

**INTERNATIONAL CRIME AND PUNISHMENT: THE GAP THROUGH WHICH TO DRIVE A MAFIA**

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**I. INTRODUCTION**

The world has developed substantive norms of criminal law in many areas without commensurate enforcement mechanisms.<sup>1</sup> Fledgling tribunals for enforcement of the Law of Armed Conflict and International Humanitarian Law hold out the promise of enforcement for crimes against humanity and its kin. The lack of any collective enforcement power, however, makes the promise relatively illusory. Even less promising is the possibility of enforcement for terrorism or human trafficking, which are wholly dependent on domestic legal systems.<sup>2</sup>

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<sup>1</sup> Professor Hart made the general observation that international law lacked what he called the “secondary rules of change and adjudication, which provide for legislature and courts.” H.L.A. HART, *THE CONCEPT OF LAW* 214 (2d ed. 1994). This observation could be transferred into the argument that norms without enforcement are not really law at all. See *id.* at 3-5. I have no interest in entering that debate in this paper; I want to describe norms that are recognized universally and expected to be enforced by someone but which have inadequate collective enforcement mechanisms.

<sup>2</sup> Financial crimes are yet another area in which the elaboration of norms and enforcement are desperately needed as well:

I propose a relatively cheap, effective solution to one of the world’s most pressing issues: an international body to police corruption. And we must have it now, not at some date into the future. It’s our money—and we want it back.

Alexander Lebedev, Op-Ed, *A World Corruption Police*, N.Y. TIMES, Feb. 27, 2014, available at [http://www.nytimes.com/2014/02/27/opinion/27iht-edlebedev27.html?\\_r=1](http://www.nytimes.com/2014/02/27/opinion/27iht-edlebedev27.html?_r=1) (Lebedev is described as a “businessman and former senior officer in the K.G.B.”).

As the title of this article suggests, there is a gap in enforcement of international norms, and that gap is enormous: it provides a gigantic opening for organized crime. In many countries today, organized crime is more powerful than the government, and corruption is rampant. Criminal groups sell people, sell weapons to terrorists, sell weapons and expertise to abusive regimes, and hire or invest in the activities of pirates. While some countries and regional groups make unilateral inroads on transnational criminal action, it is unrealistic to expect much progress until there is an international police effort on all these fronts. It is toward the creation of such a global effort that this hopeful bit of prose is directed.<sup>3</sup>

I do not expect to see in my lifetime any serious international policing for protection for human safety, but eventually there must be a genuine international response to some basic aspects of human dignity. The gap in enforcement of basic standards provides an opening for organized crime to have a dominant role and for the abuse of humans in many areas, such as labor conditions and basic subsistence. The lack of positive enforcement is being addressed in part by informal enforcement in the form of indicators and ranking systems used for various purposes such as the making of major investment or diplomatic decisions, but this informal system carries its own weight of problems, including lack of transparency or enforcement.<sup>4</sup>

The principal sources of damage to human security and dignity are organized violence, loosely labeled war crimes, the related phenomenon of terrorism, slavery (human trafficking), and piracy, which is rapidly growing into cyberspace. A word about each will set the stage for what follows.

Mass atrocities, formerly known as war crimes and now subsumed under the heading of International Humanitarian Law (IHL), continue to plague states with weak electoral systems or other accountability measures. As dictators are challenged or as ethnic hostilities break out, hundreds of thousands can be killed, and the various other forms of torture or predation multiply.

The numbers and degree of suffering from forced labor and mass atrocities far exceed acts of “terrorism” against U.S. persons or facilities. Yet, the world reacted vociferously to terrorism following 9/11, and two lone misguided young men in Boston captured the voyeuristic media of the United States for months on end while dozens of deaths in other countries went virtually unnoticed.

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<sup>3</sup> Much of what is suggested in this article is treated elaborately in a collection of 48 essays edited by the widely acknowledged guru of international criminal law, a volume which appeared after his death in 2011. *REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW* (Antonio Cassese ed., 2012). In particular, Cassese’s own view of the issues can be found in the essay “A Plea for a Global Community Grounded in a Core of Human Rights.” *Id.* at 136. It is worth observing that neither Cassese nor any of the other 39 authors in this volume considered the possibility of an international police force worth discussing. All the essays deal with various facets of internationalizing norms and providing external oversight of domestic enforcement.

<sup>4</sup> See *GOVERNANCE BY INDICATORS: GLOBAL POWER THROUGH QUANTIFICATION AND RANKINGS* (Kevin E. Davis et al. eds., 2012).

In terms of loss of life, terrorism pales by comparison to traffic fatalities and gun deaths, even just counting U.S. fatalities in the latter two categories, while death and suffering from natural disasters impact thousands, almost always the poorer regions and persons of the globe.

Slavery has existed through most of human history. The notorious trafficking of the eighteenth century from Africa to the New World brought about 12 million people to plantations. Human trafficking today enslaves hundreds of thousands of persons every year, most of them children exploited in sex markets but also many thousands of desperate immigrants and refugees.<sup>5</sup> Estimates of modern slavery range from 12 to 27 million individuals held in some form of forced labor today.<sup>6</sup>

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<sup>5</sup> Information about the extent of human trafficking is difficult to come by. The United Nations Office on Drugs and Crime describes the phenomenon and numbers this way:

Trafficking in human beings is a crime in which victims are moved from poor environments to more affluent ones, with the profits flowing in the opposite direction, a pattern often repeated at the domestic, regional and global levels. It is believed to be growing fastest in Central and Eastern Europe and the former Soviet Union. In Asia, girls from villages in Nepal and Bangladesh—the majority of whom are under 18—are sold to brothels in India for \$1000. Trafficked women from Thailand and the Philippines are increasingly being joined by women from other countries in Southeast Asia. Europol estimates that the industry is now worth several billion dollars a year.

Trafficking in human beings is not confined to the sex industry. Children are trafficked to work in sweatshops as bonded labour and men work illegally in the “three D-jobs”: dirty, difficult and dangerous. A recent CIA report estimated that between 45,000 to 50,000 women and children are brought to the United States every year under false pretenses and are forced to work as prostitutes, abused labourers or servants. UNICEF estimates that more than 200,000 children are enslaved by cross-border smuggling in West and Central Africa. The children are often “sold” by unsuspecting parents who believe their children are going to be looked after, learn a trade or be educated.

*Trafficking in Persons*, UNITED NATIONS OFFICE OF DRUGS AND CRIME, [http://www.wunrn.com/news/2006/12\\_18\\_06/122306\\_trafficking\\_persons.htm](http://www.wunrn.com/news/2006/12_18_06/122306_trafficking_persons.htm) (last visited Oct. 15, 2014).

<sup>6</sup> The International Labor Organization estimated 12 million bonded persons in 2005 and revised its estimate to 21 million in 2012 based on different methodology. INT’L LABOR ORG., ILO 2012 GLOBAL ESTIMATE OF FORCED LABOUR EXECUTIVE SUMMARY 3 (2012), available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_181953.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_181953.pdf). It says that the numbers do not reflect a trend because they are based on difference criteria. *Id.* at 6. See also KEVIN BALES, DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY (1999).

In folklore and movies, from Errol Flynn to Johnny Depp, a pirate is a swashbuckling larger-than-life character somewhat akin to Robin Hood. In reality, an eighteenth century pirate was more likely to be a hungry derelict preying on whatever traffic he—or occasionally she—could find; the person would be subject to instant punishment if caught rather than given movie royalties.

These four categories of violence, organized violence, terrorism, and slavery, and piracy, may be linked in a number of ways. Terrorist tactics can be used to enslave a population, and enslaved populations can be trained in the ways of terrorism.<sup>7</sup> In the modern world, human trafficking may provide both funds and camouflage for terrorist organizations. Both are linked to organized crime, along with drug trafficking and piracy.<sup>8</sup> Atrocities in a time of armed conflict include attacks on civilians and trafficking along with other forms of predation.

There is another critically important link among all these threats to human life and dignity. Although international norms condemn them and in some instances create international criminal prohibitions, there is no international enforcement mechanism for any of them. Even the International Criminal Court (ICC), which was created to prosecute “widespread and systematic” atrocities, has no enforcement power and must rely on member states for physical control of persons.

A spectrum of threats to human life and dignity runs inexorably from the examples of overt violence to less overt violence in the form of labor conditions. The April 2013 collapse of a factory in Bangladesh that killed over 1,100 people exemplifies the connection very clearly. Before delving deeply into labor economics, however, I propose to focus first on the issues of overt violence; these are issues that are easier to define and enforce. This article focuses on the lack of enforcement in these facets of human existence (war crimes, terrorism, trafficking, piracy). It uses enforcement experiences from individual countries, especially the United States but also the growing body of international substantive criminal law, to highlight the need for international enforcement mechanisms with which to fill the remaining enforcement gap.

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<sup>7</sup> See *infra* note 57.

<sup>8</sup> The United Nations Office on Drugs and Crime deals primarily with terrorism, human trafficking, drugs, and corruption, along with piracy. See *About UNODC*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, <http://www.unodc.org/unodc/en/about-unodc/index.html?ref=menutop> (last visited Nov. 12, 2014). The Law of the Sea Convention gives all nations jurisdiction over piracy. Politically, piracy is addressed primarily by the International Maritime Bureau, an arm of the International Chamber of Commerce. See *International Maritime Bureau*, INT’L CHAMBER OF COMMERCE, <http://www.iccwbo.org/products-and-services/fighting-commercial-crime/international-maritime-bureau/> (last visited Nov. 12, 2014).

## II. WAR-CRIME AND PUNISHMENT

### A. Origins of Organized Violence and the Idea of Control

Humans seem to be unusually aggressive territorial animals. Indeed, humans were once thought to be the only species that would kill others of its own kind until Jane Goodall laid that belief to rest with her observations of chimpanzees essentially committing genocide on other groups.<sup>9</sup>

Although we cannot really know whether humans killed each other prior to the advent of civilization, we do know that the earliest recorded history is full of organized violence: group against group for control of food, territory, or procreation opportunities. As soon as humans began to settle into communities, they went to war as community against community.<sup>10</sup>

Every mystery writer can detail out a variety of motives for violence,<sup>11</sup> but generally most observers believe that violence stems from drives for acquisition (dominance), revenge, ideology, or pathology.<sup>12</sup>

In group dynamics, except for a rare instance in which a group genuinely needs territory for food, war is probably most about the drive for dominance. "We're #1" has a very wide appeal. Just as any society needs a dominant force, such as a government, to control violence, there may well be a corollary needed at the international level for a dominant force to restrain aggression. This realization in turn can lead to a rational decision by one country to be bellicose to prevent another country from attacking.<sup>13</sup> For example, it is arguable that the presence of

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<sup>9</sup> See JANE GOODALL, *CHIMPANZEE OF GOMBE: PATTERNS OF BEHAVIOR* (1986). Although some insects kill their partners after mating, and other species will kill a defective offspring, very few animals kill in rivalry for food, sex, or land. Most combat designed for dominance is nonlethal.

<sup>10</sup> The "Pinker Debate" over the degree to which violence is increasing or decreasing is playing out in the popular press. See STEPHEN PINKER, *THE BETTER ANGELS OF OUR NATURES* (2011); Robert Epstein, *The Better Angels of Our Nature: Why Violence Has Declined*, *SCIENTIFIC AM.* (Oct 7, 2011) (book review), available at <http://www.scientificamerican.com/article/bookreview-steven-pinker-the-better-angels-of-our-nature-why-violence-has-declined/> (perhaps the harshest critique of the Pinker thesis). One interesting insight into communal behavior is that the bumper sticker "Bigots are Made, not Born" is probably not true. At least some research indicates that infants are hard-wired to recognize their own kinfolk, suggesting that clan membership is an evolutionary trait designed to generate collective protective behavior. See BERNARD CHAPAIS, *KINSHIP AND BEHAVIOR IN PRIMATES* 387 (2004).

<sup>11</sup> See, e.g., John Lescoart, *14 Motives for Murder* (April 16, 2012), <http://www.johnlescoart.com/14-motives-for-murder/>.

<sup>12</sup> ROY BAUMEISTER, *EVIL: INSIDE HUMAN VIOLENCE AND CRUELTY* 97 (1996). There is a vast and growing literature on the causes and history of violence, which is far beyond the scope of this article. Suffice to say the neuroscience is weighing in heavily with new findings continuously reported.

<sup>13</sup> Rosen also puts forward a more speculative physiological theory having to do

the two superpowers during the Cold War kept the lid on a number of volatile situations, which later blew apart with the breakup of the Soviet Union.

Regardless of the reasons for its advent, war is a state that exists between or among entities claiming or seeking nation-state status; war does not occur among individuals or even groups of individuals having no territorial objectives.<sup>14</sup> War is defined by the U.S. Joint Command as “large-scale, sustained combat operations to achieve national objectives or protect national interests.”<sup>15</sup> The official statement goes on to describe Military Operations Other Than War (MOOTW) to include military actions, such as counterterrorism, to which the “law of war” may well apply without placing the nation in a state of war.

The human impulse to violence has generated a counter force in the form of rules to confine and restrain the intensity of that violence—rules that are often violated but nevertheless recognized as a type of “law of war.” It is worth pausing to consider the impetus for a “law of war.” What is the point of a gentlemanly insistence on “playing by the rules” in a “game” that is designed to kill people?

## **B. Sources of the Law of Armed Conflict (LOAC)**

Most explanations for “rules of war” have essentially pragmatic roots. One explanation is a straightforward self-interested expression of the Golden Rule: “Do unto others as you would have them do unto you.” In this context, this root could be based on the hope that humane treatment of enemies will prompt their humane treatment of you and your soldiers. Another aspect of self-interest is that some restraints on force, especially those regarding environmental damage, likely exist because it hardly makes sense to obtain control of a piece of territory that is no longer useful.<sup>16</sup> In similar fashion, a sensible leader would generally prefer a subservient population rather than a mass of bodies.<sup>17</sup> The “principle of

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with procreation and testosterone. *See generally* STEPHEN P. ROSEN, WAR AND HUMAN NATURE (2004).

<sup>14</sup> Professor Feldman argues that the matter is no longer so clear-cut, that the identity of the actor is only one of four elements that distinguish war and crime. In his construct, the other three elements are provenance (whether the actor is within the jurisdiction of the state), intent (whether the actor intends to challenge the very existence of the state or its government), and scale (whether the hostile acts are sufficiently large to justify military response). Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J.L. & PUB. POL’Y 457, 458-61 (2002).

<sup>15</sup> JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-0: DOCTRINE FOR JOINT OPERATIONS, at I-2 (2001), available at [http://www.fs.fed.us/fire/doctrine/genesis\\_and\\_evolution/source\\_materials/dod\\_joint\\_ops\\_doctrine.pdf](http://www.fs.fed.us/fire/doctrine/genesis_and_evolution/source_materials/dod_joint_ops_doctrine.pdf).

<sup>16</sup> Thus, the rules against destruction of trees or poisoning of wells may derive from self-interest. *See* LEON FRIEDMAN, THE LAW OF WAR: A DOCUMENTARY HISTORY (1972).

<sup>17</sup> *See Deuteronomy* 20:10-20 (King James).

distinction” resulted in the practice of wearing uniforms as an attempt to minimize violence against civilians.<sup>18</sup>

At a different level, but still within the arena of pragmatism, it is wise to limit one’s own capacity for violence. Allowing troops to degenerate into random or excessive violence threatens the discipline upon which commanders rely for all military operations, and it also diverts energy from defined military objectives.<sup>19</sup> There is a distinct tendency for violence to degenerate in the absence of social controls.<sup>20</sup>

Protection of noncombatants was an early step of societies turning from nomadic to agrarian ways of life. Formerly, nomadic tribes generally had followed proscriptions against poisoning wells and water supplies, for obvious reasons, but tribal involvement made the distinction between combatants and civilians difficult. With urbanization, wars could be fought by identified armies, leaving civilian populations to carry on the business of living.<sup>21</sup>

Leon Friedman puts the self-interest aspect quite succinctly:

A commander does not kill his prisoners because he does not want his own men slaughtered if they fall into an enemy’s

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<sup>18</sup> INGRID DETTER DE LUPIS, *THE LAW OF WAR* 126 (1987).

<sup>19</sup> Colonel Winthrop’s classic treatise emphasizes the internal disciplinary need. WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 17 (2d ed. 1920). He also includes a castigation of guerilla forces:

Irregular armed bodies or persons not forming part of the organized forces of a belligerent, or operating under the orders of its established commanders, are not in general recognized as legitimate troops or entitled, when taken, to be treated as prisoners of war but may upon capture be summarily punished even with death.” *Id.* at 783. The image he has in mind is of undisciplined bands of marauders “killing, disabling and robbing of peaceable citizens or soldiers . . . from motives mostly of personal profit or revenge.”

*Id.* at 784.

<sup>20</sup> Speaking of irregulars in the American Revolution, one author makes this observation:

On the one hand there were the standards laid down by George Washington, himself a regular soldier, who was at pains to show, by the professional behavior of the American armies, that the United States had the right to be treated as a sovereign state. On the other was the ferocious banditry into which the war degenerated at the fringes, as it is always liable to do when irregular belligerents escape professional control.

Michael Howard, *Constraints on Warfare*, in *THE LAWS OF WAR* 2 (Michael Howard et al. eds., 1994).

<sup>21</sup> *See generally id.*; DETTER DE LUPIS, *supra* note 18, at 124-25.



hands. Civilian populations should not be eliminated after they have been conquered since they can work for, pay tribute to, or be conscripted into, the victorious army. Unrestrained warfare would jeopardize reconciliation and make later trade and peaceful intercourse impossible.<sup>22</sup>

In what is known as the Axial Age,<sup>23</sup> the First Millennium BCE produced the Hebrew Torah, Sun Tzu's *The Art of War*, and the Hindu Book of Manu—all contain proscriptions protecting some classes of persons and proscribe some forms of warfare.<sup>24</sup>

Sun Tzu wrote his treatise in about 300 BCE. The Hebrew Torah was written down in pieces over an extended period, but primarily during the Exile around 700 BCE. Its Book of Deuteronomy contains descriptions of divine proscriptions to the earlier Hebrew warlords to spare noncombatants and the “tree[s] of the field,” except that with the nearby cities of Canaan they were to “save alive nothing that breatheth.”<sup>25</sup> The Hindu Book of Manu was written around 200 BCE and contains many elaborate exhortations concerning what kinds of weapons may be used, prohibiting barbed, poisoned, or flaming arrows, and when to spare someone who has yielded or been injured.<sup>26</sup>

Augustine took these thoughts a bit further and delved into what would constitute the criteria for “just war.” Thomas Aquinas later in the fourteenth century systematized the criteria.<sup>27</sup> “The Christian doctors, from Augustine to Aquinas in the Middle Ages, followed by . . . de Vitoria in the sixteenth century, were above all concerned with defining the just war, *jus ad bellum*: wars in which Christians might fight with a clear conscience.”<sup>28</sup>

LOAC is codified in a number of places but primarily in the Geneva Conventions of 1948, which apply to “armed conflict.” It is also codified in the Statute of the International Criminal Court, which applies to both “armed conflict”

<sup>22</sup> FRIEDMAN, *supra* note 16, at 4.

<sup>23</sup> The Axial Age is so designated because it is the turning point for modern civilization, producing the earliest major works of philosophy and theology in Asia, India, Persia, and parts of the Mediterranean. Some scholars wonder why the movement did not reach the desert areas of what are now most of Arabia and Egypt. One speculation is that the more ancient cultures of Egypt and Berber still held sway in those regions and so there was not fertile soil for the newer philosophies until the time of Muhammad. See KAREN ARMSTRONG, *A HISTORY OF GOD* (1994).

<sup>24</sup> For example, the Book of Manu prohibited poison arrows long before the Hague Conventions banned chemical weapons. FRIEDMAN, *supra* note 16, at 90-93.

<sup>25</sup> *Deuteronomy* 20:10-20 (King James).

<sup>26</sup> FRIEDMAN, *supra* note 16 (quoting Book of Manu 90-93).

<sup>27</sup> See generally R. A. McCormick, *Morality of War*, in 14 *NEW CATHOLIC ENCYCLOPEDIA* 802, 803 (1967); John Langan, S.J., *The Elements of St. Augustine's Just War Theory*, 12 *J. RELIGIOUS ETHICS* 19 (1984); THOMAS AQUINAS, *SUMMA THEOLOGICA* 1354 (Fathers of the English Dominican Province trans., 1981).

<sup>28</sup> Howard, *supra* note 20, at 2.

and “widespread or systematic attack on a civilian population.”<sup>29</sup> The difference between those two concepts is that an armed conflict implies ongoing operations between two identifiable groups of combatants,<sup>30</sup> while “widespread or systematic attack” could take place within a single country as a one-sided assault.

### **C. Modern Law of Armed Conflict**

Who cares about these ivory tower constructs? Why should we be the least bit concerned about whether our actions conform to the rules of international law when the “bad guys,” e.g., tyrants and terrorists, are not playing by the rules?

I was particularly struck by the answer to this question given by one of my students, an active Marine Captain with experience in Fellujah: “It’s hard enough to get a 19-year-old kid to kill another person. If he doesn’t believe in what he’s doing, he may not obey orders.” To which his fellow Marine colleague added, “And, besides, it’s the right thing to do.” Both of these veterans were referring not only to ethics but also to the necessity of maintaining control of their troops for the sake of discipline.

Discipline is critical to successful military operations, and the rules of warfare are vital to discipline in a modern army. This is not to say that no organized army, including the United States, has never committed war crimes, but the lack of perfect adherence does not negate the norms and expectations. Meanwhile, guerilla groups may operate without such regard for rules for a variety of reasons. These groups may discipline members through reliance on ideological zeal; they may also have a reduced concern for the lives of their own operatives and enforce discipline very harshly.

