 1945, international law was regarded as law only between states. Individuals were not subjects of international law;³ they only benefited from a state's power to vindicate injuries made to one of its citizens by another state. The manner in which a sovereign state treated its nationals was outside the scope of international law. Since the states were conceived as rights protectors, no international law existed to confront the reality and complexities of a state as a rights violator.

By the end of the Second World War, two events altered the status of individuals under international law: the creation of standards for the protection of human rights; and the war trials at Nuremberg and Tokyo.⁴ The trials made clear that international law imposes responsibility upon individuals as well as states. The protection of human rights obliged the states to recognize, respect and ensure specific rights for their own inhabitants.

These events not only changed the status of the individual under international law,⁵ they also changed the normative basis of

² Ruti Teitel, *Human Rights Genealogy*, 66 *FORDHAM L. REV.* 301, 302 (1997).

³ With the exception of pirates, slaves and fishermen, who were subjects of international law.

⁴ See Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals rather than States*, 32 *AM. U. L. REV.* 1, 9-12 (1982); Chirstiana Ochoa, *The Individual and Customary International Law Formation*, 48 *VA. J. INT'L L.* 119, 154-154 (2007).

⁵ See Christopher Harding & C.L. Lim, *The Significance of Westphalia: An Archaeology of the International Legal Order*, in *RENEGOTIATING WESTPHALIA* 17 (Christopher Harding ed., 1999).

human rights theory. The individual as subject of international law enjoy rights and duties, but more importantly, these rights emanate from its human condition, not from his or her adscription to a specific state. “[I]nternational human rights law can *only* be conceptualized as protecting human rights and, in so doing, it clarifies the normative basis of these rights as rights all humans have simply in virtue of being human.”⁶ International human rights law changed, paradigmatically, the source behind human rights, putting the human condition at the center of rights theorization and in opposition to contractarian theses. The Inter-American Court of Human Rights has expressed on the matter that:

[M]odern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States.⁷

To be clear about the subject, this distinctive normative basis of international human rights law, does not necessarily translate into a *direct* application of human rights law to the *conduct* of private individuals, —that is, ordinarily, private individuals are not directly bound by international human rights law.⁸ States still are the mechanism through which international human rights reach the individual. This mediated subjection of the individual to international human rights law comes through the obligations that states have to “adopt, . . . such legislative or other measures as may be necessary to give effect to those rights or freedoms.”⁹ However, and notwithstanding the indirectness of the applicability of international human rights law to private individuals, the adherence to a theory of rights based on the human condition, has affected the way in which domestic constitutionalism is embracing questions regarding the scope of applicability of constitutional rights.

⁶ Stephen Gardbaum, *Human Rights as International Constitutional Rights*, 19 EUR. J. INT’L L. 749, 767 (2008). See also NORBERTO BOBBIO, *THE AGE OF RIGHTS* 16 (Allan Cameron trans., 1996).

⁷ The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts. 74 and 75), Advisory Opinion OC-2/82, Inter-Am. Ct. H.R. (ser. A) No. 2, ¶29 (Sept. 24, 1982).

⁸ Jan Arno Hessbruegge, *Human Rights Violations Arising from Conduct of Non-State Actors*, 11 BUFF. HUM. RTS. L. REV. 21 (2005).

⁹ **American Convention on Human Rights, Art. 2. See also Article 2 (2-3) of the International Covenant on Civil and Political Rights.**

A. INTERNATIONAL HUMAN RIGHTS LAW AND HORIZONTAL EFFECT

The impact that international human rights law has had on domestic constitutional law must be part of the study of the development of the horizontal effect doctrine. This topic has been almost absent from the scholarly discussion that deals with horizontal effect, although it helps to explain why there has been a re-orientation over the scope of application of constitutional norms.

The human rights discourse has its foundation in the international arena, and developed as a set of rules that apply only to state actors. Notwithstanding this fact, the international human rights language has been captured in national constitutions and the defense of such rights is deemed essential to the good standing of national states at the international forum. After World War II, a new form of constitutionalism emerged. International human rights norms became the base line for the constitutions of Germany and Japan, as well as the constitutions of de-colonized nations of Asia and Africa and de-militarized countries of Latin America.¹⁰ The strength by which fundamental human rights have been entrenched into these national constitutions demonstrates the profusion of this new legal dogma. This entrenchment has taken several forms, for example, by including specific international human rights in domestic constitutional texts or by giving supra legal status to human rights treaties. Recently, an increasing number of states have given to international human rights treaties a special status with a normative rank higher than that of other treaties and ordinary domestic law.

International human rights treaties or some of their provisions have supraconstitutional rank when they have a status superior to the national constitution. Other countries had accorded constitutional status to human rights treaties or some of their provisions, thus having a higher rank than domestic legislation. Finally, in other jurisdictions international human rights treaties have a supra legal status because the treaties prevail over domestic legislation, but are subject to the constitution.

This appropriation of the human rights discourse within the national context has opened the doors for private individuals to start opposing what are deemed as fundamental rights not only to governmental actions, but also to disputes and conflicts in their relations with other private actors. The reason for this change is that the philosophical foundation of international human rights has evolved, shifting from a theory based on states' reciprocal obligations to a theory in which the individual is the depository of rights that derive from the inherent dignity of the human person. Notwithstanding the fact that there is no consensus over the definition of human rights¹¹ or its moral ground,¹² or even its

¹⁰ See Larry Catá Backer, *God(s) Over Constitutions: International and Religious Transnational Constitutionalism in the 21st Century*, 27 MISS. C. L. REV. 11 (2008).

¹¹ See HUMAN RIGHTS WITH MODESTY: THE PROBLEM OF UNIVERSALISM (András Sajó ed., 2004).

philosophical foundations,¹³ a prevalent idea that permeates the discourse or the language of international human rights is that fundamental human rights derive their force from the human condition.¹⁴

The two major rationales that have been advanced to explain the re-orientation of the scope of application of constitutional norms do not wholly explain why constitutional norms should apply to conflicts between private parties.

One of these expositions centers its discussion on the indistinctive character of the dichotomy between public and private law.¹⁵ Since what constitutes the private sphere is dependent on state norms and their enforcement, what is deemed to belong to said private sphere does only so because the state has established it as such.¹⁶ Therefore, the argument goes, there should be no distinction in the application of constitutional standards because of the type of norm involved.¹⁷ This description, although it expands the conception of what should be considered as state action, still centers the discussion on the state and does not account for actions left unregulated by the government. Under this rationale, actions that are untouched by state regulations would not be sheltered by constitutional provisions.

The second explanation is grounded in the fact that private actors can be as powerful as governmental institutions and thus can be as oppressive as the state. The argument focuses on the “inequalities of power and the vulnerability of individuals in inferior

¹² See MICHAEL J. PERRY, *TOWARD A THEORY OF HUMAN RIGHTS: RELIGION, LAW AND COURTS* (2007).

¹³ LOUIS HENKIN, *THE AGE OF RIGHTS* 6-7 (1990).

¹⁴ See, e.g., Namita Wahi, *Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability*, 12 U.C. DAVIS J. INT'L L. & POL'Y 331 (2006).

¹⁵ The term private law used here only refers to the norms that regulate relations between private parties. For a comparative survey of the meaning of private law, see Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, 54 AM. J. COMP. L. 843, 846-851 (2006).

¹⁶ See Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923) (The public/private divide articulation goes hand in hand with one of the major concerns raised with regards to the adoption of some form of horizontal application of constitutional rights: the protection of personal autonomy.); LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1691 (2nd ed. 1988) (Argues that personal autonomy or individual liberty “would be lost if individuals had to conform their conduct to the constitution’s demands.”); See also Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 536-542 (1985).

¹⁷ See Allan C. Hutchinson & Andrew Petter, *Private rights/Public wrongs: The liberal lie of the Charter*, 38 U. TORONTO L.J. 278, 284-286 (1988) (discussing Canada’s Charter of Rights and Freedoms.).

positions.”¹⁸ This need for protecting vulnerable individuals is exacerbated when the state acts and accommodates its responsibilities under neoliberal paradigms of de-regulation and privatization, blurring even more any distinction between the private and public spheres. This rationale is based on the necessity of protection *from* private power, or private actions that contain what was a former public task. Under this rationale, however, conflicts between private parties in which there is no significant difference with regards to power or there is no delegation of services ordinarily understood as functions of the state to private actors, would not receive constitutional protection.

B. TYPOLOGY OF THE HORIZONTAL APPLICATION OF CONSTITUTIONAL RIGHTS

The way in which constitutional provisions reach private individuals is not necessarily similar in those jurisdictions that have determined to expand the scope of constitutional human rights guarantees. Various conceptual frameworks have been developed to better understand the form in which the horizontal effect plays out in the adjudication of constitutional conflicts. This is so in part, because the differences between the terms “vertical” and “horizontal” proved too limited to explain the nuances of constitutional horizontality. Gardbaum developed the idea of a spectrum in order to identify four different ways in which the constitution can reach private persons.¹⁹

At one end of the spectrum we find the vertical position in which “constitutional rights exclusively govern public law and apply only where government itself is relying on such law to burden an individual.”²⁰ Positioned in the middle, are two forms of what have been called indirect horizontal effect. The term indirect horizontal effect stands for the application of constitutional law to determine the validity of private laws that govern the relations between private parties. Here what is *indirect* is the effect of constitutional rights on private parties, since any alteration to private law will have an indirect effect on the private persons whose actions and omissions are regulated by those norms.

The indirectness can have two forms, either weak or strong. A strong indirect effect is achieved when all law is “fully and directly” subject to *constitutional provisions* and may be challenged in private litigation. This is the case of Germany, where all private law is subject to the constitution and would be invalid if it is in conflict with it.²¹ On the other hand, a weak indirect horizontal effect means that

¹⁸ Dawn Oliver & Jo rg Fedtke, *Comparative Analysis*, in HUMAN RIGHTS AND THE PRIVATE SPHERE: A COMPARATIVE STUDY 503-504 (Dawn Oliver & Jo rg Fedtke eds., 2007).

¹⁹ Stephen Gardbaum, *The Horizontal Effect of Constitutional Rights*, 102 MICH. L. REV. 387 (2003).

²⁰ Stephen Gardbaum, *Where The (State) Action Is*, 4 INT’L J. CONST. L. 760, 766 (2006).

²¹ Lüth, BVerfGE, 7, 198 (1958), *excerpted in* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 361-362 (2nd ed. 1997) (The Federal Constitutional Court held that the Basic

courts will take *constitutional values* into account when interpreting and applying private law. This type of revision is used for private litigation ruled by Canada's common law.²²

At the end of the spectrum, direct horizontal effect means that constitutional rights impose constitutional duties upon private actors as well as on the government, thus, directly regulating the conduct of private actors. Ireland has been the prototype jurisdiction used by comparatists to illustrate direct horizontal effect. In 1973, the Irish Supreme Court devised a constitutional tort that awards damages to a private individual if its constitutional rights are infringed by another private individual.²³

Indistinctively of which form of horizontality is selected, the change in the scope of applicability has a profound impact on domestic constitutional law, transforming traditional ideas about the functions of rights as well as reassessing the functions of the judiciary and its powers to remedy constitutional violations.

C. LATIN AMERICA AND DIRECT HORIZONTALITY

The idea that constitutional rights regulate not only the relations between governmental actors but also relations between private individuals is now entrenched in many Latin American countries. In some, the constitutional text expressly dictates so, in others, the judiciary has interpreted open constitutional clauses or the supremacy of the constitution as commanding such reading.

Most Latin American countries were governed by authoritarian dictatorships precisely at the time when first-world nations were adapting their legal systems to the demands of the human rights legal dogma. Countries such as the United States responded to these demands with the adoption of civil rights legislation, and others, such as Germany, interpreted recently adopted constitutions as a strong constraint against the violation of fundamental rights. These developments were not only delayed in the Latin American context, but the gross violation of human rights during the period running from the 1960's to the 1980's positioned Latin American countries in a very distinct place.

In the 1990's Latin American countries were engaged in a new constitutionalization process. These processes have in common the launching of fundamental rights as the foundation for new constitutional reconstructions, marking a new beginning and the

Law established "an objective order of values" that "must be looked upon as a fundamental constitutional decision affecting all spheres of law."); *See also* Gardbaum, *supra* note 19, at 403-407.

