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TERRORISM AND UNIVERSAL JURISDICTION: OPENING A PANDORA'S BOX?

Luz E. Nagle*

INTRODUCTION

The relationship between terrorism and international criminal law has provoked a good deal of discussion in the wake of the terrorist attacks of September 11, 2001 in New York City and at the Pentagon in Washington, D.C. A particularly challenging issue pertains to whether terrorism is an international crime or a transnational crime, and if and in what context offenders and offenses, to which we affix the label of terrorist and terrorism, should or can be subject to the limited jurisdiction of the International Criminal Court (ICC) and other international and national criminal tribunals.

While there are those who feel that terrorism should fall under the purview of universal jurisdiction, some scholars[1] argue that even while the "international state of emergency"[2] triggered by the events of September 11 generated worldwide, extensive, and severe legislation internationalizing a crime that is mainly "set deep within national borders,"[3] acts of terrorism fail to merit ICC jurisdiction because the parameters of such acts remain undefined due to politics. The ICC "would be hard pressed to fulfill the goals of deterrence and

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* Professor of Law, Stetson University College of Law. The author wishes to thank Ms. Aliza Hochmon and Graduate Research Assistant Sarah Moses for their valuable research and editing assistance in the drafting of this article. Ms. Moses, in particular, provided exceptional feedback and valuable editorial suggestions in the final drafting of the article. I am also grateful to international criminal law scholar Ms. Noelle Quenivet, who graciously provided important comments and recommendations during the writing of the article.

1. *See, e.g.*, Naomi Norberg, *Terrorism and International Criminal Justice: Dim Prospects for a Future Together*, 8 SANTA CLARA J. INT'L L. 11 (2010). Crimes of terrorism can and should qualify "as crimes against humanity under the Rome Statute," and the ICC should have jurisdiction over acts of terrorism. Vincent-Joël Proulx, *Rethinking the Jurisdiction of the International Criminal Court in the Post September 11th Era: Should Acts of Terrorism Qualify as Crimes Against Humanity*, 19 AM. U. INT'L L. REV. 1009, 1010 (2004).
2. Norberg, *supra* note 1, at 35.
3. *Id.* at 13.

justice for victims,"[4] and in trying to do so some nations might respond to internal and external terrorist threats by erecting barriers to suppress fundamental rights "in the name of combating what seems to have become the 'crime of crimes' of the 21st century."[5]

The notion of adding terrorism to a similar level of universally recognized extreme crimes elicits several concerns. First, when we talk about terrorism, what are we talking about? Are we talking about actions of violence committed in different nations by the same group with the intent of terrorizing and scaring other nations who think they may be next? Or are we talking about terrorist groups confining their operations within a specific national territory, but having a presence and source of support in other nations, such as the Revolutionary Armed Forces of Colombia (FARC) that has long maintained a global network of cells committed to specific tasks and responsibilities for furthering its terrorist activities on Colombian soil? How the international community defines terrorism will have several ramifications for international justice.

The aim of this article is to make the case that, contrary to the current opinions expressed by many influential international law scholars and practitioners, terrorism is *not* a suitable crime for universal jurisdiction. Supporting such a "minority" position requires looking carefully at the difference between international crimes and transnational crimes in the context of what constitutes crimes against humanity as recognized under international law and whether terrorism, absent a clear understanding of its definition, should be a crime subject to universal jurisdiction. We will first examine the distinctions between international crime and transnational crime, providing a context for a discussion of terrorism in both domestic and international manifestations. We will then look at how nations have responded to terrorism through the drafting of legislation and how that legislation has been correctly or incorrectly applied to crimes construed to be terrorist in nature and intent. We will also look at how immigration laws and procedures have been implemented to

4. *Id.* at 14.
5. *Id.*

combat terrorism and whether such measures taken to control terrorist acts provide a proper wall of protection. Finally, we will consider whether universal jurisdiction is the proper forum for prosecuting acts of terrorism and if so, whether domestic terrorist acts should also be subject to universal jurisdiction where it can be demonstrated that the acts committed constitute a transnational scope and rise to the level of violations of international humanitarian law and crimes against humanity.

I. DISTINGUISHING BETWEEN INTERNATIONAL AND TRANSNATIONAL CRIMES

A. The Nature of International Crimes

If a society's essential values drive it to designate a conduct as a crime, then criminal law is a barometer of those values and is applicable to both domestic and international acts that affront and disrupt the rule of law. Taken a step further, crimes construed to be so egregious as to shock humanity, such as genocide, crimes against humanity, and war crimes,[6] became international crimes by consensus of the international community. As a result, such crimes became subject to the jurisdiction of limited international tribunals, such as those created by the world community to investigate and try horrific acts committed in Bosnia, Rwanda, Sierra Leone, Lebanon, Cambodia, and East Timor.[7]

While international consensus on what constitutes crimes against the universality of mankind is paramount to the justification of tribunals endorsed and supported by an international authority and comprised of an international character, the reason for the international community to have reached such consensus compels a discussion of elements that seem at times taken for granted. First, international crimes are created by customary international law,

6. As defined in Articles 5–8 of the Rome Statute of the ICC, July 1, 2002, 2187 U.N.T.S. 90, *available at* http://untreaty.un.org/cod/icc/statute/english/rome_statute(e).pdf.

7. For an overview of current tribunals and special courts, see Global Policy Forum, International Criminal Tribunals and Special Courts, http://www.globalpolicy.org/international-justice/international-criminal-tribunals-and-special-courts.html (last visited Apr. 15, 2009).

resulting from the desire of nations to conform to a consistent practice of and respect for legal obligations.[8] Customary law binds nations in the absence of a treaty or convention in such a manner that a "state cannot opt out of its duty to conform to a general international law."[9] It imposes upon all nations a moral imperative and a shared sense of deeply rooted values.[10]

Second, the values of the international community have dictated that conducts violating basic human rights in ways that "shock the conscience of humanity"[11] constitute international crimes. Such conduct violates the "inherent values and interest of the community of nations and therefore concerns the 'international community as a whole.'"[12] International consensus to criminalize such behavior is reached by virtue of the values protected and the interests threatened. The values and interests transcend individual goals, national borders, and sovereignty limitations because they are common to and affect all nations equally. Even if international crimes only occur in a few nations, their immediate and direct effect endangers the well being of the world as a whole and threatens the international peace and security of mankind.[13] In such events, the international community, through the authority of the United Nations Security Council,[14]

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8. *See* Theodor Meron, *Customary Law*, CRIMES OF WAR, http://www.crimesofwar.org/thebook/customary-law.html (last visited Apr. 4, 2009).

9. *See* Holning Lau, *Rethinking the Persistent Objector Doctrine in International Human Rights Law,* 6 CHI. J. INT'L L. 495, 498 (2005–2006). It is important to note that a State may avoid their obligations under customary law if it has been a "persistent objector" to the norm. *Id.* The State's objection must be consistent and prior to the norm's emergence as customary law. *Id.*

10. *See* Meron, *supra* note 8.

11. The preamble to the Rome Statute of the ICC, states that the parties to the statute are "[m]indful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity." Rome Statute of the ICC, *supra* note 6.

12. Otto Triffterer, *Security Interests of the Community of States, Basis and Justification of an International Criminal Jurisdiction Versus Protection of National Security Information', Article 72 Rome Statute, in* NAT'L SEC. & INT'L CRIMINAL JUSTICE 53, 63 (Herwig Roggemann & Petar Šarčević, eds., 2002). See also the definition of gross and large-scale violations of human rights as an international crime by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1993/10 (June 8, 1999).

13. The preamble to the Rome Statute of the ICC provides that the parties to the statute "[r]ecogniz[e] that such grave crimes threaten the peace, security and well-being of the world." Rome Statute of the ICC, *supra* note 6; *see also* Triffterer, *supra* note 12.

14. Under the United Nations Charter, the Security Council is charged with maintaining the international peace and security by establishing peacekeepers, imposing economic sanctions, authorizing military action under U.N. Charter articles 39–41, and issuing resolutions establishing ad hoc tribunals

acquires a legitimate right to intrude in the sacrosanct sovereignty of a nation and may take punitive measures, such as economic sanctions, use of force, establishing an ad hoc tribunal,[15] or authorizing a national or international force to arrest an indicted suspect.[16]

Third, in order to prevent damage to the values protected by the international community and to avoid impunity from those committing core crimes,[17] international law provides for universality—the principle of law that "permits a state to exercise jurisdiction over perpetrators of certain offenses considered particularly heinous or harmful to mankind, regardless of any nexus the state may have with the offense, the offender, or the victim."[18] Thus, universal jurisdiction permits a state to prosecute those accused of committing serious crimes regardless of whether they are in violation of the *domestic* law of the country wherein the crimes are perpetrated.

The effect a crime has on peace and security triggers different reactions by the international community. If a crime constitutes "a threat to international peace and security"[19] like international crimes, the international community can act through the Security Council.[20]

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for international prosecutors to investigate international crimes. Anne-Marie Slaughter, *Use Courts, Not Combat, to Get the Bad Guys: Pre-emptive Justice*, INT'L HERALD TRIB., Nov. 20, 2003, at 9, *available at* http://www.princeton.edu/~slaughtr/Commentary/CourtsNotCombat.pdf (noting that the Security Council also has the power to create ad hoc tribunals for those nations that have yet to be part of the ICC).

15. Slaughter, *supra* note 14, at 9 (noting that the Security Council also has the power to create ad hoc tribunals for those nations that have yet to be part of the ICC).

16. *Id.* at 9 (noting that the Security Council, once an indictment has been issued by the prosecutor, could determine in the interests of international peace and security to authorize an international or national force to arrest the indicted suspect).

17. These are the crimes derived from Nuremberg: crimes against humanity, genocide, crimes against peace, and war crimes. General Assembly Resolution 95(I) of 1946 provides excellent support for this statement. G.A. Res. 95 (I), U.N. Doc. A/RES/1/95 (Dec. 11, 1946).

18. STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 161 (2001).

19. *See* International Criminal Tribunal for Rwanda, Statute of the Tribunal, http://www.un.org/ictr/statute.html (last visited Mar. 7, 2009). For the determination of the conflict as being non-international, see The Secretary-General, *Report on Practical Arrangements for the Effective Functioning of the International Tribunal for Rwanda, Recommending Arusha as the Seat of the Tribunal*, U.N. Doc. S/1995/134 (Feb. 13, 1995).