It is also true that in virtually every combat operation, some civilian deaths will occur whether by mistake or simple inevitability. The difficulty of using military force against those who hide in civilian populations will give our military planners nightmares for a long time to come.<sup>31</sup> The political fallout of

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<sup>29</sup> Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90. Article 7 applies to “crimes against humanity” under these circumstances.

<sup>30</sup> International Committee of the Red Cross (ICRC) is the recognized authority on LOAC. It describes the term as requiring “a minimum level of intensity” between armed groups. *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, INT’L COMM. OF THE RED CROSS (Mar. 17, 2008), <http://www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm>.

<sup>31</sup> A related and increasingly significant problem is that of casualties from friendly fire, which military leaders say is becoming more visible as casualties from hostile fire go down.

On one night during World War II—July 9-10, 1943—23 U.S. troop transports carrying paratroopers of the 82nd Airborne Division were

civilian deaths can be extremely damaging to the long-term interests of a nation, and again the rules of warfare help limit that likelihood.

International law applies to armed conflict in the classic form of Law of Armed Conflict. The “crimes against humanity” portion of LOAC also goes by the terminology of International Humanitarian Law, which applies to some acts of organized violence by non-state actors (widespread or systematic violence against civilians is the jurisdictional lever for IHL).<sup>32</sup>

Enforcement mechanisms for LOAC consist primarily of whatever is feasible in a given situation. The United Nations Security Council can “enforce” the principle of nonaggression by calling on member states to invoke sanctions against an aggressor state, but in reality the U.N. only engages in “peacekeeping” and economic sanctions.<sup>33</sup> There has never been a U.N. military action to intervene in an ongoing conflict. Nevertheless, there is facial legitimacy to its authority, which could be the basis for reforms that would lead to a genuine global enforcement of LOAC. In addition, the International Court of Justice has taken the position that the role of the Security Council is not exclusive and that courts such as itself can also provide remedies for nations’ violations of LOAC.<sup>34</sup>

Formal adjudicatory enforcement of the “law of war” against individuals began with trials for war crimes following World War II. The United States tried some German spies and saboteurs in military courts.<sup>35</sup> The United States also

shot down by American forces in Sicily who mistook the planes for German bombers.

The death toll in that single friendly fire incident was 410. But about 300,000 U.S. servicemen died in World War II. Fratricide killed 35 of the 146 Americans who died in the 1991 Gulf War. . . .

To date in Afghanistan, friendly fire has been responsible for the deaths of three or possibly four out of 14 Americans killed in action—more than 20 percent.

Richard Whittle, *Friendly Fire More Visible as War Casualties Decline*, DALLAS MORNING NEWS, Apr. 19, 2002 at 21A.

<sup>32</sup> It would be preferable if IHL were separated from LOAC so that it formed a cognizable regime of law outside the context of armed conflict, but in the current view of the ICRC it is regarded as a subset of LOAC, meaning that it applies only in situations of armed conflict. See *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, *supra* note 30.

<sup>33</sup> All U.N. Security Council Resolutions are now available on the web. See *Security Council Resolutions*, UNITED NATIONS SEC. COUNCIL, <http://www.un.org/Docs/sc/> (last visited Oct. 16, 2014). The reader can now review the progression of steps taken in response to international crises by scrolling through a given year with a particular country in mind.

<sup>34</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1984 I.C.J. 392, paras. 94-98.

<sup>35</sup> See *Ex parte Quirin*, 317 U.S. 1 (1942); see also *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

conducted military trials against vanquished Japanese commanders accused of allowing their troops to violate the “laws and customs of war.”<sup>36</sup> The highlight for international enforcement of the law of war was the Treaty of London and the resulting Nuremberg trials of high-ranking Nazi officials. The trials at Nuremberg were intended to import the processes of law onto the international scene for dealing with war crimes. Prior to that time, “victor’s justice” had been meted out at the national level.<sup>37</sup> The Nuremberg trials have been followed in more recent times<sup>38</sup> by ad hoc Tribunals for Yugoslavia<sup>39</sup> and Rwanda,<sup>40</sup> the Special Court for Sierra Leone,<sup>41</sup> the Extraordinary Chambers in the Courts of Cambodia,<sup>42</sup> and ultimately by the International Criminal Court.<sup>43</sup>

### 1. Sanctioning Violations of LOAC by Nation-States

The starting point for international law is similar to the basic proposition regarding assault between individuals: if you use force against another, you must have a justification. U.N. Charter Article 2(4) sets out the basic rule of nonaggression: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” Articles 39-50 give the Security Council authority to determine when a nation is committing aggression and to call on Member nations to employ sanctions ranging from diplomatic or economic sanctions to the use of military force against the aggressor.

Justifications for the use of force are implied in U.N. Charter Article 51, which states that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.” Recognition of the right of self-defense calls into play a network of doctrines and open questions regarding response to threats,

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<sup>36</sup> *In re Yamashita*, 327 U.S. 1, 15 (1946).

<sup>37</sup> Gerry J. Simpson, *War Crimes: A Critical Introduction*, in *THE LAW OF WAR CRIMES* 5 (Timothy L.H. McCormack & Gerry J. Simpson eds., 1997).

<sup>38</sup> See generally Christopher Blakesley, *Atrocity and its Prosecution*, in *THE LAW OF WAR CRIMES*, *supra* note 37, at 189.

<sup>39</sup> See UNITED NATIONS INT’L CRIM. TRIBUNAL FOR FORMER YUGOSLAVIA, <http://www.icty.org> (last visited Sept. 25, 2014).

<sup>40</sup> INT’L CRIM. TRIBUNAL FOR RWANDA, <http://www.unict.org> (last visited Sept. 25, 2014).

<sup>41</sup> SPECIAL CT. FOR SIERRA LEONE & RESIDUAL SPECIAL CT. FOR SIERRA LEONE, FREETOWN & THE HAGUE, <http://www.rscsl.org> (last visited Sept. 25, 2014).

<sup>42</sup> EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA, <http://www.eccc.gov.kh/en> (last visited Sept. 25, 2014).

<sup>43</sup> INT’L CRIM. CT., [http://www.icc-cpi.int/EN\\_Menu/ICC/Pages/default.aspx](http://www.icc-cpi.int/EN_Menu/ICC/Pages/default.aspx) (last visited Sept. 25, 2014).

proportional reprisals, protection of nationals, humanitarian intervention, and dealing with insurgents or belligerents.

Two cases from the International Court of Justice (ICJ) deal with issues of armed attack. Recent internecine strife has raised the question of whether one state or a collection of states may invade another for humanitarian reasons. This issue was probably unknown until the late twentieth century, but it has now ripened into a claim in some quarters that everyone has a “responsibility to protect” (RtP or R2P) civilian populations.<sup>44</sup> It has been the focus of a number of legal debates regarding the North American Treaty Organization (NATO) intrusion into Kosovo, the most significant being the ICJ’s expression of serious doubt about NATO incursion.<sup>45</sup> In justifying the invasion of Iraq in 2003, the Bush Administration referred to a desire to “protect Iraqi citizens” but relied on the UN Security Council rather than arguing for humanitarian intervention as an autonomous legal justification.<sup>46</sup> Although President Clinton apologized on

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<sup>44</sup> The United Nations Office of the Special Adviser on the Prevention of Genocide has outlined the idea of “RtP” this way:

Sovereignty no longer exclusively protects States from foreign interference; it is a charge of responsibility where States are accountable for the welfare of their people. . . .

The three pillars of the responsibility to protect . . . are:

1. The State carries the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement;
2. The international community has a responsibility to encourage and assist States in fulfilling this responsibility;
3. The international community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from these crimes. If a State is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nations.

*The Responsibility to Protect*, UNITED NATIONS OFF. OF THE SPECIAL ADVISER ON THE PREVENTION OF GENOCIDE, <http://www.un.org/en/preventgenocide/adviser/responsibility.shtml> (last visited Oct. 16, 2014).

<sup>45</sup> Legality of Use of Force (*Yugoslavia v. Belg.*), 1999 I.C.J. 124 (June 2).

<sup>46</sup> See WAYNE MCCORMACK, UNDERSTANDING THE LAW OF TERRORISM (2007).

When the Ba’ath regime refused to fully cooperate with the U.N. inspections, the Security Council employed sanctions to prevent further WMD development and compel Iraqi adherence to international obligations. Coalition forces enforced no-fly zones in southern and northern Iraq to protect Iraqi citizens from attack by the regime and a no-drive zone in southern Iraq to prevent the regime from massing forces to threaten or again invade Kuwait.

behalf of the “international community” for not intervening earlier in Rwanda, there was no suggestion in his remarks that the United States should have considered unilateral intervention—it could hardly have done so in light of the presence of U.N. “peacekeeping” forces already in the country.<sup>47</sup> The argument for a new-found “responsibility to protect” has not yet found wide acceptance among international jurists.

## 2. Sanctioning Violations of LOAC by Individuals

One outgrowth of the prosecution of war crimes at the end of World War II has been international tribunals for atrocities in “internal” conflicts, which have provided a number of legal principles regarding criminal responsibility for attacks on civilian populations. These developments have led to the establishment of the International Criminal Court for prosecuting what we now know as International Humanitarian Law.

Nuremberg, as the post-WWII trials are known colloquially, was a product of the Treaty of London.<sup>48</sup> The treaty was an agreement of the four victorious powers (United States, Britain, France, and U.S.S.R.) to adjudicate three categories of crimes: crimes against peace (aggression), war crimes, and crimes against humanity. The International Military Tribunal conducted one trial, known generally as the Trial of Major War Criminals. In addition to the trial of major leaders, the four occupying forces adopted Control Council Law No. 10, which repeated the definition of crimes and authorized each military authority to conduct trials of lower-level Nazi officials. Under this order, the United States conducted twelve additional trials in Germany, the most notable being those of Nazi judges (the “Justice” case) and Nazi doctors.

In addition to the German trials, the United States conducted war crimes trials in Tokyo and Manila. The leading example was General Yamashita, who was put on trial for failing to control his troops from committing multiple atrocities during Japan’s occupation of the Philippines. His conviction reached the U.S. Supreme Court on the issues of whether the military commission was valid and whether the commission observed due process. Over vigorous dissents

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A U.S.-led coalition removed the Ba’ath regime in March and April 2003, bringing an end to more than 12 years of Iraqi defiance of U.N. Security Council resolutions.

*Iraq (08/05)*, U.S. DEP’T OF STATE, <http://www.state.gov/outofdate/bgn/iraq/50942.htm> (last visited June 21, 2007).

<sup>47</sup> John Ryle, *A Sorry Apology from Clinton*, THE GUARDIAN (Apr. 13, 1998), <http://www.theguardian.com/Columnists/Column/0,5673,234216,00.html>.

<sup>48</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, available at <https://www.icrc.org/ihl/INTRO/350?OpenDocument>.

by Justices Murphy and Rutledge, not the most liberal members of the Supreme Court at the time, the Court upheld the military imposition of a death sentence for mere failure to control his troops.

### 3. Crimes in the Absence of War—an International Law of Atrocity

In the late twentieth century, International Humanitarian Law (IHL) became a subset of LOAC. Even so, universal revulsion of mass atrocities should produce a set of norms that apply outside the context of “armed conflict” in order to criminalize abuses by a regime against its own citizens or abuses by a sub-governmental group. The concept of “crimes against humanity” (CAH), which applies to “widespread or systematic” violence against civilians, could be such body of law and could have been labeled IHL. Instead, however, we have the awkwardness of CAH, known also as the Law of Atrocity.

Development of atrocity law flowed from protections for basic due process and the right to life. These protections were included in the 1948 Universal Declaration of Human Rights (UDHR) and the 1966 Covenant on Civil and Political Rights (CCPR). The 1948 Genocide Convention and the 1984 Convention Against Torture further amplified the obligations of nations to assist in the pursuit and prosecution of the defined crimes.

By the 1990s, when the atrocities of Yugoslavia and Rwanda occurred, international law arguably included criminal sanctions against the wrongful taking of life or torture by government agents. Generally speaking, international law is concerned with transnational disputes and with mass atrocities. If two rival gangs in Los Angeles are engaged in bloodshed without following the laws and customs of war, the conflict is the business of neither the international community nor the federal government, absent impact on interstate commerce or racial animus. It is a problem to be dealt with by local authorities. If the United States government were engaged in “widespread and systematic attack” against its own civilians, then CAH under the auspices of the International Criminal Court would apply. In between these extremes, there is the possibility that one gang is acting “under color of state law,”<sup>49</sup> in which case the federal government, but not the international community, would take an interest.

If a rebel group is not playing by the rules, then perhaps the international community should leave them to the tender mercies of the government under attack and not take an interest in their behavior. Meanwhile, the government attacked need not be concerned about application of the Geneva Conventions to its treatment of the rebels until the rebel groups reach the state at which they take on the character of “belligerents” in an “armed conflict.” But none of this has anything obvious to do with whether the international community has a criminal interest in the activities of the rebels.

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<sup>49</sup> See 18 U.S.C. § 242 (2012).



There are a host of questions that probe at the limits of international interest in localized violence. In the *Akayesu* case, the International Criminal Tribunal for Rwanda (ICTR) applied international law, in the form of both genocide and crimes against humanity, to the activities of paramilitary militia groups.<sup>50</sup> The issue of what constitutes ethnicity may never need to be resolved in courts, but these are questions that could lead to important research into the causes of group violence.<sup>51</sup> The international community has established specialized or hybrid tribunals for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia (ECCC) to deal with the widespread atrocities in those post-conflict settings. International tribunals will seek limitations on their own authority for the same reasons that federal law in the United States has been limited so as not to occupy or preempt the roles of the states in addressing violence against civilians.<sup>52</sup> In the U.S. system, the states need to have some relative autonomy in the operation of their criminal justice systems and in the definition of crimes, although this autonomy is limited by procedural requirements of the Constitution, substantive limits gleaned from Constitutional protections of individual liberties, and preemption in some instances by federal law. With all these limitations, however, federalism has worked reasonably well to preserve some level of autonomy closer to where the people live. That autonomy serves to enhance the perception, if not the reality, of accountability of government to the populace.

At the international level, nation-states have been accustomed to independent sovereign status. The inroads on that status have begun with statements of international criminal responsibility for the acts of a state. As individual criminal responsibility expands, the autonomy of the nation-state will be reduced to the extent that it cannot immunize its nationals for conduct that the international community proscribes. In return, the international community will almost certainly be alert to encroachments on state autonomy because all international actors are, to some extent, also nationals of a nation-state themselves. In this sphere, the pressures for nation-state autonomy are identical to the pressures for autonomy of the states in the U.S. federal system.

If the ICC could not obtain independent investigative authority, even less likely in the foreseeable future is legal recognition of the rights of one state to

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<sup>50</sup> Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, (June 1, 2001), available at [http://www1.umn.edu/humanrts/instree/ICTR/AKAYESU\\_ICTR-96-4/AKAYESU\\_Appeal\\_Index.html](http://www1.umn.edu/humanrts/instree/ICTR/AKAYESU_ICTR-96-4/AKAYESU_Appeal_Index.html).

<sup>51</sup> The ICTR statute applies genocide to “national, ethnical, racial, or religious” groups, and the ICTR Court attempts to delineate identity in a group by either language and culture or by “hereditary physical traits.” See *Id.* paras. 512-15. But it may be that identity is more a matter of what others think you are, in which case it is not a matter of your reality but of someone else’s perception. Questions about cultural or political identity are not as facetious as they may seem at first glance because biological ethnicity is not an easy demarcation among the groups involved in Rwanda, Bosnia, or even Palestine/Israel.

<sup>52</sup> See generally *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).



investigate within the borders of another state. Thus, even under an international criminality regime, investigation, pursuit, and arrest are all likely to be contingent upon either the resident state's consent, action of the U.N. Security Council, or simple exertion of force by the investigating state. In this latter instance, the legal regime is a long way from recognizing a "right" of an aggrieved state<sup>53</sup> to intervene on the territory of the resident state. In other words, it is not by legal claim of right, but by sheer force of ability, that one state may carry on investigations within another state.

Even if the investigation must be clandestine, once evidence of wrongdoing of a person found within the borders of a resident state is obtained, the aggrieved state obtains a number of rights against the resident state. Conventions mandating cooperation operate with the premise of "extradite or prosecute." As international criminal law develops, it eventually may be recognized that the aggrieved state may make a limited military incursion into the territory of another state that is "harboring" a terrorist organization or persons who have committed crimes against humanity or genocide. This is a limited authorization, however, and would not be justification for "total war" or complete supplanting of the government of the invaded nation unless that government resists with its own military force. In other words, "military necessity and proportionality" would be defined by reference to the objective of capturing or disabling the perpetrators. In this fashion, an international criminal law of genocide, terrorism, and crimes against humanity would supplement the choices of extradition and abduction by providing for a regularized, open, and visible incursion by military force.

An instructive historic experience with interstate criminalization was the post-Civil War experience of the United States with the Ku Klux Klan; here, the example is of terrorism. The interstate, or national, criminalization of the Klan did not reach fruition until after WWII. The effects of Klan activities—the values of the collective whole, effects on the economies of other states, the ability of the Klan to organize and mobilize resources beyond the capacity or will of local law enforcement—all prompted federal action to deal with a problem that was not being adequately addressed by the states in which Klan activity was occurring. This is the identical problem with group atrocities around the world today, and the U.S. example shows the need for enforcement mechanisms beyond the nation-state.

### III. TERRORISM—CRIME AND PUNISHMENT

Terrorism is now subject to almost universal condemnation but has no commonly agreed definition, let alone any consistent or coherent enforcement

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<sup>53</sup> The "aggrieved" state and the "investigating" state may or may not be the same because some crimes of universal jurisdiction could be investigated by any state.

pattern. There have been many attempts by writers to define the phenomenon, most of which have ended up with emphasis on the same factors that are contained in the U.S. Code, which has three separate but similar definitions. The elements in all definitions are: (1) violence, (2) against a civilian target, by (3) a clandestine group. Most definitions include a fourth factor: political motivation.

Problems exist, however, with that fourth element. Motivation can be either pushing from behind or pulling forward—political motivation can be found in a group's desire to avenge perceived past wrongs or in a group's goal of obtaining a political objective. Yet, it is highly likely that many "foot soldiers" in terrorist attacks have little idea of the political strategy of the group, and instead are just glad to be part of serving a cause that has won widespread adherence within their affinity group. In other words, the violence is part of joining a new family.<sup>54</sup>

Before grappling with the enforcement problem, let us turn to the theory and practice.

### **A. The Theory of Terrorism and a Brief History**

Terrorism is a major political issue precisely because the theory behind its deployment is effective. Terrorist tactics have ancient roots. If we limit our notion to widespread violence against civilians, it is clear that governmental and invading forces have used the threat as well as the practice for millennia. The threat of violence against women and children, who traditionally were noncombatants and were the future servants of the victors, has had two principal objectives: first, to cause the existing regime to capitulate; and, more recently, to cause the existing regime to overreact. Many authors have noted that terror is an extremely effective weapon and has been for centuries.

The first recorded justification for the killing of noncombatants occurs in the description of the Hebrew conquering of the lands of Canaan in the Second Millennium BCE. In the Torah, God's instructions to the invaders drew a distinction between cities that the invaders were to be occupied and those that were to be somewhat removed.<sup>55</sup> When the latter were conquered, the male

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<sup>54</sup> This seems to be the predominant theory for gang membership among urban youth. *Why Do Youth Join Gangs?*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, (Aug. 1998), <http://www.ojjdp.gov/jjbulletin/9808/why.html>.

<sup>55</sup>

When thou drawest nigh unto a city to fight against it, then proclaim peace unto it. And it shall be, if it make thee answer of peace, and open unto thee, then it shall be, that all the people that are found therein shall become tributary unto thee, and shall serve thee. And if it will make no peace with thee, but will make war against thee, then thou shalt besiege it.

inhabitants were to be put to death while the women, children, and cattle were to be spared.<sup>56</sup> But with a city to be occupied, the invaders were to “save alive nothing that breatheth.”<sup>57</sup>

The rationale for such harsh treatment of occupied land was that the new settlers might otherwise be tempted to take up some of the customs of the former occupants, and thus dilute their own their culture. Shakespeare attributes to Henry V, in his warning before the gates of Harfleur, a related but different approach, threatening rape and murder of the inhabitants and attempting to place the blame for atrocities on the defenders for failing to yield.<sup>58</sup> Thucydides, in his account of

*Deuteronomy* 20:10-12 (Jewish Publication Society of America), available at <http://jewishpub.org/pdf/Tanakh1917.pdf>.

<sup>56</sup>

And when the Lord thy God delivereth it unto thy hand, thou shalt smite every male thereof with the edge of the sword; but the women, and the little ones, and the cattle, and all that is in the city, even all the spoil thereof, shalt thou take for a prey upon thyself; and thou shalt eat the spoil of thine enemies, which the Lord thy God hath given thee. Thus shalt thou do unto the cities which are very far off from thee, which are not of the cities of these nations.

*Id.* at 20:13-15.

<sup>57</sup>

Howbeit of the cities of these peoples, that the Lord thy God giveth thee for an inheritance, thou shalt save alive nothing that breatheth, but thou shalt utterly destroy them . . . as the Lord thy God hath commanded thee; that they teach you not to do after all their abominations, which they have done unto their gods, and so ye sin against the Lord thy God.

*Id.* at 20:16-18. A more modern translation of the phrase “thou shalt utterly destroy them” is “you are to devote-them-to-destruction.” EVERETT FOX, *THE FIVE BOOKS OF MOSES: A NEW TRANSLATION WITH INTRODUCTIONS, COMMENTARY, AND NOTES* 941 (1995). The translator explains that their “lives are to be forfeit, confiscated to God, so to speak.” *Id.*

<sup>58</sup>

What is't to me, when you yourselves are cause,  
 If your pure maidens fall into the hand  
 Of hot and forcing violation?  
 . . . Therefore, you men of Harfleur,  
 Take pity of your town and of your people,  
 Whiles yet my soldiers are in my command;  
 . . . If not, why, in a moment look to see  
 The blind and bloody soldier with foul hand  
 Defile the locks of your shrill-shrieking daughters;  
 Your fathers taken by the silver beards,  
 And their most reverend heads dash'd to the walls,  
 Your naked infants spitted upon pikes, . . .  
 What say you? will you yield, and this avoid,  
 Or, guilty in defence, be thus destroy'd?