²² *See* Gardbaum, *supra* note 19, at 398-400. *See also* William Rivera-Pérez, *Dolphin Delivery: The Constitutional Values Standard and its Implications for Private Law in Quebec*, 36 OHIO N.U. L. REV. 59 (2010) (On the different constitutional treatment of defamation law in common law and civil code jurisdictions within Canada)..

²³ *Meskeil v. Coras Iompair Eirann*, [1973] I.R. 121.

transition to a democratic political organization.²⁴ International human rights norms have left a pronounced mark in these processes, and it has been essential in the development of the horizontal application of constitutional norms.

Because of these particularities, and in contrast with other democracies, the adoption of the horizontal application of constitutional provisions in Latin America, after the return to democracy and the adoption of new constitutions, creates a situation in which the use of the horizontal effect is not limited to making sure that private law norms are consistent with constitutional rights, what is commonly known as indirect horizontal effect, but most importantly, it is being employed by the judiciary as a strong tool for the creation of new legal remedies in the protection of constitutional rights.

Argentina, Colombia, and Puerto Rico not only adopted the horizontal application of constitutional rights, but adopted the *direct* application of constitutional norms to adjudicate conflicts arising from relations between private parties. This mode of horizontal effect, apart from the case of Ireland, has not received much attention from legal scholars, despite the fact that fourteen Latin American countries have adopted some form of direct horizontal effect: Argentina, Bolivia, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Honduras, Paraguay, Perú, Puerto Rico, Uruguay and Venezuela.

The re-positioning of the human condition as the center and foundation of all human rights claims requires from the state a re-evaluation of the nature and conceptualization of constitutional rights. Argentina, Colombia, and Puerto Rico in different ways had anchored their bill of rights to the concept of human dignity, and from that positioning had determined that some private conduct will be subjected to constitutional norms.

II. Constitutional Protection in the Private Sphere: Argentina's Amparo, Colombia's Tutela and Puerto Rico's Constitutional Tort

A. ARGENTINA

The direct application of constitutional norms to relations between private parties has been developing in Argentina for more than 50 years. The question of whether the constitution applies directly to actions between private parties was settled in 1957 when the Supreme Court determined that the constitutional protections were equally enforceable either in the face of governmental or private parties' actions or omissions. This aspect of Argentina's constitutional law is a departure from United States constitutional understandings, which is deemed by many legal historians as the model and inspiration behind Argentina's constitution.²⁵

²⁴ Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 COLUM. J. TRANSNAT'L L. 211, 213 (1997).

²⁵ See Jonathan M. Miller, *The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century*

In 1957, Ángel Siri, the owner of a newspaper challenged the shutting down of his newspaper.²⁶ Although the lower court determined that the freedom of press and the right to work were infringed, it did not grant any relief following the settled rule that a *habeas corpus* could not be used for such a situation, since the physical liberty of the petitioner was not involved. The Supreme Court revoked the lower court, and granted an order directing the police to cease the closure of the paper. The court determined that in cases where no specific constitutional provision or legal procedure granted a redress for the infringement of a constitutional right, the right to a remedy has to be read as necessarily implied in the constitution:

This confirmation of the constitutional violation is sufficient reason for the judges to re-establish in its entirety the constitutional guarantee that is invoked, and it may not be alleged to the contrary that there is no law regulating the guarantee. Individual guarantees exist and protect the individuals by virtue of the single fact that they are contained in the Constitution, independently of regulatory laws.²⁷

The reasoning of the Supreme Court in *Siri* can be summarized as follows: constitutional rights, simply by being in the Constitution, require a procedural device offering effective protection, thus, ensuring the protection of all other rights not included within the scope of the *habeas corpus* (corporal or physical liberty), is by itself a constitutional requirement. In such a case, express legislative authorization is not necessary due to the constitutional basis of the action.²⁸

The legal rationale behind the change was further clarified in a later decision, which not only elaborated on the legal basis for the *Siri* decision, but also expanded the scope of the *amparo* to cover the infringement of fundamental rights coming from acts of private persons. In *Kot*,²⁹ the owner of a textile factory brought an action claiming usurpation of property against a group of employees who had taken over the factory upon the dismissal of two union officials in the aftermath of a strike. Relying on the *Siri* decision, the relief was sought in the nature of an *amparo* and not as a writ of *habeas corpus*.

With regards as to the basis for the *amparo*, this time the Court explained in detail that the force behind the *amparo* derives

Argentina and the Argentine Elite's Leap of Faith, 46 AM. U. L. REV. 1483 (1997).

²⁶ "Siri, Ángel s/ Amparo", [CSJN], Fallos 239:459 (1957), translated in KENNETH L. KARST & KEITH S. ROSENN, LAW AND DEVELOPMENT IN LATIN AMERICA: A CASE BOOK 162 (1975).

²⁷ *Id.*

²⁸ See Thomas E. Roberts, *Writ of Amparo: A Remedy to Protect Constitutional Rights in Argentina*, 31 OHIO ST. L.J. 831, 835 (1970).

²⁹ "Samuel Kot, S.R.L. s/habeas corpus", [CSJN], Fallos 241: 291 (1958).

from Article 33 of the Constitution, which established that “[t]he declarations, rights and guarantees which the Constitution enumerates shall not be construed as a denial of other rights and guarantees not enumerated, but rising from the principle of sovereignty of the people and from the republican form of government.”³⁰ But the Court did not stop there, and although in *Kot* the defendants were private persons, the court did not find any justification to deny the use of the *amparo* mechanism:

If it be admitted that a tacit or implicit guarantee exists, protecting the various aspects of individual liberty (art. 33 National Constitution), no exception may be established that might exclude, absolutely and a priori, all such restrictions imposed by private persons.

There is nothing in either the letter or the spirit of the Constitution that might permit the assertion that the protection of human rights - so called because they are the basic rights of man- is confined to attacks by official authorities. Neither is there anything to authorize the assertion that an illegal, serious, and open attack against any of the rights that make up liberty in the broad sense would lack adequate constitutional protection because of the single fact that the attack comes from other private person or organized groups of individuals.³¹

The Court gave great importance to language itself of the constitutional guarantees to explain why the *amparo* mechanism was to be extended to the infringement of a constitutional right by a private person. The Argentinean Constitution enumerates the rights of individuals without referencing the parties who are bounded to respect them. Focusing on this fact the court stated that since the constitutional guarantees do not pay attention to the aggressors but to those who have been harmed, in order to re-establish their basic rights the writ of *amparo* does not need to focus on who originates an illegitimate restriction upon fundamental rights.

To support its determination the Court reached for Article 8 of the Universal Declaration of Human Rights, equalizing the right to an effective remedy³² to its own determination as to the necessity of a mechanism for the protection of constitutional rights, and concluded that “whenever the illegality of any restriction to any of the essential rights of a person is clear and evident, and also that submitting the question to ordinary procedures, administrative or judicial, would

³⁰ Art. 33, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

³¹ “Samuel Kot, S.R.L. s/habeas corpus”, [CSJN], Fallos 241: 291 (1958).

³² Universal Declaration of Human Rights, Art. 8. (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”).

cause grave and irreparable harm, judges must restore the restricted right immediately through the swift remedy of *amparo*.³³

The 1994 Argentinean constitutional reform constitutionalized the *amparo* mechanism. The text of the new Article 43 summarizes the *amparo's* judicial doctrine and in its first paragraph describes what can be called the "classic" *amparo*. It reads:

Any person shall file a prompt and summary writ of *amparo*, provided there is no other better suited legal remedy, against any act or omission of public authorities or private individuals which, in its present or imminent form, injures, restricts, alters, or threatens with manifest arbitrariness or illegality, the rights or guarantees recognized by this Constitution, or any treaty or law. In such a case, the judge may declare unconstitutional the law upon which the act or omission was based.³⁴

The inclusion of the *amparo* in the constitutional text did not convey significant changes in the mechanism's substantive or procedural requirements. Substantively, the *amparo* is a mechanism for the immediate protection of constitutional rights,³⁵ when these are infringed by acts or omissions of either public officials or private individuals. The impugned act or omission must be serious, present and imminent; and its illegality, illegitimacy or arbitrariness must be clear and indisputable. With regards to its procedural characteristics, the *amparo* is still an auxiliary mechanism. The party seeking an *amparo* must exhaust all ordinary judicial or administrative remedies available, unless their use would lead to grave and irreparable harm. Although the Supreme Court repeatedly uses the phrase "grave and irreparable harm", ordinarily, the suitability of the ordinary proceedings is measured in a case by case analysis. Factors such as the length of the proceeding or its costs, the personal characteristics of the petitioner such as age or disabilities, and even the possibility of dilatory maneuvers from the petitioned are weighted in order to determine if there is no other better suited legal remedy.

The interrelation between international human rights norms and the *amparo* increased after the 1994 constitutional reform.³⁶ The

³³ "Samuel Kot, S.R.L. s/habeas corpus", [CSJN], Fallos 241: 291 (1958).

³⁴ Art. 43, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

³⁵ Art. 43, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.). Extended the protection for acts or omissions in violation of ordinary laws or treaties norms.

³⁶ However, the trend began in 1992 when the Supreme Court held that the American Convention on Human Rights had created in Argentina a directly enforceable right of reply. See "Miguel Ángel Ekmekdjian c/ Gerardo Sofovich", [CSJN] Fallos: 315: 1492 (1992) [hereinafter Ekmekdjian]. See generally Thomas Buergenthal, *International Tribunals and National Courts: The Internationalization of Domestic Adjudication*, in RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG 687, 695-699 (1995); León Patricios, *Ekmekdjian*

Court's holding in *Ekmekdjian* cleared the road for the new constitutional Article 75(22) which gave constitutional status to various international human rights treaties and categorically ranked all other ratified international treaties as superior to domestic laws.³⁷

The question of how the now constitutionalized human rights treaties were going to be interpreted quickly reached the Supreme Court. The text of Article 75 (22) establishes that constitutionalized treaties were incorporated "under the conditions under which they are in force." The phrase was understood by the majority of legal scholars as referring to any reservations made by Argentina at the time of ratification. However, in *Giroldi*³⁸ the Court held that the phrase refers as to how the treaties at the international level are held in force, giving special consideration to the interpretations given by international courts, which should serve as guide for their interpretation. Using this rationale, the Court concluded that the reform not only imported the text of the treaties, but it also their interpretative case law.

The Supreme Court has not limited the use of international interpretative jurisprudence to that specifically framed within the international courts' jurisdiction, but it also has expanded it to cover resolutions of the **Inter-American Commission on Human Rights**³⁹ **and even decisions from the** European Court of Human Rights to construe articles of the American Convention on Human Rights not yet interpreted by the Inter-American Court that have similar text to the European Convention on Human Rights.⁴⁰

A case that exemplified the use of direct horizontal effect and international human rights treaties is *Etcheverry*.⁴¹ Although, Article

v. Sofovich: The Argentine Supreme Court Limits Freedom of the Press with a Self-Executing Right of Reply, 24 U. MIAMI INTER-AM. L. REV. 541 (1993).

³⁷ The constitutionalized treaties and declarations are: American Declaration of the Rights and Duties of Man; Universal Declaration of Human Rights; American Convention on Human Rights; International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights and its empowering Protocol; Convention on the Prevention and Punishment of Genocide; International Convention on the Elimination of all Forms of Racial Discrimination; Convention on the Elimination of all Forms of Discrimination against Woman; Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments; Convention on the Rights of the Child.

³⁸ "Giroldi, Horacio David y otro s/ recurso de casación", [CSJN], Fallos 318: 514 (1995). The petitioner questioned the constitutionality of a penal procedure rule which denied him the right to an appellate recourse based on Article 8 (2)(h) of the American Convention. The Court reached for the Inter-American Court of Human Rights Advisory Opinion OC-11/90 (paragraph 34) to affirm that the State has a responsibility to guarantee the realization of the rights declared in the Convention.

³⁹ See "Bramajo, Hernán Javier s/ incidente de excarcelación", [CSJN], Fallos: 319: 1840 (1996).

⁴⁰ "Nardelli, Pietro Antonio s/ extradición", [CSJN], Fallos: 319: 2557 (1996).

⁴¹ "Etcheverry, Roberto Eduardo c/ Omint Sociedad Anónima y Servicios", [CSJN], Fallos: 324: 677 (2001).