20. Conversely, this could also mean that any time the Security Council acts under Article 39 of the U.N. Charter, the crimes dealt with could be construed as international crimes.

For example, even if the conflict in Rwanda was characterized as "non-international,"[21] the international community acted through the Security Council's formation of an international tribunal to prosecute crimes that threatened international peace and security.[22] Traditionally, international crimes are broadly defined as encompassing criminal acts that threaten the international community as a whole or acts that threaten its most fundamental values; in comparison, transnational crimes are more limited in scope, encompassing only crimes that take place across borders.

B. The Nature of Transnational Crimes

In contrast to the definition of international crimes, the criminalization of conduct classified as transnational crimes emerges from the concerns of individual states regarding their "political, social and economic interests" and "assertions about the harm caused to these interests."[23] For instance, money laundering is seen as a crime that erodes financial institutions, depresses economic growth, facilitates corruption, and increases economic instability,[24] while drug trafficking threatens public safety, economic productivity, public health, professional advancement and education, and public institutions.[25]

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21. For a discussion of what constitutes a non-international conflict, see L.J. VAN DEN HERIK, THE CONTRIBUTION OF THE RWANDA TRIBUNAL TO THE DEVELOPMENT OF INTERNATIONAL LAW 214–215 (2005).

22. The Security Council's language establishing the International Criminal Tribunal for Rwanda (ICTR) expressed that "the reports indicat[ed] that genocide and other systematic, widespread and flagrant violations of international humanitarian law" were committed in Rwanda, and the Security Council determined that such situations "constitute a threat to international peace and security." Resolution 1674, which established the ICTR, emphasized that all governments have a "responsibility to protect populations from genocide, war crimes, ethnic cleaning and crimes against humanity," that the deliberate targeting of civilians, and the commission of violations of international humanitarian law and human rights in situations of conflict may constitute a threat to international peace and security, and that the Security Council would act appropriately. S/RES/1674 (Apr. 28, 2006).

23. Neil Boister, '*Transnational Criminal Law'?*, 14 EUR. J. INT'L L. 953, 957 (2003).

24. BRENT L. BARTLETT, THE NEGATIVE EFFECTS OF MONEY LAUNDERING ON ECONOMIC DEVELOPMENT 3 (2002), *available at* http://www.adb.org/documents/others/ogc-toolkits/anti-money-laundering/documents/money_laundering_neg_effects.pdf.

25. *See* Zarina Othman, *Myanmar, Illicit Drug Trafficking and Security Implications*, 65 AKADEMIKA 27, 31 (2004), *available at* http://pkukmweb.ukm.my/~penerbit/jurnal_pdf/akad65_02.pdf (discussing how drug trafficking threatens the civil society).

The effect that transborder crimes could have on international peace and security is an indirect and collateral result of the crime. Moreover, any of these effects would depend *not only* on the commission of an illegal act per se (as it is for international crimes), *but also* on how extensive, violent, and damaging that illegal conduct is on states' interests. Such is the case with drug trafficking in Colombia over the last two decades and more recently in Mexico.[26] Drug trafficking alone was not considered a threat to the peace and security in both nations until sophisticated weapons use sharply escalated, huge earnings by criminal organizations armed with professional accountants, attorneys, chemists, and intelligence agents amassed, and political instability resulting from mass killings drastically increased.[27] Drug trafficking presented a risk to peace and security not only because of the commission of the conduct (drug trafficking), but also due to the type and amount of violence caused by the drug cartels, the sizeable geographic area affected by the drug violence, and the significant damage the violence caused in both nations. This second step of determining if a transnational crime threatens peace and security takes us to mixed views and conclusions. Nations, lawyers, analysts, and scholars could see a threat, while many others would disagree.[28]

Transnational crimes apply a limited extraterritorial jurisdiction.[29] To exercise this jurisdiction, there is regard for where the crime is committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, and/or whether the crime threatens a state's national security; if any or all of these are met, the authority to punish

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26. In Mexico alone, drug violence has claimed more than 7,000 lives since January 2007. *See 60 Minutes: Mexico's Drug War* (CBS television broadcast Mar. 4, 2009), *available at* http://www.cbsnews.com/video/watch/?id=4836946n.

27. *See generally* Max Manwaring, *National Security Implications of Drug Trafficking for the USA and Columbia*, SMALL WARS & INSURGENCIES, 5:3:379–408 (1994).

28. In Southeast Asia, Myanmar is the main producer of illegal drugs in the region. Its closest geographic neighbor, Thailand, declared illicit drug trafficking the number one threat to its national security, and Malaysia and Singapore implemented mandatory penalties for drug traffickers. Myanmar "has never admitted that illicit drugs are a threat to its national security." Othman, *supra* note 25, at 33–35.

29. The United States approaches jurisdiction for terrorists on an extraterritorial basis. *See* Roman Boed, *United States Legislative Approach to Extraterritorial Jurisdiction in Connection with Terrorism*, 2 INT'L CRIM. L. REV. 145, 145–77 (2002).

such crimes emerges under domestic law. However, extraterritorial jurisdiction is seen as an encroachment upon the sovereignty of nations; hence, this jurisdiction will come about only through the cooperation of nations willing to work together.

With regard to extraterritorial jurisdiction for transnational crimes, jurisdiction seems to be limited to when there is an injury caused or threatened on a specific nation claiming jurisdiction. Transnational crimes address private injuries, while international crimes focus on international injury and injury to the international community as a whole. So, when we seek to obtain jurisdiction for transnational crimes, it seems that states ought to establish a link between the crime and the state in order to exercise that territorial jurisdiction. In contrast, with international crimes, there is no need for that specific link. In transnational crimes, we must respect the sovereignty of the state where harm is caused upon the private state and not on the community as a whole. We must look at the type of crime that is committed in order to justify extraterritorial jurisdiction. In other words, we need to emphasize that international crime threatens international values and harms international order, while transnational crimes only affect individual states. In addition, unlike in international crimes, the interests imperiled by transnational crimes, and the possible effects that such crimes may have on peace and security, do not justify a legitimate intrusion on nations' sovereignty.

II. DEFINING TERRORISM

There is no international consensus as to what constitutes a terrorist act[30] or what "terrorist acts" concern the international

30. There are numerous documents and databases with lists of terrorists' incidents. Yet, there is no uniformity in the methodology used to determine if an act was/is terrorism or some other form of political violence. For instance, the United States includes an incident as terrorist if it "was premeditated; perpetrated by a subnational or clandestine agent; politically motivated, potentially including religious, philosophical, or culturally symbolic motivations; violent; and perpetrated against a noncombatant target." It is international if the incident involves citizens or territory of more than one country. *See* NAT'L COUNTERTERRORISM CTR., A CHRONOLOGY OF SIGNIFICANT INTERNATIONAL TERRORISM FOR 2004 vii–viii, http://www.hanford.gov/oci/maindocs/ocihome_docs/NCTC_Report.pdf

community and violate human rights in a way that shocks the conscience of humanity. Will the bombing of a runway at an airport in Colombia or the detonation of a 200-kilogram car bomb near a bullring in Medellin qualify as terrorists' acts? Will bombings of the Guardian Civil police barracks in Barcelona, Spain by the Basque separatist group Euskadi Ta Askatasuna (ETA) qualify, or will an armed attack of an Indonesian village by illegally armed groups?[31] Will the restaurant bombing in Spain that killed eighteen U.S. servicemen and injured eighty-three people[32] or the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City qualify? Lack of agreement as to what constitutes terrorism is demonstrated by the failure of numerous nations to ratify many terrorist conventions,[33] by the diverse definitions of terrorism that exist,[34] by the wide gap in these different definitions,[35] and by the continuing disagreement over whether certain conducts can be construed as terrorist acts.[36]

(last visited Mar. 6, 2009). Comparing the information offered, one can see that some documents/databases contain incidents that others ignore. For instance, a search on the Worldwide Incidents Tracking System webpage for Colombia shows a total of 2,293 incidents between 2004 and 2008. http://wits.nctc.gov/ (last visited Mar. 7, 2009). One excellent resource to consult in trying to understand the definitions of terrorism is BEN SAUL, DEFINING TERRORISM IN INTERNATIONAL LAW (Oxford University Press 2006).

31. Looking at several and diverse lists of terrorists' acts worldwide, one can see how many acts are labeled as terrorist that perhaps should not be. *See* William Robert Johnston, *Selected Terrorist Incidents Worldwide, Through September 2000*, JOHNSTON'S ARCHIVE, Aug. 21, 2006, http://www.johnstonsarchive.net/terrorism/wrjp255b.html; *see also* Tripatlas, List of Terrorist Incidents, http://tripatlas.com/Terrorist_attack (last visited Mar. 6, 2009).

32. The restaurant was near a U.S. Air Force Base in Torrejon, Spain. The attack occurred April 12, 1984. U.S. DEP'T OF STATE, SIGNIFICANT TERRORISTS INCIDENTS, 1961-2003: A BRIEF CHRONOLOGY (2004), *available at* http://fas.org/irp/threat/terror_chron.html.

33. There are at least twelve conventions covering acts associated with terrorism. For the text and status of these conventions, see http://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml&menu=MTDSG.

34. *See* Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation*, 29 B. C. INT'L & COMP. L. REV. 23 (2006) (for a detailed list of the many definitions of terrorism).

35. The OAS Convention only refers to the crimes against internationally protected persons. The Islamic Convention includes certain intents as an element of the crime, while the OAS Convention does not. *See* INTERNATIONAL COOPERATION IN COUNTER-TERRORISM: THE UNITED NATIONS AND REGIONAL ORGANIZATIONS IN THE FIGHT AGAINST TERRORISM 37 (Giuseppe Nesi ed., Ashgate 2006).