WILLIAM SHAKESPEARE, *THE LIFE OF KING HENRY THE FIFTH*, act 3, sc. 3.

the ancient Hellenic wars, asserts that wartime atrocities are inevitable because war has a debilitating effect on public morality and stability.<sup>59</sup>

These examples of organized mass murder of civilians may have slightly different tactics and strategic objectives from the random and isolated deaths of civilians in the use of terror from the past few decades. The modern terrorist clandestinely attacks civilians knowing that the act will generate passion and fear, which may then generate an overreaction by government forces, in turn generating more recruits for the rebel cause. If the terrorist can create the impression that the government is helpless to protect its citizenry, the government loses not only credibility but also authority. This creates pressure for the government to overreact and enforce severe restrictions on its citizenry, further undermining confidence and trust between the government and citizen.

Caleb Carr makes a strong case that terrorism carries within it the seeds of its own destruction.<sup>60</sup> His strongest example is that of the Romans in their heyday. Carr argues that the Romans governed by terror, recruited members of conquered tribes into their service, and then suffered the consequences when those minions learned the techniques of terror well enough to turn against a Roman populace who had no taste for brutality.<sup>61</sup> The parallel with how the United States trained and equipped the mujahedin in Afghanistan and then suffered the wrath of al Qaeda is compelling. Carr claims that this pattern has repeated itself throughout history. Christopher Harmon makes a similar point in claiming that governments that come to power by the use of terror continue the pattern and “will rely upon violence against the innocent to keep power,”<sup>62</sup> which of course raises the prospect that the new regime eventually will be met by strong counterrevolutionary forces.

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Many harsh events befell the various cities due to the ensuing factional strife—things which always occur in such times and always will occur, so long as human nature remains the same, although with varying degrees of violence, perhaps, and differing in form, according as variations in circumstances should arise. For in peacetime, and amid prosperous circumstances, both cities and individuals possess more noble dispositions, because they have not fallen into the overpowering constraints imposed by harsher times. But war, which destroys the easy routines of people’s daily lives, is a violent schoolmaster, and assimilates the dispositions of most people to the prevailing circumstances.

THUCYDIDES, *HISTORY OF THE PELOPONNESIAN WAR*, Book 3.82 (Steven Lattimore trans., 1998).

<sup>60</sup> CALEB CARR, *THE LESSONS OF TERROR: A HISTORY OF WARFARE AGAINST CIVILIANS: WHY IT HAS ALWAYS FAILED, AND WHY IT WILL FAIL AGAIN*, 16-17 (2002).

<sup>61</sup> *Id.* at 34-44.

<sup>62</sup> CHRISTOPHER HARMON, *TERRORISM TODAY* 198 (2000).

## **B. The International Response**

At one time it could be said that terrorists wanted lots of people watching, not lots of people dead. That attitude changed sometime in the post-colonial independence movements of the 1960s and beyond. By 2000, it was clear that terrorism would be most effective with many deaths.

International concern over clandestine attacks on civilians began with airplane hijackings and was fueled by the worldwide visibility of the Munich Olympic massacre of 1972. The international community cranked out 12 separate Conventions dealing with air piracy, taking of hostages, piracy against maritime shipping, acts involving airports, control of nuclear devices, and plastic explosives. Each of the conventions commits signatory nations to define the offenses as crimes within their own law,<sup>63</sup> which in turn leads to a commitment either to extradite or to place the accused on trial.<sup>64</sup>

There are several basic problems with this international regime of law:

- (1) It creates no international enforcement mechanism but instead relies on individual nation-state enforcement; therefore, it will be ineffective without significant cooperation among states.
- (2) Cooperation in turn requires several elements:

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<sup>63</sup> A typical example is the Convention Against the Taking of Hostages. Article 1.1 states

Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking") within the meaning of this Convention.

International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205. According to article 2, "[e]ach State Party shall make the offences set forth in article 1 punishable by appropriate penalties which take into account the grave nature of those offences." *Id.*

<sup>64</sup> According to article 8,

The State Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.

*Id.*

- (a) A desire to eliminate the practice, which does not exist among nations that harbor groups;
  - (b) Trust among intelligence officers of different nations, who are unlikely to place their sources of information at risk by disclosure even to a friendly nation; and
  - (c) A willingness to forego control of one's own enforcement to allow another nation to handle a situation.
- (3) The principle of non-intervention into another nation's sovereign territory along with the frustrations of lack of cooperation gives rise to an impetus for clandestine or military raids into other nation's territory.

The United Nations has created a special Committee on Counter-Terrorism but apparent from its public statements, it plays merely a hortatory role with member nations.<sup>65</sup> The combination of these problems means that prosecuting terrorist plots will lie primarily in the hands of individual states with little cooperation from other states, a potentially chaotic picture. This places even more impetus on the likelihood of using force rather than law against terrorist groups. The result is either overt military force or covert operations such as the "extraordinary renditions" of the Bush regime or targeted killings that have increased dramatically under Obama.

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<sup>65</sup> The CTC website describes its operations this way:

In short, the work of the CTC and CTED comprises:

- Country visits – at their request, to monitor progress, as well as to evaluate the nature and level of technical assistance a given country may need in order to implement resolution 1373 (2001);
- Technical assistance - to help connect countries to available technical, financial, regulatory and legislative assistance programmes, as well as to potential donors;
- Country reports – to provide a comprehensive snapshot of the counter-terrorism situation in each country and serve as a tool for dialogue between the Committee and Member States;
- Best practices – to encourage countries to apply known best practices, codes and standards, taking into account their own circumstances and needs; and
- Special meetings – to develop closer ties with relevant international, regional and subregional organizations, and to help avoid duplication of effort and waste of resources through better coordination.

*Our Mandate*, SECURITY COUNCIL COUNTER-TERRORISM COMMITTEE, <http://www.un.org/en/sc/ctc/> (last visited Oct. 16, 2014).

One downside of this realization is that target states will be sorely tempted to strike with preemptive violence against suspected terrorists. That in turn breeds more resentment, which serves as a recruiting device for the terrorist organization. This pattern can be perceived not only in recent times, but also in looking back at anti-colonial independence efforts and even insurgence movements against occupying forces such as the French Resistance and the Iraqi insurgence against the United States.

These thoughts lead inexorably to the common misconception that “one person’s freedom fighter is another person’s terrorist.” There is, however, no known regime of law or moral philosophy by which anyone who deliberately targets civilians can be a responsible freedom fighter. It is certainly true that some terrorists have been successful, have gained power in the territory for which they were fighting, and have not been punished by the international community.<sup>66</sup> If their tactics included targeting of civilians, their success does not change the character of their actions. No known moral philosophy justifies the taking of innocent life for a political cause.

Despite the apparently universal condemnation of taking innocent civilian life, the international community has failed to respond with a single voice. The confusion in this area is partly a matter of perspective that results from the combination of two factors. One factor is the lack of enforcement of international norms against successful powers, and the other is the frustration of “freedom fighters” in the breakup of the colonial system.

Those who wish to justify targeting civilians will point to the Allied bombing of Dresden and the U.S. use of nuclear bombs on Hiroshima and Nagasaki. The claim for the terrorist is that international law is meaningless if it punishes only the losers—to be legitimate, a rule of law must be coherent, consistent, and neutrally applied. To this argument, we can say at least that the rule of sparing noncombatants is coherent regardless of whether it has been applied consistently. The justification for the bombing of Dresden was that the Nazi regime had blended military and industrial targets with the civilian population so that existing technology could not distinguish between legitimate and illegitimate targets. This is similar to the threat of the Iraqi government in 2003 to deploy “human shields” to deter bombing runs on valid targets. The justification for dropping atomic bombs on Japan was the excuse of necessity; it was argued that prolonging the war would lose more lives than by demonstrating overwhelming force via use of the bombs.

Whether these justifications for Dresden or Hiroshima would hold up in adjudication is slightly, but only slightly, beside the point. In the absence of a tribunal with adjudicatory authority, the court that matters will be the court of

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<sup>66</sup> The most frequently cited examples are the Zionists of the immediate post World War II era. David ben-Gurion, Manachem Begin, and others have been widely characterized as terrorists who became leaders of a recognized government known at least to their own constituents as freedom fighters. Che Guevara could be another example.

world opinion, in which the jury is still out—at least with regard to the use of nuclear weapons. Thus, with regard to state actors subject to the Law of Armed Conflict, we can articulate the applicable legal rule regardless of whether we can insist upon its enforcement.

The frustration of post-colonial movements against “racist or oppressive regimes” is a bit harder to evaluate. The insurgent does not have the luxury of wearing a distinctive uniform and attacking openly with military precision for the simple reason that he is up against overwhelming force. But those elements of the Law of Armed Conflict are not applicable until the rebel force attains the strength to be considered a belligerent—a body capable of governing. Prior to that stage, the only existing rule of law that applies is that of the recognized government, and under that regime the rebel is a criminal regardless of what his targets may be or how righteous his cause. Of course, to win the approval of the world audience, the “freedom fighter” must be careful in target selection but that is a political rather than a moral or legal issue.

These issues have been played out dramatically throughout the Middle East and Africa starting with the “Arab Spring” of 2011 and continuing into uprisings in Egypt, Syria, and even the Ukraine. Most of the protesters in these events were loosely organized and did not attack civilian targets, although the civil war in Syria certainly involved widespread civilian casualties.

On the moral and legal front, that the terrorist may be acting with moral outrage against an oppressive regime does not change the immorality of targeting civilians with clandestine violence. If the insurgent gains sufficient power to be described as a belligerent, then the Law of Armed Conflict becomes applicable. In this setting, it is even clearer that the targeting of civilians is illegal. So where does the “freedom fighter” claim moral legitimacy? The problem is that some definitions of terrorism have not made a sufficient distinction between civilian and military targets. An easy example of the problem is found in comparison of the International Convention Against Terrorist Financing (CATF) and the Draft Comprehensive Convention on Terrorism (DCCT).

The CATF creates a criminal offense of providing funds for an “act intended to cause death or serious bodily injury to a civilian.” The DCCT, however, criminalizes “death or serious bodily injury to any person” in addition to “serious damage to a State or government facility, a public transportation system, communication system or infrastructure facility.” It is easy to see why the DCCT raises serious concerns—it is not just about the targeting of civilians but it also attempts to use international criminal measures to penalize those who attack government agencies or facilities.

To be clear about what is at stake, the question is not whether violence against government interests will be criminal but under what regime of law will the violence be criminalized? There is nothing necessarily admirable about violence against government agents or facilities. There is nothing to prevent considering those acts to be violations of criminal law of the country in which they occur. Even if that government were oppressive and violent itself, it still has the inherent power to punish the true “freedom fighter.” The issue is whether it



can call on other governments to lend their authority and power to punish the insurgent.

Imagine this scenario under the two treaties. Chilean citizens challenge the brutality of the Pinochet regime by committing some acts of violence in Chile, but then escape to Spain. Under the definition of the CATF, Spain would have obligations to Chile only if the actors had attacked civilians and not if their attacks were limited to government agents or facilities. Under the DCCT, however, Spain's international obligations would require it to extradite or prosecute even when the actors had attacked only government facilities.

From this simple example, it is easy to see why many persons who laud the efforts of citizens to free themselves from oppressive regimes would object to the definition in the DCCT. What is a bit more curious is why governments would object. In the traditional model of international law, in which nation-state sovereignty is the benchmark and entitled to absolute protection, should not every government want to have assurance of cooperation by other nations in penalizing those who attack it?

Imagine now that Spain had actually been complicit in our hypothetical attacks on the Pinochet regime. Under the DCCT, Spain would have an obligation to prosecute or extradite the very people with whom it has been cooperating or sheltering. This raises the subtleties of the extent to which one nation may intervene in the affairs of another. Spain would have committed an act of aggression against Chile if the actors were under the control and direction of Spain to the point that an external observer would attribute the acts of the agents to that foreign government. Short of enough control to reach that conclusion, it could also be argued that Spain has violated Chile's sovereignty by mere "involvement in the internal affairs" of another country. It is readily apparent that not all nations subscribe to the principle of non-involvement in the affairs of other nations. A recent example of non-violent involvement was the United States' funding and coordination of a political movement against the former regime of the Ukraine. In the absence of consensus around this point, Spain's support of insurgents in Chile would not be a violation of international law. Thus, Spain would have every reason not to be party to a convention that would run counter to its own interests in attempting to promote the overthrow of a regime that was inimical to its interests.

This example shows the classic basis of norm-setting and law-making in operation. Country X is happy to have the cooperation of Country Y when Country X's own facilities are attacked, but Country X is not about to declare itself in violation of law when it clandestinely supports those who attack Country Z. Unless those with sovereignty are willing to have a rule applied to them as well as to others, then the rule does not take on the force of law. A rule of law must have universal applicability or it qualifies only as an edict of power, not as a principle.

### **C. Enforcement by Individual States**

Since 9/11, the United States has been the subject of only two attacks that could remotely be designated as “terrorist actions”: Major Hasan’s shooting at Fort Hood in Texas and the Boston Marathon bombing. Conversely, other countries have experienced serious assaults: the London and Madrid subway bombings; the Kenyan shopping mall attack; and hundreds of bombings, suicide or detonated, in Iraq, Afghanistan, Chechnya, and Russia. Unfortunately, it seems that geography is playing almost as significant a role in determining where violence occurs as are government policies.

#### 1. United States

There are three possible reasons why the United States has experienced a relatively low level of “group violence against civilians.” One is that we have just been lucky. It may also be that the dismantling of Al Qaeda and Taliban training camps in the Tora Bora, along with scattering of jihadists across the Middle East and Africa, means that there are no significant groups with the ability or interest in carrying out attacks on United States soil. Third is the possibility that serious law enforcement and intelligence sharing (not the combination of renditions, torture, and targeted killings) have been successful in thwarting plots.<sup>67</sup>

After 9/11, the United States devoted extraordinary resources to “terrorism” cases. The Department of Justice (DOJ) reported that it prosecuted over 350 terrorism cases in 2002. But priorities changed promptly so that the emphasis was placed on prevention more than prosecution, and the number of cases fell to less than thirty by 2006. Other data tends to show that in 2006, a total of almost 500 persons were prosecuted, while in 2012, less than 200 were prosecuted.<sup>68</sup>

As calculated and reported by one academic institute, in the decade since 9/11 there have been over 1,000 federal prosecutions associated with terrorism.<sup>69</sup> Nine out of every ten cases have been resolved by conviction, the majority by plea bargain. The most frequent charges include material support for terrorists (18 U.S.C. § 2332A) or terrorist organizations (18 U.S.C. § 2332B) along with

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<sup>67</sup> Jena Baker McNeill et al., *39 Terror Plots Foiled Since 9/11: Examining Counterterrorism’s Success Stories*, HERITAGE FOUND. (MAY 20, 2011), <http://www.heritage.org/research/reports/2011/05/39-terror-plots-foiled-since-911-examining-counterterrorism-success-stories>.

<sup>68</sup> *Terrorism/National Security Prosecutions for February 2013*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Apr. 23, 2013), <http://trac.syr.edu/tracereports/terrorism/316/>.

<sup>69</sup> CTR. ON LAW & SEC., N.Y. UNIV. SCH. OF LAW, TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001-SEPTEMBER 11, 2011 (2011), available at <http://www.lawandsecurity.org/portals/0/documents/ttrc%20ten%20year%20issue.pdf>

possession or training for use of explosives and weapons of mass destruction. Over the past few years, conspiracy to commit acts of violence in a foreign nation (18 U.S.C. § 956) has been a common charge as well.

That same report indicates that while prosecutions were relatively static during the Bush Administration, at an average of twenty-seven per year, the number of indictments almost doubled in the first two years of the Obama regime. The report speculates that the reasons for this sudden increase could be actual threats, “an escalation in FBI sting operations,” and “increased resort to material support charges.”<sup>70</sup> The short of the matter is that the Obama Administration attempted to emphasize prosecution to defuse support for continued military detentions, but that effort was thwarted when Congress prohibited the transfer of detainees from Guantanamo to the United States for trial.<sup>71</sup>

One major problem in attempting to track statistics in this arena is the issue of what counts as a “terrorism” case—cases involving visa violations to credit card fraud could be considered part of some plot to commit a violent act for political reasons, and the DOJ has not derived a consistent definition of a terrorism case for this purpose.

Following the report of the 9/11 Commission, the U.S. government was generally reorganized with the creation of the Department of Homeland Security, the establishment of the Director of National Intelligence, and the passage of statutory mandates to emphasize cooperation among government agencies with a view to intercept plots before they could come to fruition.

At the same time, there were a number of extra-legal measures taken in the so-called “war on terror.” Those measures included extra-judicial detentions at both disclosed and undisclosed sites around the world and “harsh interrogation techniques” carried out despite the requirements of the Convention Against Torture. Not the least of the “war” measures were the invasions of Afghanistan and Iraq. The initial invasion of Afghanistan was perfectly understandable as a measure to take out the camps from which 9/11 and other destructive operations had been launched. The subsequent occupation of Afghanistan, however, could have been handled very differently, and it is still not clear what objective lay behind the invasion of Iraq.

Nevertheless, it is instructive to see how the United States has handled law enforcement against terrorism. The principal emphasis in court cases has been the concept of “material support” of terrorism or terrorist organizations. In the U.S. model, a group can be designated as a “foreign terrorist organization” (FTO), which triggers three consequences: (1) the assets of the organization can be seized and forfeited, (2) it becomes illegal for a member of that organization to travel to the United States, and (3) most importantly for our purposes, it becomes illegal for anyone to provide “material support” to a designated FTO.

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<sup>70</sup> *Id.* at 3.

<sup>71</sup> See, e.g., Peter Landers, *Congress Bars Gitmo Transfers*, WALL ST. J. (Dec. 23, 2010), <http://online.wsj.com/articles/SB10001424052748704774604576036520690885858>.

Of the hundreds of prosecutions in the United States since 9/11, only a handful have involved persons who actually represented a serious threat to public safety. Many were misguided individuals swept up in “sting” operations by the FBI after they expressed a desire to engage in jihad. Others were serious conspirators but either could not keep their plots secret long enough to bring them to fulfillment or just proved incapable of causing harm.<sup>72</sup> A few, such as Sami al-Arian, were fundraisers for foreign terrorist organizations (FTO). And a couple actually inflicted direct harm.<sup>73</sup> The shocking aspect of this history is that the United States Congress saw the effectiveness of judicial prosecution and nevertheless statutorily prevented the government from bringing anyone, including Khalid Sheikh Muhamed, from Guantanamo to the United States for trial in a civilian court.

## 2. United Kingdom<sup>74</sup>

The U.K. Terrorism Act of 2000 adopted an approach similar to that of the United States by criminalizing assistance to designated organizations.<sup>75</sup> The 2000 statute applied to one who “belongs to,” “invites support for,” or “addresses a meeting of” a proscribed organization. An organization can be proscribed if it is “concerned in terrorism.”<sup>76</sup>

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<sup>72</sup> See, e.g., Laura Richardson, *Skies Are Safer, but Not Safe Enough*, POLITICO (June 28, 2010, 4:11 AM), <http://www.politico.com/news/stories/0610/39071.html> (citing the cases of “shoe bomber” Richard Reid, “underwear bomber” Umar Farouk Abdulmutallab, and “Times Square bomber” Faisal Shahzad).

<sup>73</sup> For example, the Boston Marathon bombing and the Fort Hood shooting.

<sup>74</sup> See generally CLIVE WALKER, BLACKSTONE’S GUIDE TO THE ANTI-TERRORISM LEGISLATION (2002) (a general guide to UK counter-terrorism law).

<sup>75</sup> As of August 2014, the Home Office listed 60 “international terrorist organisations under the Terrorism Act 2000,” and retained “14 organisations in Northern Ireland that were proscribed under previous legislation.” U.K. HOME OFFICE, PROSCRIBED TERRORIST ORGANISATIONS 5 (2014), *available at* [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/354891/ProscribedOrganisationsAug14.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/354891/ProscribedOrganisationsAug14.pdf).

<sup>76</sup> Section 3(5) of the Terrorism Act of 2000 dictates that “an organization is concerned in terrorist acts if it”

- (a) commits or participates in acts of terrorism,
- (b) prepares for terrorism,
- (c) promotes or encourages terrorism, or
- (d) is otherwise concerned in terrorism.

*The Terrorism Act, 2003*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, <https://www.unodc.org/tldb/showDocument.do?documentUid=8879&node=docs&cmd=ad d&country=GRN> (last visited Sept. 24, 2014).

The Terrorism Act of 2006<sup>77</sup> added provisions prohibiting “encouragement of terrorism,” “distribution of terrorist publications,” and “training for terrorism.” Encouragement is criminal if the speaker “intends” or “is reckless” in relation to “inducing” another to “commit, prepare, or instigate” an act of terrorism. A statement is criminal if it is “likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism.” Statements are conclusively within the proscription if they “glorify acts of terrorism” or if a reasonable person would understand that terrorism is “being glorified as conduct that should be emulated by them in existing circumstances.”

The British prosecution of Abu Hamza (a.k.a. al-Masri) was similar to the prosecution of Ali Al-Timimi. Both cases seemed to penalize expression beyond the limits of what liberal notions of free speech would allow, but in both cases the expression had resulted in imminent threats of harm. Without actual attempts at violence by some members of the speaker’s audience, it is not clear whether an incitement prosecution can stand.