14bis implies a right to health⁴² the right to health was not explicitly enumerated in Argentina's charter of rights until 1994. With the reform, the right to health is referenced in the new Article 42, but only as it is linked to consumers' rights.⁴³ It was with the adoption of Article 75 (22) and the constitutionalization of various human rights treaties, specifically Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) that a universal right to health came to be judicially enforceable in Argentina.

In *Etcheverry* the Supreme Court determined that a pre-pay health insurance's refusal to continue health coverage after the plaintiff was diagnosed with HIV, constituted a violation of the right to health and of his rights as a consumer. The plaintiff acquired a pre-pay health plan through an agreement with his employer. The plaintiff was diagnosed with HIV and after quitting his job, he asked to continue with the health coverage at his own expense, but the pre-pay company refused to keep him on the health plan. The Court ordered the company to reinstate the plaintiff's health plan coverage, asserting that private providers "have upon their purview a transcendental social function that is beyond any business considerations."⁴⁴ The activities of health providers, the Court noted, are aimed at protecting the constitutional guarantees to a person's life, health, security and integrity. In these types of cases the Court has stressed the vulnerable position of the plaintiffs for whom, after being diagnosed with HIV, the possibilities of obtaining the services of another private provider is almost none.⁴⁵

B. COLOMBIA

Many coincide in asserting that the aims of the 1991 constitutional reform can be divided in three sets of aspirations: 1) foster greater participation in the democratic process; 2) strengthen the rule of law as means to counterbalance the proliferation of political violence; and 3) secure human rights with mechanisms to protect these rights.⁴⁶ After five months of work, the National Assembly approved the final constitutional document on July 4, 1991. The new constitution was centered on two tenets: the *Estado Social*

⁴² Art. 14bis, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.). "The State shall grant the benefits of social security, which shall be of an integral nature and may not be waived. In particular, the laws shall establish: compulsory social insurance."

⁴³ Art. 42, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) "As regards consumption, consumers and users of goods and services have the right to the protection of their health, safety, and economic interests."

⁴⁴ "Etcheverry, Roberto Eduardo c/ Omint Sociedad Anónima y Servicios", [CSJN], Fallos: 324: 677 at para. 15 (2001).

⁴⁵ For a similar factual situation against an *obra social*, see "V., W. J. c/ Obra Social de Empleados de Comercio y Actividades Civiles s/ sumarísimo", [CSJN], Fallos: 327: 5373 (2004).

⁴⁶ Donald T. Fox & Anne Stetson, *The 1991 Constitutional Reform: Prospects for Democracy and the Rule of Law in Colombia*, 24 CASE W. RES. J. INT'L L. 139, 142 (1992); María Paula Saffon, *Can Constitutional Courts be Counterhegemonic Powers vis-à-vis Neoliberalism? The Case of the Colombian Constitutional Court*, 5 SEATTLE J. FOR SOC. JUST. 533, 540 (2007).

de Derecho (social state of law) and the human dignity.⁴⁷ Taken together, these two concepts asserted the human person as the *raison d'être* of the new political pact. Because of this new commitment, the Assembly understood as necessary the development of a comprehensive new charter of rights as well as new mechanisms for its protection.

The 1991 Constitution incorporated a rich set of individual, social, and collective rights.⁴⁸ In addition to the thorough enumeration of specific rights, Article 93 of the Constitution ended any future debate with regards to the force of international human rights law in Colombia, establishing that international human rights treaties ratified by Colombia prevail in the domestic order, creating what is now called the "constitutional body of law" (*bloque constitucional*).⁴⁹

While there was no consensus in the National Assembly with regards to the creation of a Constitutional Court, by the end of the deliberations the project that put forward a new judicial body won the approval of the delegates, and the Constitutional Court came to life. The Government's proposal seriously embraced the idea of creating this new judicial organ in order to provide a space for the development of the new Bill of Rights and its protection mechanisms.

Colombia's writ of protection for fundamental rights was inspired by the Mexican *amparo*. But as adopted by the 1991 Constitutional Assembly, the *tutela*, is distinctively Colombian.⁵⁰ The mechanism is designed to provide "immediate protection of ... fundamental constitutional rights, when any of these [rights] are violated or threatened by the action or omission of any public authority."⁵¹

⁴⁷ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] ART. 1. "Colombia is a social state of law organized in the form of a unitary republic, decentralized, with the autonomy of its territorial units, democratic, participatory and pluralistic, founded on the respect of human dignity, on the work and solidarity of the individuals who belong to it, and the predominance of the general interest."

⁴⁸ Title II of the 1991 Constitution, the Bill of Rights, consists of 84 articles divided in five chapters: Fundamental Rights (Arts. 11-41); Social, Economic and Cultural Rights (Art. 42-77); Collective Rights and the Environment (Arts. 78-82); Protection and Application of Rights (Arts. 83-94) and Duties and Obligations (Art. 95).

⁴⁹ Four constitutional clauses create the bloc: Article 93 establishes that international treaties and conventions ratified by Colombia that recognize human rights prevail in the domestic order; Article 94 declares that the "enunciation of rights and guarantees contained in the Constitution and international conventions ... should not be understood as a negation of others which, being inherent to the human being, are not expressly contained in them.;" Article 53 stipulates that international labor agreements are part of the domestic law; and Article 214 regulates the state of exceptions.

⁵⁰ Martha I. Morgan, *Taking Machismo to Court: The Gender Jurisprudence of the Colombian Constitutional Court*, 30 U. MIAMI INTER-AM. L. REV. 253, 276 (1998).

⁵¹ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] ART. 86.

The Colombian Congress enacted the Decree 2591 of 1991 for the implementation of Article 86 of the Constitution. Article 42 of the decree enumerates nine instances in which *tutelas* could be brought against private entities and individuals. These can be divided in 3 categories depending on the service that the private person provides,⁵² the relation of power between the parties,⁵³ and the type of right infringed or threatened.⁵⁴ The subsections that regulate the use of *tutelas* against private persons who provide public services, established that *tutelas* could only be granted for the protection of certain rights.

The Constitutional Court, since its first decisions, has interpreted the dispositions of Article 86 very broadly and the limitations imposed by Article 42 of Decree 2591 most of the time have been relegated or ignored. Thus, according to the Constitutional Court *tutelas* may be used against private parties in cases where the private party is charged with providing public services, a private party seriously harms collective interests, or the plaintiff is in a position of subordination or otherwise defenseless.

Tutela actions provide ordinary persons with an accessible and inexpensive mechanism to challenge the infringement of fundamental rights. The action has no particular prerequisites; it can be presented *pro se* and even orally.⁵⁵ Procedurally speaking, a *tutela* can be filed before any ordinary judge with territorial jurisdiction. The mechanism is preferential and summary. Judges have ten days to reach a decision⁵⁶ and can adopt any measure necessary to protect threatened fundamental rights, even before rendering a final judgment.⁵⁷ The remedy consists of an order similar to an injunction, which has immediate effects. In some cases the judge can impose monetary damages.⁵⁸ Fines and jail sentences may be imposed in cases of noncompliance.⁵⁹ Orders can be appealed,⁶⁰ and all *tutelas* can be reviewed, at its discretion, by the Constitutional Court.⁶¹

⁵² CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] ART. 42(1-3, 8). (private providers of education, health or services such as electricity, gas or water). L. 2591, NOVIEMBRE 19, 1991, DIARIO OFICIAL [D.O.] (COLOM.).

⁵³ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] ART. 42(4). (when the plaintiff is in a position of subordination or is otherwise defenseless in relation to the private party against whom the claim is directed).

⁵⁴ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] ART. 42(5). (prohibition against slavery, servitude, or human trafficking); CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] ART. 42(6). (*habeas data*); CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] ART. 42(7) (rectification of false information); CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] ART. 42(9) (in protection of the right to life).

⁵⁵ L. 2591, NOVIEMBRE 19, 1991, DIARIO OFICIAL [D.O.] (COLOM.) (Art. 1 and 14).

⁵⁶ *Id.* at art. 29.

⁵⁷ *Id.* at arts. 7-8.

⁵⁸ *Id.* at art. 25.

⁵⁹ L. 2591, NOVIEMBRE 19, 1991, DIARIO OFICIAL [D.O.] (COLOM.) (Art. 52-53).

⁶⁰ *Id.* at art. 31.

⁶¹ *Id.* at art. 32.

There is no doubt that the reason why the Constitutional Assembly constitutionalized a mechanism for the protection of fundamental rights was to demonstrate the seriousness of the pledge to a new constitutional framework based on the protection of rights. The expansion of that protection, to include also the protection against actions or omissions from private persons that could threaten fundamental rights was motivated by the recognition of the disparity of power in the relations between private parties, and the ineffectiveness of private law norms to protect fundamental rights. The Constitutional Court has echoed these two rationales as the basis for the *tutela* action against private persons.⁶² However, the Court has developed these rationales, contextualizing them in a bigger framework: the centrality of a new culture of rights based in the human dignity.

Many examples can be listed which demonstrate the impact and the differenced the use of the *tutela* had have in the protection of constitutional rights between private parties. One of the areas most impacted has been gender discrimination. The 1991 Constitution opened the constitutional arena for women's rights. For the first time in many years the Colombian Constitution prohibited gender-based discrimination.⁶³

After the adoption of the new Constitution, women began using *tutelas* to obtain orders against various types of discriminatory conduct, including the physical or psychological abuse by husbands or companions, the stigmatization of teenage mothers excluded from schools after becoming pregnant, and the loss of employment for reasons related to pregnancy, among others. The Constitutional Court has not only relied in the discussed Constitutional provisions when deciding cases about women's rights but has used international law extensively to shape the extents of those rights.

Women have also used *tutelas* to seek protection against violence in their homes. In 2006, 26,684 new criminal investigations related to intra-family violence were reported.⁶⁴ In that same year, Colombia's forensic medical services reported the evaluation of 72,849 victims of intra-family violence.⁶⁵ In 37,047 of those cases the violence was between intimate partners, and ninety-one percent (91%) of the victims were women. As high as these numbers may seem, according to the *National Demographic and Health Survey*, seventy-six percent (76%) of the physically abused women do not report the abuse.⁶⁶

⁶² See Sentencias T-524/92, T-251/93, T-507/93, T-28/94, C-134/94, T-463/94, T-379/95, T-100/97, T-351/97, T-767/01, T-222/04.

⁶³ The 1886 Constitution did not include a specific prohibition on gender-based discrimination neither a generic guarantee of equal protection.

⁶⁴ ANUARIO ESTADÍSTICO 2006, 191 (Fiscalía General de la Nación, Colombia) (2006).

⁶⁵ FORENSIS: DATOS PARA LA VIDA 2006, 115-116 (Instituto Nacional de Medicina Legal y Ciencias Forenses, Colombia) (2006).

⁶⁶ Salud Sexual y Reproductiva en Colombia, Encuesta Nacional de Demografía y Salud (2005), available at

It was not until 1996 that Colombia enacted a criminal law penalizing domestic violence.⁶⁷ The absence of any civil or specific criminal mechanism to oppose this brutality drove women to use their new rights promulgated in the 1991 Constitution to contest and resist the physical and psychological abuse perpetrated by their partners.

In 1992, the Court granted the first *tutela* sought in a case of domestic violence.⁶⁸ The Court expressed that domestic abuse denies the fundamental rights to life and physical integrity under Articles 11 and 12 of the Constitution and contradicts the mandates of Articles 42 and 43 regarding family relations.

The cases brought by teenage mothers challenged different illegal practices including expulsion,⁶⁹ prohibitions to enroll in the next academic year,⁷⁰ changes in the student schedule so the student could only continue her studies during the night shift or at home,⁷¹ prohibition to attend commencement ceremonies,⁷² and requiring pregnant students or those that live in free union with their partners to wear a red apron as part of their school uniforms.⁷³ In most of the cases these sanctions were part of the students' handbook. While in the first cases the Court did not rely on international law to reinforce the maternity rights of pregnant teenagers, it used international law to strengthen their educational rights, and determined that the handbooks were contrary to the Constitution. However, by the year 2000 the Court, when invalidating one of these handbooks, expressed that a handbook which portrays pregnancy as reproachable and reprehensible conduct tramples the human dignity in open violation of the Constitution and international human rights treaties.⁷⁴

C. PUERTO RICO

The significance of the adoption of Puerto Rico's Constitution to the political relations between the island and the United States have been discussed and analyzed at length elsewhere.⁷⁵ For the

<http://www.profamilia.org.co/encuestas/02consulta/13violencia/03solicitud.htm>.