36. Such as acts of self-determination: "Peoples' struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered as a terrorism crime." Organization of the Islamic Conference, July 1, 1999, *Convention of the Organisation of the Islamic*

It has been said, "One country's terrorist is another's freedom fighter," and how a country views its own struggle for independence from colonization will influence its definition of terrorism and, as we will later see, directly affect the development and implementation of anti-terrorism policy, which includes its immigration policy. In fact, this struggle between acts of terrorism versus acts in furtherance of national liberation can be considered one of the main reasons that have precluded the development of a universal definition of terrorism. For example, Professor Michael P. Scharf notes instances where the motivation to develop a universal definition becomes paramount, and one such time was post-September 11.[37] There was little doubt that the events of September 11 triggered a renewed sense of cooperation and cohesiveness among nations, and this became the backdrop for the United Nations General Assembly to establish a working group to develop a "comprehensive convention on international terrorism."[38] Even with this renewed vigor, the hope for a universal definition of terrorism remained elusive when Malaysia, on behalf of the fifty-six member Organization of the Islamic Conference (OIC), refused to accept any definition of terrorism that did not exclude acts of "armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination."[39] Some argued the reason why the OIC was so vehement about including such language was "to exempt acts against Israel over the occupied territories and acts against India over Kashmir from the definition of terrorism, and to brand violations of the laws of war by State military forces such as the Israel Defense Forces as terrorist acts."[40] Again, as a result of this lack of

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Conference on Combating International Terrorism, Annex to Resolution No: 59/26-P, *available at* http://www.unhcr.org/refworld/category,LEGAL,OIC,,,3de5e6646,0.html.

37. Michael P. Scharf, *Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects*, 36 CASE W. RES. J. INT'L L. 359, 361 (2004).

38. *Id.*; *see also* HELEN DUFFY, 'THE WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW 18–25 (Cambridge 2005) (providing a detailed list of the many attempts toward a universal definition of international terrorism from as early as the 1930s to post-September 11, 2001).

39. Scharf, *supra* note 37 (quoting Surya P. Subedi, *The U.N. Response to International Terrorism in the Aftermath of the Terrorist Attacks in America and the Problem of the Definition of Terrorism in International Law*, 4 INT'L L. F. DU DROIT INT'L 159, 163 (2002)).

40. *Id.* (citing Nicholas Rostow, *Before and After: The Changed UN Response to Terrorism Since*

cohesiveness as to "who is a terrorist?" versus "who is a legitimate freedom fighter?," and with no side willing to compromise on this issue, the goal of a universally accepted definition remains out of reach, even today.

This lack of a universally accepted definition also directly affects how nations implement traditional limits on the obligation to extradite. Extradition is essential in bringing individuals to justice for international criminal offenses, including acts of terrorism. However, without a universally accepted definition of terrorism, the obligation to extradite and the exceptions to extradition (i.e. the political offense exception[41]) are not uniformly applied and as such are subjective and left for the individual states to define. This lack of uniformity in nations' obligations to extradite for acts of terrorism has forced nations to change how they view their obligations to extradite for crimes considered to be political in nature. For example, the political offense exception typically is applied as a bar to extradition if certain requirements are met.[42] However, recently many nations have sought to remove this exception for terrorism and crimes associated with such acts. For example, the United States refused to apply this doctrine to members of terrorist organizations, arguing that terrorists who indiscriminately attack civilian populations should not be permitted to hide behind the political offense exception, even if their crimes can be considered "committed to achieving a political purpose."[43] In the same manner, the High Court of Ireland extradited members of the Irish Republican Army (IRA) and in so doing argued

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September 11th, 35 CORNELL INT'L L.J. 475, 488 (2004)).

41. DUFFY, *supra* note 38, at 108–12 (containing a detailed discussion on key features of extradition law and defines the "political offense exception" as the protection against extradition for crimes that are considered to be political in nature).

42. *See* Christopher L. Blakesley, *The Evisceration of the Political Offense Exception to Extradition,* 15 DENV. J. INT'L L. & POL'Y 109, 110–18 (1986) (offering a detailed analysis of the political offense exception, including a discussion as to how it is applied by various nations' judiciaries, and emphasizing the fact that while the exception is "universally accepted" but is not universally applied); Abraham D. Sofaer, Critical Essay, *The Political Offense Exception and Terrorism*, 15 DENV. J. INT'L L. & POL'Y 125, 126–28 (1986) (providing a detailed historical analysis of the history of the political offense exception).

43. Marcello Di Filippo, *Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes,* 19 EUR. J. INT'L L. 533, 559 (2008).

that the political offense exception cannot be used to shield crimes against humanity and acts of terrorism.[44] National Courts in Latin America also refused to permit the political offense exception to be used for acts considered terrorist in nature and followed the reasoning of both the American and Irish Courts.[45] Thus, without a universally accepted definition, it is clear that when states are left to define terrorism on their own terms we will continue to see differing opinions as to what constitutes terrorism and how such diverging beliefs directly affect extradition and evidence-sharing.

As one can see from the above discussion, there are different approaches to defining terrorism, which makes deciding what constitutes a terrorist act "more art than science." [46] Terrorism "is a tactic used, on many fronts, by diverse perpetrators in different circumstances and with different aims."[47] Information is frequently deficient and only available over time, "fact patterns may be open to interpretation, and perpetrators' intent is rarely clear." [48] As such, it is this unsettled, ambiguous and subjective meaning that evolves and results in the proliferation of definitions.[49] This struggle is also expressed in court decisions,[50] United Nations resolutions,[51] and even within domestic legislation.[52]

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44. *Id.* (citing Quinlivan et. al., [2000] 3 I.R. 154 (H.Ct.) (Ir.), *reprinted in* THE UNITED KINGDOM'S LEGAL RESPONSES TO TERRORISM 577 (Yonah Alexander and Edgar H. Brenner eds., 2003)).

45. Filippo, *supra* note 43, at 560 (offering a detailed analysis where the Supreme Court of Venezuela and the Constitutional Court of Colombia both refused to permit perpetrators of terrorist acts to hide behind the political offense exception because of the heinous crimes committed against civilians).

46. Worldwide Incidents Tracking System, National Counterterrorism Center, *Methodology Utilized to Compile NCTC's Database of Terrorist Incidents*, Apr. 30, 2010, http://wits-classic.nctc.gov/Methodology.do.

47. *Id.*; *see also* RONALD C. SLYE & BETH VAN SCHAACK, INTERNATIONAL CRIMINAL LAW: THE ESSENTIALS 185 (Kluwer 2009) (noting that to some, "[t]errorism is a concept with a colloquial meaning."); Jonathan R. White, *Terrorism in Transition*, HANDBOOK OF TRANSNATIONAL CRIME AND JUSTICE 65, 66 (Philip Reichel ed., 2005) ("[T]errorism is a political activity involving crime [that changes] with historical circumstances and the political environment.").

48. Worldwide Incidents Tracking System, National Counterterrorism Center, *supra* note 46.

49. *See* DUFFY, *supra* note 38, at 17–46 (offering an excellent compendium and in-depth analysis of the many definitions by the League of Nations, the United Nations, and regional organizations).

50. *See* United States v. Yousef, 327 F.3d 56, 107 (2d Cir. 2003) (asserting that "confusion on the definition of terrorism abounds," because "terrorism is defined variously by the perpetrators' motives, methods, targets, and victims").

51. According to a 1970 General Assembly resolution, armed and violent acts do not constitute terrorism if they are committed when seeking self-determination in opposition to violently enforced

There are essentially two steps to defining terrorism. The first step concerns the commission of the act (terrorism, i.e. tactic) and the second step involves determining if the goal for resorting to terrorism was *primarily* to influence a government or for some other purpose.[53] Here, with regards to the second step, we find great discrepancy and disagreement. For some analysts, the extent of the psychological impact of violence committed determines if the act is terrorism, particularly with regard to the manner in which an act may be portrayed in the media. Cherif Bassiouni alluded to this as far back as 1981:

> The relatively limited social harm resulting from acts commonly denominated terrorism, when compared to the social harm caused by common crimes, indicates that this psychological impact is more significant than the acts of violence committed and that this impact may be more media-created than intrinsic to the acts. The role of the media likewise would explain in part the terrorist's choice of target and the manner of affecting the act; the terrorist tailors both to insure media dissemination of both the act and an underlying message to achieve terror-inspiring effect.[54]

Even if both criminals and terrorists use violence as a means to obtain a specific end, their motivation and the reach of the effects caused are dissimilar. The *criminals'* primary and direct motivation is egocentric and personal and is often a matter of obtaining or

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occupation. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of United Nations, G.A. Res. 2625, at 21, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (Oct. 24, 1970).

52. *See* GREGORY E. MAGGS, TERRORISM AND THE LAW, CASES AND MATERIALS 1 (West, 2005) (noting Nicholas J. Perry's findings of "twenty-two different definitions of terrorism in [U.S.] federal law alone").

53. According to the United States, it is politically motivated and against noncombatants. *See* NATIONAL COUNTERTERRORISM CENTER, NCTC FACT SHEET AND OBSERVATIONS RELATED TO 2005 TERRORIST INCIDENTS 4 (2005), *available at* http://wits.nctc.gov/reports/nctcfactsheetandpressslides_2005.pdf.

54. M. Cherif Bassiouni, *Terrorism, Law Enforcement, and the Mass Media: Perspectives, Problems, Proposals*, 72 J. CRIM. L. & CRIMINOLOGY 1, 3 (1981).

protecting material gain. Conversely, the *terrorists'* primary and direct aim is political or ideological and intended to influence public opinion and eventually change "the system."[55] Many terrorist acts are within one nation's borders, and the psychological fear and primary effects are limited. Some incidents reported as terrorist in nature, while highly violent, are more criminal in intent than terrorist, and this leads to some confusion over the primary and direct motivation of the group using violent acts.[56] The war-like acts of Pablo Escobar, for example, terrorized the people of Colombia and had the character of immediate mass destruction. Yet, it was not terrorism *per se*, because the immediate aim of Pablo Escobar was not to terrorize for political reasons or convictions, but to protect himself and preserve his wealth.[57]

Terrorism is a personalizing and direct crime. Terrorists target individuals, groups, and property in ways that yield the most far-reaching psychological repercussions beyond the immediate target. This is precisely why Timothy McVeigh targeted the Murrah Federal Building, why Colombian guerrillas bombed an athletic club crowded with Bogotá's social elites, and why terrorists in Mumbai targeted a well-known and historic hotel serving international business travelers. There is a difference between transnational crimes (drug trafficking and money laundering) and terrorism, however, and it is rooted in the primary goal individuals have for committing a specific crime. In transnational crimes, the motivation is personal aggrandizement, while the terrorist act is fundamentally altruistic.[58] "A terrorist without a cause is not a terrorist."[59]

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55. BRUCE HOFFMAN, INSIDE TERRORISM 37 (2006).