Al-Masri was the Imam of the very radical Finsbury Park Mosque in North London, which produced the subway bombers and was attended by both “twentieth hijacker” Zacarious Moussaoui and “shoebomber” Richard Reid. Al-Masri has also been indicted in the United States on material support charges and is wanted in Yemen on charges related to attacks on tourists in the country in 2004. In the U.K., Al-Masri was convicted on six counts of soliciting murder and two counts of “using threatening, abusive or insulting words or behaviour with the intention of stirring up racial hatred.”<sup>78</sup> The solicitation counts sound as if they relate to specific acts of violence, but in fact the prosecution identified no specific targets of violence; the charges depended completely on general incitement principles.<sup>79</sup>

On appeal, the court had no occasion to address the vagueness or over breadth of the phrase “glorifies the commission or preparation . . . of such acts [of terrorism]” because the prosecution had proved sufficient intent to “stir up racial hatred” without reliance on former phrase.<sup>80</sup> After being sentenced to only seven years in prison in the U.K., al-Masri was subsequently extradited to the United States to stand trial on multiple counts of hostage-taking and material support.

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<sup>77</sup> Terrorism Act, 2006, c. 11, §§ 1, 2, 6 (U.K.), available at [http://www.legislation.gov.uk/ukpga/2006/11/pdfs/ukpga\\_20060011\\_en.pdf](http://www.legislation.gov.uk/ukpga/2006/11/pdfs/ukpga_20060011_en.pdf).

<sup>78</sup> The racial hatred counts would be difficult to sustain in the United States despite the recognition in *Virginia v. Black* that threats may lie outside the protection of the First Amendment. See, 538 U.S. 343 (2003).

<sup>79</sup> *R v. Abu Hamza*, [2006] EWCA (Crim) 2918 (Eng.); see also Don Van Natta Jr., *Cleric Convicted of Stirring Hate*, N.Y. TIMES (Feb. 8, 2006), <http://www.nytimes.com/2006/02/08/international/europe/08cleric.html?pagewanted=all&r=0>.

<sup>80</sup> *R v. Abu Hamza*, [2006] EWCA (Crim) 2118, para. 5 (Eng.).

The extradition request produced an extraordinary amount of legal wrangling because, first, the European Court of Human Rights<sup>81</sup> and, second, the U.K. Court of Appeals had to be convinced that he would not be abused by U.S. authorities if transferred to their custody.<sup>82</sup>

### 3. Canada

The Canadian Criminal Code has several provisions<sup>83</sup> dealing with listed organizations,<sup>84</sup> financing, and facilitating terrorism. For these purposes, “terrorist activity” is defined as a violation of one of ten international conventions, such as

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<sup>81</sup> The European Court of Human Rights took seriously arguments that defendants extradited to the United States might face brutal treatment and violations of their rights to fair hearing, but the United States assured the Court that they would be accorded all the rights of ordinary criminal defendants. The Court then acceded to the extradition. *Ahmad v. U.K.*, Eur. Ct. H.R. (Apr. 10, 2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110267>.

<sup>82</sup> See *Mustafa v United States*, [2008] EWHC (Admin) 1357 (Eng.).

The argument is redolent with implied, if not express criticism of the United States of America, and its judicial processes. In effect we are invited to the conclusion that the diplomatic assurances given by the USA cannot be relied on, or more tactfully, cannot be wholly relied on. We have read Diplomatic Notes which make it clear that (a) that the United States will not seek nor carry out the death penalty against the appellant; (b) that the appellant will be prosecuted before a Federal Court in accordance “with the full panoply of rights and protections that would otherwise be provided to a defendant facing similar charges.” He would not be prosecuted before a military commission, nor “criminally prosecuted at any tribunal or court other than a . . . Federal Court,” and he will not be treated as “an enemy combatant;” and if the prosecution is discontinued, or he is acquitted, or when he has completed any sentence following conviction, if the appellant requests it, he will be returned to the United Kingdom.

*Id.*

<sup>83</sup> Criminal Code of Canada, R.S.C., c. C-46, §§83.01-83.3 (1985), available at <http://laws-lois.justice.gc.ca/eng/acts/C-46/>.

<sup>84</sup> § 83.05(1) provides for listing an entity if the Governor in Council is satisfied that there are reasonable grounds to believe that

- (a) the entity has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity; or
- (b) the entity is knowingly acting on behalf of, at the direction of or in association with an entity referred to in paragraph (a).

aircraft hijacking or financing of terrorism, or an act of violence for political ends.<sup>85</sup>

In 2012, the Canadian Supreme Court dealt with the issue of whether the “political ends” phrase rendered the definition of terrorist activity unconstitutional.<sup>86</sup> More explicitly, the purpose clause of the statute applied the law to violence done “in whole or in part for a political, religious or ideological purpose, objective or cause.” The trial judge found that the purpose clause was unconstitutional and “severed” it from the statute. Nevertheless, the defendant was found guilty of several counts of “participating or contributing,” “facilitating,” and “instructing” terrorist activity. The Supreme Court, however, rejected the argument that the purpose clause was unconstitutional: “The activities

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<sup>85</sup> *Id.* § 83.01(1)(b)(ii). In addition to violations of the listed international conventions, “terrorist activity” includes

- (b) an act or omission, in or outside Canada,
  - (i) that is committed
    - (A) in whole or in part for a political, religious or ideological purpose, objective or cause, and
    - (B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and
  - (ii) that intentionally
    - (A) causes death or serious bodily harm to a person by the use of violence,
    - (B) endangers a person’s life,
    - (C) causes a serious risk to the health or safety of the public or any segment of the public,
    - (D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or
    - (E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C),

and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission

*Id.*

<sup>86</sup> *R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555 (Can.), available at <http://scc-csc.lexum.com/scc-csc/scc-csc/en/12768/1/document.do>.

targeted by the [Criminal Code] . . . are in a sense expressive activities, [but m]ost of the conduct caught by the terrorism provisions . . . concerns acts of violence or threats of violence,”<sup>87</sup> and such “conduct falls outside the protection of [the freedom of expression guarantee].”<sup>88</sup>

With regard to cooperation between the United States and Canada, relations were certainly strained by the experience with Maher Arar, who was detained by U.S. authorities at JFK Airport, then allegedly rendered to Syria and allegedly mistreated until finally being released to Canadian authorities. Canada eventually reached a \$10 million settlement with him in compensation for the Royal Canadian Mounted Police having given U.S. authorities misleading information that led to his arrest, rendition, and torture.<sup>89</sup>

According to the Canadian Broadcasting Corporation, two people were extradited to the United States from Canada for trial on charges of material support for the Tamil Tigers; Canada, however, refused to extradite the brother of Omar Khadr, a Guantanamo detainee.<sup>90</sup>

#### 4. Australia

Australia sets out a statutory definition of terrorist organization and provides for either the designation of an organization by the Attorney General or an adjudication that the organization meets the statutory definition.<sup>91</sup> Planning or fostering terrorist acts is within the definition regardless of whether a terrorist act occurs.<sup>92</sup>

In the one reported case involving terrorism incitement, the High Court affirmed the conviction of a person for making “a document connected with

<sup>87</sup> *Id.* para. 67.

<sup>88</sup> *Id.* para. 71.

<sup>89</sup> *Ottawa Reaches \$10 Million Settlement with Arar*, CBC NEWS, (Jan. 25, 2007, 9:06 PM), <http://www.cbc.ca/news/canada/ottawa-reaches-10m-settlement-with-arar-1.682875>.

<sup>90</sup> *Recent Terrorism-related Cases with Canadian Connections*, CBC NEWS, (Jan. 21, 2011, 10:26 PM), <http://www.cbc.ca/news/canada/recent-terrorism-related-cases-with-canadian-connections-1.1016842>.

<sup>91</sup> The Australian Government has a single website devoted to counterterrorism. See *Listed Terror Organizations*, AUSTRALIAN NAT’L SECURITY, <http://www.nationalsecurity.gov.au/Listedterroristorganisations/Pages/default.aspx> (last updated 2010).

<sup>92</sup> *Criminal Code Act 1995* (Cth) s 102.1 defines a “terrorist organization” as

- (a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs); or
- (b) an organisation that is specified by the regulations for the purposes of this paragraph.



assistance in a terrorist act knowing of that connection.”<sup>93</sup> Again, much like the incitements of al-Timimi and al-Masri in the U.K., there was no showing that the materials were directed at any particular person or event. Indeed, the Court upheld a jury instruction that placed the burden on the defendant of showing that the “accused did not intend to facilitate assistance in a terrorist act.”

### 5. Germany<sup>94</sup>

Although continental legal systems do not contain the concept of “conspiracy” exactly as it exists in the Anglo-American system, the German law on “attempt to participate” is virtually the same as conspiracy law. It allows for punishing one who “agrees with another to commit or incite the commission of a serious criminal offense.”<sup>95</sup>

The German Code also contains a “material support” provision and a criminal organization approach. Section 129 of the German Penal Code is directed toward ordinary organized crime and criminalizes “whoever forms an organization, the objectives or activity of which are directed towards the commission of crimes, or whoever participates in such an organization as a member, recruits for it or supports it.” Section 129a is labeled “[f]orming terrorist organizations” and has two components. Subsection (1) describes an “organization whose aims or activities are directed towards the commission of” violations of international humanitarian law such as crimes against humanity, war crimes, or genocide. Subsection (a)(1) describes a list of offenses “endangering the general public” (most of which have to do with explosives or damaging public buildings) and goes on to criminalize mere membership in such an organization if a listed offense is

intended to seriously intimidate the population, to unlawfully coerce a public authority or an international organisation through the use of force or the threat of the use of force, or to significantly impair or destroy the fundamental political, constitutional, economic or social structures of a state or an international organisation, and which, given the nature or consequences of such offences, may seriously damage a state or an international organisation.<sup>96</sup>

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<sup>93</sup> The Queen v. Khazaal [2012] HCA 26 (Austl.), available at <http://www.austlii.edu.au/au/cases/cth/HCA/2012/26.html>.

<sup>94</sup> STRAFGESETZBUCH [StGB] [PENAL CODE] Nov. 13, 1989, BUNDESGESETZBLATT [BGBl], translated in *Criminal Code (Strafgesetzbuch, StGB)*, FED. MINISTRY OF JUSTICE, <http://www.iuscomp.org/gla/statutes/StGB.htm> (last visited Oct. 18, 2014).

<sup>95</sup> *Id.* § 30(2).

<sup>96</sup> *Id.* §129(a).

The German system does not provide for designation of proscribed organizations, so the court must determine in each case whether the defendant was providing support to an organization with the proscribed objectives. Although this could create the possibility of conflicting decisions within the same organization, German fact-finders are judges who are likely to be aware of rulings by their colleagues and likely to be consistent.

## 6. Netherlands

The Netherlands is the locus of many international tribunals and has taken aggressive steps on dealing with terrorism. The Crimes of Terrorism Act criminalizes conspiring to commit a terrorist crime, recruiting for an armed struggle, and participating in an organization with the objective of committing terrorist crimes.<sup>97</sup>

Although the National Coordinator for Counterterrorism and Security (NCTV) coordinates the efforts of the police and intelligence services and is housed within the Ministry of Justice with prosecutors,<sup>98</sup> the Dutch attempt to maintain a strict wall of separation between intelligence and law enforcement in order to insulate the prosecution from knowledge of classified information that the intelligence agencies want to keep from defendants.

## 7. France

French Penal Code § 421-1 contains a list of violent acts and possession of proscribed weapons that become “terrorist acts” when “the purpose of which is seriously to disturb public order through intimidation or terror.”<sup>99</sup> The Code goes on to provide that “participation in any group formed or association established with a view to the preparation, marked by one or more material actions, of any of the acts of terrorism provided for under the previous articles shall in addition be an act of terrorism.”<sup>100</sup> The most extreme provision criminalizes “being unable to account for resources corresponding to one’s lifestyle when habitually in close

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<sup>97</sup> *Crimes of Terrorism Act*, NAT’L COORDINATOR FOR SEC. AND COUNTERTERRORISM, MINISTRY OF SEC. & JUSTICE (Aug. 10, 2004), [http://english.nctb.nl/themes/Counterterrorism/Legislation/national/Crimes\\_of\\_Terrorism\\_Act.aspx](http://english.nctb.nl/themes/Counterterrorism/Legislation/national/Crimes_of_Terrorism_Act.aspx).

<sup>98</sup> *Departments and Institutions*, MINISTRY OF SEC. & JUSTICE, <http://www.government.nl/ministries/venj/organisation/departments-and-institutions>, (last visited Sept. 25, 2014).

<sup>99</sup> CODE PÉNAL [C. PÉN.] art. 421-1 (Fr.), available at [https://www.unodc.org/tldb/pdf/France\\_Penal\\_Code\\_En.pdf](https://www.unodc.org/tldb/pdf/France_Penal_Code_En.pdf).

<sup>100</sup> *Id.* art. 421-2-1.

contact with a person or persons who engage in one or more of the activities” listed as terrorist acts.<sup>101</sup>

#### IV. HUMAN TRAFFICKING—CRIME AND PUNISHMENT

Like terrorism, human trafficking has ancient roots. Moreover, the two are closely connected in the sense that enslavement may be both a technique of terrorism and a goal. Subjugation of part of a population may serve to intimidate the remaining populace into submission, while terrorizing a population by violence against random members may be an effective means of coercing the populace into involuntary servitude.

Slavery became a subject of treaty law in the 1800s, and some scholars believe it would have been considered a crime under the law of nations as early as the eighteenth century.<sup>102</sup> It was not until 1926, however, that the subject was mentioned in an international document.<sup>103</sup> Finally, in 2003, a treaty committed most nations of the world to taking effective steps to stamp out trade in humans, placing a special emphasis on children and women.<sup>104</sup> Despite universal revulsion of slavery, there are many forms of forced labor still in practice, and international law retains some definitional issues to be resolved.

Although it is impossible to get precise numbers on the phenomena, it is clear that there are many thousands if not millions of people in various forms of

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<sup>101</sup> *Id.* art. 421-2-3.

<sup>102</sup> *See, e.g.*, ILIAS BANTEKAS & SUSAN NASH, INTERNATIONAL CRIMINAL LAW 152 (3d ed. 2007). The concepts of *jus cogens* (immutable rules) and *erga omnes* (applicable to all) were developed primarily to deal with piracy, so that a pirate was subject to universal jurisdiction and could be punished by any nation obtaining custody. Slavery may have been treated in similar fashion, but there was not the same level of consensus regarding it as there was regarding piracy. Part of the reason may have been that slavery was effectively stamped out in the domains of the European-American hegemony of the Colonial Era; its remnants in other parts of the world were then ignored by the major powers.

<sup>103</sup> The Slavery Convention was proposed by the League of Nations in 1926. The International Labour Organization promulgated the Convention on Forced or Compulsory Labour in 1930, and the 1948 Universal Declaration of Human Rights included a broad proscription against slavery. For a very useful summary of the international agreements, see *Slavery and Forced Labor*, HUMAN RIGHTS EDUC. ASSOCIATES, [http://www.hrea.org/index.php?base\\_id=160](http://www.hrea.org/index.php?base_id=160) (last visited Sept. 25, 2014).

<sup>104</sup> *See* Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the Convention Against Transnational Organized Crime, Nov. 15, 2000, T.I.A.S. No. 13127, 2237 U.N.T.S. 319 [hereinafter Palermo Protocol]. *See also* Convention Against Transnational Organized Crime and the Protocols Thereto, G.A. Res. 55/25, U.N. Doc. A/RES/55/25 (Nov. 15, 2000), available at [http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOC\\_ebook-e.pdf](http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOC_ebook-e.pdf).

forced labor today. The major components are sex marketing, domestic servants, and agricultural workers, but other components of manual labor may also involve some degree of coercion. Organ trafficking has also become a part of the phenomenon in recent years.<sup>105</sup>

There are no reliable estimates of number of persons or dollars involved in the sex or forced labor trades.

For example, in 2001, the FBI estimated 700,000 women and children were trafficked worldwide, UNICEF estimated 1.75 million, and the International Organization on Migration (IOM) merely 400,000. In 2001, the UN drastically changed its own estimate of trafficked people in 2000—from 4,000,000 to 1,000,000. The most cited statistics on trafficking come from the U.S. State Department's annual reports on trafficking in persons. According to the 2005 report, 600,000 to 800,000 people are trafficked across international borders each year, with 14,500 to 17,500 trafficked into the United States<sup>106</sup>

Assume half a million persons per year are involved in the modern slave trade. Over the course of ten years that is five million people. The slave trade in the eighteenth century brought somewhere over ten million people from Africa to the West, although the numbers worldwide were even higher.

The dominant international convention on forced labor is Protocol I of the Convention Against Transnational Organized Crime, commonly known as the Palermo Protocol. It defines the phenomenon this way:

- (a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of

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<sup>105</sup> Leslie P. Francis & J.G. Francis, *Stateless Crimes, Legitimacy, and International Criminal Law: the Case of Organ Trafficking*, 4 CRIM. L. & PHIL. 283, 293 (2010).

Surely, the level of human misery caused by organ trafficking as well as by other forms of human trafficking is comparable to that of many examples of genocide or crimes against humanity. Nor is there a theoretical reason to believe that genocides or crimes against humanity are any less—or for that matter more—likely to be addressed by domestic legal regimes.

*Id.*

<sup>106</sup> *Sex Slaves: Estimating the Numbers*, FRONTLINE (Feb. 6, 2014), <http://www.pbs.org/wgbh/pages/frontline/slaves/etc/stats.html>.

- a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
  - (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article;
  - (d) “Child” shall mean any person under eighteen years of age.<sup>107</sup>

The Protocol obligates each signatory nation to criminalize trafficking and to provide assistance to victims of trafficking:

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.<sup>108</sup>

The statutes of the United States have long criminalized the slave trade. Even before the Civil War and Emancipation, it was a crime for an American citizen to work on a slave ship. Following adoption of the Thirteenth Amendment, the U.S. Code provided criminal penalties for holding another person in peonage, slavery, or involuntary servitude.

The United States adopted a series of provisions in 2000 under the heading of the Trafficking Victims Protection Act, 18 U.S.C. §§ 1589-1596, with particular emphasis on sex trafficking<sup>109</sup> and a new definition of forced labor.<sup>110</sup>

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<sup>107</sup> Palermo Protocol, *supra* note 104, art. 3.

<sup>108</sup> *Id.* art. 5.

<sup>109</sup> 18 U.S.C. § 1591 (2012) (Sex trafficking of children or by force, fraud, or coercion). It dictates that

- (a) Whoever knowingly—
  - (1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, or maintains by any means a person; or

### **A. A Brief History of the Slave Trade**

The historical source of Deuteronomy chronicles both violence against civilians and impressment into servitude: “[A]ll the people that are found therein shall become tributary unto thee, and shall serve thee.”<sup>111</sup> To be fair to the ancient Hebrews, the chronicles go back further to the use of torture and killings to subdue the Hebrews into working for the Egyptians prior to their mass migration out of Egypt and back to Canaan.<sup>112</sup>

There are some indications that slavery, or at least conditions of servitude, existed even before the development of agricultural civilization.<sup>113</sup>

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- (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),

knowing, or in reckless disregard of the fact, that means of force, threats of force, fraud, coercion, . . . or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished . . . .

*Id.*

<sup>110</sup> 18 U.S.C. § 1589 (2012) (Forced labor). It dictates that

- (a) Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means

- (1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;
- (2) by means of serious harm or threats of serious harm to that person or another person;
- (3) by means of the abuse or threatened abuse of law or legal process; or
- (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint,

shall be punished as provided . . . .

*Id.*

<sup>111</sup> *Deuteronomy* 20:11.

<sup>112</sup> *Id.*

<sup>113</sup> *Slavery: History*, INFOPLEASE, <http://www.infoplease.com/encyclopedia/business/slavery-history.html> (last visited Feb. 20, 2006).

Although it is commonly held that slavery was rare among primitive pastoral peoples and that it appeared in full form only with the development of an agricultural economy, there are numerous instances that contradict this belief. Domestic slavery and sometimes concubine slavery appeared among the nomadic Arabs, among Native Americans primarily devoted to hunting, and among the seafaring Vikings. Some

Beginning with recorded history, most enslavement occurred as the result of one people conquering another. Slaves were used in Greek and Roman times as domestic servants, artisans, and scribes, but also less humanely in mining,<sup>114</sup> gladiatorial entertainment, and prostitution. Medieval Europe operated an entire social structure on a state of reduced individual autonomy known as serfdom or villeinage.

Modern slavery began as early as the fifteenth and sixteenth centuries with acquisition of labor for sailing ships along the African coasts.<sup>115</sup> By the late seventeenth century, as the American colonies began to emerge as agricultural centers crying out for cheap labor, the practice was fueled by Spanish and Dutch merchant shippers who would carry slaves to the Americas and return with commodities for the European markets.<sup>116</sup> The mythology of the era has it that Arab and African tribal slavers did the capturing of humans, transported them to coastal market depots, and sold them to the merchant shipping traders.<sup>117</sup>

Some scholars contend that the formative period of international law in the seventeenth and eighteenth centuries virtually ignored slavery because the phenomenon did not exist on mainland Europe to any significant degree. The jurists of the period, led by Grotius, mentioned the concept briefly and placed it in the natural condition of mankind, possibly because Roman law had considered it to be acceptable and the jurists were working from Roman law as if it represented the natural order of the emerging international legal system.<sup>118</sup>

It was not until the late eighteenth century that British law directly confronted the issue of the validity of slavery, holding that a slave who was

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ascribe the beginnings of slavery to war and the consequent subjection of one group by another. Slavery as a result of debt, however, existed in very early times, and some African peoples have had the custom of putting up wives and children as hostages for an obligation; if the obligation was unfulfilled, the hostages became permanent slaves.

*Id.*

<sup>114</sup> A HISTORICAL GUIDE TO WORLD SLAVERY 194-95 (Seymour Drescher & Stanley L. Engerman, eds., 1998).

<sup>115</sup> *Id.* at 100-01.

<sup>116</sup> *Id.* at 395-98.

<sup>117</sup> *Id.* at 370-75.

<sup>118</sup> See Alan Watson, *Seventeenth-Century Jurists, Roman Law, and the Law of Slavery*, in SLAVERY AND THE LAW 368, 368 (Paul Finkelman ed., 1997).