⁶⁷ L. 294, JULIO 16, 1996, DIARIO OFICIAL [D.O.] (COLOM.) (Ley de Violencia Intrafamiliar).

⁶⁸ Sentencia T-529/92.

⁶⁹ Sentencias: T-079/94, T-211/95, T-145/96, T-393/97, T-580/98.

⁷⁰ Sentencias: T-420/92, T-393/97, T-412/99.

⁷¹ Sentencias: T-590/96, T-656/98, T-1101/00, T-1531/00, T-551/02, T-683/02, T-918/02, T-918/05, T-348-07.

⁷² Sentencia T-012/99.

⁷³ Sentencia T-516/98.

⁷⁴ Sentencia T-1531-00.

⁷⁵ For a sample of this scholarship, *See*: 2-4 JOSÉ TRÍAS MONJE, HISTORIA CONSTITUCIONAL DE PUERTO RICO (1981-1983); RAYMOND CARR, PUERTO RICO, A COLONIAL EXPERIMENT (1984); CARMELO DELGADO CINTRÓN, DERECHO Y COLONIALISMO: LA TRAYECTORIA HISTÓRICA DEL DERECHO PUERTORRIQUEÑO (1988); RONALD FERNÁNDEZ, THE DISENCHANTED ISLAND: PUERTO RICO AND THE UNITED STATES IN THE TWENTIETH CENTURY (2ND ed. 1996); PEDRO A. MALAVET, AMERICA'S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO (2004); ALFREDO MONTALVO-BARBOT, POLITICAL CONFLICT AND CONSTITUTIONAL CHANGE IN

purpose of this work what is important is that the process was undoubtedly framed within the ideology of the decolonization movement of the 1950s and the baggage that World War II left. The adoption by the United Nations of the Universal Declaration of Humans Rights as well as the American Declaration of the Rights and Duties of Man adopted by the Ninth International Conference of American States in 1948, resounded and found their place in the bill of rights adopted by the people of Puerto Rico.

The Bill of Rights adopted by the Constitutional Convention consists of twenty sections, and it includes rights not then found in either the United States or states' constitutions. The framers formulated a Bill of Rights broader than the United States Constitution, rejecting a charter of rights "that simply incorporated federal individual protections without any independent vitality."⁷⁶ At least three important factors helped to create a different language of rights for the Puerto Rican constitutional project.⁷⁷ First in the list is the recent history under the Insular Cases which severely limited the individual rights available to the population. Second, the voices at the Convention were not comprise only of elite leaders and technocrats embedded in the liberal ideology, but by representatives of popular movements that stamped in the Bill of Rights some of the demands for change in areas such as workers and women rights.⁷⁸ And finally, the constitutional process was undoubtedly framed within the ideology of the decolonization movement of the 1950s and postwar international concerns over the protection of universal rights.

The Bill of Rights can be divided in five topics: civil and political liberties,⁷⁹ rights of accused,⁸⁰ workers' rights,⁸¹ social and economic rights,⁸² and an interpretation clause.⁸³ Of the twenty sections that make the Bill of Rights, ten of them do not specify whether the rights are of exclusive application to the relations between the state and the individual,⁸⁴ and two others specifically reference private citizens as bounded by the rights guaranteed.⁸⁵

PUERTO RICO (1997); NONE OF THE ABOVE: PUERTO RICANS IN THE GLOBAL ERA n-Muntaner ed., 2007); BHANA SURENDRA, THE UNITED STATES AND THE DEVELOPMENT OF THE PUERTO RICAN STATUS QUESTION 1936-1968 (1975); JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL (1985); J T AS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD (1997).

⁷⁶ Hiram A. Meléndez-Juarbe, *Privacy in Puerto Rico and The Madman's Plight: Decisions*, 9 GEO. J. GENDER & L. 1, 38 (2008).

⁷⁷ *Id.* at 37-40.

⁷⁸ See Ángel Rodríguez Rivera, *The Significance of Class in the Formation of the Puerto Rican State: Recovering the Subaltern voices in the Constitutional Convention* (Dec. 2002) (Unpublished Ph.D. dissertation, Purdue University) (on file with Purdue University e-Pubs).

⁷⁹ P.R. LAWS ANN. TIT. II, § 1-4, 6-10 (2012).

⁸⁰ P.R. LAWS ANN. TIT. II, § 11-13 (2012).

⁸¹ P.R. LAWS ANN. TIT. II, § 16-18 (2012).

⁸² P.R. LAWS ANN. TIT. II, § 20 (2012).

⁸³ P.R. LAWS ANN. TIT. II, § 19 (2012).

⁸⁴ Puerto Rico's Bill of Rights does not contain a provision specifying its applicability. The language of Sections 1 (human dignity and equality), 5

The majority of these twelve sections were inspired by either the *Universal Declaration* or the *American Declaration of the Rights and Duties of Man*. An examination of the language used by the Committee on the Bill of Rights, the report submitted by the School of Public Administration and the bulk of the propositions related to the topic of human rights shows how influential these two international texts were. The School of Public Administration⁸⁶ stated the following reasons for using the *Universal Declaration* as a model: a) it best-defined the ideals of the era; b) its international prestige; c) it coincided with the aspirations and rights consecrated by the Puerto Rican people; and d) it identifies with the United States' democratic practices and ideals.⁸⁷

Notwithstanding the influence that these international texts had in the process of drafting Puerto Rico's Bill of Rights, this influence mostly disappeared when the rights were in need of judicial interpretation. It is important to have in mind that the Constitutional Assembly did not adopt a special mechanism for the vindication of constitutional rights, and, although the courts have delivered legal remedies for the violation of constitutional rights in cases between private persons, there is little consistency and much uncertainty regarding to what sections of the Bill of Rights have direct horizontal application.

Article II, Section 8 establishes the right to privacy, honor and reputation.⁸⁸ The language is identical to that of article V of the *American Declaration of the Rights and Duties of Man*, which states: "Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life."⁸⁹ From this section derives the bulk of judicial decisions applying constitutional rights directly to relations between private parties. The Committee on the Bill of Rights expressly stated in its

(education), 6 (freedom of association), 7 (life, liberty and property), 8 (honor, reputation and privacy), 10 (search and seizure, wiretapping), 12 (prohibition of slavery or servitude), 15 (employment of minors), 16 (worker's rights) and 20 (social and economic rights) are not directed towards the state but framed in a general language. P.R. LAWS ANN. TIT. II, § 1, 5-8, 10, 12, 15-16, 20 (2012).

⁸⁵ P.R. LAWS ANN. TIT. II, § 17-18 (2012) (right to form unions and right to strike).

⁸⁶ LA NUEVA CONSTITUCIÓN DE PUERTO RICO: INFORMES A LA CONVENCION CONSTITUYENTE PREPARADOS POR LA ESCUELA DE ADMINISTRACION PÚBLICA DE LA FACULTAD DE CIENCIAS SOCIALES 217 (1954).

⁸⁷ Politicians as well as scholars of the time were heavily influenced by Franklin D. Roosevelt's address to the 77th Congress on July 6, 1941, known as "The Four Freedoms." See 4 DIARIO DE SESIONES DE LA CONVENCION CONSTITUYENTE DE PUERTO RICO 2522-2325 4 DIARIO DE SESIONES DE LA CONVENCION CONSTITUYENTE DE PUERTO RICO 2562-2577 (1961).

⁸⁸ Proposition 11, submitted by Heraclio Rivera Colón, was the only proposal that suggested the incorporation of these rights. See PROPOSICIONES Y RESOLUCIONES DE LA CONVENCION CONSTITUYENTE DE PUERTO RICO 38 (1992).

⁸⁹ American Declaration of the Rights and Duties of Man, art. V. A similar provision is established by Article 12 of the Universal Declaration of Human Rights.

report the horizontal applicability of this right. For its importance is quoted is full:

The protection against attacks on the honor, reputation and private life constitutes a principle that complements the concept of human dignity upheld in this constitution. We are speaking of the inviolability of the person in its most complete and broadest sense. *Honor and privacy are personal values that should be thoroughly protected, not only from attack by others, but also against the abusive intervention of the State.* The formula proposed in section 8 covers both aspects. It constitutionally supplements the provisions of section 10 and covers the field known in North American law as ‘right of privacy’, a particularly important right in today’s world.⁹⁰

After the adoption of the Constitution, the Court was confronted with legal claims not covered by statutory provisions. Using the general tort statute,⁹¹ the Court gave way to a tort based on the infraction of this constitutional provision.⁹² Concordantly with the above quoted expression, the Supreme Court had frequently asserted that Section 8 operates *ex proprio vigore*, that is, it does not need a legislative authorization for obtaining a remedy: “The fact that no law defining the rights of privacy, does not discharge us from our obligation to validate [section 8], for it is well known that all constitutional provisions are ... self-executable.”⁹³ With regards to the remedies available, it has been held that a plaintiff may seek either damages or injunctive relief for the infraction of privacy rights. The Court has also stated that these rights can be claimed in actions between private parties. For example, in *González v. Ramírez Cuerda*,⁹⁴ although calling a person a prostitute did not amount to slander under the libel and slander statute,⁹⁵ the Court reasoned that under the general tort action the plaintiff could bring an action to vindicate her constitutional right to dignity against a private person.

The Supreme Court’s case law reflects a willingness to find solutions for conflicts between private persons that have not been regulated by legislation and that affect constitutional rights. However, the Court has been less than consistent in its endeavor. One of the most persistent critiques to the work of the Supreme Court

⁹⁰ 4 DIARIO SESIONES, *supra* note 87, at 2566 (emphasis added).

⁹¹ P.R. LAWS ANN. TIT. 31, § 5141 (2012). “A person who by an act or omission causes damage to another through fault or negligence shall be obliged to repair the damage so done. Concurrent imprudence of the party aggrieved does not exempt from liability, but entails a reduction of the indemnity.”

⁹² This path was anticipated. *See Muriel v. Suazo*, 72 D.P.R. 370 (1951).

⁹³ *Alberio Quiñones v. E.L.A.*, 90 D.P.R. 812, 816 (1964) (civil suit against the State).

⁹⁴ *González v. Cuerda*, 88 D.P.R. 125, 130 (1963).

⁹⁵ P.R. LAWS ANN. TIT. 33, § 3143 (2012). “Sander is a false and unprivileged publication other than libel, which imputes to any person the commission of a crime, or tends directly to injure him in respect to his office, profession, trade or business, or which by natural consequences causes actual damages.”

is that the Court has not conceptually defined the substantive content of the rights involved nor specified how it determines the scope of applicability (especially in the case of privacy rights).⁹⁶

Despite the relevance and centrality of international human rights texts in the creation of the Bill of Rights, the judicial interpretation of fundamental rights has not reverberated that original idea. As it has been exposed, Puerto Rico's Supreme Court very rarely uses international texts for the interpretation of the rights that were modeled after the *Universal Declaration of Human Rights* and the *American Declaration of the Rights and Duties of Man*, or uses international human rights texts as a comparative tool for the development of the rights guaranteed by the Constitution. This could be explained by the fact that the Puerto Rico Supreme Court closely follows the United States federal case law not only in the substance⁹⁷ but also in its methodology, which is commonly believed to retreat from the use of international text as a comparative tool.

The historical background of the Puerto Rican Bill of Rights demonstrates a willingness of the Constitutional Convention to create a Bill of Rights that would break, although in a timid form, with a history of limited individual liberties. Inspired by an international discourse about the importance of the human dignity, the proposals submitted were framed by the *Universal Declaration* and the *American Declaration*. This is also part of Puerto Rico's constitutional background, and the use of international human rights texts to interpret and develop Puerto Rico's jurisprudence should not be viewed as irrelevant or foreign.

III. Conclusions

The subject of the horizontal effect of constitutional rights brings to the forefront a series of very interesting and complex topics that bear profound impact on fundamental constitutional issues such as the nature and function of constitutions, the rationales behind why rights are deemed to have a fundamental nature, and the nature and legitimacy of constitutional judicial review.