56. The violence used by Colombian drug lord Pablo Escobar was primarily to defend his wealth and desire to remain in Colombia. Some analysts also claim that the FARC is nothing more than a criminal group using violent tactics to hold onto its vast wealth acquired through traditional criminal conduct and that any political ideology or goals the group may have once had were abandoned long ago.

57. *See* HOFFMAN, *supra* note 55, at 35–37.

58. *Id.* at 37 ("The terrorist is fundamentally an *altruist*; he believes that he is serving a "good" cause designed to achieve a greater good for a wider constituency—whether real or imagined—that the terrorist and his organization purport to represent. The criminal, by comparison, serves no cause at all, just his own personal aggrandizement and material satisfaction.").

59. *Id.* at 37–38. (statement of Konrad Kellen).

Of greater concern to me is what I perceive as an over-reaction to atrocious, violent acts committed worldwide by various groups. Even if the violence created by terrorist acts is high, they do not justify being treated as international crimes. With all the uncertainties we have in determining what acts deserve the label of terrorism, we should be cautious to avoid creating the specter of a world of insecurity and war. As Helen Duffy so aptly put it, "[L]awlessness is met with unlawfulness, unlawfulness with impunity, the long-term implications for the rule of law, and the peace, stability and justice it serves, will be grave."[60]

For instance, a terrorist act in Colombia or in India damages that nation's interest. However, the terrorist act *per se* does not directly and immediately threaten the peace and security of England, France, or the United States. The criminal act of terrorism in Colombia may, nonetheless, immediately and directly affect the peace and security of the Latin American region. While all acts of terrorism are unjustified and criminal, not all of these acts constitute a *direct* threat to international peace and security and all mankind that justifies an intrusion on a nation's sovereignty. On the other hand, the U.N. Security Council, in Resolution 1377, has declared that "acts of international terrorism constitute one of the most serious threats to international peace and security in the twenty-first century."[61] This again raises the question of how we define international terrorism. Is it transnational or international terrorism, and does the terminology make a difference?[62]

The 2008 Mumbai attack in India was a terrorist assault targeting a specific group of individuals and facilities with cultural and political value that maximized the psychological impact of the attack.[63] Yet, the horrendous crime did not justify legal action by the international

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60. Helen Duffy offers an excellent compendium and in-depth analysis of the many definitions by the League of Nations, the United Nations, and regional organizations. *See* DUFFY, *supra* note 49, at 1.

61. G.A. Res. 4413/1377, 2, U.N. Doc. A/RES/4413/1377 (Nov. 12, 2001).

62. Comments of Noelle Quenivet, Senior Lecturer, Bristol Law School, England, and noted European expert on international criminal law and human rights.

63. The terrorist attack in Mumbai took place November 2008. For an excellent study of the Mumbai attack, see ANGEL RABASA ET AL., THE LESSONS OF MUMBAI (2009), *available at* http://www.rand.org/pubs/occasional_papers/2009/RAND_OP249.pdf.

community so as to impinge upon India's sovereignty (such as military action by the Security Council), even if the action was authorizing peacekeepers. The Mumbai attacks, the attacks of September 11, and many other attacks around the world demonstrate the transnational sources of terrorism and raise concerns over how safe havens continue to enable terrorists to train, recruit, plan, and execute their deeds. Nevertheless, these attacks alone do not justify a violation of a nation's sovereignty.

On the other hand, the commission of any international crimes, like acts of genocide, *per se* constitutes a direct threat to international peace and to the security of mankind regardless of intensity, expansion, depth of violence, damage, and impact on a nation's security. The acknowledgment of the existence of such crimes authorizes the international community, through the Security Council, to enter into the nation regardless of that nation's sacrosanct sovereign rights.

Contrast this with transnational crimes, which are conducts already criminalized by some individual states but that have an international component, transboundary implications, and global impacts that are internationalized, regulated, and homogenized in and emerging from a treaty formed by several nations in order to curtail such crimes at the international level. Prior to the existence of specific international conventions, acts may have been prohibited in certain nations, but not in others. Only when and after the specific convention is ratified by member states does an obligation to prohibit the conducts specified in the convention merge together with the obligation to cooperate. This is the case with crimes of money laundering, drug trafficking, human trafficking, and even terrorism. Unlike international crimes, then, that emerge from international law, transnational crimes emerge from treaty law. Likewise, transnational interests are not necessarily common to all states and can vary from state to state.[64]

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64. *See* Gregory Shaffer, *Transnational Legal Process and State Change: Opportunities and Constraints* 1 (Inst. For Int'l Law & Justice, Working Paper No. 2010/4, 2010), *available at* http://www.iilj.org/publications/documents/2010-4.Shaffer.pdf ("The effects of transnational legal norm conveyance, however, are not homogeneous across states. They vary in light of identifiable factors.").

III. CRIMINALIZATION OF TERRORISM

Human rights, the interests of legitimately constituted governments, states' peaceful and political processes, and international peace and security are just some of the interests protected by the criminalization of terrorism.[65] Even though various events throughout history have driven the international community to criminalize diverse expressions of terrorism[66] and to disapprove of terrorism as a human rights violation and a threat to peace and security,[67] we still do not have a universal definition of terrorism. Without a clear, concise, and cohesive definition, how can terrorism be elevated to an international crime? This raises two critical questions: Regarding acts that violate basic human rights in a manner that "shock[s] the conscience of humanity,"[68] is the international community well-settled on the interests that triggered the consideration of terrorism as an international crime, and do violent acts defy the "inherent values and interests of the community of nations"[69] so as to become of interest to the international community?

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65. According to Ben Saul, the international community disapproves of terrorism on several grounds beyond it being a serious human rights violation. Terrorism undermines democratic governance and states' peaceful political process, and threatens international peace and security. Saul affirms that even if several United Nations' resolutions implied that self determination movements were excluded from the notion of terrorism, today "the international community has agreed that 'all acts, methods and practices of terrorism in all its forms and manifestations, wherever and by whomever committed' are both criminal and unjustifiable." Ben Saul, *Three Reasons for Defining and Criminalizing Terrorism,* EUR. SOC'Y OF INT'L L., at 2, 10, *available at* http://www.esil-sedi.eu/fichiers/en/Saul_625.pdf (last visited Mar. 4, 2009).

66. The first attempt was by the League of Nations following the 1934 assassination in France of King Alexander of Yugoslavia by Croatian separatists. Only India ratified the 1937 Convention for the Prevention and Punishment of Terrorism. The Convention paved the way for later instruments addressing terrorist offenses such as acts committed on-board aircraft, crimes against internationally protected persons, hostage-taking, crimes involving maritime navigation, crimes involving nuclear material, and financing of terrorism. INTERNATIONAL COOPERATION IN COUNTER-TERRORISM: THE UNITED NATIONS AND REGIONAL ORGANIZATIONS IN THE FIGHT AGAINST TERRORISM, *supra* note 35, at 37; SLYE & VAN SCHAACK, *supra* note 47, at 186–87.

67. For a comprehensive compilation of instruments considering terrorism as a threat to human rights and to peace and security, see Saul, *supra* note 65, at 3–5.

68. *Id.* at 2.

69. Otto Triffterer, *Security Interests of the Community of States, Basis and Justification of an International Criminal Jurisdiction versus 'Protection of National Security Information,' Article 72 Rome Statute*, in NATIONAL SECURITY AND INTERNATIONAL CRIMINAL JUSTICE 53, 63 (Herwig Roggemann & Petar Šarčević, eds., 2002).

Moreover, are these interests generally recognized by all nations and acknowledged and applied in a consistent fashion? As stated clearly in the United States' Supreme Court case of *The Paquete Habana*,[70] through the passage of time, "what originally may have rested in custom or comity, courtesy or concession," eventually grew by the "general assent of civilized nations, into a settled rule of international law."[71] This leads to the question whether terrorism reached such a level of customary international law so as to legitimize the claim that it is an international crime and not a transborder crime? I think the answer to this question is no. Conversely, one could argue that the practices and customs of states regarding terrorism are inconsistent and that the rules applied to terrorism are yet to be settled rules recognized through the "general assent" of nations.

IV. DETERMINING VENUE

In determining a proper forum to prosecute acts of terrorism, one must first understand the differences in jurisdiction for international and transnational crimes. Universal jurisdiction is broad and rooted in "the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction."[72]

A. Crimes that Warrant Universal Jurisdiction

Is jurisdiction justified according to the type of threat or injury, or the type of impact that the crime causes on the state or on the international community? This question reveals the basis for classifying terrorism. Those grave and heinous crimes that violate the *jus cogens* and encroach upon the fundamental interests of the

70. *The Paquete Habana*, 175 U.S. 677 (1900). For a detailed discussion, see GREGORY E. MAGGS, TERRORISM AND THE LAW CASES AND MATERIALS 40 (West 2005).

71. *The Paquete Habana*, 175 U.S. at 694.

72. *The Princeton Principles on Universal Jurisdiction 28*, *Princeton University Program in Law and Public Affairs* (2001), *available at* http://www1.umn.edu/humanrts/instree/princeton.html (discussing Principle 1).

international community are subject to universal jurisdiction because they injure the "interests of the international society as a whole."[73]

Indeed, crimes eliciting universal repudiation share certain elements: the crimes may be precisely defined, globally accepted as such, and the jurisdiction for trying such crimes may reside in international tribunals of supranational character or domestic tribunals having universal jurisdiction.[74] Crimes of genocide, crimes against humanity, torture, war crimes, and acts of aggression represent the kinds of criminal acts we generally accept as being subject to the purview of international criminal tribunals such as the ICC.[75]

The question is whether terrorism belongs to this category of crimes.

Prior to the September 11 attacks, many nations raised criminal acts to the level of terrorist acts if certain conditions were met.[76] Usually terrorism was understood in a domestic context and states were reluctant to prosecute terrorist acts that were unrelated to them. This changed following the September 11 attacks, however, as a flurry of legislation worldwide, specifically labeled "terrorist legislation," elevated crimes under ordinary law to the level of terrorist acts if a transnational character, such as linkage to foreign or domestic terrorist organizations, was indicated.