When no general written laws, privileges, by-laws or customs were found touching the matter in hand, the judges were from times of old admonished by oath to follow the path of reason according to their knowledge and discretion. But since the Roman laws, particularly as codified under Justinian, were considered by men of understanding to be full of wisdom and equity, these were first received as patterns of wisdom and equity and in course of time by custom as law.

*Id.* (quoting Hugo Grotius).

brought into England by his owner could not be detained forcibly by the owner for transfer back to a colony.<sup>119</sup> The effect of that holding was to abolish slavery on English soil while leaving it in place in the colonies. The Slavery Abolition Act of 1833, also known as the Emancipation Act of 1833, outlawed slavery in the British colonies, although slaves were indentured to their former owners until 1838.<sup>120</sup> Meanwhile, France had outlawed slavery in its colonies in 1794,<sup>121</sup> Freetown in Sierra Leone was established as a haven for freed slaves from the French colonies in 1791.<sup>122</sup> Liberia began receiving former slaves from America in 1816.<sup>123</sup>

International movements to end the slave trade may date back to 1794 when the U.S. government's Slave Trade Act of 1794 was enacted, which prohibited the use of American ports for the slave trade to foreign countries.<sup>124</sup> In a series of treaties between 1810 and 1817, Britain was instrumental in establishing treaties to end slave traffic in the Atlantic among Portugal, Spain, France, and the Netherlands.<sup>125</sup>

International force was levied against slave trading beginning in 1819 when Britain began patrolling the west coast of Africa to intercept slave traders operating in violation of treaties.<sup>126</sup> In 1820, the United States declared slave trading to be piracy punishable by death.<sup>127</sup> The U.S. Senate demanded

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<sup>119</sup> WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA 1760-1848* 20-21 (1977) (Discussing *Somerset v. Stewart*: "As interpreted by American abolitionists and others, *Somerset* seemed to be a declaration that slavery was incompatible with natural law and that, in the Anglo-American world, it could legitimately exist only if established by what Mansfield [Chief Justice of King's Bench] ambiguously termed 'positive law.'").

<sup>120</sup> A HISTORICAL GUIDE TO WORLD SLAVERY, *supra* note 114, at 12-13.

<sup>121</sup> *Id.* at 15 (noting that "France . . . reinstated [slavery] in 1802 . . . and definitively abolished it in 1848, when abolition took place in the French African colonies as well).

<sup>122</sup> SEYMOUR DRESCHER, *The Ending of the Slave Trade and the Evolution of European Scientific Racism* (1990), in *FROM SLAVERY TO FREEDOM: COMPARATIVE STUDIES IN THE RISE AND FALL OF ATLANTIC SLAVERY* 285-86 (1999).

<sup>123</sup> A HISTORICAL GUIDE TO WORLD SLAVERY, *supra* note 114, at 22.

<sup>124</sup>

no . . . persons coming into [the United States] shall . . . build, fit, equip, load or otherwise prepare any ship or vessel, within any port or place of the said United States nor shall cause any ship or vessel to sail from any port or place within the same, for the purpose of carrying on any trade or traffic in slaves, to any foreign country; or for the purpose of procuring, from any foreign kingdom, place or country, the Inhabitant of such kingdom, place or country, to be transported to any foreign country, port, or place whatever, to be sold or disposed of, as slaves.

1 Stat. 347.

<sup>125</sup> A HISTORICAL GUIDE TO WORLD SLAVERY, *supra* note 114, at 382.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 383.



amendments to the treaty that Britain refused to sign; consequently, the United States terminated the arrangement.<sup>128</sup>

Following the U.S. Emancipation Proclamation of 1863 and the adoption of the Thirteenth Amendment in 1865, the Atlantic slave trade faded away. It was not until 1926 that the nations of the world agreed on an international Slavery Convention<sup>129</sup> by which the signatories agreed to

undertake, each in respect of the territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage, so far as they have not already taken the necessary steps:

- (a) To prevent and suppress the slave trade;
- (b) To bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms.<sup>130</sup>

The Slavery Convention (1926 Convention) does not express a principle of universality—the parties agree to take steps within their own dominions. The Convention, however, has been followed by a number of subsequent agreements and protocols including the 1948 Universal Declaration of Human Rights, which stated: “No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”<sup>131</sup>

## **B. Varieties of Human Bondage**

Societies have been extremely adept at finding mechanisms by which to place some people into the service of others with greater or lesser rights and bargaining power. The 1926 Convention defines slavery as a “status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”<sup>132</sup> During common law struggles with the concept, the British courts compared slavery to the status of villeinage.<sup>133</sup> As international attention has been drawn to practices less formal than ownership, conventions have been written to deal with “forced labor” and “human trafficking.”<sup>134</sup>

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<sup>128</sup> *See id.*

<sup>129</sup> A HISTORICAL GUIDE TO WORLD SLAVERY, *supra* note 114, at 163-65.

<sup>130</sup> Slavery Convention art. 2, Sept. 25, 1926, 46 stat. 2183, 60 L.N.T.S. 253, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/SlaveryConvention.aspx>.

<sup>131</sup> Universal Declaration of Human Rights art. 4, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://www.un.org/Overview/rights.html>.

<sup>132</sup> Slavery Convention, *supra* note 130, art. 1.

<sup>133</sup> Jonathan A. Bush, *The British Constitution and the Creation of American Slavery*, in SLAVERY AND THE LAW, *supra* note 118, at 384.

<sup>134</sup> *See generally* United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, *supra* note 104.

Various terms have been used over the centuries to categorize relationships of “unfree labor”—vassal, serfdom or villeinage, peonage, indentured servitude, or debt bondage. A brief review of the terms will indicate the scope of the problem for today’s concern with human trafficking.

A vassal (or liege) originally was a gang member. In much the same way that modern gangs swear loyalty to a leader in return for protection and a share of the spoils of group activity, medieval vassals collected around their patriarch for mutual support and sustenance. Over the centuries, the spoils of victory came to include the more enduring form of wealth—land. Thus, the vassal emerged as the landed gentry in the system ultimately to be known as feudalism.<sup>135</sup>

The serf or villein of late medieval Europe was tied to the land of a manor. The status was the creation of the agricultural phase of the Middle Ages. The serf could not be sold but was transferred with the land. He was not free to negotiate wages or better living conditions in exchange for his services. He was not a slave, but he was seldom free to pick up and leave the manor nor could he exact food or other remuneration if the lord of the manor did not give it.<sup>136</sup> Serfdom died out slowly starting in England in the seventeenth century, in France in 1789, and ended in Russia in 1861.<sup>137</sup>

Villeinage evolved so that there were various levels or classes of serf. The serf was not without rights—he could contract with others of his own status for payment for services or goods to which he held title, and he could even sublet his plot of land to others with the lord’s permission. In this fashion, an industrious villein could increase the wealth and status of his family.<sup>138</sup> Some villeins left the land to become artisans in the lord’s household—a more privileged status but one that did not have the security of land for the villein’s family.

In the early stages of the colonial era, especially in the Americas, a variety of unfree laborers came from the practices of indentured servitude,<sup>139</sup> debt bondage, and peonage. All these terms are similar expressions for the practice by which a person could sell to another his labor for a period of years. Often, this would be someone wishing to immigrate to a new land and who would enter into indentured servitude in return for passage and some assurance of means at the end of the period. The idea of debt bondage was similar but more useful for someone who was already in-country but needed money to purchase land or supplies and

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<sup>135</sup> See David Ross, *Feudalism and Medieval Life*, BRITAIN EXPRESS, [http://www.britainexpress.com/History/Feudalism\\_and\\_Medieval\\_life.htm](http://www.britainexpress.com/History/Feudalism_and_Medieval_life.htm) (last visited February 20, 2006).

<sup>136</sup> A HISTORICAL GUIDE TO WORLD SLAVERY, *supra* note 114, at 354-55.

<sup>137</sup> *Id.* at 355-57.

<sup>138</sup> *Id.* at 355.

<sup>139</sup> *Id.* at 239 (“It has been estimated that between one-half and one-third of all white immigrants to British colonies between the 1630’s and the American revolution came under indenture.”).

would repay a loan with labor.<sup>140</sup> Peonage came into use as the term for attracting Spanish-speaking or Chinese laborers to the western states in the late nineteenth century.

In the seminal case of *Somerset v. Stewart* in 1772, Lord Justice Mansfield cited approvingly the opinion of predecessors that the “Statute of Tenures had abolished villeins regardant to a manor” but that “a man might still become a villein in gross, by confessing himself such in open Court.”<sup>141</sup> The question in *Somerset*, however, was whether the law of England would operate to enforce the rights of ownership by which the master wished to detain the slave “to be sold abroad.”

So high an act of dominion must be recognized [if at all] by the law of the country where it is used. . . . The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: it’s so odious, that nothing can be suffered to support it, but positive law.<sup>142</sup>

In this reasoning, Lord Mansfield appeared to be leaving open the door for a type of voluntary bonded labor arrangement under the law of England.<sup>143</sup> As the law of service contracts developed, however, the common law determined that an agreement to work for another could be enforced only by a damage action or by preventing the service provider from working for another employer, not by requiring that services be performed.

During the twentieth century, sharecroppers in the South of the United States owned their land but committed a portion of their crops to merchant-bankers while tenant farmers owned no land and paid rent in the form of crops. In the late twentieth century, migrant laborers worked the fields and vineyards of agricultural employers in California and Arizona until the agricultural collectives mechanized some of that work. Today, migrant farm workers are still important to portions of the agricultural industry.<sup>144</sup>

Illegal immigrants form a major social controversy in twenty-first century United States. Typically, a “coyote” offers to bring migrants from Mexico to the United States for an exorbitant fee. If all goes well, the coyote will

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<sup>140</sup> *Id.* at 207 (“Even though indebtedness is usually voluntary, people sometimes (perhaps often) find it impossible ever to repay the debt because of coercive practices adopted by the creditor, such as dishonest bookkeeping.”).

<sup>141</sup> *Somerset v. Stewart*, (1772) 99 Eng. Rep. 499, 510 (K.B.).

<sup>142</sup> *Id.*; see also WIECEK, *supra* note 119, at 31.

<sup>143</sup> WIECEK, *supra* note 119, at 23.

<sup>144</sup> See NAT’L CENT. FOR FARMWORKER HEALTH, FACTS ABOUT FARMWORKERS (2006), available at <http://www.ncfh.org/docs/fs-Facts%20about%20Farmworkers.pdf>.

not only transport them, but will also set them up with a job. When things go poorly, however, the migrant may be abandoned in unsafe conditions.<sup>145</sup> The employer may or may not make good on wages and other promises, but the worker exercises few rights because he believes that any recourse to the legal system to enforce promises will bring the worker to the attention of immigration officials and result in deportation.<sup>146</sup>

### **C. Definitions of Prohibited Servitude**

In a series of steps in the middle half of the twentieth century, the international community acted to outlaw almost all forms of involuntary labor. The 1926 Convention defined slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”<sup>147</sup> The emphasis on “right of ownership” could be read to prohibit only a status which carried the sanction of law, although the definition included the notion of the exercise of any of the powers of ownership, leaving open the question of whether an individual violated the convention by acting as if he held rights of ownership without regard to state recognition of those rights. This “state action” problem, as it is known in U.S. law, has been substantially mooted by subsequent developments.

The 1930 Convention on Forced Labour defined forced labor as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily” with exceptions for conscripted military service, communal obligations, and punishment under conviction by a court of law.<sup>148</sup> The Preamble to the 1957 Convention on Abolition of Forced Labor (1957 Convention) noted that

the Slavery Convention, 1926, provides that all necessary measures shall be taken to prevent compulsory or forced labour from developing into conditions analogous to slavery and that the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery,

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<sup>145</sup> See generally Christine Ahn et al., *Migrant Farmworkers: America's New Plantation Workers*, 10 FOOD FIRST BACKGROUNDER, no. 2, 2004, available at <http://foodfirst.org/publication/migrant-farmworkers-americas-new-plantation-workers/>.

<sup>146</sup> NAT'L CENT. FOR FARMWORKER HEALTH, *supra* note 144.

<sup>147</sup> Slavery Convention, *supra* note 130, art. 1.

<sup>148</sup> Forced Labour Convention, June 28, 1930, art. 2, 39 U.N.T.S. 55, available at [http://portal.unesco.org/culture/en/files/38445/12815485821ILO\\_Convention\\_29.pdf/ILO\\_Convention\\_29.pdf](http://portal.unesco.org/culture/en/files/38445/12815485821ILO_Convention_29.pdf/ILO_Convention_29.pdf).

1956, provides for the complete abolition of debt bondage and serfdom.<sup>149</sup>

Under the 1957 Convention, a signatory nation “undertakes to suppress [and] to take effective measures to secure the immediate and complete abolition of forced or compulsory labour.”<sup>150</sup>

Through these series of steps, the nations of the world committed themselves not just to ending slavery but also to eliminating related forms of involuntary labor. Nevertheless, various practices of human trafficking continue. The number of persons selling themselves into sweatshop conditions or prostitution, or selling their children into such conditions, is difficult to estimate, but it is known to constitute a multi-billion dollar business that benefits mostly developed nations at the expense of populations from developing areas.

The Protocol to Prevent, Suppress, and Punish Trafficking in Persons (Protocol) contains this definition:

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>151</sup>

The United Nations Office of Drugs and Crime explains the underlying philosophy in the definition this way: “With the exception of children, who cannot consent, the intention is to distinguish between consensual acts or treatment and those in which abduction, force, fraud, deception or coercion are used or threatened.”<sup>152</sup> The Protocol requires signatory states to criminalize trafficking, to

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<sup>149</sup> Abolition of Forced Labour Convention (No. 105), June 25, 1957, 320 U.N.T.S. 291, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/AbolitionOfForcedLabourConvention.aspx>.

<sup>150</sup> *Id.*

<sup>151</sup> Convention Against Transnational Organized Crime and the Protocols Thereto, *supra* note 104, annex II, art. 3.

<sup>152</sup> *The Protocol to Prevent, Suppress and Punish Trafficking in Persons (Summary)*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, [http://web.archive.org/web/20060221155536/http://www.unodc.org/unodc/en/trafficking\\_protocol.html](http://web.archive.org/web/20060221155536/http://www.unodc.org/unodc/en/trafficking_protocol.html) (last visited Oct. 19, 2014).

provide assistance to trafficked persons, and to implement border controls to detect trafficking.<sup>153</sup>

Running throughout all these developments is the consistent theme of preventing involuntary servitude while allowing consenting adults to barter or sell their labor subject to minimum standards of labor conditions. The modern dilemma with sweatshops can be simply stated: a wage that would be substandard in one part of the world may be a boon to those in another locale. The need for standardizing labor conditions, the economics of global labor markets, and methods for making gains from globalization are mostly beyond the dimensions of this article. In the current context, however, it is worth noting that labor conditions in the United States did not become subject to standardized minima until the United States recognized that it was a single national labor market; global standardization of labor conditions should naturally follow when the world recognizes that it is a single global labor market.<sup>154</sup> Until that occurs, the possibility of exploitation remains a local phenomenon.

## **D. Enforcement**

### 1. United States

Despite the alarming rate of sex trafficking into the United States, there are few cases under the United States' forced labor statute, 18 U.S.C. § 1589. Most of the sex trafficking seems to have been attacked by local authorities under prostitution charges, while the victims are either offered asylum or deported back to home countries. Most of the federal cases have dealt with farm labor.

In *United States v. Kozminski*, “two mentally retarded men were found laboring on a Chelsea, Michigan dairy farm in poor health, in squalid conditions, and in relative isolation from the rest of society.”<sup>155</sup> The farm owners were

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<sup>153</sup> *Id.*

<sup>154</sup> There are many persons of good will who criticize the globalization of trade and free trade agreements as if it were trade itself that created substandard labor conditions. In the absence of trade agreements, however, labor conditions are the subject of only indirect manipulation because a developed nation has no mechanism for imposing labor conditions on a less developed nation. For example, if the United States disapproves of the conditions under which recreational shoes are made in Sri Lanka, the most it could do is impose a tariff on imported shoes. The tariff reduces the amount of profit to the manufacturer but does nothing to raise the standard of labor conditions unless the manufacturer chooses to enter into bilateral negotiations over the issue. On the other hand, if the United States has agreed to allow the shoes into the country without tariffs, now the United States will demand that the shoes be made under adequate conditions. This is precisely the scenario that played out under the interstate commerce clause of the United States, an experience which shows that the free trade approach requires a central entity with authority to legislate and enforce labor standards.

<sup>155</sup> 487 U.S. 931, 935 (1988).

charged under a prior version of § 1589 (18 U.S.C. § 1584) but were not shown to have used any physical coercion—they took advantage of the childlike mental condition of the two men causing them to obey an appearance of authority. The U.S. Supreme Court held that the statute required “that compulsion of services by the use or threatened use of physical or legal coercion is a necessary incident of a condition of involuntary servitude.”<sup>156</sup>

The immediate effect of the holding was that taking advantage of a person’s peculiar weaknesses would not amount to coercion. But further implications included that neither the taking of a victim’s passport nor threats of legal harm against a victim would suffice. The statute was then amended to include “threats” of “serious harm” to oneself or others as well as any scheme intended to make a victim believe that “another person would suffer serious harm or physical restraint.”

In *United States v. Bradley*, a couple from New Hampshire was convicted of forced labor for luring Jamaican laborers to the United States with promises of work at good wages and decent living conditions.<sup>157</sup> Rather, the laborers found themselves living in squalid circumstances, threatened with physical harm, deprived of their passports, and threatened with deportation despite their having valid work visas.

The defendants argued, and the court agreed,

that the phrase “serious harm,” as extended to non-physical coercion, creates a potential for jury misunderstanding as to the nature of the pressure that is proscribed. Taken literally, Congress’ “threats” and “scheme” language could be read to encompass conduct such as the employer’s “threat” not to pay for passage home if an employee left early. Depending upon the contract, surely such a “threat” could be a legitimate stance for the employer and not criminal conduct.<sup>158</sup>

But here the defendants had taken advantage of “known objective conditions that make the victim especially vulnerable to pressure (such as youth or immigrant status)” which meant that “consent” was obtained by forbidden means of coercion.<sup>159</sup>

A case illustrating that not all illegal bargains result in forced labor was presented by a corruption scandal when a Georgia county sheriff was found to have been offering jail inmates the choice of working as free labor on a private farm or on a county work crew.<sup>160</sup> Despite the illegality under state law, and

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<sup>156</sup> *Id.* at 952-53.

<sup>157</sup> 390 F.3d 145 (1st Cir. 2004).

<sup>158</sup> *Id.* at 151.

<sup>159</sup> *Id.* at 153.

<sup>160</sup> *See United States v. Peterson*, 627 F. Supp. 2d 1359 (M.D. Ga. 2008).

possibly under federal racketeering statutes, the trial court concluded that there was no coercion involved in the bargaining.

In contrast with individual incidents of coercion and the mere illegal bargaining of the county sheriff, a major class action case brought in California dealt with a much more elaborate and widespread operation.<sup>161</sup> Here is how the district court described the allegations in the class action complaint:

Enticed by promises of lucrative and exciting employment through a work program, a foreign worker speaks with recruiters about working in the United States. The recruiters explain the terms and costs of the work program, and the worker gets a large loan and voluntarily uses it to join the program.

After the worker joins the program and begins employment, the worker becomes unhappy. But if the worker quits, awaiting is a trip home with a massive amount of debt that will be impossible to repay. Working in the program is the only way to repay the loan. Is this forced labor? Fraud? No. It is a bargained-for exchange. Despite the worker's unhappiness, the terms and costs of the program were known, and the worker voluntarily obtained the loan to join the program. The worker's eventual discontent does not transform the valid contract with the recruiters into something illegal.

But what if after the worker made the payment, the recruiters alter the program terms and costs? The recruiters demand an additional payment of double what the worker has already paid. They threaten to kick the worker out of the program if additional payments aren't made, and they keep the initial payment even if the worker decides to leave to program. The worker is therefore faced with a choice of forfeiting the first payment, knowing that repayment of the debt may be impossible, or paying the additional money the recruiters now demand. Knowing that working in this program is the only way to repay the initial debt, the worker pays the additional sum and continues working in the program.

Once the worker begins employment, complaints about the payments and working conditions are met with continued threats of termination and deportation. Knowing that this job is the only way to repay the debt, the worker remains silent and continues working. Is this forced labor? Fraud?<sup>162</sup>

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<sup>161</sup> See *Nunag-Tanedo v. E. Baton Rouge Parish Sch. Bd.*, 790 F. Supp. 2d 1134 (C.D. Cal. 2011).

<sup>162</sup> *Id.* at 1137.



The district court held that the practices of these recruiters were fraudulent and amounted to forced labor through abuse of the legal process.