"Rights revolution" and the "age of rights" are phrases that have been used to summarize the progression of how rights are conceived. From natural rights, to constitutional rights to human rights, historical and material conditions have prompted the re-conceptualization of the function of rights. Under the current human rights discourse fundamental human rights derive their force, not from an official state recognition, but from the human condition itself. Positioning the human condition at the center of its claims, the human rights discourse has moved beyond the social contractual thesis of rights, and is influencing a broader national-domestic

⁹⁶ See Álvarez González, *supra* note 75, at 172-173. See also Meléndez Juarbe, *supra* note 76, at 58-70.

⁹⁷ There is no question that in some areas Puerto Rico's Supreme Court is obliged to follow federal judicial interpretations.

reassessment about the nature of rights. This trend can be observed in the constitutions of Puerto Rico, Argentina and Colombia all of which have anchored their bill of rights to the concept of human dignity and upon it have determined to directly subject, if not all, at least some private conduct to constitutional obligations.

Complementing this scenario and appraised from a political perspective, the classic liberal distinction between public and private domains has been under attack for several decades now, and today, it is difficult to maintain, with a straight face, that private life is shielded from public and constitutional considerations. What is deemed private is dependent on state norms and their enforcement. What is deemed as belonging to the private sphere is only so because the state has established it as private, and in so doing privileges the wrongdoings of some private actors over others. Therefore, there should be no worries about the constitutionalization of private conduct, since private conduct already is largely regulated and indirectly subjected to some form of constitutional review.

Once a jurisdiction resolves that its constitutional norms are directly applicable to private actors, the institutional question comes to the scene. The decision of admitting direct horizontality produce a mandate directed to private individuals to not violate constitutional provisions in their dealings with other private individuals. In case of an infringement of that mandate, courts will have the authority to regulate the private conduct which violated a constitutional provision, even without a previous determination from the legislature of a need to regulate such conduct. This authority derives from the courts' role to determine the rights of individuals when protecting and vindicating constitutional freedoms. And this is what the direct horizontal model brings to the constitutional landscape that is completely different from other forms of indirect application of constitutional norms to private actors. Direct horizontality permits that conflicts between private parties that have not been regulated by private law be brought to the courts, making available a legal resolution to conflicts that otherwise would not be able to make it to the courts. This judicial authority to directly regulate private conduct pushes us to rethink about how to conceptualize the power of judicial review. Is judicial review only concerned with the power to repeal legislation or is it also concerned with the power of courts to create remedies based on constitutional norms?⁹⁸

But direct horizontality has another and probably most important component. By opening the court to conflicts that have been outside of the legal regulation, direct horizontality can unlock the legal arena for groups of people that have been living outside the classical liberal formulation of modernity that is impregnated in the civil codes of Latin America. Nontraditional families, minors, elderly, single mothers, unemployed, displaced, dispossessed, ethnic and

⁹⁸ See *Bivens v. Six Unknown Named Agents*, 401 U.S. 388, 399-411 (1971) (Harlan, J., concurring) (describing the power of federal courts to create causes of action for constitutional violations in the absence of legislative authorized remedies).

racial minorities and homosexuals are some of the groups that are been incorporated into the legal apparatus. These social groups rarely have enough political power to campaign in favor of their needs at the political arena. However, mechanisms like the *tutela* or the *amparo* gave them a chance to voice their cases, be granted a remedy and in some instances prompt the adoption of regulatory schemes for the protection of their human rights.

The development of this component of direct horizontal effect has been heavily aided by the universalization of the human rights discourse. The normative reach of the international human rights language has been captured in the national constitutions of Argentina, Colombia and Puerto Rico, and the appropriation of this language within the national context has given the opportunity for private individuals, particularly those that were outside the legal apparatus, to present legal claims asserting respect for their fundamental rights not only from governmental actions, but also in their relation with other private actors.

As we have seen, especially in the cases of Argentina and Colombia, courts are using international human rights norms to adjudicate claims related to fundamental rights, construing the substantive content of constitutional rights using the jurisprudence of international human rights courts. For the most part the use of international human rights norms have expanded the content of what is deemed to be a fundamental right introducing a more progressive reading to the area of constitutional rights law. The use of international human rights norms has not been limited to treaties or conventions ratified by States. There are plenty of references to non-binding declarations, non-ratified treaties, and decisions from international courts that do not bind Colombia, Argentina or Puerto Rico (USA) in the interpretation of constitutional rights, which may reflect a new approach to international human rights norms similar to the use of comparative law.

**“ASILO AMERICANO” AND THE INTERPLAY
OF SOVEREIGNTY, REVOLUTION, AND
LATIN AMERICAN HUMAN RIGHTS
ADVOCACY: THE CASE OF 20TH-CENTURY
ARGENTINA**

LYNSAY SKIBA¹

Introduction

In 1952, Carlos Sánchez Viamonte, a prominent Argentine lawyer, congressman, and early human rights advocate, called “*el derecho de asilo*” – the right of diplomatic asylum – the most significant Latin American contribution to public international law.² He labeled it a “guarantee in favor of the... oppressed...[,] sometimes the only possible protection for individual liberty inside the territorial limits of a nation whose government invokes sovereignty with repressive...ends.”³ Other commentators have called it “the highest tribute that can be paid to individual liberty,”⁴ “not only an exceptionally noble conquest of American International Law, but a tradition that extols the humanitarian and democratic spirit of the hemisphere’s countries, since it is founded on the defense of all men’s freedom to speak out against a government or political system.”⁵

This understudied Latin American practice allows political dissidents to seek refuge in, and safe passage out, of embassies and other extraterritorial sites located in the very countries that deem them threats.⁶ Frequently

¹ JD, PhD Candidate, Department of History, University of California, Berkeley. I am grateful to conference participants for their valuable comments and suggestions. All translations are my own.

² Carlos Sánchez Viamonte, *EL DERECHO DE ASILO*, LIBERALIS, March-April 1952, at 50.

³ *Id.* at 48-49.

⁴ R.B. Greenburgh, *Developments in the Law of Diplomatic Asylum*, 41 TRANSACTIONS OF THE GROTIUS SOCIETY 103, n.13 (1955) (citing Julio Luelmo, *Teoría del derecho del asilo*, REVISTA DE LA ESCUELA NACIONAL DE JURISPRUDENCIA, Jan.-March 1947, at 165.).

⁵ Luis Carlos Zárate, *EL ASILO EN EL DERECHO INTERNACIONAL AMERICANO* 374 (1958).

⁶ It should be noted that in Latin America, “asilo” and related words

employed during the civil wars and revolutionary conflicts of the 19th century, diplomatic asylum became by the middle of the 20th century both a mechanism for states to assert their sovereignty and a method for non-governmental advocates to defend individuals from state-sponsored persecution. By the late 20th century, while never disappearing, it had faded as a celebrated advocacy tool in the region. This paper examines diplomatic asylum and its links to sovereignty, political dissent, and the development of Latin American human rights activism.

To explore the uses and meanings of Latin American diplomatic asylum law in concrete terms, this paper focuses on the national context of 20th-century Argentina. Part I briefly describes the deep historical origins of diplomatic asylum before turning to the 1880s and early 20th-century, when the first inter-American treaties codifying the practice were adopted. Part II explores the diverse applications of this legal framework in the 1930s by government representatives and non-governmental advocates. Part III examines international challenges to Latin American asylum law and advocates' defense of the institution by turning to the 1950s and the famous case of Víctor Raúl Haya de la Torre. The final section, Part IV, analyzes another, much more serious challenge to diplomatic asylum in Latin America: the political violence of the 1970s.

My preliminary research suggests that Argentine non-governmental advocates, through their use of diplomatic asylum, were working to incorporate universal rights principles into international legal practice long before the development of the modern human rights movement in the 1970s.⁷ But this is not to say that human rights law activism was constant over time. The century I consider reveals an apparent shift in strategy

have been used inconsistently, causing significant confusion. Historically, "asilo" has generally referred to diplomatic asylum and is therefore used that way here. See Jaime Esponda Fernández, *La tradición latinoamericana de asilo y la protección internacional de los refugiados*, in EL ASILO Y LA PROTECCIÓN INTERNACIONAL DE LOS REFUGIADOS EN AMÉRICA LATINA. ANÁLISIS CRÍTICO DEL DUALISMO "ASILO-REFUGIO" A LA LUZ DEL DERECHO INTERNACIONAL DE LOS DERECHOS HUMANOS (María Laura Gianelli Dublanc et al. eds., 2004).

⁷ This paper is part of a dissertation project that examines Argentine individual rights advocacy and executive power over the course of the 20th century.

among advocates: from taking advantage of spaces in international law that allowed for individual rights – and political dissent – to coexist with state sovereignty, to applying a new international law framework premised on basic individual rights. I seek to understand what drove this shift and what it meant for the development of human rights advocacy.

This paper was originally presented at the 2012 South-North Exchange on Theory, Culture, and Law (SNX). Paired with Sheila Vélez Martínez's presentation on present-day asylum claims for LGBTQ people, it provided a historical perspective on Latin American asylum advocacy on behalf of victims of persecution. My hope is that my work also engaged some of the questions that animated this year's SNX, chief among them 1) the relationship between national sovereignty and human rights (explored by Yanira Reyes Gil), 2) political crime, the law, and human rights (treated by Farid Samir Benavides Vanegas), and 3) human rights tools and their application in the Americas (addressed by Wilmai Rivera). This revised version of the essay attempts to incorporate the thought-provoking insights and comments of my fellow presenters and conference participants. Specifically, I have added analysis of the Haya de la Torre case in response to Farid Samir Benavides Vanegas's questions on this point and additional discussion of Chilean asylum-seekers to address Mara Sankey's feedback.

I. REFUGE FOR POLITICAL CRIMINALS AND THE EXERCISE OF SOVEREIGNTY, 1889-1929

I will begin by stepping back in time and space to address the following question: Where did the right of diplomatic asylum come from and how, when, and why did it become a Latin American institution? The practice of providing physical protection to individuals fleeing harm is an ancient one that existed in the Greek, Roman, Jewish, and Christian civilizations. It was in its very early forms a religious practice based in religious sanctity. This early asylum offered protection in churches, temples, and at altars to non-political fugitives; political crimes were the gravest of offenses and treated as such.⁸ Over

⁸ See S. Prakash Sinha, *ASYLUM AND INTERNATIONAL LAW* 5-15 (1971).

the centuries, with the development of sovereign states, asylum's foundation shifted from religious inviolability to territorial sovereignty.⁹ Asylum became available in towns and other countries rather than sacred places. Another important change occurred in the 18th century: jurists began to invoke the institution of asylum to protect political rather than common criminals. This move to defend political dissidents was, in important part, a result of the French Revolution's celebration of the right of insurrection.¹⁰ Other authors have emphasized the rise of nationalism in the 19th century and its recasting of the political offender as patriot.¹¹

With the development of permanent diplomacy starting in the 15th century, and then the creation of permanent embassies, another form of asylum developed: diplomatic asylum. This form of asylum was originally based on the principle that the ambassador and his dwelling were inviolable, and was bolstered by the legal fiction of extraterritoriality.¹² As with territorial asylum, diplomatic asylum first protected common criminals before being reconfigured in the late 18th and early 19th centuries to protect political criminals. But while the invention of territorial asylum relied on the development of territorial sovereignty, diplomatic asylum depended on a restriction of that sovereignty, since embassies now provided refuge *inside* the borders of a nation-state.¹³ It is precisely this challenge to national sovereignty, denying a government the ability to categorize and deal with alleged criminals as it sees fit, as well as the potentially bloody repercussions, that has made diplomatic asylum controversial from its inception.¹⁴ In addition, at various

⁹ *Id.* at 15; see also John Bassett Moore, A DIGEST OF INTERNATIONAL LAW 755-57 (1906).

¹⁰ Mario Sznajder & Luis Roniger, THE POLITICS OF EXILE IN LATIN AMERICA 146-47 (2009); Prakash Sinha, *supra* note 8, at 19.

¹¹ See Alona E. Evans, *The Colombian-Peruvian Asylum Case: The Practice of Diplomatic Asylum*, 46 AM. POL. SCI. REV. 142, 143 (1951).