The United States enacted anti-terrorism legislation based on the idea that if terrorism is an act occurring beyond U.S. borders, but of which the United States can feel threatened, then such unlawful acts

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73. Boister, *supra* note 23, at 963; *see also* Gregory S. Gordon, *From Incitement to Indictment? Prosecuting Iran's President for Advocating Israel's Destruction and Piecing Together Incitement Law's Emerging Analytical Framework*, 98 J. CRIM. L. & CRIMINOLOGY 853, 882–84 (2008).

74. For a comprehensive study on the jurisdiction and formation of international tribunals, see Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 901 (2005).

75. Rome Statute of the ICC, *supra* note 6. These crimes are typically characterized as being of such extreme gravity as to be considered injurious to mankind as a whole and for which some universal duty arises to sanction and punish.

76. In the United States, for example, criminal acts are considered terrorist when it can be shown that the crimes perpetrated are "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents," 22 U.S.C. § 2656f(d)(2) (2006), or are intended "to intimidate or coerce a civilian population" or "influence the policy of a government by intimidation or coercion," 18 U.S.C. §§ 2231(B)(ii)–2331(B)(i) (2006).

constituting terrorism in other countries are similarly unlawful in the United States.[77] Armed with such domestic legislation, the United States will without hesitation go after any individual who it claims to be a terrorist. Through the execution of extraterritorial measures, including a practice known as rendition, the United States will try to reach within the borders of another country to grab a suspect and bring that suspect onto United States soil. However, the United States reserves the right to prohibit other nations from doing the same within the United States.[78] This reservation again raises the specter of imperialistic condescension and can be construed in parts of the world as anathema to the spirit of universal and multilateral cooperation in the fight against terrorism and crimes of universal jurisdiction.

In Canada, terrorist legislation was added to the Criminal Code by the Anti-Terrorism Act of December 2001.[79] Similar to terrorism legislation in the United States, the Canadian law is intended to bring terrorism offenses under Canadian jurisdiction,[80] "even if the ultimate terrorist activity takes place entirely outside of Canada or is intended to take place elsewhere."[81] The law defines terrorist activity as "an act or omission that is committed in or outside of Canada" that (A) is an offense under one of ten United Nations anti-terrorism conventions and protocols; or (B) is (1) committed for political, religious, or ideological purposes; and (2) is intended to threaten the public or national security, including economic security; or to compel a person, a government or an organization (whether located in or outside of Canada) to do or to refrain from doing something; and (3)

77. *See, e.g.*, 8 U.S.C. § 1182(a)(3)(B)(iii) (2006) ("[T]he term 'terrorist activity' means any activity which is unlawful under the laws of the place where it is committed [ ]or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State.").

78. One is reminded of former Defense Secretary Donald Rumsfeld delaying a trip to a conference in Germany until indictments brought against him in France and Germany for torture in Iraq were dismissed. *See* Bruce Zagaris, *French Prosecutors Dismiss Torture Case Against Rumsfeld*, 24 INT'L ENFORCEMENT L. REP. 84 (2008).

79. Canada Criminal Code, R.S.C., ch. C 46 §§ 83.01–83.33 (2010); *see also* Debbie Johnston, *Lifting the Veil on Corporate Terrorism: The Use of the Criminal Code Terrorism Framework to Hold Multinational Corporations Accountable for Complicity in Human Rights Violations Abroad*, 66 U. TORONTO FAC. L. REV. 137, 152 (2008).

80. Canada Criminal Code, R.S.C., ch. C 46 §§ 7(3.73), 7(3.74), 8.03 (2010).

81. Johnston, *supra* note 79, at 152.

intentionally causes death or serious harm; endangers a person; causes substantial property damage that is likely to seriously harm people; or interferes with or disrupts an essential service, facility, or system.[82]

We need to ask, however, whether criminal acts (answerable under the principle of territoriality), relabeled as terrorist acts (answerable under the principles of universality), rise to the level of crimes subject to the universal jurisdiction of international criminal tribunals. The Canadian and British legislative bodies were sensitive to this distinction in the drafting of their anti-terrorist laws, which "are grounded in the principle of universal jurisdiction,"[83] by inserting a "'political, religious, or ideological' motive clause . . . in an effort to narrow the reach of an otherwise broad definition and to distinguish it from other criminal acts aimed at intimidation."[84]

B. The Use of Universal Jurisdiction in Domestic Courts

In past eras, nations were generally reluctant to cast the net of domestic adjudication over crimes having extraterritorial character. More recently, however, due in part to the global war against terrorism and the globalization and breakdown of trade, economic, and political barriers, states have enacted criminal legislation that asserts extraterritoriality. Such a move by nations toward universal jurisdiction represents the global coalescence of common causes, such as responding to gross violations of human rights, including "genocide, crimes against humanity, and trafficking of women and children, particularly where host states lack the capacity or will to hold perpetrators accountable."[85] According to Amnesty International, some 125 nations have enacted criminal legislation extending universal jurisdiction over crimes against humanity and other *jus cogens* crimes.[86] Notable cases of domestic courts

82. Canada Criminal Code, R.S.C., ch. C 46 §§ 83.01(1)(a), 83.01(1)(b)(ii) (2010).
83. Johnston, *supra* note 79, at 143, n.18.
84. *Id.* at 153.
85. *Id.* at 146.
86. AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION: THE DUTY OF STATES TO ENACT AND IMPLEMENT LEGISLATION 3 (2001), http://www.amnesty.org/en/library/asset/IOR53/002/2001/en/dom-

prosecuting foreign nationals under universal jurisdiction and extraterritoriality include Adolf Eichmann in Israel, Nikolai Jorgic in Germany (for crimes of genocide in the former Yugoslavia),[87] and more recently Roy M. Belfast, a.k.a. Charles "Chuckie" Taylor, convicted in the United States for acts of torture and other crimes in Liberia.[88]

However, it must be noted that universal jurisdiction under domestic legislation does not impose a duty on a State to act against the perpetrators of extraterritorial crimes. Such legislation only "authorizes, rather than obliges States to prosecute and punish offenders" under international law.[89]

There is an inherent risk, however, in exercising universal jurisdiction in a domestic judicial venue over international terrorist acts. The specter of imperialism looms over the attempts by global powers, particularly the United States, to hold the perpetrators of terrorist acts accountable for acts that occur outside a prosecuting State's sovereign territory. Austen Parrish makes the point, well taken, that the "extraterritorial application of American law certainly has the appearance of a unilateral instrument of American hegemony."[90] The same can be said for other superpowers using domestic legislation to impose order on a chaotic and violent world. From this there is a cautionary tale to be learned: Court decisions issued forth from the world's power brokers, especially the United States, are often viewed by other nations as suspect. "This is

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IOR530022001en.pdf (visited Apr. 4, 2009). *Jus Cogens* crimes include crimes of aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture. *See* M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 68 (1996).

87. *See* Gordon, *supra* note 68, at 883–84 (also noting the conviction of Désiré Munyaneza, tried in Canada for genocide related to the mass murder of Tutsis in Rwanda in 1994).

88. *See Roy Belfast Jr., a/k/a Chuckie Taylor, Sentenced on Torture Charges*, BIOTERRORISM WEEK, Jan. 26, 2009, *available at* 2009 WLNR 1275299.

89. Audrey Golden, Comment, *Monkey Read, Monkey Do: Why the First Amendment Should Not Protect the Printed Speech of an International Genocide Inciter*, 43 WAKE FOREST L. REV. 1149, 1159–60 (2008) (emphasis omitted) (citing Lee A. Steven, Note, *Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of Its International Obligations*, 39 VA. J. INT'L L. 425, 440 (1998–1999)).

90. Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 866–67 (2009).

particularly true when the United States applies a double standard—permitting foreigners to be sued in U.S. courts, but not permitting human rights lawsuits to be filed against American actors."[91] If such is the case, Parrish concludes, then "vigorous enforcement of human rights through international instruments and institutions"[92]—in other words international tribunals and sanctions by the United Nations or other international bodies—would seem the proper avenue for adjudicating criminal acts that fall under the mantel of universal jurisdiction.

C. Universal Jurisdiction in International Tribunals

With regards to terrorism, there are several pitfalls to lifting it to the level of tribunals having universal jurisdiction, such as the International Criminal Court. For one thing, doing so would be difficult because the crimes that are included in the ICC are *jus cogens* crimes, considered so awful as to shock the conscience of the world and to be an affront to all human beings. If we adhere to this standard, then terrorism does not necessarily meet the criteria of the ICC if one considers that terrorism is a very politicized and contradictory concept subject to interpretation—"One man's terrorist is another man's freedom fighter."[93] If such were the case then acts considered heroic in different epochs of United States history could be subject to universal jurisdiction, such as the pacification of the Indians of the American Plains in the later nineteenth century. Also, we may not wish to revisit the many accounts of atrocities carried out in the Philippines by United States military commanders during the Filipino-American War of 1899–1902, in which some 1.4 million Filipinos died under what by today's standards would be considered state-sponsored *jus cogens* crimes against humanity. The same analogy might be drawn to crimes of aggression, which will never be

91. *Id.* at 867.
92. *Id.*
93. A widely used aphorism attributed by some to former U.S. Attorney General Ramsey Clark and by others to Irish revolutionary and early Sinn Fein leader Michael Collins who is thought to have said, "One man's terrorist is another man's revolutionary." The Clark-attributed phrase is actually found in Gerald Seymour's 1975 novel, HARRY'S GAME: A THRILLER 62 (Overlook TP 2007) (1975).

part of the ICC because we don't have universal agreement as to the definition. For example, prior to September 11, the acts of the FARC guerrillas were considered common crimes. However, post-September 11, the FARC guerrillas became terrorists committing the same crimes.[94]

International crimes are domestic crimes internationalized by treaty or convention. Crimes are made international in scope by the international community in reaction to the heinous gravity of the criminal conduct. However, they do not become crimes just by customary international law; they become international crimes by the shock and repugnance that the actions provoke in the global community as a whole. Whereas transnational criminal law becomes an obligation through domestic legislation,[95] international criminal law imposes obligations regardless of domestic legislation. Transnational criminal law does not create individual criminal responsibility under international law but does so under domestic law. The authority to punish emerges from domestic law. On the other hand, international criminal law creates individual criminal responsibility under international law regardless of whether or not individual nations criminalized such conduct under its domestic law. The authority to punish international crimes arises from international law because these crimes are codified under customary international law, which is the product of international consensus. Therefore, the prohibition of this crime is independent of the existence of a treaty.