Similar charges have been brought in some high-profile cases that have subsequently been dropped by the government. In two related cases against Global Horizons, a major supplier of foreign workers in U.S. agriculture, it was alleged that hundreds of Thai workers had been offered transportation and work permits for the United States, for which they borrowed large sums of money. They were then not paid as promised for work on farms in Hawaii and Utah; their debts mounted with unpaid interest and their ability to return home diminished because they would then owe huge penalties for leaving early. The fraud involved in these cases could be held to be abuse of legal process under the concept of forced labor, but the criminal cases were dropped.<sup>163</sup> Meanwhile, the Equal Employment Opportunity Commission (EEOC) obtained a civil judgment for the same activities based on the concept of discrimination.<sup>164</sup>

Somewhat related to farm labor are a few cases involving domestic labor in which young girls are brought to the United States with promises of money and education but then placed in severe work conditions. Mere humiliation and threats may be sufficient to amount to coercion in the case of a young, unsophisticated foreigner.<sup>165</sup> In one case, the court described the government's evidence this way:

The government introduced a wealth of evidence detailing Paulin's deplorable treatment of Simone Celestin, a girl who Paulin had brought to the United States from Haiti when Celestin was fourteen years old in 1999. From 1999 to 2005, Celestin was forced to do Paulin's bidding. Although Paulin had a guest room at her house, she made Celestin sleep on a mattress on the living room floor. Celestin was required to wake up at 5 a.m. to begin her chores, which included cooking the family's meals and spending the day cleaning the house on her hands and knees. She was not allowed to sit with Paulin's family to eat the meals that she prepared. Instead, she had to wait until after they had finished and then go out to the back porch to eat whatever

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<sup>163</sup> See *Human Trafficking Case Against Executives Is Dismissed*, ASSOCIATED PRESS (July 21, 2012), <http://www.nytimes.com/2012/07/22/us/human-trafficking-case-dismissed-against-global-horizons-officials.html>; Malia Zimmerman, *Exclusive: Global Horizons CEO Speaks Out About Human Trafficking Allegations - and the Justice Department's Decision to Drop the Charges*, HAW. REP. (July 24, 2012), <http://www.hawaiireporter.com/exclusive-global-horizons-ceo-speaks-out-about-human-trafficking-allegations-and-the-justice-departments-decision-to-drop-the-charges/123>.

<sup>164</sup> See Jennifer Sinco Kelleher, *Global Horizons Found Liable for Thai Worker Abuse*, HUFFINGTON POST (Mar. 24, 2014, 11:44 PM), [http://www.huffingtonpost.com/2014/03/24/global-horizons-liable\\_n\\_5025179.html](http://www.huffingtonpost.com/2014/03/24/global-horizons-liable_n_5025179.html).

<sup>165</sup> *United States v. Sabhnani*, 599 F.3d 215 (2d Cir. 2010).

was left over. She was also forced to bathe outside, using a bucket of cold water. When Celestin objected to her treatment or otherwise "got fresh" with Paulin, Paulin beat her or threatened to send her back to Haiti. Paulin did not enroll Celestin in school. Celestin was not even allowed to leave the house unaccompanied or to make friends. Testimony from several witnesses painted this deplorable picture of Celestin's life, which she endured for six years. Finally, in 2005 Celestin was rescued from Paulin's control and taken to the Florida Immigrant Advocacy Center, which arranged for her to live in a shelter.<sup>166</sup>

Again, some degree of physical coercion reinforced the psychological coercion by which the defendant took advantage of an unsophisticated, frightened foreigner, resulting in a conviction for forced labor.

Turning to sex trafficking, there are, as noted, a paltry of cases under the federal statutes. In one bizarre case combining farm labor with sex, the husband and wife operators of a "home for the mentally ill" were charged with having mentally ill residents disrobe and perform sexual acts on videotape.<sup>167</sup> The defendants were actually a doctor and nurse who claimed "that the workers were residents of the Kaufman House Residential Care Treatment Center (the Kaufman House), an unlicensed group home for the mentally ill" and "maintained that these acts constituted legitimate psychotherapy for the residents' mental illnesses. Moreover, the Kaufmans billed Medicare and the residents' families for the therapy."<sup>168</sup> Needless to say, the court was not impressed with the defendants' argument that this form of therapy did not constitute "forced labor."<sup>169</sup>

In one case involving an "alternative lifestyle," one of several women involved in a sadomasochistic relationship featured on a website became so severely abused that she wanted to leave but was afraid to do so and was subjected to increasingly severe "punishment" for wanting to leave.<sup>170</sup> Here, interestingly, the defendant was found guilty of both sex trafficking and forced labor because he benefitted commercially from nonconsensual sexual activity.

It bears repeating that thousands of young women are trafficked into the United States every year for forced sexual activity, yet people are hardly prosecuted for this barbarous activity. The typical prosecution is a state prosecution for prostitution, in which the owners of the business are prosecuted while the victims, sometimes children, might even be treated initially as illegal

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<sup>166</sup> United States v. Paulin, 329 F. App'x 232 (11th Cir. 2009).

<sup>167</sup> United States v. Kaufman, 546 F.3d 1242 (10th Cir. 2008).

<sup>168</sup> *Id.* at 1246.

<sup>169</sup> *Id.* at 1261-62 (the sex abuse constituted part of the coercion in obtaining forced labor on the farm).

<sup>170</sup> United States v. Marcus, 628 F.3d 36 (2d Cir. 2010).

aliens.<sup>171</sup> There were ten young women of that description detained after a raid in Salt Lake City, Utah in December 2012, and it is not clear whether they will be deported or placed in protective shelters for other disposition.<sup>172</sup>

## 2. Australia

Australia has chosen to treat forced labor under the heading of slavery and declares that it is both unlawful and abolished.<sup>173</sup> This gives rise to a slight semantic difficulty—if something does not exist, then it is difficult to punish someone for it. In a classic example of sex trafficking, the High Court of Australia held that “contract workers” from Thailand were held in a condition of “slavery.”<sup>174</sup> The Court’s statement of facts, which reads like a textbook on sex trafficking, is roughly as follows:

The respondent was the owner of a licensed brothel in Australia. The five complainants were Thai nationals. They had all previously worked in the sex industry. They became “contract workers.” They were recruited in Thailand and consented to come to Australia to work as

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<sup>171</sup> See *Human Trafficking*, POLARIS, <http://www.polarisproject.org/human-trafficking/overview> (last visited Nov. 12, 2014). If the federal government becomes involved, the Trafficking Victim Protection Act may provide immigration relief, although removal back to the home country is still likely. *Fact Sheet: Sex Trafficking*, OFFICE OF REFUGEE RESETTLEMENT (Aug. 2, 2012), <http://www.acf.hhs.gov/programs/orr/resource/fact-sheet-sex-trafficking-english>.

<sup>172</sup> Amy J. O’Donoghue, *3 Men Arrested in Alleged Sex Trafficking Ring*, KSL.COM (Dec. 1, 2012), <http://www.ksl.com/?nid=148&sid=23202904>.

<sup>173</sup> The Australian Criminal Code defines slavery as “the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person.” *Criminal Code Act* (Cth) div 270.1. “Slavery remains unlawful and its abolition is maintained, despite the repeal by the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* of Imperial Acts relating to slavery.” *Id.*, div 270.2. Any person who

- (1) . . . whether within or outside Australia, intentionally:
    - (a) possesses a slave or exercises over a slave any of the other powers attaching to the right of ownership; or
    - (b) engages in slave trading; or
    - (c) enters into any commercial transaction involving a slave; or
    - (d) exercises control or direction over, or provides finance for:
      - (i) any act of slave trading; or
      - (ii) any commercial transaction involving a slave;
- is guilty of an offence.

*Id.*, div 270.3.

<sup>174</sup> *R v Tang*, [2008] HCA 39, available at <http://www.austlii.edu.au/au/cases/cth/HCA/2008/39.html>.

prostitutes, on the understanding that, once they had paid off the contract “debt” of \$45,000, they would have the opportunity to earn money on their own account as prostitutes. They entered Australia on visas that were obtained illegally and, upon their arrival, they were financially deprived and vulnerable. The respondent agreed to accept four of the complainants as contract workers in her brothel and to take up a 70% interest in a syndicate which would “purchase” the women. While under contract, each complainant was to work in the respondent’s brothel six days per week, serving up to 900 customers over a period of four to six months.

While on contract, the complainants’ passports and return airfares were retained by the respondent. The complainants earned nothing in cash while under contract except that, by working on the seventh, “free,” day each week, they could keep the \$50 per customer that would, during the rest of the week, go to offset their contract debts.<sup>175</sup>

The Court explained that the condition of slavery was no longer a concept of legal title but a line of behavior in which one person treated another “person over whom any or all of the powers attaching to the right of ownership were exercised.”<sup>176</sup> In this situation, “[t]he critical powers the exercise of which was disclosed . . . by the evidence were the power to make the complainants an object of purchase, the capacity, for the duration of the contracts, to use the complainants and their labour in a substantially unrestricted manner, the power to control and restrict their movements, and the power to use their services without commensurate compensation.”<sup>177</sup> The Court explained further that although the history of slavery coincided with concepts of legal ownership, it was no longer necessary that the person enslaved be considered a “chattel,” for it was enough that the person was treated as an object available for purchase. Nor was the consent of the enslaved person relevant: “[T]he commodification of an individual by treating him or her as an object of sale and purchase [would] involve the exercise of a power attaching to a right of ownership.”<sup>178</sup>

### 3. European Convention Cases

In another domestic abuse case involving exploitation of a foreign nanny, France found the employer couple liable in damages but acquitted them of criminal charges.<sup>179</sup> The European Court of Human Rights (ECHR) occasionally

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<sup>175</sup> See *id.* paras 6-14.

<sup>176</sup> *Id.* para 24.

<sup>177</sup> *Id.* para 50.

<sup>178</sup> *Id.* para 35.

<sup>179</sup> *Siliadin v. France*, 2005-VII Eur. Ct. H.R. 333.

will consider a case brought by an individual against a State Party on the grounds that it failed to protect the applicant's rights under the Convention. In this case, France was charged with failing to protect the worker adequately from involuntary servitude.

The facts of the French case display a typical situation: a young foreign girl was brought to the home to be a nanny but was found working seven days a week with only eight hours to sleep, doing all the household chores, being paid nothing except an occasional pittance, and sleeping on a mattress in the baby's room so that she could wake up in the night to care for him. The couple kept her passport so that even when she finally fled, her uncle advised her to return to the home. She eventually escaped and complained to the police, who raided the home and brought charges against the couple.

Under Article 4 of the European Covenant of Human Rights (Covenant),

- (a) no one shall be held in slavery or servitude; and
- (b) no one shall be required to perform forced or compulsory labor.

The ECHR agreed with the complainant "that the exploitation to which she had been subjected while a minor amounted to a failure by the State [France] to comply with its positive obligation under Articles 1 and 4 of the Convention, taken together, to put in place adequate criminal law provisions to prevent and effectively punish the perpetrators of those acts."<sup>180</sup> The Court referred to prior cases in which it had held that the Convention places an affirmative obligation on State Parties to protect against slavery and, in particular, to care for vulnerable young people:

The Court reiterates that Article 4 enshrines one of the fundamental values of democratic societies. In those circumstances, the Court considers that, in accordance with contemporary norms and trends in this field, the member States' positive obligations under Article 4 of the Convention must be seen as requiring the penalisation and effective prosecution of any act aimed at maintaining a person in such a situation.<sup>181</sup>

Given that she was working seven days a week for fifteen hours a day, unpaid, and not in possession of her passport, the Court had little difficulty in finding that the conditions of her "employment" amounted to slavery.

In a separate, particularly tragic case of sex trafficking, the European Court dealt with the suicide-death of a young Russian girl who took her life after being held to work in a "cabaret" in Cyprus.<sup>182</sup> She had fled the confines of her

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<sup>180</sup> *Id.* para 65.

<sup>181</sup> *Id.* para 112.

<sup>182</sup> *Rantsev v. Cyprus and Russia*, App. No. 25965/04, 51 Eur. H.R. Rep. 1 (2010).

apartment and was found by the brother of the cabaret owner, who took her to a police station. The police failed to detain her because she had broken no law and returned her to the owner's premises. Somewhat later, she was found dead on the street below her open window.

The girl's father charged both Russian and Cypriot authorities with failure to protect her life as well as failure to prevent her enslavement. With regard to the first charge, the Court held that the Convention

enjoin[ed] the state not only to refrain from the intentional and unlawful taking of life but also to take appropriate steps to safeguard the lives of those within its jurisdiction . . . . For the Court to find a violation of the positive obligation to protect life, it would have to be established that the authorities had known or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they had failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. In all the circumstances of the instant case, there had been no violation of the Cypriot authorities' positive obligation to protect the first applicant's right to life under art[icle] 2 of the Convention.<sup>183</sup>

But with respect to the claim under Article 4, the Court held that the Cypriot authorities had sufficient notice of the girl's circumstances and therefore should have launched an investigation into the possibility that she had been trafficked and enslaved. The Court took notice that "artiste" visas had been used for sex trafficking in a number of instances, and that the practice should have led to an inquiry when she was brought to the police station. The Court held that neither Cyprus nor Russia had failed in its obligation to protect her right to life and that Russia was not obligated to "take operational measures" against trafficking outside its borders, but that Cyprus failed in its obligations to investigate her death and to protect her against trafficking and that Russia had failed to take sufficient steps to investigate the alleged trafficking.<sup>184</sup>

In these and other cases, the ECHR has imposed affirmative obligations on the part of State Parties to protect vulnerable young foreigners against enslavement. Although the Covenant does not explicitly cover sex trafficking, it is clear that offering a young person for sale as a sex object when she has no ability to exercise genuine volition amounts to enslavement. As the Australian

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<sup>183</sup> *Id.* paras 218-23.

<sup>184</sup> *Id.* (following holdings).

court put it, commodification of a person is the modern equivalent of slavery without regard to initial consent or legal constructs of ownership.<sup>185</sup>

### **E. Sex Tourism**

The horrific circumstances of children engaged in commercial sex began to catch the world's attention in the 1990s following the demise of the Soviet Union and the shifting economic arrangements of "globalization." Cambodia and Thailand in particular became destinations for sex tourists, many of whom were interested in younger and younger targets of opportunity. The economics of those countries and their neighbors made it possible for purveyors to "purchase" children from their families for nominal amounts and then employ those children in providing services to sex tourists. The International Labor Organization led the way in developing Standards of Good Practice for tour companies. International organizations then moved to find other ways of combating the practice.

The U.S. Criminal Code contains a number of provisions that can be brought to bear on the commercial sex trade. We have already seen some aspects of the provisions, 18 U.S.C. §§ 1581-1596, in the chapter dealing with forced labor. The chapter dealing with "sexual abuse," 18 U.S.C. §§ 2241-2248, criminalizes nonconsensual sex within federal territories or the extraterritorial jurisdiction of the United States. The chapter on "sexual exploitation and other abuse of children," 18 U.S.C. §§ 2251-2260A, criminalizes sexual behavior with children either within the special jurisdiction of the United States or through use of the channels or instrumentalities of interstate commerce.

One approach to dealing with the phenomenon of commercial sex exploitation is to reduce the demand by criminalizing the patron. In the leading case dealing with the U.S. statutes, the Eleventh Circuit affirmed a conviction of a man who "merely" decided to have paid sex with a young boy in Cambodia.<sup>186</sup> "Traveling to a foreign country and paying a child to engage in sex acts are indispensable ingredients of the crime to which Clark pled guilty. . . . Congress did not exceed its power 'to regulate Commerce with foreign Nations' in criminalizing commercial sex acts with minors committed by U.S. citizens abroad."<sup>187</sup>

### **F. International Cooperation Addressed to Human Trafficking**

The United Nations Convention against Transnational Organized Crime and its accompanying Protocol to Prevent, Suppress and Punish Trafficking in

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<sup>185</sup> *Siliadin*, 2005-VII Eur. Ct. H.R. 333.

<sup>186</sup> *United States v. Clark*, 435 F.3d 1100 (11th Cir. 2006).

<sup>187</sup> *Id.* at 1116-17 (citing U.S. CONST. art. I, § 8, cl. 3).

Persons, Especially Women and Children, went into force in 2003. The United States ratified them with exceptions in 2005.<sup>188</sup> The U.N. Office on Drugs and

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<sup>188</sup> The United States' reservations are as follows:

- (1) The United States of America reserves the right not to apply in part the obligation set forth in Article 15, paragraph 1 (b), of the United Nations Convention Against Transnational Organized Crime with respect to the offenses established in the Trafficking Protocol. The United States does not provide for plenary jurisdiction over offenses that are committed on board ships flying its flag or aircraft registered under its laws. However, in a number of circumstances, U.S. law provides for jurisdiction over such offenses committed on board U.S.-flagged ships or aircraft registered under U.S. law. Accordingly, the United States will implement paragraph 1 (b) of the Convention to the extent provided for under its federal law.
- (2) The United States of America reserves the right to assume obligations under this Protocol in a manner consistent with its fundamental principles of federalism, pursuant to which both federal and state criminal laws must be considered in relation to conduct addressed in the Protocol. U.S. federal criminal law, which regulates conduct based on its effect on interstate or foreign commerce, or another federal interest, such as the Thirteen Amendment's prohibition of "slavery" and "involuntary servitude," serves as the principal legal regime within the United States for combating the conduct addressed in this Protocol, and is broadly effective for this purpose. Federal criminal law does not apply in the rare case where such criminal conduct does not so involve interstate or foreign commerce, or otherwise implicate another federal interest, such as the Thirteenth Amendment. There are a small number of conceivable situations involving such rare offenses of a purely local character where U.S. federal and state criminal law may not be entirely adequate to satisfy an obligation under the Protocol. The United States of America therefore reserves to the obligations set forth in the Protocol to the extent they address [sic] conduct which would fall within this narrow category of highly localized activity. This reservation does not affect in any respect the ability of the United States to provide international cooperation to other Parties as contemplated in the Protocol.
- (3) In accordance with Article 15, paragraph 3, the United States of America declares that it does not consider itself bound by the obligation set forth in Article 15, paragraph 2.

Convention Against Transnational Organized Crime, Declarations and Reservations, UNITED NATIONS OFFICE ON DRUGS & CRIME (Sept. 26, 2008), <http://www.unodc.org/unodc/en/treaties/CTOC/countrylist.html>.



Crime (UNODC) describes the definition of human trafficking as having three components: an act, means, and purpose.

- (a) The act can consist of recruitment, transportation, harboring, or receipt of persons;
- (b) the means may be “[t]hreat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim;”
- (c) purpose of exploitation includes “prostitution of others, sexual exploitation, forced labour, slavery or similar practices and the removal of organs.”<sup>189</sup>

The Protocol requires that signatory nations criminalize human trafficking.<sup>190</sup> Although UNODC recognizes that the definitions will need to be adapted to domestic justice systems, it expects definitions to “give effect to the concepts contained in the Protocol.”<sup>191</sup>

The Protocol adds obligations to criminalize attempt, complicity, and “organizing or directing others to commit trafficking.”<sup>192</sup> Thus, the Protocol edges in the direction of adopting an international concept of conspiracy law but is not quite there. Given the struggles of the international criminal tribunals with the concept of joint criminal enterprise, the inability to adopt international conspiracy law could become a significant barrier to effective prosecutorial efforts, especially when combined with the gap discussed in the next paragraph. The complicity requirement only applies to one who is “participating as an accomplice in an

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<sup>189</sup> *Human Trafficking*, UNITED NATIONS OFFICE OF DRUG & CRIME, <http://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html> (last visited Oct. 19, 2014).

<sup>190</sup> See Palermo Protocol, *supra* note 104, art. 5.

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.
2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:
  - (a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;
  - (b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and
  - (c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

*Id.*

<sup>191</sup> *Human Trafficking*, *supra* note 189.

<sup>192</sup> *Id.*

offense.”<sup>193</sup> If a ringleader, such as a sex trafficking drug lord, is not personally involved in or knowledgeable about any specific incident, then some courts may not find him to be an accomplice.

Meanwhile, the most obvious gap in the Protocol is lack of *aut dedere aut judicare*: the obligation to extradite or prosecute an offender. This obligation is a platform on which many other international law enforcement cooperative efforts have rested. All the thirteen terrorism conventions, e.g., air piracy, explosives, terrorist financing, contain this obligation. So, for example, when an airplane hijacker escapes and is tracked to a third country with no direct connection to the incident itself, that country has a treaty obligation to prosecute or extradite the person to an interested country. Granted that this obligation is no more enforceable than other treaty obligations, it nevertheless creates a bargaining position in diplomatic circles that is stronger than the mere statement that “you should do the right thing.” Without the treaty obligation, the host nation might say “we fully support your efforts in law enforcement but we cannot assert jurisdiction over this offense because we must respect the sovereignty of our sister nations and so cannot criminalize this act that occurred outside our borders.”

Here is how the argument goes in this situation. Say that Mongladesia is a country with a poor economy but has thus far managed to avoid some of the worst of the drug trade and prostitution that plagues some of its neighbors. To do so, it is heavily dependent on aid from both the United States and China. The United States finds that a Chinese citizen who is a mainstay of the sex trade between Thailand and Germany is residing in Mongladesia. What is poor Mongladesia to do? If the United States requested extradition, Mongladesia could plausibly say to the United States that it does not wish to interfere in the affairs of either Thailand or Germany. Even if Germany requests extradition, Mongladesia has an arguable position with respect to the sovereignty of Thailand because that is where the trafficking originates. If all these states were parties to a convention with an *aut dedere aut judicare* clause, then these arguments carry no weight and Mongladesia would be forced to publicly confront the reality of its economic dependence on China.

Now add the lack of conspiracy law concepts to the lack of *aut dedere aut judicare*. Combining these two limitations means that a state choosing not to become involved in controversy or actively wishing to harbor a trafficking operation can effectively shield the organizer of human trafficking from legal systems of other nations. Thus, a state that takes human trafficking seriously would be forced to choose between doing nothing or unlawfully abducting the accused organizer.

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<sup>193</sup> *Id.*

## V. PIRACY—CRIME AND PUNISHMENT

By customary international law as well as conventions, a pirate is subject to punishment by any nation who can capture him or her.<sup>194</sup> Universal jurisdiction over crimes *erga omnes* means that even a landlocked nation may punish an act on the high seas or in unclaimed airspace.

Piracy has been condemned as a matter of international law at least since the early 1700s when commercial operations went to sea. The images of swashbuckling rogues in popular literature and film are somewhat at odds with the hard realities of piracy. In the eighteenth century, pirates were hanged summarily in Caribbean ports by both British and Spanish governors. Today, the ragtag Somali fishermen-turned-pirates are part objects of sympathy for their hard economic lives and part objects of rage for their callous attitude toward life.

The critical issues are the extent to which nations have the power, or obligation, to use military force or judicial prosecutions against pirates operating on the open seas, the extent to which political motivations play a role in defining the criminality of piracy, and the appropriate responses by the shipping industry, i.e., whether to arm civilian ships, make ransom payments, etc.