¹² See UN General Assembly, QUESTION OF DIPLOMATIC ASYLUM: REPORT OF THE SECRETARY-GENERAL, September 22, 1975, A/10139 (Part II), available at <http://www.unhcr.org/refworld/docid/3ae68bf10.html>.

¹³ Prakash Sinha, *supra* note 8, at 20.

¹⁴ See Evans, *supra* note 11, at 143.

points in history governments have been accused of misusing asylum for political ends.¹⁵

Diplomatic asylum became a well-established practice before falling into disuse in most places over the course of the 19th century, rejected as an unacceptable limitation on territorial sovereignty. But its decline was not immediate or without reversals, especially during periods of political upheaval.¹⁶ The United States government has never recognized diplomatic asylum as part of international law.¹⁷ That said, the United States and European countries have provided diplomatic asylum on occasion in modern times.¹⁸ During the Spanish Civil War in particular, European governments that had rejected diplomatic asylum as a legal principle made use of the practice to protect thousands of people from persecution, Nationalists and Republicans.¹⁹

In Latin America, diplomatic asylum during the 19th century, far from fading away, became an important custom, and was codified in law.²⁰ Authors have explained the survival of the institution in Latin America by pointing to the region's plentiful revolutions and civil wars, its history of liberalism, humanitarianism, and tolerance,²¹ or its ties to Spain, where diplomatic asylum had been an important tradition.²² Linking liberty and violence, the International Court of Justice has explained Latin America's embrace of diplomatic asylum as the product both of the region's celebration of individual rights and its experiences of civil unrest:

The American institution of asylum, with the special characteristics which it assumes on the continent, is... the result of two coexisting phenomena deriving from law and politics respectively and in evidence throughout the history of this group of States: on the one hand, the

¹⁵ See Moore, *supra* note 9, at 763-66; Greenburgh, *supra* note 4, at 104.

¹⁶ See Prakash Sinha, *supra* note 8, at 25-27; Moore, *supra* note 8, at 766-77.

¹⁷ See Esponda Fernández, *supra* note 6, at 86.

¹⁸ See Prakash Sinha, *supra* note 8, at 27.

¹⁹ Greenburgh, *supra* note 4, at 103-4.

²⁰ Esponda Fernández, *supra* note 6, at 85.

²¹ Carlos Bollini Shaw, DERECHO DE ASILO 31-33 (1937).

²² Lucio M. Moreno Quintana, DERECHO DE ASILO 2 (1952).

power of democratic principles, respect for the individual and for freedom of thought; on the other hand, the unusual frequency of revolutions and armed struggles which, after each internal conflict, have often endangered the safety and life of persons on the losing side.²³

Other authors have emphasized the class dimension of this development, noting that elite government leaders and elite rebels shared an interest in preserving an institution that could avert full-blown civil war by physically removing, and protecting, well-connected rebels.²⁴

During a period marked by widespread labor activism, the rise of mass politics, and anarchist and communist mobilization, diplomatic asylum was formalized in Latin America. An 1889 treaty signed at the First South American Congress on Private International Law, the Treaty on International Penal Law, was the first to codify Latin American asylum law, regulating both territorial and diplomatic asylum.²⁵ Inter-American and sub-regional treaties governing diplomatic asylum, and in some cases territorial asylum, were signed in Havana in 1928, Montevideo in 1933 and 1939, and Caracas in 1954.²⁶ In addition to these conventions, one lingering question was whether there was a legally binding *custom* of asylum in the region. This issue would be addressed, if not put to rest, in the 1950 International Court of Justice

²³ UN General Assembly, *Question of Diplomatic Asylum : Report of the Secretary-General*, 22 September 1975, A/10139 (Part II), available at: <http://www.unhcr.org/refworld/docid/3ae68bf10.html> [accessed 28 July 2012] (citing ICJ, Pleadings, Oral Arguments, Documents, Colombian-Peruvian Asylum Case, vol. I, p. 25.).

²⁴ See Sznajder and Roniger, *supra* note 10.

²⁵ Esponanda Fernández, *supra* note 6, at 96-97.

²⁶ The inter-American treaties on diplomatic asylum include the following: Convención sobre Asilo adoptada en la VI Conferencia Internacional Americana, La Habana 1928; Convención sobre Asilo Político adoptada en la VII Conferencia Internacional Americana, Montevideo 1933; and Convención sobre Asilo Diplomático adoptada en la IX Conferencia Internacional Americana, Caracas 1954. Subregional treaties that addressed the issue of diplomatic asylum were the following: Tratado sobre Derecho Penal Internacional, Montevideo 1889; Tratado General de Paz y Amistad Centro Americana de 1907; Convención Bolivariana de 1911; and Convención sobre Asilo y Refugio Político, Montevideo 1939. See Héctor Gros Espiell, *El derecho internacional americano sobre asilo territorial y extradición en sus relaciones con la Convención de 1951 y el Protocolo de 1967 sobre estatuto de los refugiados. Primera parte*, in ASILO Y PROTECCIÓN INTERNACIONAL DE REFUGIADOS EN AMÉRICA LATINA 44 (1982).

case of Víctor Raúl Haya de la Torre, discussed below. While not all Latin American authors and states supported diplomatic asylum as a legal institution, many spoke enthusiastically in favor of the practice as a protection firmly established in the region's unique humanitarian or legal tradition, calling it an American, or sometimes South American, law.²⁷

II. STATE POWER, REVOLUTION, AND HUMAN RIGHTS IN THE 1930S

What was this tradition from the perspective of people on the ground? Now we move to Argentina. The Argentine government ratified the 1889 Treaty on International Penal Law and signed the 1928, 1933, 1939, and 1954 treaties. Prior to the late 1970s, it frequently granted asylum.²⁸ The government expressly supported the institution on multiple occasions, most notably during the Spanish Civil War, when its representatives lauded diplomatic asylum as an American right to be respected, sent warships to Spain to pick up asylum-seekers, and presented to the League of Nations a draft treaty on asylum, covering both diplomatic and territorial asylum.²⁹

But what did it mean for the government to support asylum as a legal right? An important feature of the treaties ratified and signed by Argentina is the balancing act they attempt to strike between sovereignty, political dissent, and protection of the physical integrity of the asylum-seeker. The 1889 Treaty on International Penal Law, for example, provides that asylum is inviolable for people tried for political crimes. But if a government gives territorial asylum to such people, a potential outcome of diplomatic asylum, it must ensure that they do not endanger the safety of their home countries. National security was a concern built into the early asylum regime. It should therefore perhaps come as no surprise that the Argentine government in the 1940s and 1950s granted requests for "internación política," political internment, issued by neighboring governments like Chile, Bolivia, and Paraguay. When these

²⁷ See Bollini Shaw, *supra* note 21, at 23 n.28.

²⁸ Moreno Quintana, *supra* note 22, at 46.

²⁹ Prakash Sinha, *supra* note 8, at 222; Esponda Fernández, *supra* note 6, at 93-94.

neighboring states claimed that asylees already in Argentina posed a threat to them, they requested that Argentina remove the asylees from border areas and relocate them in politically safer, more remote, terrain. Argentine Interior Ministry documents indicate that the Argentine government obliged on multiple occasions, sometimes meeting the resistance of Congress and the asylees themselves.³⁰ The key point is that this practice of “internación política,” which limited asylees’ liberty rights, was utterly consistent with the codified version of the right of asylum. This right, after all, belonged to sovereign states and their representatives. It was a right to be applied at their discretion to the benefit of asylees’ personal integrity, but it was not the asylum-seeker’s to exercise. This argument was made by the Argentine representatives so active in efforts to improve asylum law codification in the late 1930s. Carlos Bollini Shaw, who advised the Argentine delegation on the 1939 Treaty on Asylum and Political Refuge, wrote in a memorandum about the treaty that, “Asylum is a humanitarian more than a legal institution; it is not an international obligation on the part of the asylum-granting state, nor is it a right whose realization can be demanded by an individual...”³¹ The secretary of the same Argentine delegation concurred, explaining that no asylum treaties, from the 1889 Treaty on International Penal Law to the recently signed 1939 convention contained a state obligation to grant asylum or an individual’s right to obtain it.³²

Nongovernmental activists and advocates in Argentina also promoted “derecho de asilo,” but from a very different perspective, or rather, perspectives. They intervened in this realm of international law in letters to the Ministry of the Interior, Ministry of Foreign Relations, and Congress, through organizational

³⁰ Departamento Archivo Intermedio - Archivo General de la Nación, Fondo: Ministerio del Interior, expedientes secretos, confidenciales y reservados (1932 - 1983), Box 88, documents num. 83, 100.

³¹ *Memorandum presentado por el Secretario Asesor de la Delegación Argentina, doctor Carlos Bollini Shaw, acerca del Tratado sobre Asilo y Refugio Políticos*, in Zárate, *supra* note 5, at 88.

³² *Memorandum Presentado por el Secretario de la Delegación Argentina, Doctor Isidoro Ruíz Moreno (H), Sobre el Derecho de Asilar: los Precedentes Americanos y el Tratado de Montevideo*, in Zárate, *supra* note 5, at 82-86.

publications and newspapers, and via habeas corpus petitions. In terms of the substance of the messages they conveyed, I will describe two trends I have identified.

Some nongovernmental political actors in the first part of the 20th century used the same language of “derecho de asilo” not as a safety valve to maintain peace, but rather as a tool for revolution. In the early 1930s, the Argentine branch of International Red Aid/Socorro Rojo was founded. This was the international social service organization started in the 1920s by the Communist International to provide legal, material, and social support to political prisoners. Referring especially to territorial asylum, Socorro Rojo Internacional called on its national branches to back “derecho de asilo” as a way to protect fellow revolutionaries and advance the revolutionary cause.³³

Another version of the right of asylum was also promoted by Argentine nongovernmental groups starting at least in the 1930s. This was a less politicized variety rooted in universal human rights principles. The legal developments of 1930s Argentina were shaped in important ways not only by the Spanish Civil War, as noted before, but also by the international rise of fascism and, domestically, by the first military coup in modern Argentine history. One of these developments was the appearance of new progressive organizations, formed to protect the rights of Argentines and foreigners alike. The plight of political prisoners and fulfillment of “derecho de asilo” were among the important themes in their work. Prominent among these groups was the Comité Pro Amnistia a Presos Políticos y Exiliados de América, which, in 1937, reorganized to form Argentina’s first human rights organization, the Liga Argentina por los Derechos del Hombre.³⁴ The Liga had ties to the

³³ Socorro Rojo Internacional, 10 AÑOS DE S.R.I. 244-50, Biblioteca del Centro de Documentación e Investigación de la Cultura de Izquierdas en la Argentina.

³⁴ See Mauricio Chama, *Activismo social y político, represión estatal y defensa de “presos Conintes”: la experiencia de Cofade (1960-1963)*, paper presented at V Jornadas de Historia Política “Las provincias en perspectiva comparada,” Universidad Nacional de Mar del Plata, September 29-October 1, 2010, 3, *available at* historiapolitica.com, http://historiapolitica.com/datos/biblioteca/vj_chama.pdf (last accessed January 19, 2012); Ian Guest, BEHIND THE DISAPPEARANCES: ARGENTINA’S

Communist Party, but it included among its members and beneficiaries non-Communists and used self-consciously nonpartisan, universal rights language.³⁵ Another group, the Comité Contra el Racismo y el Antisemitismo de la Argentina, likewise employed universal rights principles in its advocacy. In an event it organized in 1939 to celebrate the 150th anniversary of France's Declaration of the Rights of Man and of the Citizen, the Comité emphasized the right of asylum. It explained in a letter to the Liga that the protection of people persecuted for political – and social, religious, or racial – reasons epitomized the human rights values born of the French Revolution.³⁶ Labor organizations, whose members were frequently represented by Liga lawyers, also invoked the right of diplomatic asylum. In a 1937 letter to the Argentine lower house of Congress, a group of unions and cultural organizations highlighted the Argentine government's hypocrisy in supporting the right of asylum in Spain while violating the same right at home by deporting workers that the executive branch deemed to be subversives or common criminals.³⁷

III. AMERICAN ASYLUM IN INTERNATIONAL LAW: THE CASE OF VÍCTOR RAÚL HAYA DE LA TORRE

The Latin American tradition of asylum attracted renewed international scrutiny in the early 1950s, when the International Court of Justice decided the case of Víctor Raúl Haya de la Torre. This was a pivotal moment, sparking vociferous discussion about the place of individual human beings in international law.