When comparing perpetrators of international crimes with those who commit transnational crimes, a characteristic emerges that can determine if national criminal jurisdiction or another jurisdiction is the more appropriate forum for prosecuting terrorist acts.

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94. It is noteworthy that the conflict between the United States and Colombia over prosecuting the war against terrorism, currently, is that President Alvaro Uribe began extraditing FARC members under the label narcotraffickers rather than trying them in Colombia under the label of terrorist. This presents a significant problem in international criminal justice. However, in 2004, Juvenal Palmera Pineda, a.k.a. Simón Trinidad, a FARC commander, was extradited to the United States under a terrorism indictment related to the taking of American hostages in Colombia in 2003. Press Release, High-Ranking Member of Colombian FARC Narco-Terrorist Organization Extradited to U.S. on Terrorism, Drug Charges (Dec. 31, 2004), *available at* http://www.justice.gov/opa/pr/2004/December/04_crm_808.htm.

95. *See, e.g.*, 18 U.S.C. § 1182(a)(3)(B) (2006) (defining terrorist activities and terrorist organizations under United States law).

International crimes are often linked to individuals occupying positions of power[96] who commit those crimes out of or in relation to that position, or who have the appearance of power within a particular nation and frequently claim to have acted to protect national security or the nation's interest.[97] In such cases, one must ask if domestic jurisdiction preserves a sufficient guarantee to protect the values inherent to the international community and prevent further violations without the aid of other nations or that of supranational jurisdictions. In contrast, individuals accused of transnational crimes are generally not motivated to commit such acts out of or in relation to their position of power or to protect the nation's interest or national security. Rather, the motives of those committing transnational crimes more often include greed, hatred, ambition, and other personal objectives.

V. UNIVERSAL JURISDICTION FOR DOMESTIC TERRORISM

If acts of international terrorism become subject to international tribunals, then where do domestic terrorist acts fall? If a state is unable to respond to domestic terrorism, would not the enormity or wantonness of a domestic terrorist act subject its perpetrators to the universal jurisdiction and trial before an international tribunal? For instance, terrorist acts carried out by such groups as the ETA in Spain, the IRA in Northern Ireland, the Tamil guerrillas in Sri Lanka, and the FARC and Ejercito de Liberacion (ELN) in Colombia do not target individuals because of nationality. Rather, they target individuals because of the impact such indiscriminate and wanton violence will have on the state. Terrorists who cause mayhem within

96. Sometimes those accused of having committed the crimes in the name of and for the nation are not actually running the country.

97. Under Article 6(1)(a) & (b) of the ICC, crimes of genocide "do *not necessarily* presuppose an abuse of power, but quite often have this basis." The definitions in (c) and (e) show "that position of power and its abuse appear there as a typical and sometimes as an indispensable condition." Under Article 7(1) and (2)(a), in crimes against humanity, "a power position and its abuse based on the context with activities of a greater unit is presupposed for every single one of these crimes." The war crimes listed in Article 8 "presuppose already by their definitions a certain position of power and its abuse, or at least a relationship to such a position." Triffterer, *supra* note 12, at 65–66.

their national borders still commit terrorism *per se* that is universally recognized for what it is; they terrorize civilians and government targets in order to compel the state to act in conformance with their objectives.

VI. OTHER MECHANISMS FOR COMBATING TERRORISM

A. Institutionalization of States of Emergency

In the post-2001 world, there has been a trend toward the institutionalization of states of emergency in the United States and other nations.[98] For some nations, the move to strengthen the rule of law through executive fiat represents an honest effort to reinforce and restore the rule of law in weak and failing states, while in other nations, such as Venezuela and Colombia, the institutionalization of states of emergency seems little more than an effort to cloak totalitarian tendencies in the guise of cooperating with other states to fight both domestic and international terrorism. It appears, especially in the aftermath of September 11, that more nations are imposing state-of-emergency situations in order to implement forms of legislation that may be construed as oppressive and that curtail or threaten to curtail human rights. One might consider that there has emerged a correlation made between pre-September 11 conditions when nations were criticized, even by the United States, for legislating repressive criminal sanctions, and post-September 11 conditions when states were praised for promulgating such legislation in the name of being strong on terrorism. Some of the nations brought to mind include Colombia, India, China, Chile, and Israel.

Following September 11, a host of nations declared states of emergency. While some used such measures as a consequence to implementing terrorist-specific legislation, one could suggest that for a few nations, invoking a state of emergency was little more than a pretext for oppressive regimes to exert themselves, particularly by labeling groups as terrorists that would otherwise have been nothing

98. Norberg, *supra* note 1 at 30.

more than dissident groups. Chile is a current case in point. There, the government is using its Anti-Terrorist Law,[99] first enacted during the Pinochet dictatorship, to suppress a long-running indigenous Mapuche autonomy movement. Miguel Tapia Huenulef, the first Mapuche dissident to be tried under the law, was charged in February 2009 with arson on a private estate and for an alleged attack on a public defender's office.[100] In announcing the charges, Chile's Interior Minister stressed that the alleged acts show all the hallmarks of terrorism and warrant invoking the Anti-Terrorist Law. The Observatory on the Rights of Indigenous Peoples, a human rights organization monitoring the developments in Chile, countered that the Anti-Terrorist Law was being applied inappropriately. "The Mapuche people's struggle in support of their demands is not an act of terrorism . . . . 'In actual fact, there is no organization for the purpose of sowing fear among the population, there is no organization that would commit those crimes defined in law as terrorist crimes.'"[101] This is a clear example of how the lack of a clear and cohesive definition contributes to the misapplication of anti-terrorist legislation.

B. Immigration Law and Policy to Fight Terrorism

Terrorism has been fought with tools of law enforcement, legislative acts, and executive fiat of rule by decree. Added to the arsenal of fighting terrorism is the application of a more innocuous weapon: immigration law and procedures to control terrorism on domestic soil and to prevent suspected terrorists from going elsewhere to commit terrorist acts.[102] Many nations have used police

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99. Law No. 18314, Mayo 16, 1984, DIARIO OFICIAL [D.O.] (Chile), *amended by* Law No. 19241, Agosto 28, 1993, DIARIO OFICIAL [D.O.] (Chile), *available at* http://www.leychile.cl/Navegar?idNorma=29731&buscar=Ley+18314 (determining terroristic acts and establishing the penalties).

100. *See* Pamela Sepúlveda, *Chile: Indigenous Activist Arrested Under Anti-Terrorist Law*, INTERPRESS SERV., Feb. 24, 2009, *available at* http://www.allbusiness.com/crime-law-enforcement-corrections/law-arrests/12699360-1.html.

101. *Id.* (quoting Rodolfo Valdivia, co-director of the Observatory on the Rights of Indigenous Peoples (ODPI)).

102. According to Michael J. Garcia, head of U.S. Homeland Security's Immigration and Customs Enforcement (ICE), immigration law is "an incredibly important piece of the terrorism response." Mary

forces to locate and arrest suspected or perceived terrorists, and they have used their domestic courts to prosecute them. It is true that to some extent, there is greater vigilance at points of entry; although, one may argue that international borders are more porous than in the past.

In the aftermath of September 11, several nations discovered that existing immigration laws were not enforced and that the laws contained several loopholes that could compromise a state's ability to secure its territory from illegal entries by terrorists. The vulnerabilities discovered in immigration practices led to radical shifts in nations' anti-terrorism policies.[103] For example, in partial response to the breakdown in immigration enforcement in the United States that contributed to the September 11 attacks, extensive measures were undertaken in many nations to identify weaknesses in the laws that allowed some of the terrorists to go about their business largely unnoticed on foreign soil.[104]

For instance, in the United States, prior to September 11, the United States Immigration and Naturalization Services (INS) failed on many occasions to register and track aliens as required by law. This kept the government in the dark as to when aliens entered the United States and when they exited the country.[105] Such a "lack of

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Beth Sheridan, *Immigration Law as Anti-Terrorism Tool*, THE WASH. POST, June 13, 2005, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/06/12/AR2005061201441.html.

103. For a comprehensive description of the European Union response, see Evelien Brouwer, *Immigration, Asylum and Terrorism: A Changing Dynamic Legal and Practical Development in the EU in Response to the Terrorist Attacks of 11.09*, 4 EUR. J. MIGRATION L. 399 (2003).

104. FRANCIS T. MIKO & CHRISTIAN FROEHLICH, GERMANY'S ROLE IN FIGHTING TERRORISM: IMPLICATIONS FOR U.S. POLICY, 4 (2004), *available at* http://www.fas.org/irp/crs/RL32710.pdf.

105. After 9/11, the Justice Department began the National Security Entry-Exit Registration System, or NSEERS, to close such loopholes. *War on Terrorism: Immigration Enforcement Since September 11, 2001: Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the Comm. on the Judiciary*, 108th Cong. 2 (2003), *available at* http://commdocs.house.gov/committees/judiciary/hju86954.000/hju86954_0f.htm. ("Since the implementation of NSEERS in September 2002, more than 138,000 aliens from over 151 countries have been registered. NSEERS has resulted in the identification of 11 aliens linked to terrorism, the arrests of more than 120 criminal aliens and the issuance of more than 12,000 charging documents placing deportable aliens in deportation proceedings. This program is now run in DHS.").

enforcement was dangerous and ripe for abuse by aliens wishing to stay below the radar, including terrorists."[106]

The horrific train bombings in Madrid, Spain, on March 11, 2004, were perpetrated by Moroccan immigrants. Three years earlier, in November 2001, two of the perpetrators had been named in a report as members of an al Qaeda cell, which had suspected links to a group that later carried out several bombings in Casablanca in 2003; another terrorist in the Madrid attacks was linked to a group that deployed several suicide bombers throughout Morocco, also in 2003.[107]

The fact that all of the terrorist hijackers who attacked the United States on September 11 were aliens does not, of course, make all aliens terrorists. But it does, however, reveal that those terrorists exploited existing weaknesses in immigration laws and procedures,[108] and demonstrates an urgent need for changes in and implementation of U.S. immigration policy.