### A. The Setting

Piracy was virtually stamped out in the twentieth century as worldwide shipping was conducted in the shadow of two world wars and then the Cold War. During that time, there was little occasion for private actors to be boarding ships and no market for captured goods. With the demise of the Soviet Union and the harshness of economic conditions in many parts of the world, the “cork popped out of the bottle” on the seas and in simmering cultural hotspots such as Bosnia and Rwanda.

Statistics on maritime piracy are not easily obtained. As of February 2011, some reports had as many as fifty vessels and over 800 persons being held for ransom in Somalia. In 2009, there were over 400 incidents, most of which were in the Gulf of Aden off the coast of Somalia.<sup>195</sup> The total impact on shipping

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<sup>194</sup> The “her” was rather rare but there were a handful of female pirates during the “Golden Age of Piracy,” the two most notorious examples being Anne Bonny and Mary Read. Summary execution of pirates probably would be considered illegal under international law today because of guarantees of at least minimal due process, just as summary execution of a spy once removed from the battlefield might require some minimal hearing.

<sup>195</sup> Nancy Knudsen, *IMB’s Piracy Hotspots from 2009*, SAIL-WORLD (Feb. 16, 2010), <http://www.sail-world.com/Cruising/pda.cfm?Nid=66507&RequestTimeOut=180>. International Maritime Bureau reported 153 vessels boarded in 2009, 1052 crew taken hostage, 68 injured, and 8 killed. *Id.*

is in the range of \$15 billion. Ransom payments tend to run about \$2 million for release of the ship and crew.

Piracy found a stronghold in Somalia for several reasons. It has been a failed state with no effective government since 1991. The CIA World Factbook describes the history of the country this way:

Britain withdrew from British Somaliland in 1960 to allow its protectorate to join with Italian Somaliland and form the new nation of Somalia. In 1969, a coup headed by Mohamed Siad Barre ushered in an authoritarian socialist rule characterized by the persecution, jailing and torture of political opponents and dissidents. After the regime's collapse early in 1991, Somalia descended into turmoil, factional fighting, and anarchy.<sup>196</sup>

Although parts of the country continued to have a reasonable agricultural output, the fishing industry succumbed to a variety of pressures. The Gulf of Aden serves as a chokepoint adjacent to the Suez Canal, the primary sea route between Asia and Europe, and there are no effective naval forces indigenous to the region. The lure of robbery on the high seas attracted many new adherents to the world of piracy.

In the modern high-tech era, it is easy to forget that shipment by sea is still an important aspect of the world economy. Some estimates say that 90% of world trade commodities, such as raw materials, food, and manufactured goods, move by sea for at least a significant portion of their commercial transport. The leading players in combating piracy are the International Maritime Bureau, an offshoot of the International Chamber of Commerce, Lloyd's of London, the leading insurance broker for maritime trade, and the International Chamber of Shipping (ICS), which has stated that

The protection of shipping from piracy, regardless of flag or the nationality of the crew, is a clear and legitimate responsibility for governments under the United Nations Convention on the Law of the Sea. Historically, as now embodied in international law, a primary role of navies has always been to protect merchant shipping and to keep the sea lanes open to trade. The shipping industry is therefore feeling deepening frustration at the seeming impotence of the international community to address the continuing piracy crisis in the Indian Ocean.<sup>197</sup>

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<sup>196</sup> *The World FactBook: Somalia*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/so.html> (last visited Sept. 25, 2014).

<sup>197</sup> 2010 ANNUAL REVIEW, INTERNATIONAL CHAMBER OF SHIPPING, *available at* [http://www.ics-shipping.org/ics-isfcirculars/ics-isfcirculars10/ICSISF\\_10\\_21%20%202010%20ANNUAL%20REVIEW%20-%20ADVANCE%20COPY.pdf](http://www.ics-shipping.org/ics-isfcirculars/ics-isfcirculars10/ICSISF_10_21%20%202010%20ANNUAL%20REVIEW%20-%20ADVANCE%20COPY.pdf).

NATO, however, began coordinating anti-piracy operations in the Gulf of Aden and Indian Ocean in 2008. China soon followed suit. The United States has been in the Indian Ocean for decades but has been heavily engaged with Afghanistan and Iraq. It has begun devoting more resources to anti-piracy operations, resulting in some of the prosecutions discussed below.

All the world's major economic players are now engaged in policing the seas of the Indian Ocean, but that is still a vast area to patrol. With so many other military priorities, particularly various Middle East concerns, it is not realistic for all of the world's military fleets to concentrate solely on the Indian Ocean. Nevertheless, Somali piracy has declined precipitously since its peak in 2008-10. According to the International Chamber of Shipping,

Somali pirates are still active and retain the capacity to attack ships far into the Indian Ocean. In 2013 there were at least 13 reported incidents including two hijackings. It must also not be forgotten that many seafarers are still being held hostage, some having been in captivity for over three years.<sup>198</sup>

Modern piracy also presents a dilemma because of a change in strategy from the days of Blackbeard. By contrast to the eighteenth century pirate, who either killed or recruited the crew and sold the cargo, the modern pirate may hold the captured ships and crews for ransom. Ship owners typically will pay the ransom, and while some observers have objected that this encourages further kidnapping, it is difficult to tell the ship owner to leave his or her crew in the hands of pirates. It has even been noted that making ransom payments could be illegal if it were shown that the money was going to support terrorist activity or, going to a designated FTO.<sup>199</sup> If Al Shabaab, a designated FTO, is known to be receiving any portion of ransom proceeds, then the payment would almost certainly be illegal under 18 U.S.C. § 2339B.<sup>200</sup>

In fairness, to round out the picture of Somali piracy, it must be noted that the collapse of Somalia as a nation coincided with an influx of illegal fishing practices into the waters off the coast. The devastation to the fishing grounds contributed to the taking up of pirate activity by the former Somali fishermen. Some observers report now that, after the peak of piracy in 2010, the illegal

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<sup>198</sup> 2014 ANNUAL REVIEW, INTERNATIONAL CHAMBER OF SHIPPING, *available at* <http://www.ics-shipping.org/docs/default-source/Annual-Review-2014/ics-annual-review-2014.pdf?sfvrsn=14>.

<sup>199</sup> INCE & CO., INCISIVE RISK: PIRACY OFF ADEN AND SOMALIA: AN OVERVIEW OF LEGAL ISSUES FOR THE INSURANCE INDUSTRY 2 (2008), *available at* <http://incelaw.com/en/documents/pdf-library/shipping/piracy-off-aden-and-somalia-an-overview-of-legal-issues-for-the-insurance-industry.pdf>.

<sup>200</sup> Providing cash to a designated FTO with knowledge of either the designation or the illegal activities of the organization is a violation regardless of the motivation of the supplier.

fishing ships are starting to be scared off and that the fisheries are returning to a more profitable status.

Indeed, the era of Somali piracy seems to be coming to a close:

Data released by the [U.S.] Navy showed 46 pirate attacks in the area in 2012, compared with 222 in all of 2011 and 239 in 2010. Nine of the piracy attempts in 2012 have been successful, according to the data, compared with 34 successful attacks in all of 2011 and 68 in 2010.<sup>201</sup>

The Piracy Reporting Center of the International Maritime Bureau (IMB) reports that “[p]iracy at sea reached its lowest levels in six years, with 264 attacks recorded worldwide in 2013, a forty percent drop since Somali piracy peaked in 2011. . . . Fifteen incidents were reported off Somalia in 2013, down from seventy-five in 2012, and 237 in 2011.”<sup>202</sup> The IMB goes on to speculate that “Somali pirates have been deterred by a combination of factors, including the key role of international navies, the hardening of vessels, the use of private armed security teams, and the stabilizing influence of Somalia’s central government.”<sup>203</sup>

It is even possible that the success of the pirates, combined with the patrolling naval vessels of other nations, have scared away the illegal fishing marauders which threatened Somali livelihoods so that the fishermen can now return to their former way of life. Or it may be that the pirates will simply relocate to Kenya or North Korea or more remote places in the East Indies.

## **B. The Law**

### 1. International Conventions

It is generally understood that all nations have an interest in suppressing attacks on shipping. The United Nations Convention on Law of the Sea (UNCLOS) is the definitive charter with regard to these issues. In Article 100, UNCLOS is headed, “Duty to cooperate in the repression of piracy.”<sup>204</sup> UNCLOS

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<sup>201</sup> *Piracy at Sea*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/subjects/p/piracy\\_at\\_sea/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/p/piracy_at_sea/index.html) (last visited Oct. 19, 2014).

<sup>202</sup> *Somali Pirate Clampdown Caused Drop in Global Piracy, IMB Reveals*, ICC COM. CRIME SERVS. (Jan. 15, 2014), <http://www.icc-ccs.org/news/904-somali-pirate-clampdown-caused-drop-in-global-piracy-imb-reveals>.

<sup>203</sup> *Id.*

<sup>204</sup> “All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.” United Nations Convention on the Law of the Sea art. 100, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

goes on to define a “pirate ship or aircraft”<sup>205</sup> and to authorize, but not compel, any nation to seize a pirate ship, arrest the persons in control, seize the property on board, and decide on both criminal penalties and disposition of property.<sup>206</sup>

A very important cautionary note in UNCLOS is that privateers are no longer considered legitimate—a seizure must be carried out by duly authorized and marked vessels.<sup>207</sup> This has proved to be a significant issue for those ship owners who felt that they were not being sufficiently protected by military vessels and wanted to hire private security firms. Starting in the twentieth century, it became commonplace to forbid armed guards on a merchant vessel. The primary reasons were fears of accidental shootings, especially around flammable cargo, and the ban on weapons by many nations where ships might be docked or transiting. For example, Egypt has strictly prohibited weapons on board ships in the Suez Canal, but weapons can be offloaded at the entrance and flown to the other end of the canal. In recent years, the policy against armed guards has been reversed by most flag nations; the United States even goes so far as to recommend the employment of private security on merchant vessels.

It is one thing, however, to deploy armed personnel on board the merchant vessel and quite another to deploy armed vessels themselves. The latter would be akin to the “privateers” of the eighteenth and nineteenth centuries, some of whom were important elements of the national defense for the United States as well as of that of some European nations, much to the chagrin of each other. Although the U.S. Constitution authorizes Congress to “grant letters of marque

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A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

*Id.* art. 103.  
206

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith

*Id.* art. 105.  
207

A seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

*Id.* art. 107.

and reprisal,<sup>208</sup> and the practice was important through the War of 1812, no privateers have been authorized by the United States since then.

During the Crimean War, Britain and France agreed to respect neutral shipping. At the close of the war, many nations, excluding the United States, signed the Declaration of Paris banning the practice of privateering. The principal reasons for disbanding the practice were, as one might well imagine, that it proved to be impossible for governments to control the activities of those whom they authorized to act on their behalf. This position was clarified and reinforced fifty years later in Hague Convention VII.<sup>209</sup>

Under the Hague Convention, it may be illegal for the United States to authorize a private security company to operate an armed vessel at sea. However, there is no reason to believe that it would be illegal for a shipping company to employ such an operation. With regard to the first point, I say “may be illegal” because the use of an armed vessel to protect a merchant vessel from pirates would not be precisely the same as converting a merchant ship into a “warship.” In this instance, there are no belligerent hostilities in which the ship would be engaged—it would be a quasi-governmental operation against a private set of actors, not a situation in which nation-states were in a state of “armed conflict” or “hostilities.”

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<sup>208</sup> U.S. CONST. art. 1, § 8, cl. 11.

<sup>209</sup>

Art. 1

A merchant ship converted into a war-ship cannot have the rights and duties accruing to such vessels unless it is placed under the direct authority, immediate control, and responsibility of the Power whose flag it flies.

Art. 2

Merchant ships converted into war-ships must bear the external marks which distinguish the war-ships of their nationality.

Art. 3.

The commander must be in the service of the State and duly commissioned by the competent authorities. His name must figure on the list of the officers of the fighting fleet.

Art. 4.

The crew must be subject to military discipline.

Art. 5.

Every merchant ship converted into a war-ship must observe in its operations the laws and customs of war.

Art. 6.

A belligerent who converts a merchant ship into a war-ship must, as soon as possible, announce such conversion in the list of war-ships.

Convention (VII) Relating to the Conversion of Merchant Ships into War-Ships, arts. 1-6, Oct. 18, 1907, 205 C.T.S. 319.



## 2. United States Jurisdiction and Definitions

The second half of the opening line of the Marine Hymn, “to the shores of Tripoli,” memorializes the incursion of U.S. forces onto the shores of a sovereign nation, now Libya, to root out the pirates of the Barbary Coast at their bases near Tripoli. That episode stands for the proposition that it is appropriate for any nation to intrude on the turf of another nation that is unwilling or unable to eliminate safe harbors for pirates.

The next question then becomes what is a pirate, or an act of piracy? The definition in the Convention on Law of the Sea<sup>210</sup> arguably applies only to completed acts of plunder, which seems to have been the accepted understanding in the eighteenth and nineteenth centuries. International law generally contains no crime such conspiracy and only occasional prohibitions on attempt. The UNCLOS definition applies to “acts of violence” or “depreddation,” so it could be argued that an attempt is not included. Earlier international law contemplated that attempted piracy would not count, apparently because it would demonstrate such ineptitude on the part of the wannabe perpetrator that it was not worth the state’s trouble to deal with the bundling oaf. The definition does include the offense of inciting or facilitating, but that would appear to be relevant only in the event of a completed act of violence or depreddation.

The United States’ implementation of piracy law is found in one simple definition,<sup>211</sup> which is then further elaborated for some specific situations without changing the basic definition of piracy.<sup>212</sup>

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<sup>210</sup> Piracy consists of any of the following acts:

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

UNCLOS, *supra* note 204, art. 101.

<sup>211</sup> 18 U.S.C. § 1651 (2012) (“Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.”).

<sup>212</sup> Separate statutes deal with U.S. citizens (§ 1652), aliens (§ 1653), and other details such as mutiny, plunder, disposition of stolen property, even robbery ashore by a pirate (§ 1661).

This provision makes the crime of piracy specifically dependent on whatever is “defined by the law of nations.” That gave rise to some very sophisticated arguments in the first two cases, in which U.S. Navy personnel captured Somali pirates and brought them to the United States for trial.<sup>213</sup> The *U.S.S. Nicholas* was patrolling at night with running lights intended to disguise it as a merchant vessel. Three would-be pirates departed from their mother ship, advanced on the *Nicholas*, and opened fire. After a brief firefight in which they apparently realized their mistake, the pirates attempted to flee but were captured along with their cohorts on the mother ship.

The defendants did not seriously contest universal jurisdiction over acts of piracy, but they argued that universal jurisdiction would apply only to those acts that were either considered piracy as of 1787 when the “law of nations” was written into the U.S. Constitution or as of 1819 when this statute was adopted. The first statute on the subject, enacted by Congress in 1790, was not read by the Supreme Court to embrace universal jurisdiction because it did not explicitly “authorize the courts of the union to inflict its penalties on persons who are not citizens of the United States, nor sailing under their flag, nor offending particularly against them.”<sup>214</sup> In other words, the original statute was read not to embrace universal jurisdiction. The statute could have been based either on Congress’s power under the Commerce Clause or on its power to “define offenses against the law of nations,” and the statute referred to piracy as a crime against the United States. Therefore, the Supreme Court read the statute as applying only to “offences against the United States, not offences against the human race.”<sup>215</sup> Congress acted promptly to broaden the definition to what it remains today, merely incorporating “the crime of piracy as defined by the law of nations.”

Thus, the question becomes, what is the definition of piracy under the law of nations? The history of the statute adequately disposed of any argument regarding universal jurisdiction, but it left open the following very subtle argument: because the Define and Punish Clause of the Constitution spoke of three categories—“Piracies, Felonies committed on the high Seas, and Offenses against the Law of Nations”—it necessarily distinguished piracy from offenses against the law of nations. As soon as Congress adopted the 1819 statute, the Court in the 1820 case of *United States v. Smith* considered the issue of what constituted piracy under the law of nations.<sup>216</sup> In an opinion by Justice Story, the Court stated

There is scarcely a writer on the law of nations, who does not allude to piracy as a crime of a settled and determinate nature; and whatever may be the diversity of definitions, in other

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<sup>213</sup> *United States v. Dire*, 680 F.3d 446 (4th Cir. 2011).

<sup>214</sup> *United States v. Palmer*, 16 U.S. 610, 631 (1818).

<sup>215</sup> *Id.*

<sup>216</sup> 18 U.S. 153 (1820).

respects, all writers concur, in holding, that robbery, or forcible depredations' upon the sea, *animus furandi*, is piracy.<sup>217</sup>

The defendants in *Smith* may have been arguing that, at the time of their capture, they were not actively engaged in plunder or robbery. But Justice Story was quite clear that prior taking of property with intent to steal, *animus furandi*, would be sufficient to establish the crime of piracy regardless of when or where the pirate was captured. In other words, the crime of piracy was similar to an act of war, making the person susceptible to the power of any state because of his status as a pirate.

The Somali defendants used these concepts to assert that piracy "as defined by the law of nations" meant a completed act because international law in 1819 did not make an attempt a crime. The Fourth Circuit accepted the U.S. government's response that the law of nations could evolve over time. Citing both the Geneva Convention on the High Seas of 1958 and UNCLOS (quoted above), the court found that acts of violence on the high seas were within the modern definition regardless of whether they resulted in a completed act of robbery.<sup>218</sup>

But can evolution of the law of nations affect the meaning of a previously adopted U.S. statute, especially a criminal statute as to which due process and the Ex Post Facto Clause apply? The Fourth Circuit found this question foreclosed by *Sosa v. Alvarez-Machain*,<sup>219</sup> in which the Supreme Court held that the Alien Tort Statute's<sup>220</sup> incorporation of the law of nations was intended to incorporate whatever torts would arise in the course of international affairs. To the arguments about due process, and that there are no federal common law crimes, the Court merely responded that the law of nations had included all acts of violence on the high seas for decades so that the defendants were acting unlawfully at the time of their actions.<sup>221</sup> Thus, the law of the United States is quite clear that attempted acts of violence on the high seas fall within the definition of piracy for purposes of universal jurisdiction.

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<sup>217</sup> *Id.* at 161. Justice Story, in a massive display of eighteenth century learning, quoted extensively in Latin from Grotius and Bynkershoek, turned to English for Azuni and Lord Bacon, and then to French for Martens, before going back to English and Latin for numerous other writers. Story concluded with this modest disclaimer:

The foregoing collection of doctrines, extracted from writers on the civil law, the law of nations, the maritime law, and the common law, in the most ample manner confirms the opinion of the Court in the case in the text; and it is with great diffidence submitted to the learned reader to aid his future researches in a path, which, fortunately for us, it has not been hitherto necessary to explore with minute accuracy.

*Id.* at 163 n.h.

<sup>218</sup> 680 F.3d at 463.

<sup>219</sup> 542 U.S. 692 (2004).

<sup>220</sup> 28 U.S.C. § 1350 (1945).

<sup>221</sup> 680 F.3d at 469.

One point stands out in this recitation of events. The pressure brought to bear by commercial shipping through the International Maritime Bureau and the International Chamber of Shipping had an immediate and dramatic effect on the enforcement efforts of the world's major naval powers. If the same level of enforcement cooperation were brought to bear on issues such as human trafficking, especially the sex trade, it would be interesting to see what would result from the effort. With genuine pressure from the business communities, the world could become a much safer place.

## VI. INTERNATIONAL COOPERATION

The dominant theme of international law has been the inviolability of sovereignty. One nation does not intrude into the affairs of another. The law of war is designed to operate between and among nations. Only in the last couple of centuries have international norms come to bear on the wrongdoing of non-state actors. But the trend is inevitable and gaining in momentum.

As the above section on piracy demonstrates, when commercial interests are sufficiently threatened, they can bring substantial pressure to bear on governments to crack down on a criminal environment.

International action to control violence comes in two forms. First is cooperation among states, traditionally consisting of extradition of alleged offenders by one state for trial in another, and in recent years codified agreements to cooperate in the detection, apprehension, and prosecution of offenders have emerged. The second, and much more recent, phenomenon is collective action in the form of supranational tribunals, as the law of war has morphed into a body of international criminal law applying to individuals engaged in particularly appalling behavior. American law students will find familiar themes in the difference between trial of an offender under state law compared with definition and prosecution of crimes by the federal government. The next section will look at the international tribunals, but first this section will address the specifics of nations' international cooperation in dealing with the specific issue of terrorism.

As a formal matter, nations are supposed to cooperate in criminal investigations through such means as letters rogatory, but it is common knowledge that cooperation is wholly dependent on the self-interest of the state that has control of the information—witness the continued proliferation of “offshore” banking systems that allow the hiding of billions in stolen assets by corrupt regimes.<sup>222</sup> Even among friendly nations, there is a fear of releasing information

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<sup>222</sup> THE STOLEN ASSET RECOVERY INITIATIVE, <http://star.worldbank.org/star/> (last visited Oct. 19, 2014) (The World Bank and UNODC both work diligently—but with questionable efficacy—to recover assets stolen by corrupt regimes.); *see also The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to do About it*, ANTI-CORRUPTION RESEARCH NETWORK (Jan. 31, 2012), <http://corruptionresearchnetwork.org/acrn-news/articles/the-puppet-masters-how-the->

because the original possessor has no control over the information once it is in foreign hands. Indeed, the release itself may endanger the original sources of the information.<sup>223</sup>

### **A. Extradition and Universal Jurisdiction**

International conventions all proceed on the following structure: state parties agree to criminalize certain behavior, to cooperate in the apprehension of persons who commit that behavior, and then either to extradite or prosecute an accused person. Extradition arises only by operation of treaties and not by operation of general customary international law, although there is some reason to expect this to change under increasing pressure of international regimes.