DIRTY WAR AGAINST HUMAN RIGHTS AND THE UNITED NATIONS 51 (1990); Emilio F. Mignone, *Derechos humanos y sociedad: El caso argentino* 100-01 (1991).

³⁵ Héctor Ricardo Leis, *EL MOVIMIENTO POR LOS DERECHOS HUMANOS Y LA POLÍTICA ARGENTINA*/1 14 (1989); Alfredo Villalba Welsh, *TIEMPOS DE IRA, TIEMPOS DE ESPERANZA* (1984).

³⁶ Letter from the Comité Contra el Racismo y el Antisemitismo de la Argentina to Mario Bravo, president of the Liga Argentina por los Derechos del Hombre, June 2, 1939, Subfondo Arturo Frondizi - Fondo Centro de Estudios Nacionales (Subfondo AF - CEN), Archivos y Colecciones Particulares, Biblioteca Nacional de la Republica Argentina.

³⁷ Letter from Organizaciones Obreras y Culturales de la Capital Federal Solicitan el Rechazo del Proyecto de Ley de Represión del Comunismo to the Chamber of Deputies, Aug. 19, 1947, Cámara de Diputados de la Nación, Secretaría Parlamentaria, Dirección de Archivo, Publicaciones y Museo, Caja 21, Expediente 00809-P-1937, at 11.

In the wake of a 1948 military uprising in Peru, Haya de la Torre, founder and leader of the Alianza Popular Revolucionaria Americana, was charged with instigating the rebellion. Evading capture, he sought protection in the Colombian embassy in Lima. Though granted asylum by the Colombian ambassador, who qualified Haya de la Torre as a political offender, Haya de la Torre was stuck; the Peruvian government refused to grant Haya de la Torre safe-conduct out of the country, considering him a common criminal who should be tried in Peruvian courts.³⁸ While Haya de la Torre remained in the embassy, the two governments took the case to the International Court of Justice in The Hague, which issued decisions in 1950 and again in 1951.³⁹

The 1950 decision hinged on two major questions: whether Colombia could unilaterally and definitively qualify Haya de la Torre's alleged crime as political, making Haya de la Torre eligible for asylum, and whether Peru was obligated to provide safe-conduct. Colombia based its arguments on conventional law and custom, specifically American international law. After reviewing the applicability of the treaties invoked by Colombia – the Bolivarian Agreement of 1911 on Extradition, the Havana Convention of 1928 on Asylum, and the Montevideo Convention of 1933 on Political Asylum – the court determined that conventional law did not support Colombia's qualification of Haya de la Torre's crime as political over Peru's objections, nor did it require that Peru provide safe-conduct. Moreover, the court rejected Colombia's claim that regional custom constituted a legal norm allowing the asylum-granting government to qualify the asylum-seeker's alleged offense as it saw fit. The court explained that in Latin America the practice of unilateral and definitive qualification of offenses by asylum-granting governments lacked the constancy, uniformity, and *opinio juris* necessary to be legally binding.⁴⁰ It was, instead, a decision governments generally made on the basis of political expediency.

³⁸ Colombian-Peruvian Asylum Case, 1950 ICJ 266, 272-73 (Nov. 20), available at <http://www.icj-cij.org/docket/files/7/1849.pdf>.

³⁹ *Id.*; Haya de la Torre Case (Colombia v. Peru), 1951 ICJ 71 (June 13), available at <http://www.icj-cij.org/docket/files/14/1937.pdf>.

⁴⁰ See Gros Espiell, *supra* note 26, at 53.

But in its 1951 decision, the court nonetheless recognized a tradition of American asylum and its legal implications. Following the 1950 judgment, Colombia submitted an application to the court to challenge Peru's demand that the embassy hand over Haya de la Torre. While Haya de la Torre's asylum had been granted improperly, as established in the 1950 judgment, the Latin American tradition of asylum held that refugees should not be surrendered. Without an explicit treaty provision modifying this traditional ban on surrender, the court reasoned, Colombia was not required to turn in Haya de la Torre.⁴¹ The court's judgments, taken together, thus protected Haya de la Torre from surrender while demanding an immediate end to his asylum. In limbo, Haya de la Torre spent five years in the Colombian embassy until, finally, bilateral negotiations resulted in his release by the Peruvian government.⁴²

Latin American states responded to the Haya de la Torre case by further developing regional treaties on diplomatic asylum. The Haya de la Torre decisions inspired Latin American countries to address some of the defects in existing conventional law, giving rise in 1954 to the Caracas Convention on Territorial Asylum and the Caracas Convention on Diplomatic Asylum.⁴³ Among their provisions, the former treaty established that governments are not obligated to surrender people persecuted for political offenses or motives, and the latter treaty made clear that safe-conduct, once requested, was generally required by the territorial state.⁴⁴

Some proponents of asylum demanded more than further elaboration of existing treaties. In books, articles, and court documents, they insisted that asylum was not a right of governments but of individuals, and that states were obligated to grant asylum on the basis of universal,

⁴¹ Haya de la Torre Case, *supra* note 39, at 80-81.

⁴² See Galindo Vélez, Francisco, *El asilo en el sistema de las Naciones Unidas y en el sistema Interamericano*, COMPILACIÓN DE INSTRUMENTOS JURÍDICOS REGIONALES RELATIVOS A DERECHOS HUMANOS, REFUGIADOS Y ASILO. COLECCIÓN DE TEXTOS BÁSICOS DE DERECHOS HUMANOS Y DERECHO DE LOS REFUGIADOS, TOMO II 35 (2003).

⁴³ *Id.* at 55.

⁴⁴ Caracas Convention on Diplomatic Asylum art. XII, March 28, 1954, 1438 U.N.T.S. 101; Caracas Convention on Territorial Asylum art. III, March 28, 1954, 1438 U.N.T.S. 127; See Esponda Fernández, *supra* note 6, at 96.

humanitarian norms. One writer on the topic was Argentine human rights lawyer and congressman Carlos Sánchez Viamonte, whose words open this article. Asylum was, according to Sánchez Viamonte, much more than an abstract and subjective individual right; it was a legal guarantee.⁴⁵ In a 1952 magazine article, Sánchez Viamonte proclaimed the special role of Latin America, and Argentina in particular, in promoting the idea that sovereignty and international relations must advance the interests of the people, not governments.⁴⁶ Advocates also expressed these views in domestic legal proceedings. Following the 1954 coup in Guatemala, a group of 33 Guatemalan exiles found safety in the Argentine embassy and were transported out of the country on Argentine Air Force planes. But when they arrived in Argentina, the men were arrested. The team of lawyers who came to their defense, including members of the Liga Argentina por los Derechos del Hombre, argued in their habeas corpus petition that Latin America and Argentina had a proud history of defending “el derecho de asilo” in international law and, citing the 1939 Treaty on Asylum and Political Refuge, the new Universal Declaration of Human Rights, and the “derecho de gentes” (law of peoples), they urged the law of asylum to be interpreted as obligating states to provide protection to asylum-seekers who requested it at their embassies. The right of diplomatic asylum was a right to be enjoyed by the individual seeking protection from persecution, not a right exercised by the state at its discretion.⁴⁷ Similar arguments were made by Latin American authors explicitly in connection with the Haya de la Torre case; they answered the international court’s challenge to regional asylum law with affirmations of its universal legal foundations in natural law.⁴⁸ In so doing, these advocates pushed for an international legal framework that would serve the needs of people before states.

⁴⁵ Sánchez Viamonte, *supra* note 2, at 48.

⁴⁶ *Id.* at 48-50.

⁴⁷ Comisión Pro Defensa de la Libertad y de los Presos Políticos, POR LA LIBERTAD DE LOS PRESOS POLÍTICOS Y GREMIALES. DOCUMENTOS RELATIVOS A LA EXISTENCIA DE MÁS DE 600 PRESOS POLÍTICOS Y GREMIALES EN LA ARGENTINA, Y LA LUCHA POR SU LIBERTAD (1955), Biblioteca del Centro de Documentación e Investigación de la Cultura de Izquierdas en la Argentina.

⁴⁸ See Zárate, *supra* note 5, at 9.

IV. FROM AMERICAN ASYLUM TO PLAN CÓNDOR: THE 1970S AND NEW CHALLENGES TO ASYLUM LAW

By the late 1970s, the Latin American tradition of diplomatic asylum was under great pressure. In Argentina, the two decades following Juan Perón's overthrow in 1955 were marked by revolutionary and reactionary violence. The military junta that seized power on March 24, 1976, pledging to bring order as well as economic improvement, ushered in unprecedented levels of bloodshed and, in collaboration with its fellow military regimes in the region, restricted previously available channels for refuge. The government relied most often on the extralegal realm to fight its opponents, discarding legal process for clandestine violence.⁴⁹ In what would become its trademark tactic, the regime "disappeared" tens of thousands of people.⁵⁰ Advocates had to craft new strategies to protect those targeted for state-sponsored violence.

In the years just prior to the 1976 coup, during a brief and tumultuous period of democratic rule (1973-1976), thousands of Latin Americans fleeing political persecution in their own countries found legal protection in Argentina. Alongside the inter-American and sub-regional asylum treaties created between the turn of the 20th century and 1954, the creation of the United Nations in 1948 and adoption of the 1951 UN Convention relating to the Status of Refugees introduced a new regime to govern the treatment of refugees. Argentina became a party to the Refugee Convention in 1961 and, in 1967, acceded to the Protocol adopted that year. However, until 1984, Argentina did not accept the Protocol's removal of the geographic restrictions originally set by the 1951 treaty, which, reflecting its focus on World War II atrocities, had allowed parties to limit protection to those people who fled persecution in Europe before January 1, 1951. Argentina's legal commitments under the UN

⁴⁹ See Anthony W. Pereira, *POLITICAL (IN)JUSTICE: AUTHORITARIANISM AND THE RULE OF LAW IN BRAZIL, CHILE, AND ARGENTINA* Chapt. 6 (2005).

⁵⁰ Estimates of the number of people forcibly disappeared by the Argentine dictatorship range from 9,000 to 30,000. See John Dinges, *THE CONDOR YEARS: HOW PINOCHET AND HIS ALLIES BROUGHT TERRORISM TO THREE CONTINENTS* 139-40 (2004); Alison Brysk, *THE POLITICS OF HUMAN RIGHTS IN ARGENTINA: PROTEST, CHANGE, AND DEMOCRATIZATION* 36-40 (1994).

system to Latin American exiles seeking protection were thus limited.⁵¹

Especially in the wake of the September 11, 1973 military coup in Chile, these legal protections were put to the test, and the right to asylum was once again the topic of public debate and advocacy efforts.⁵² Estimates of the numbers of Chileans who left their country during the Pinochet regime, many for political reasons, range from hundreds of thousands to almost two million.⁵³ Argentina was a major destination for Chilean exiles.⁵⁴ Hundreds sought protection from the Argentine government while still inside of Chile, requesting asylum at the embassy in Santiago. The Argentine government's response to these asylum-seekers prompted criticism on the part of the Peronist left and prominent intellectuals, led to a congressional investigation and the submission of habeas corpus petitions on the asylum-seekers' behalf, and garnered ample coverage in the press.⁵⁵ After waiting two weeks in the embassy, those who received diplomatic asylum soon after the coup were flown to Argentina, where they complained of being held under guard and incommunicado in a hotel. Some of these asylees,

⁵¹ United Nations High Commissioner for Refugees, INPUT PROVIDED BY THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES INTO THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS' COMPILATION AND STAKEHOLDERS REPORTS FOR THE UNIVERSAL PERIODIC REVIEW OF ARGENTINA (2007), *available at*

http://lib.ohchr.org/HRBodies/UPR/Documents/Session1/AR/UNHCR_ARG_UPR_2008_UnitedNationsHighCommissionerforRefugees_uprsubmission.pdf. See too María Cecilia Azconegui, *Triple Alianza para el Refugio: las Iglesias, el ACNUR y el gobierno argentino en la protección y asistencia a los refugiados chilenos (1973-1976)* (2012).