Some observers suggest that terrorism has been fought largely with immigration law[109] and that doing so stigmatizes innocent individuals caught up in the war on terrorism.[110] Yet, one must acknowledge that immigration policies are key ingredients in the efforts to combat terrorism. Further, one must acknowledge that such policies are effective if the implementation of the policies is evenhanded, if the laws are carefully crafted to avoid further erosion of civil liberties, if

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106. *Id.* (statement of Hon. John Hostettler, Chairman, Subcomm. on Immigration, Border Sec. & Claims, Committee on the Judiciary)

107. *See* David Ing, *Moroccan Islamist Group Linked to Madrid Bombs*, JANE'S INTELLIGENCE REV., Apr. 2004, at 4. One of the individuals had been living in Spain since 1985, another since 1996, and yet another had moved to Spain in 1999. Tim Golden & Craig S. Smith, *Spain Arrests 5 More Suspects in Madrid Bomb Attacks*, N.Y. TIMES, Mar. 19, 2004, at A12.

108. Five of the 9/11 hijackers had clear immigration violations and one had a possible violation. THOMAS R. ELDRIDGE, SUSAN GINSBURG, WALTER T. HEMPEL II, JANICE L. KEPHART & KELLY MOORE, NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, 9/11 AND TERRORIST TRAVEL 147 (2004), *available at* http://www.9-11commission.gov/staff_statements/911_TerrTrav_Monograph.pdf.

109. Naomi Norberg, *Terrorism and International Criminal Justice: Dim Prospects for a Future Together*, 8 SANTA CLARA J. INT'L L. 11, 33–34 (2010).

110. For example, "Ali Alubeidy was caught up in an investigation of fraudulent Pennsylvania commercial driver's licenses. It wasn't until after the attacks on New York and the Pentagon that the FBI pursued his case as having a possible link to terrorism. Although the connection soon unraveled, Alubeidy, an Iraqi immigrant, lives with the stigma." Mary Beth Sheridan, *Immigration Law as Anti-Terrorism Tool*, WASH. POST, June 13, 2005, at A01, http://www.washingtonpost.com/wp-dyn/content/article/2005/06/12/AR2005061201441.html (visited Apr. 18, 2009).

detentions solely based on someone looking "Arab or Middle Eastern or Latino or other" are avoided,[111] and if implementation avoids generalization and the amalgam between Islam immigrants and terrorism.[112]

In order to be effective, immigration laws must balance the need of protecting the security of nations with the needs of the immigrant population. States must be aware that immigrants are "person[s] with identities, with cultural and religious backgrounds, with aspirations, with all the complexities" that cannot be disregarded out of hand.[113] Immigrants go through "tremendous change in their lives."[114] They must adapt to new cultures and new realities while often receiving contradictory signals as to their acceptance by the communities in which they have settled.[115] At the same time, external forces, such as the sweeping momentum of globalization, generate tensions that impact the capacity of immigrants to be integrated into new surroundings.[116] Integration favors the haves and exclusion awaits the have-nots. Meanwhile, immigrants also face the mega-trend of standardization through the media, the pressure of consumption patterns, and a youth culture of intolerance that foments violent reactions from disaffected and marginalized members of the immigrant community toward the established order, be it of national or international character.[117]

Immigration policy changes alone cannot prevent terrorism, but perhaps are a viable "soft" alternative to employing the use of force, potentially trampling on human rights. Even if immigration laws do not explicitly incorporate anti-terrorism measures, "immigration laws can provide a quick, easy way to detain people who could be

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111. *War on Terrorism: Immigration Enforcement Since September 11, 2001: Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the Comm. on the Judiciary*, 108th Cong. 6 (2003).

112. Bensalah Alaoui, Remarks at the International Summit on Democracy, Terrorism and Security: Immigration: Is Integration Failing? (Mar. 9, 2005) (transcript available at http://summit.clubmadrid.org/keynotes/immigration-is-integration-failing.html).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

planning attacks,"[118] and at the very least, can be used to detain and deport individuals suspected of being terrorists or supporters of terrorist groups who have overstayed their visa limits.[119]

Yet, because immigration law is primarily intended to regulate those seeking to migrate to another country, it is very difficult to ensure that innocent individuals will not be unjustly caught up in the application of immigration law and procedures to combat terrorists. Indeed, one cannot deny that in the War on Terror, immigrants constitute an invisible casualty.[120] Based on research of "more than 212 known terrorists in North America and Europe," the Nixon Center concluded that even though "most immigrants are not terrorists, most terrorists are immigrants."[121] Those findings explain why numerous immigrants have come under scrutiny in national security investigations.

Standards of practice vary from nation to nation. In Germany, the government has decided that profiling is an acceptable means for identifying likely terrorists.[122] In contrast, the Department of Homeland Security (DHS) in the United States asserts that it does not focus on any particular ethnic or religious group, but does target individuals who, according to DHS investigations, are or may be involved in activities damaging to national security.[123] Reporting Justice Department activities with regard to DHS prosecutions of

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118. Sheridan, *supra* note 110, at A01.

119. *Id.*

120. Sean Garcia, Immigration Reform Key to Border Security 7 (Americas Program, Interhemispheric Resource Center 2003) (referring to the hundreds of migrants who either die trying to enter the United States or work on all kinds of jobs once in the United States).

121. Robert S. Leiken, *Bearers of Global Jihad? Immigration and National Security after 9/11*, at 14 (The Nixon Center 2004). The Center surveyed "212 individuals arrested or killed from 1993 to 2003 in North America or Western Europe for their links to Al Qaeda." *Id.* In footnote 1, the Center refers to a study done by the Center for Immigration Studies by Steven Camarota, The Open Door: How Militant Islamic Terrorists Entered and Remained in the United States 1993-2001, which studied forty-eight terrorists detained before September 11, including the nineteen hijackers.

122. In Germany, the Muslim population has influenced that nation's antiterrorism legislation, and profiling is considered an acceptable means for identifying likely terrorists. However, the "police are prohibited from collecting intelligence and can only begin an investigation when there is probable cause that a crime has been committed." FRANCIS T. MIKO & CHRISTIAN FROEHLICH, GERMANY'S ROLE IN FIGHTING TERRORISM: IMPLICATIONS FOR U.S. POLICY, 5–10 (2004), *available at* http://www.fas.org/irp/crs/RL32710.pdf.

123. Sheridan, *supra* note 110, at A01.

individuals suspected of having ties to terrorist groups, *Washington Post* reporter Mary Beth Sheridan noted,

> Homeland Security agents do detain people from lots of different countries on immigration charges; but they succeed in arresting only a small percentage of the illegal population . . . . They clearly have focused more on looking at people who they consider possible national-security threats. Many Muslims and Arab-Americans feel they're being hit with charges very few others face. They're true in some cases. The issue there is whether they've violated the immigration law, and whether there's reason to scrutinize them. The government argues it's not profiling but checking out information it receives that links the individuals to some kind of threat.[124]

The events of September 11 also triggered in some nations the fear that suspects already living within their borders would be able to take advantage of the laws in place, such as petitioning for political asylum, extending residency permits, and capitalizing on guest worker and professional training programs. An example of the latter would be the ability of foreign students to remain in the United States following completion of their studies in the capacity of a trainee in a professional field related to their studies under the terms of their F-1 or M-1 visas.[125] A number of governments also question whether terrorists may have married in order to obtain citizenship and view certain second-generation immigrants with citizenship as a potential recruitment pool for terrorism.[126] This is a particularly thorny issue for European states, where, for example, 93% of all Algerian immigrants settle in France, creating a condition of mass migration

124. Dan Eggen & Mary Beth Sheridan, *Justice Department: Terror Trials and Tribulations*: Live Q&A Transcript, WASH. POST.COM, June 13, 2005, http://www.washingtonpost.com/wp-dyn/content/discussion/2005/06/10/DI2005061001426.html.

125. *See* U.S. Department of State, Student Visas, http://travel.state.gov/visa/temp/types/types_1268.html (last visited Apr. 18, 2009).

126. In Germany, this happens mainly with the Muslim community. MIKO & FROEHLICH, *supra* note 122, at 7–8.

known as "channeling."[127] Under such a condition, entire populations relocate to a receiving nation, and with that comes insulated networks for smuggling, moving money around outside the formal economy, and creating and sustaining conditions for terrorists and terrorist networks to thrive. Coupled with the isolation and lower-class status in European societies that most immigrants experience, the second- and even third-generation offspring grow up with deep resentment and distrust of the nations in which they have been raised but for which they have little attachment or affinity.

So, even if immigration laws are enforced, the loopholes and problems with monitoring the status of legal immigrations and the conditions created by marginalization and isolation do nothing to insulate or shield a nation from potential terrorists, since the terrorists may have already legalized their status as resident aliens allowing them to live within the borders of states they hate and want to destroy. Besides, one might suggest that deporting all illegal aliens would likely still not relieve a nation of potential terrorists.

In the United States, the Immigration and Customs Enforcement (ICE) approach has resulted in very few terrorism or national security convictions, although several individuals detained for immigration violations have been successfully prosecuted for other crimes.[128] Reporting on the actual level of success, however, is not terribly reliable. Whereas the Justice Department, during a three-year period of enforcement activity following the September 11 attacks, claimed that some 200 aliens had been convicted of crimes related to terrorism or national security, a *Washington Post* investigation placed the number at 39 individuals.[129] "Most of the others were convicted of relatively minor crimes such as making false statements and violating immigration law—and had nothing to do with terrorism."[130] The *Washington Post* reached a number of startling conclusions that

127. Robert S. Leiken, *Europe's Mujahideen: Where Mass Immigration Meets Global Terrorism*, CTR. FOR IMMIGRATION STUDIES, Apr. 2005, at 2, *available at* http://www.cis.org/articles/2005/back405.pdf.

128. Eggen & Sheridan, *supra* note 124.

129. Dan Eggen & Julie Tate, *U.S. Campaign Produces Few Convictions on Terrorism Charges*, WASH. POST, June 12, 2005, at A1.