One reason that it is important for states to agree to criminalize the defined behavior is that extradition hinges on the principle of “dual criminality,” which permits extradition only if the alleged conduct was criminal in both the requesting and requested (rendering) states. Dual criminality does not require identity of all elements of the crime or of procedures for adjudication: it requires only that the specific alleged conduct be criminal in both jurisdictions.

In this regard, there is at least one puzzling aspect of the British House of Lords’s handling of the request to extradite Pinochet to Spain.<sup>224</sup> Pinochet was the former military leader and head of state of Chile who was accused of torture and murder during his tenure. When he went to Great Britain for medical treatment, the Spanish government moved to extradite him to Spain to stand trial for criminal offenses committed in Chile, thus invoking the doctrine of universal jurisdiction. Spain and Britain were both parties to the International Convention on Torture, which required extradition to a requesting country and required all parties to criminalize torture. In 1988, Britain adopted a statute, section 134, designed to carry out the Convention by making it a crime under British law to commit torture in another country.<sup>225</sup>

The House of Lords put considerable effort into determining whether Pinochet was extraditable for offenses committed before the Convention and before the adoption of section 134. Lord Browne-Wilkinson stated: “No one has suggested that before section 134 came into effect torture committed outside the United Kingdom was a crime under United Kingdom law.”<sup>226</sup> Why not? Surely

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corrupt-use-legal-structures-to-hide-stolen-assets-and-what-to-do-about-it.

<sup>223</sup> I sat in a high-level conference of counter-terrorism prosecutors from four friendly nations where the ultimate conclusion was “If I have a good friend in another country, I may trust him or her with information. But otherwise, I keep myself to myself.”

<sup>224</sup> See *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte*, [1999] 2 W.L.R. 827 (H.L. 1999), available at <http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm>.

<sup>225</sup> Criminal Justice Act, 1988, c. 33 § 134 (Gr. Brit.).

<sup>226</sup> [1999] 2 W.L.R. 827.

torture and murder were crimes in the United Kingdom long before 1988. And dual criminality does not require that the requested nation assert extraterritorial jurisdiction over the alleged misconduct. Indeed, most often extradition will occur precisely because the crime was committed in another nation and the rendering nation will not claim jurisdiction over it. So what is the point of requiring that the rendering nation criminalize conduct committed outside its borders?

Perhaps the real issue with the *Pinochet* case was not so much whether the acts were criminal under English law, but whether the particular crime was triable by Spain. Murder and assault would not have been criminal under international *jus cogens*, a peremptory norm so fundamental that it is not subject to derogation by any nation. Thus, assault and murder would not be subject to universal jurisdiction; however, Torture, with a capital t, would be. The question, therefore, in the case was whether there was an offense of Torture in England on which Spain could then base its extradition request.

Viewed in this fashion, the efficacy of international conventions requires that a crime as defined by the Convention be either adopted into the criminal code of each nation or recognized as an offense that is against the universal norms of international law known as *jus cogens*. To rely on *jus cogens* and universal jurisdiction, it would be unnecessary for the rendering state to have a crime with many of the same elements because all states would have jurisdiction to enforce the universal norm.

International law essentially consists of three categories in ascending order of the degree to which a state is free to modify or ignore any particular rule: treaty law, customary law, and *jus cogens*.

Viewed from the perspective of international law as understood in the first part of the 20th century, *ius cogens* seemed hardly conceivable, since at that time the will of States was taken as paramount: States could, between themselves, abrogate any of the rules of customary international law. . . . After World War II the international community became conscious of the necessity for any legal order to be based on some consensus concerning fundamental values which were not at the disposal of the subjects of this legal order. . . . These obligations are seen as fundamentally different from those existing vis-a-vis another State in the field of diplomatic protection.<sup>227</sup>

Another factor in this area is the relatively recent application of international law to individuals:

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<sup>227</sup> Jochen A. Frowein, *Ius Cogens*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 66 (Rüdiger Wolfrum et al. eds., 3rd ed. 1997).

According to the traditional view, only states can be relevant actors in international law. States are sovereign and theoretically equal; it follows that one state cannot be impugned before the courts of another and, inexorably, that a head of state (or a former head of state) is entitled to claim absolute immunity from the jurisdiction of national courts, whether in criminal or civil proceedings.

Traditional international law has changed profoundly since the Second World War. An alternative view has emerged, positing that the international community comprises not only states, but individuals, peoples, inter-governmental organizations, non-governmental organizations, and corporations. These entities have emerged as international actors engaged in international discourse and, in some areas, they have been granted important rights, such as the right of individuals not to be tortured.<sup>228</sup>

The earliest aspects of international law applied to individuals were general proscriptions against piracy and slave trading, but these were crimes that for the most part were committed on the high seas. In some instances, when a pirate was captured, punished, or killed without capture, there was little need for concern with international law because the municipal law of the nation was sufficient to punish offenses against its own nationals or its own shipping.<sup>229</sup> From early days, however, Gentili and Grotius asserted that every nation could punish piracy, eventually leading to both a universalist position and a position that, when it offended, the pirate had committed an offense against each nation that operated on the high seas.<sup>230</sup>

After World War II, it became possible to speak of crimes against universally applicable international law—*jus cogens*—such as war crimes, crimes against humanity, genocide, and probably slavery and piracy.<sup>231</sup> “Violations of *jus cogens* will in most cases also be violations of obligations *erga omnes* [against all] . . . .” It has been recognized that in such cases third states may legitimately have recourse to some sort of response.<sup>232</sup>

The International Criminal Tribunal for Yugoslavia (ICTY or Tribunal) discussed some of this history in these terms:

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<sup>228</sup> Michael Byers, *The Law and Politics of the Pinochet Case*, 10 DUKE J. COMP. & INT’L L. 415, 417-18 (2000).

<sup>229</sup> United States v. Wiltburger, 18 U.S. 76 (1820); United States v. Klintock, 18 U.S. 144 (1820).

<sup>230</sup> Alfred P. Rubin, *Piracy*, in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1036-37 (1997).

<sup>231</sup> See, e.g., *Barcelona Traction, Light and Power Co., Ltd.* (Belg. v. Spain) 1970 I.C.J. 3 (Feb. 5).

<sup>232</sup> Frowein, *supra* note 227, at 68.

There exists today universal revulsion against torture: as a USA Court put it in *Filartiga v. Pena-Irala*, “the torturer has become, like the pirate and the slave trader before him, *hostis humani generis*, an enemy of all mankind.” This revulsion, as well as the importance States attach to the eradication of torture, has led to the cluster of treaty and customary rules on torture acquiring a particularly high status in the international normative system, a status similar to that of principles such as those prohibiting genocide, slavery, racial discrimination, aggression, the acquisition of territory by force and the forcible suppression of the right of peoples to self-determination.<sup>233</sup>

The ICTY may be overly inclusive in stating that racial discrimination and offenses against self-determination stand on the same footing as genocide or torture, but the Tribunal is probably correct in stating that torture has followed piracy and slaving in the international pantheon of universally proscribed offenses “against all mankind.” The significance of that statement is that the individual who violates the “law of nations” may then be prosecuted wherever found, without regard to where the offenses occurred. As the cases in the Yugoslavia and Rwanda tribunals have unfolded, genocide, war crimes, and atrocities have become the focal points of prosecutions by supranational bodies, a topic explored in the next section. These developments are leading to the question of whether terrorism itself may become such an internationally proscribed offense. If so, then a definition of the offense will be required.

## **B. Implementing the “Law of Nations”**

International criminal law is developing around offenses that are characterized by ongoing violence against civilians, particularly when it is “widespread or systematic.”

Customary international law consists of principles that are generally regarded as binding on all nations in their dealings with other nations, and consists of principles observed by all “civilized nations.” In essence, that body of “law” has arisen as a set of mutual understandings among nations, as “codified” by respected commentators. As a result, customary international law has been malleable and has been easily ignored by any nation choosing to do so.<sup>234</sup>

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<sup>233</sup> Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, para. 147 (Dec. 10 1998).

<sup>234</sup> ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2007).



That understanding, however, began to change when it was discovered that there are some criminal behaviors that ought to be enforceable against individuals regardless of their nationality or locus of action. These are the offenses *ergo omnes*, or offenses against all. They form part of the law *jus gentium*, which nations are not allowed to abrogate. Thus, no nation can authorize and validate piracy or slavery because they are offenses *ergo omnes* part of the law *jus gentium*.

Any nation capturing a pirate<sup>235</sup> or slaver<sup>236</sup> is entitled to enforce criminal sanctions against the perpetrator pursuant to the practice of universal jurisdiction.<sup>237</sup>

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<sup>235</sup> “Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.” 18 U.S.C. § 1651 (2012).

Whoever, being a citizen or subject of any foreign state, is found and taken on the sea making war upon the United States, or cruising against the vessels and property thereof, or of the citizens of the same, contrary to the provisions of any treaty existing between the United States and the state of which the offender is a citizen or subject, when by such treaty such acts are declared to be piracy, is a pirate, and shall be imprisoned for life.

18 U.S.C. § 1653 (2012).

<sup>236</sup>

(a) Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means—

- (1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;
- (2) by means of serious harm or threats of serious harm to that person or another person;
- (3) by means of the abuse or threatened abuse of law or legal process; . . .

shall be punished as provided under subsection (d).

...

(d) Whoever violates this section shall be fined under this title, imprisoned not more than 20 years, or both. If death results from a violation of this section, or if the violation includes kidnapping, an attempt to kidnap, aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title, imprisoned for any term of years or life, or both.

18 U.S.C. § 1589 (2012).

(a) . . . In addition to any domestic or extra-territorial jurisdiction otherwise provided by law, the courts of the United States have extra-territorial jurisdiction over any offense [of peonage or forced labor], if

When this concept applied to just piracy and slavery, there was very little controversy about it, because who would stand up for the rights of a pirate or slave trader? As of now, crimes under customary international law that are enforceable under the heading of “universal jurisdiction” generally are: slavery, piracy, violations of the law of war, genocide, and torture.<sup>238</sup> All that is needed now is recognition that any incident that is part of a “widespread or systematic” pattern of violence against civilians is an offense against the law of nations, and our definitional needs are met.

In other words, we need to be able to say to an alleged criminal, “You should have known the rules because the law against killing civilians is part of customary international law.” The Rome Statute of the International Criminal Court criminalizes behavior in four categories: aggression, genocide, crimes against humanity, or war crimes. Crimes against humanity consist of violence “as part of a widespread or systematic attack directed against any civilian population.” The Statute creates a supranational body with investigatory power within the borders of any state party but only through the “cooperation” and within the mechanisms of that state.<sup>239</sup> The cooperative approach recognized the sovereign status of nation-states and was central to obtaining ratification by many states that would not have consented to an external police force operating within its borders.

A significant issue revolves around the use of deadly force in the pursuit or pre-capture stages. U.S. intelligence managed to pinpoint the identity and location of Abu Ali, the “chief suspect” in the USS Cole bombing, to the point of being able to target his automobile with a drone missile, killing him and five other suspected al Qaeda members.<sup>240</sup> Is it legal to seek out and kill someone who is not at the moment “carrying arms” with hostile intent?<sup>241</sup> The Israeli Supreme Court has answered the question with a resounding “maybe.” President (Chief Justice) Barak said it depends on the certainty of the target and the difficulty of capture. It

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- (1) an alleged offender is a national of the United States or an alien lawfully admitted for permanent residence; or
  - (2) an alleged offender is present in the United States, irrespective of the nationality of the alleged offender.

18 U.S.C. § 1596 (2008).

<sup>237</sup> An excellent discussion of universal jurisdiction, in a case in which the tribunal struggled with political implications of the concept, is found in *Ex parte Pinochet Ugarte* (No.3), [2000] 1 A.C. 147(H.L. 1999).

<sup>238</sup> *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, paras. 153-56 (Dec. 10 1998); *Ex parte Pinochet Ugarte* (No.3), [2000] 1 A.C. 147 (H.L.) (Opinion of Lord Browne-Wilkinson).

<sup>239</sup> Rome Statute of the International Criminal Court, *supra* note 29, art. 54.

<sup>240</sup> *Sources: U.S. Kills Cole Suspect*, CNN (Nov. 5, 2002, 12:17 PM), <http://edition.cnn.com/2002/WORLD/meast/11/04/yemen.blast/index.html>.

<sup>241</sup> Drone missile attacks have escalated during the Obama Administration and increase anti-American sentiment in many quarters.

also depends on the proximity of the actor to likely violent actions both before and after the event, as well as the prospects for peaceful capture.<sup>242</sup>

With regard to certainty of the target, the most famous mistake occurred when Israeli Mossad agents hunted down and killed someone in Norway they mistakenly believed was responsible for the Munich Olympic incident. Ahmad Salameh, who probably was the mastermind behind the Munich attack, was later killed in a car bombing in Lebanon. Norway sentenced the group who killed the wrong person to relatively short prison terms, and Israel agreed to pay compensation to the victim's family.<sup>243</sup>

Another concern of both legal and pragmatic dimensions is the likelihood of "collateral damage." In the law of war, it is illegal to use more force than is necessary to accomplish the military objective. Usually, this is of little concern in classic open warfare, but it has spawned enormous controversy over the firebombing of Dresden and the use of nuclear weapons on Hiroshima and Nagasaki. In modern conflict, there is certainly a strong argument to be made for tighter controls in light of the escalating use of drone-launched missiles against so

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We cannot determine that a preventative strike is always legal, just as we cannot determine that it is always illegal. . . .

If a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed. Trial is preferable to use of force. At times the possibility does not exist whatsoever; at times it involves a risk so great to the lives of the soldiers, that it is not required.

Protection does not exist regarding those civilians "for such time as they take a direct part in hostilities." Harming such civilians, even if the result is death, is permitted, on the condition that there is no other means which harms them less, and on the condition that innocent civilians nearby are not harmed. Harm to the latter must be proportional.

H CJ 769/02 Pub. Comm. Against Torture v. Gov't of Isr. [2005].

<sup>243</sup> *Id.* One online source recounts the story this way:

In Lillehammer, Norway, on 07 January 1974, Mossad agents mistakenly killed Ahmad Boushiki, an Algerian waiter carrying a Moroccan passport, whom they mistook for PLO security head Ali Ahmad Salameh, believed to have masterminded the 1972 massacre of Israeli athletes at the Munich Olympics [Salameh was killed in a 1979 car-bomb explosion in Lebanon]. Following the attack, the Mossad agents were arrested and tried before a Norwegian court. Five Israeli agents were convicted and served short jail sentences, though Israel denied responsibility for the murder. In February 1996, the Israeli government agreed to compensate the family of Ahmad Boushiki.

*Mossad: The Institute for Intelligence and Special Tasks*, GLOBAL SECURITY, <http://www.globalsecurity.org/intell/world/israel/mossad.htm> (last modified July 28, 2011).

many houses.<sup>244</sup> Rampant targeting of civilians is not a good way to lessen tensions and defuse hostilities.

Despite these limitations, the principal message here is that the model of international criminal law should be employed against organized violence of civilians. Although an international criminal tribunal could be effective, there is serious doubt about when a tribunal with sufficient breadth of jurisdiction might be effective. Meanwhile, following the models of piracy and slavery, every nation can employ the power of the law of nations—by doing so, it will not stamp out terrorism any more than it has stamped out piracy or slavery, but at least there is a regime of law from which beleaguered public officials can draw. For the international prosecutorial community, this means a more common set of understandings with some potential for greater cooperation—again, not that cooperation will be automatic, but at least there will be elements of a common language with which to address the problems.

If humanitarian intervention is not authorized under international law, then a conundrum exists with the criminalization of genocide and crimes against humanity. Assume that the leaders of a government engaged in atrocities against their own people could be prosecuted in the International Criminal Court. How are these leaders to be apprehended without intervention by some other government? An investigation leading to prosecution can be initiated on the request of any state party, the U.N. Security Council, or on the prosecutor's initiative.<sup>245</sup> If "reasonable grounds to believe that the person has committed a crime" are shown by the prosecutor, the Pre-Trial Chamber can issue an arrest warrant, which serves as a request to a state party to take that person into custody for surrender to the ICC. There are elaborate provisions for cooperation and for setting priorities if a state receives both a request from the ICC and a request for extradition from another state.

Over all of this elaborate machinery floats the reality that a regime accused of committing atrocities is not likely to surrender its own leaders for prosecution so long as that regime remains in control of its territory. This fact leaves the ICC subject to the vicissitudes of armed conflict before it can obtain effective power over an accused. If under the prevailing views of international law only the U.N. Security Council can authorize intervention into the internal affairs of a state, then only the U.N. Security Council can initiate armed invasion of a state to topple a regime and take its leaders into custody.

Of course, a regime that is committing atrocities against its own people may well step outside its own borders. Once it attacks the territory of another sovereign state, the attacked state can call for outside assistance and thus trigger a

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<sup>244</sup> When the United States used a drone missile attack to kill Abu Ali al-Harethi in Yemen in 2002, along with a U.S. citizen, there were only a handful of objections from the international community, and the objections did not focus on the "collateral damage" of killing four other unnamed individuals who were in the car at the time.

<sup>245</sup> Rome Statute of the International Criminal Court, *supra* note 29, art. 13.

state of war that will result in invasion and overthrow of the abusive regime by other states. In this instance, a warrant of arrest from the ICC could become effective as a result of aggressive action by the regime in question. This possibility leads back to the issue of what constitutes a legitimate government under such circumstances; for example, if Kosovo had been recognized as an independent State prior to “invasion” by Serbia, then collective self-defense by NATO forces would have been perfectly appropriate without Security Council authorization.

For Americans, some of these difficulties are analogous to the early days of federalism and the post-Civil War era. When the people of the American Colonies formed the United States, they gave the central government no coercive power over the states under the Articles of Confederation. But when the Constitution was framed with the Supremacy Clause of Article VI, there was at least the vestige of coercive power in the federal government. The Civil War and the post-war amendments settled the proposition that the federal government can intervene in the internal affairs of a state to enforce provisions of federal law. Nothing in the American experience, however, implies that California can intervene in the affairs of Nevada without federal authority. Eventually, it may become reality that the United Nations exercises the power to intervene in the affairs of a nation-state to enforce norms of international law in a fashion similar to the federal enforcement of federal civil rights laws within one state of the United States.

## **VII. CONCLUSION: SOVEREIGNTY AND GLOBAL FEDERALISM**

This article touches on only a few aspects of concern for the human condition: mass violence, terrorism, human trafficking, and piracy. All of these are related aspects of violence, and they are connected to the degree which they cross international boundaries. They are further related in the difficulty of formulating and implementing a global response.

The trend toward global definitions of substantive norms has given us rules on war, terrorism, human trafficking, and piracy. There are also universal norms of personhood, upon which I will touch in a moment. What the world is lacking is a link from the substantive norms defined under international law and enforcement mechanisms—the latter necessarily implicating judicial independence.

Why is it difficult to deploy global mechanisms to deal with crimes that are so obviously in need of international attention? The objections to international criminalization are essentially the same as the objections to federal punishment of crime in the United States—in both situations, detractors object to the intrusion on the sovereign prerogatives of the state or nation. These objections may be camouflage for protection of potential malefactors, or they may be sincere objections on principle.

But what principle or principles can be deployed to resist criminalization of violent or abusive behavior? The notion of sovereign prerogative links with the ideal of self-determination. This takes us into the realm of liberal ideology that power flows from the people, which of course then leads to the question of which “people” get to make the central determinations. Thus, the conundrum for any transborder reform, whether within the United States or across nations, has been the extent to which externally imposed norms trump the wishes of the local populace.

The answer to that conundrum is that when a norm becomes universally recognized, the relevant “people” extend beyond the borders of the nation-state. I argue that “We the People of the World” should be free to impose human rights obligations on every nation when people feel strongly enough about a given issue.

There certainly is room for some cultural relativism in the increasingly globalized community. After all, what a boring place the world would be without Tchaikovsky, the Rolling Stones, and the many forms of music that have grown from other cultures. Thus, there is clearly room for different forms of governance, ranging from the most primitive tribal systems of seniority through power-based oligarchies to complex forms of parliamentary democracies.

Because there are different systems of governance, there is room in those systems for different forms of the rule of law.<sup>246</sup> Obviously, not every dispute resolution system will be the same. Tribal and village elders can deploy extremely effective informal dispute resolution. Both elected and appointed judiciaries can function under administrative systems within the executive or legislative branches, although some degree of administrative independence is highly desirable. Any dispute resolution system can adhere to the rule of law so long as it meets the basic requirements of transparency and universality.<sup>247</sup>

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<sup>246</sup> The World Justice Project defines the rule of law as a system that upholds four “universal principles”:

1. The government and its officials and agents as well as individuals and private entities are accountable under the law.
2. The laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property.
3. The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.
4. Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.

*What is Rule of Law?*, WORLD JUSTICE PROJECT, <http://worldjusticeproject.org/what-rule-law> (last visited Nov. 12, 2014).

<sup>247</sup> Some people add elements of fairness and consistency, but I think the twin elements of transparency and universality are broad enough to include those.

Yet, there is no room for cultural relativism on fundamental rights of personhood. The Universal Declaration of Human Rights may have stemmed from Western liberal thought processes, but it includes universal norms that reach beyond the traditional rights of Western nations, such as rights of social and economic subsistence.

Perhaps it is best to think in terms of universal norms of human dignity. For example, with regard to violence against civilians or the commodification of human beings, especially the most vulnerable of the world, there should be little doubt of the universal norms in play. There is no principle of cultural relativism that can justify employing hundreds of workers in unsafe conditions. There is no justification for an informal dispute resolution system in which the village elders award the nine-year-old daughter of one family to another man in the village to be his concubine.

Universal principles of human dignity make it easy enough to define certain behaviors as illegal. What is much more difficult is finding the means and resources to deploy enforcement mechanisms. We may not see an effective international police force within my lifetime, but surely the increasing pressure for international cooperation in these arenas ultimately must lead to an effective law enforcement response. As stated at the outset, the movement for rating systems offers some hope for developing norms but little hope for enforcement.

Thus runs the need for a link from substantive norms of criminal behavior to supra-state enforcement.