⁵² For example, See *El derecho de asilo*, CLARIN, Oct. 5, 1973, *El derecho de asilo y la realidad histórica*, LA PRENSA, Oct. 6, 1973, SM 2431 bis Asilados políticos, Subfondo documental Secretaría de Medios – Departamento Archivo – Microfilm, Presidencia de la Nación (1934-1990), Archivo Nacional de la Memoria; See also Azconegui, *supra* note 51.

⁵³ Sznajder and Roniger, *Exile Communities and Their Differential Institutional Dynamics: A Comparative Analysis of the Chilean and Uruguayan Political Diasporas*, 27 REVISTA DE CIENCIA POLÍTICA 43, 46 (2007).

⁵⁴ *Id.* at 48.

⁵⁵ *El recurso en favor de los asilados*, LA NACIÓN, Oct. 6, 1973, *Libertad y detención de ciudadanos extranjeros*, LA PRENSA, May 8, 1974, SM 2431 bis Asilados políticos, Subfondo documental Secretaría de Medios – Departamento Archivo – Microfilm, Presidencia de la Nación (1934-1990), Archivo Nacional de la Memoria; See Francisco Corigliano, *Las relaciones entre Argentina y Chile 1973-1976: El doble canal de vinculación*, POSTDATA, Sept. 2002, at 170-72.

demanding their immediate release and territorial asylum in Argentina, issued a statement to the press.⁵⁶ Many more were denied diplomatic asylum or permission to remain in Argentina. In particular, foreigners who were in Chile were deemed ineligible for asylum by the Argentine government. This situation laid bare one of the weaknesses in existing diplomatic asylum treaties, which did not specify the treatment owed to people seeking diplomatic asylum outside of their home countries.⁵⁷

The plight of the Chileans seeking protection in embassies brought greater attention to the international legal landscape as well. Invoking the historical example of the Spanish Civil War as well as the contemporary example in Chile, the Australian government asked the UN General Assembly to consider universal guidelines to govern diplomatic asylum. In 1975, the UN Secretary General issued a thorough report on the topic, but as Francisco Galindo Vélez notes, this was as far as the issue got in the United Nations.⁵⁸

The situation facing Latin American exiles and asylum-seekers in the Southern Cone, and the legal framework meant to protect them, worsened after the Argentine coup. Though always contested and often abused or ignored, the “derecho de asilo” faced unprecedented challenges as the region’s military dictatorships cooperated to eliminate political opponents across borders. Plan Cóndor, Operation Condor in English, was a secret military alliance formally created in 1975 by South American governments including Argentina and Chile that targeted alleged “subversives” in member countries (and elsewhere) for surveillance,

⁵⁶ “*Al pueblo argentino*,” EL MUNDO, Oct. 15, 1973, SM 2431 bis Asilados políticos, Subfondo documental Secretaría de Medios – Departamento Archivo – Microfilm, Presidencia de la Nación (1934-1990), Archivo Nacional de la Memoria.

⁵⁷ Ana María Buriano Castro and Silvia Elena Dutrénit Bielous, *En torno a la política Mexicana de asilo en el Cono Sur*, HAOL, Fall 2003, at 61-62, 64.

⁵⁸ Galindo Vélez, *supra* note 42, at 40; UN General Assembly, QUESTION OF DIPLOMATIC ASYLUM. REPORT OF THE SECRETARY-GENERAL, 2 September 1975, A/10139 (Part I), *available at* <http://www.unhcr.org/refworld/docid/3ae68bee0.html>; See Esponda Fernández, *supra* note 6, at 91.

enforced disappearance, torture, and assassination.⁵⁹ Its diverse victims – who included students, labor activists, prominent politicians, nuns, and guerrillas – had all fled political persecution in their home countries in search of safety abroad, with some having secured U.N. refugee status.⁶⁰ In Argentina, the Southern Cone, and beyond, Operation Condor undermined the legal protections for asylum-seekers and refugees.⁶¹ Of the many thousands of people in the affected countries who pursued protection from foreign governments, those requesting diplomatic asylum were the smallest group.⁶² But some people did manage to leave the country this way, including around 60 Argentines who were given asylum through the Mexican embassy.⁶³ The Mexican embassy was also the site of one of the most prominent diplomatic asylum controversies during the last dictatorship. Recalling the Peruvian case of Haya de la Torre, the ex-president of Argentina, Héctor Cámpora, his son, and a Peronist leader spent years awaiting safe-conduct in the Mexican embassy in Argentina after being granted asylum.⁶⁴ The Inter-American Commission on Human Rights (IACHR) investigated the case as part of its much-publicized 1979 visit to Argentina, concluding in its report that while diplomatic asylum was a right possessed by the state rather than the individual, the prolonged detention of asylum-seekers due to the Argentine government's protracted refusal to provide safe-conduct was inconsistent with the country's liberal asylum tradition and constituted a violation of asylum-seekers' freedom.⁶⁵

⁵⁹ The original members of Operation Condor also included Bolivia, Paraguay, and Uruguay, with Brazil joining in 1976. Peru and Ecuador joined in 1978. Dinges, *supra* note 50, at 10-15, 224; J. Patrice McSherry, PREDATORY STATES: OPERATION CONDOR AND COVERT WAR IN LATIN AMERICA (2005).

⁶⁰ Dinges, *supra* note 50, at 1-2; J. Patrice McSherry, *Tracking the Origins of a State Terror Network: Operation Condor*, 29 LAT. AM. PERSPECTIVES 38, 38 (2002); NUNCA MÁS: THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED 254-55 (1986).

⁶¹ See NUNCA MÁS, *supra* note 60, at 254-55; Dinges, *supra* note 50, at 14.

⁶² Buriano Castro and Dutrénit Bielous, *supra* note 57, at 60.

⁶³ *Id.* at 60-61.

⁶⁴ Buriano Castro and Dutrénit Bielous, *supra* note 57, at 64-65.

⁶⁵ Inter-American Commission on Human Rights, *The Situation of Those in Asylum, Chapt. IV. The Right to Liberty*, REPORT ON THE SITUATION OF HUMAN RIGHTS IN ARGENTINA (1980).

Coordinated state violence against refugees and asylum-seekers was an important focus of human rights advocates during the dictatorship, but diplomatic asylum does not appear to have been a major tool they employed to combat it. While diplomatic asylum remained part of the public debate about individual rights and state power, the debate's scope was limited. For example, one of Argentina's major human rights organizations founded during the period, the Centro de Estudios Legales y Sociales (CELS), invoked "derecho de asilo" to challenge the continued confinement of the Peronist politician who remained in the Mexican embassy after the Argentine government permitted a critically ill Héctor Cámpora and his son to leave the country.⁶⁶ Like the Inter-American Commission on Human Rights, and other international bodies, CELS targeted this particular case when appealing to the right to diplomatic asylum in Argentina.⁶⁷

For more generally applicable legal protections, Argentine advocates looked beyond Latin American diplomatic missions. This was a time when an embassy – as was the case for the Argentine embassy in Madrid – might itself be implicated in transnational human rights violations.⁶⁸ It was also a time, as noted above, when exiles inside Argentina – from Paraguay, Uruguay, and Bolivia, in addition to Chile, and including prominent political leaders – were being disappeared and assassinated. In their work on behalf of exiles and asylum-seekers, 1970s and 1980s human rights groups – including the still-active Liga Argentina por los Derechos del Hombre – worked to uncover these abuses and the clandestine international coordination that produced them.⁶⁹ Jaime Esponda Fernández has observed that in

⁶⁶ Centro de Estudios Legales y Sociales, INFORME SOBRE LA SITUACIÓN DE LOS DERECHOS HUMANOS EN ARGENTINA (NOVIEMBRE DE 1980 – FEBRERO DE 1982) Sec. 11 (1982).

⁶⁷ See Documents produced by the IV Conferencia de los Parlamentos Europeo y Latinoamericano (no title), Feb. 19-21, 1979, Archivo institucional del Centro de Estudios Legales y Sociales, Víctimas 5 (CIDH).

⁶⁸ *La Embajada argentina, guarida de asesinos*, DIARIO 16, Aug. 7, 1980, reprinted in Comisión Argentina por los Derechos Humanos, *Dossier Molfino* (1980), Archivo institucional del Centro de Estudios Legales y Sociales, Víctimas 5 (CIDH).

⁶⁹ Liga Argentina por los Derechos del Hombre, DOCUMENTO PRESENTADO A LA COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS DE LA ORGANIZACIÓN DE ESTADOS AMERICANOS, 21-22 (July 1979).

this period, and especially as a result of the Central American refugee crisis, the regional tradition of asylum entered into crisis and Latin American countries turned to broader international law and the United Nations system for support.⁷⁰ Advocates for individual victims in Argentina, like their predecessors earlier in the century, submitted habeas corpus petitions to challenge unlawful detentions. But these petitions were almost invariably denied. The writ of habeas corpus became a “mere formality, rendering it totally ineffective,” and the judicial process “almost inoperative as a means of appeal.”⁷¹ Lawyers responded by persisting in domestic courts and by addressing enforced disappearance and other human rights violations in the international arena, where, among their achievements, they helped to craft a UN treaty on the topic.⁷² In doing so, Argentine activists not only reacted to a changed environment for advocacy, they helped transform it.

Conclusion

By the late 1970s, human rights in Argentina could not be protected by relying on the region’s governments and their tolerance for political dissent, a safety valve built into international law that in the past, however imperfectly, had allowed some individuals to escape state violence. Having earlier emphasized the right of diplomatic asylum, which allowed dissent – and even revolution – to coexist to some extent with state sovereignty and human rights protections, Argentine legal activists, while not abandoning diplomatic asylum as a human rights tool, focused during the last dictatorship and after on different methods for protecting human rights. They had new institutions and instruments at their disposal, and many used them: the Inter-American Commission on Human Rights, national bodies like specialized congressional subcommittees in Washington, the United Nations and its new human rights conventions, and international human rights NGOs like Amnesty International and Human Rights Watch.

⁷⁰ Esponda Fernández, *supra* note 6, at 106-07.

⁷¹ NUNCA MÁS, *supra* note 60, at 386-87.

⁷² See Kathryn Sikkink, *From Pariah State to Global Protagonist: Argentina and the Struggle for International Human Rights*, *LAT. AM. POL. & SOC.*, 2008, at 5.

But my preliminary research suggests that advocates' shift away from diplomatic asylum was the result of more than changing government repression and international conditions. In the first part of the 20th-century Argentina, the flexibility of diplomatic asylum allowed both statesmen and early human rights advocates to embrace the institution as a proud Latin American tradition. For statesmen, it was generally viewed as an exercise of state sovereignty in the service of humanitarianism. For advocates, it was a fundamental form of protection for individual liberty. Responding to the Spanish Civil War and anti-Semitism in Europe, Argentine progressive advocates adopted the framework of universal human rights rooted in the legacy of the French Revolution. They located diplomatic asylum within that legacy, emphasizing not only individuals' right to be free of repression but also their right to resist oppression. By the 1950s, applying the new UN Universal Declaration of Human Rights and influenced by the international community's scrutiny in the Haya de la Torre case, Argentine advocates were speaking clearly in favor of diplomatic asylum as an individual right and state obligation. Little more than two decades later, diplomatic asylum ceased to be the vaunted advocacy tool it once was, and other strategies for protecting human rights inside state borders were crafted.

There is a range of likely reasons for this development in Argentina, which I will explore in my future research.⁷³ The fact that some Argentine dissidents had already fled the country as violence escalated in the run-up to the 1976 coup, for example, might have been a factor in reducing the perceived utility of diplomatic asylum during the dictatorship.⁷⁴ Other factors were likely the product of a longer-term trend: the changing nature of human rights advocacy in Argentina and Latin America more broadly. Despite their insistence that diplomatic asylum was an individual right and state obligation, for example, advocates might have recognized that international resistance to this argument made desirable a shift to the more widely accepted international

⁷³ I will also continue my search for statistics on diplomatic asylum applications submitted to and granted by the Argentine government, information I have not yet been able to locate in state archives.

⁷⁴ Buriano Castro and Dutrénit Bielous, *supra* note 57, at 63.

human rights law framework. On a more fundamental level, the decline of diplomatic asylum as an advocacy tool might have reflected a change in the substance of human rights. While earlier advocates linked diplomatic asylum to the right to resist oppression, the revolutionary bloodshed of the 1960s and 1970s might have convinced some that human rights would be better served if they were disassociated from the potentially violent forms such political resistance could take.