130. *Id.*

called into serious question not only the practicality of using immigration laws to hunt down terrorists or those associating with them but also the "truthiness" of claims proffered by the government as to its success in fighting the War on Terror on home turf:

> Taken as a whole, the data indicate that the government's effort to identify terrorists in the United States has been less successful than authorities have often suggested. The statistics provide little support for the contention that authorities have discovered and prosecuted hundreds of terrorists here. Except for a small number of well-known cases—such as truck driver Iyman Faris, who sought to take down the Brooklyn Bridge—few of those arrested appear to have been involved in active plots inside the United States.
>
> Among all the people charged as a result of terrorism probes in the three years after the Sept. 11, 2001, attacks, The Post found no demonstrated connection to terrorism or terrorist groups for 180 of them.
>
> Just one in nine individuals on the list had an alleged connection to the al Qaeda terrorist network and only 14 people convicted of terrorism-related crimes—including Faris and convicted Sept. 11 plotter Zacarias Moussaoui—have clear links to the group. Many more cases involve Colombian drug cartels, supporters of the Palestinian cause, Rwandan war criminals or others with no apparent ties to al Qaeda or its leader, Osama bin Laden.[131]

In order to differentiate real threats from perceived threats, nations need to review their immigration policies and implement comprehensive changes, considering in the process their duty to protect the rights of immigrants and refugees from government abuse and harassment. Immigration policies at the most fundamental level are little more than a checkpoint to (1) facilitate the entry of

131. *Id.* at A1, A18.

foreigners whose presence is desired and (2) identify and deter the entry of foreigners who are not so desirable.

Carefully drafted policies should help discourage future domestic terrorist attacks without damaging other values inherent in nations who adhere to the rule of law and aspire to the best aspects of a civil society. Such policies should also address methods of continually monitoring, evaluating, and then improving the processing and issuing of visas, curbing unauthorized entries, and increasing enforcement in a fair and reliable manner. However, the immigration-terrorism link, reinforced by post-2001 Security Council Resolutions, appears to conflict with such sentiments, condones conflict between the two components of law and government, and stands in sharp contrast to the world's response to the core crimes. Therefore, there is a serious question as to whether the ICC should have jurisdiction over terrorism, because doing so would not only condone but also exacerbate the efforts to strike a balance between immigration policy and fighting terrorism.

Prior to the attacks of September 11, terrorism was fought with tools of law enforcement rather than with administrative processes such as immigration law and procedure. Many nations have used police forces to locate and arrest suspected or perceived terrorists, and they have used their domestic courts to try them. It is true that to some extent there is greater vigilance at points of entry, although one may argue that international borders are now more porous than in the past.

After September 11, the trend seems to have become one in which nations are trying to look more carefully at who is violating immigration laws that have already been established, as a further weapon in a state's counter-terrorism arsenal. For instance, prior to September 11, with the exception of the attack at the 1972 Munich Olympics on Israeli athletes by the Palestinian Black September Movement,[132] Germany's experience combating terrorism was

132. For a brief background of the events and actors involved in the Munich tragedy, see Wikipedia.com, Munich Massacre, http://en.wikipedia.org/wiki/Munich_massacre (last visited Apr. 18, 2009).

predominantly focused on domestic actors such as the Red Army Faction and its derivatives.[133] But Germany received a wake-up call when it realized that the 9/11 terrorists hatched their plot on German soil over the course of several years, largely by taking advantage of Germany's liberal asylum policies and the low levels of surveillance by authorities.[134] In response to what had occurred under Germany's watch, the government took extensive domestic measures to identify weaknesses in their laws, which had allowed some of the terrorists to live and plot in Germany largely unnoticed. In revising its anti-terrorism policies, Germany was careful to ensure that its internal and international actions would remain consistent with its own domestic laws:

> In its efforts to combat terrorism, Germany has emphasized the need to ensure that all of its domestic and international actions are consistent with the country's own laws, values and historical lessons of the Nazi era. Germany has given high priority to the protection of the civil rights and liberties of all those residing in Germany, including non-citizens. Germans stress that this long-standing emphasis on civil rights should not be seen as a lack of political will to target terrorists today.[135]

In the drafting of its anti-terrorism legislation, Germany followed Canada and Britain, and was particularly sensitive to religious and cultural groups.

> The first [of two major anti-terrorism packages that Germany adopted] . . . targeted loopholes in German law that permitted terrorists to live and raise money in Germany. Significant changes included[:] (1) [t]he immunity of religious groups and charities from investigation or surveillance by authorities was

133. For a brief background on the history and operations of the Red Army Faction, see Wikipedia.com, Red Army Faction, http://en.wikipedia.org/wiki/Red_Army_Faction (last visited Apr. 18, 2009).

134. *See* MIKO & FROEHLICH, *supra* note 122, at 2.

135. *Id*. at 3.

> revoked, as were their special privileges under right of assembly, allowing the government greater freedom to act against extremist groups; (2) terrorists could now be prosecuted in Germany, even if they belonged to foreign terrorist organizations acting only abroad; (3) the ability of terrorists to enter and reside in Germany was curtailed; and [(]4) border and air traffic security were strengthened.[136]

Moreover, in conjunction with reforming its immigration laws, Germany also took the added step to strengthen its ability to resist and combat terrorism by improving the effectiveness and communication of intelligence and law enforcement agencies at the federal and state levels. "The new laws provided the German intelligence and law enforcement agencies greater latitude to gather and evaluate information, as well as to communicate and share information with each other and with law enforcement authorities at the state level."[137]

VII. APPLYING UNIVERSAL JURISDICTION TO DOMESTIC TERRORISM

A. Extraditing Terrorists to Face Charges

Yet another problem for terrorism to be lifted to the status of an international crime is the lack of cooperation among nations to extradite those responsible. Take, for example, the case of César Orgafas, a Colombian national, whose extradition to the United States to answer to charges of terrorism was blocked by the Supreme Court of Colombia. The Court reasoned that the criminal acts of kidnapping and terrorism had not occurred in the United States but in Colombia despite the fact that the victims were American citizens. The Supreme Court agreed to extradite Orgafas to the United States if he was to be only tried for narco-trafficking, specifically stating that

136. *Id*. at 4.

137. *Id*. ("Some $1.8 billion was made immediately available for new counterterrorism measures. In fiscal years 2002 and 2003, the budget for relevant security and intelligence authorities was increased by about $580 million.").

he could not be tried for the crime of kidnapping, terrorism, or giving material support to international terrorist organizations. Such a ruling could be construed as an indication as to how nations feel, that maybe an act of terrorism belongs to their specific jurisdiction and not to the jurisdiction of requesting states. The Colombian Supreme Court has also stated that the lack of territorial jurisdiction on the part of the United States renders Colombia the proper forum to try this or any other similarly-charged individual because according to the Supreme Court, the crimes of kidnapping and terrorism were initiated and ended in Colombian territory, and the laws of kidnapping are subject to the principle of territorial jurisdiction.

B. Gathering Evidence to Try Terrorists in International Tribunals

This example similarly illustrates the challenge of gathering evidence in order to bring individuals accused of perpetrating terrorist acts or associating with terrorists before an international tribunal, or subject an accused to extraterritorial jurisdiction. Secrecy is crucial for defending nations to succeed in gaining strategic advantage against terrorists. So, in the interest of national security, certain information may be withheld. Disclosure of such information can be construed as being prejudicial to the national security interest of the nation; yet, the information may be crucial to the determination of individual responsibility of the doer. Domestic security is prejudiced when evidence is revealed. In terrorism, evidence often relies on the unencumbered discretion of the concerned state, so withholding evidence would bar any investigation by the ICC.[138]

In 1998, the French High Court overturned a court of appeal's dismissal of a case brought against a foreign national living in

138. In Australia, Faheem Khalid Lodhi, a 34-year-old Pakistani-born Australian citizen was accused of terrorism. Mike Head, *Secret Evidence Used in Australian "Terrorist" Trial*, WORLD SOCIALIST WEB SITE, Dec. 20, 2004, http://www.wsws.org/articles/2004/dec2004/terr-d20.shtml. Under the National Security Information Act, his trial was in complete or partial secrecy. The act calls for closed court sessions, witnesses testify in disguise via video and, in some circumstances, exclude defendants and their lawyers from trial proceedings. Failure of a lawyer to obtain a security clearance excludes them from secret sessions and from viewing transcripts. Juries can convict a defendant without seeing key evidence. The prosecution can withhold testimony or other material from the accused and present it to the jury in summarized and censored form. *Id.*

France.[139] The defendant, a Rwandan priest, had been charged with participating in torture, crimes against humanity, and genocide. The court of appeal ruling, that French courts lacked universal jurisdiction over acts of genocide committed abroad by a foreign national, was overturned on the grounds that the acts committed could also be qualified as acts of torture, triggering universal jurisdiction under Article 689-2 of the French Code of Criminal Procedure.[140]

CONCLUSION

The future of fighting terrorism depends on the will of nations to resist those who resort to extreme violence as a means of promoting a cause or seeking redress. Yet, the problematic obstacles of determining whether terrorism rises to the level of crimes invoking universal jurisdiction, at least for now, are too controversial to be resolved absent a greater understanding of terrorism in domestic and international forums. Subjecting terrorism to an international forum of adjudication also presents problems in the definitions and distinctions of transnational crimes and international crimes. Much care must be given to sorting out the impact of terrorism on both types of crimes in order to determine the proper forum.

If acts of terrorism found to be of an international and extraterritorial nature are construed to warrant universal jurisdiction, then what becomes of domestic acts of terrorism that have all the hallmarks of crimes against humanity and other acts so abhorrent as to shock the conscious of nations? If, for example, Osama bin Laden were to be apprehended, how would his answering for his alleged crimes be handled? If he were not to be adjudicated in an international criminal court where all nations who suffered the loss of citizens and property in one heinous act could be represented, then

139. Munyeshyaka Case, Cour de cassation, Chambre criminelle [Criminal Chamber, Court of Cassation], No. 96-82491, Jan. 6, 1998, *available at* http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007069907&dateTexte=.

140. *See* Rule of Law in Armed Conflicts Project RULAC, The Munyeshyaka Case–Rwanda, http://www.adh-geneva.ch/RULAC/national_judical_decitions.php?id_state=67 (last visited Feb. 25, 2009).

one could envision a seemingly endless succession of one nation after another requesting bin Laden to answer charges of terrorism in domestic courts for crimes determined to be of a transnational rather than of an international nature. Quite likely, bin Laden would live out his lifespan before the nations involved would be able to bring him to the bar before their own courts of justice.

Hopefully, in the meantime nations will continue to seek cooperative means to combat terrorism both domestically and transnationally so that crimes of terrorism will be subject to a universal-like standard of rebuke and nations will seek to combat terrorism through the drafting and enforcement of anti-terrorism legislation that is tough on terrorists but remains accountable to all members of a civil society.