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THE ANXIETY OF SOVEREIGNTY: BRITAIN, THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT

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Abstract: This Article examines the development of the International Criminal Court, outlines the positions of and disagreements between Britain and the United States concerning the ICC, and analyzes the specific objections to the ICC raised by the United States. In this discussion, the Article argues that the contrasting positions of Britain and the United States toward the ICC can be understood in terms of each nation’s differently configured perception of its own sovereign power. For various reasons, Britain’s sovereignty is tested most acutely by its relationship with the European Union, while the United States feels its sovereignty encroached primarily by its relationship with the United Nations. Britain and the United States share a commitment to constitutionalism and this commitment has grounded Anglo-American support for international war crimes tribunals in the past. In the end, the ICC raises the question whether constitutionalism is a domestic or a universal conception.

DEFINING TERRORISM: THE EVOLUTION OF TERRORISM AS A LEGAL CONCEPT IN INTERNATIONAL LAW AND ITS INFLUENCE ON DEFINITIONS IN DOMESTIC LEGISLATION

Reuven Young

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Abstract: This Article examines the evolution of the definition of terrorism at international law and tests the widely held view that international law does not provide a definition of terrorism. It contends that by ab-
stracting from the common elements and themes present in the United Nations General Assembly and Security Council resolutions concerning terrorism, and the multi-lateral anti-terrorism conventions, treaties, and protocols, one can discern a core international law definition of terrorism. The Article then compares this definition to those in the domestic legal systems of the United States, United Kingdom, India, and New Zealand to determine whether (1) international law was influential in the drafting of these definitions or in the anti-terrorism legislative process generally and (2) these definitions are consistent with the international law definition discerned from the existing sources of international law relating to terrorism. It concludes that until a customary international law rule prohibiting terrorism emerges or a comprehensive terrorism convention is concluded, states should draw on the international law definition of terrorism when drafting their domestic anti-terrorism legislation for legal and policy reasons, including to enhance the protection of human rights. The Article also examines the history of the development of the international law anti-terrorism instruments and the development of a comprehensive terrorism convention and model domestic legislation, and serves as a study of the implementation or incorporation of international law treaty obligations into domestic law in the context of terrorism.

NOTES

PAKISTAN, THE WTO, AND LABOR REFORM

Asna Afzal

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Abstract: This Note examines the economic and legal implications of developing nations’ membership in the World Trade Organization (WTO). Specifically, the article analyzes Pakistan’s labor reforms subsequent to its membership in the WTO. The Note first provides a historical background of Pakistani membership in the WTO. Next, the Note discerns that despite the lack of established WTO labor standards, developing nations face pressure to implement labor reforms incidental to trade liberalization policies. The author argues that the pressures imposed on lesser-developed countries (LDCs) such as Pakistan have, as of yet, spawned only superficial labor reforms. The final section of the Note suggests that whether or not the WTO chooses to set labor standards in the future, international trade commitments must adequately account for the economic and legal constraints of LDCs in order to spur lasting labor reform.
RIGHTS RHETORIC AS AN INSTRUMENT OF RELIGIOUS OPPRESSION IN SRI LANKA

Tracy Hresko

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Abstract: Two laws proposed by the Sri Lankan government present a threat to Christians and other religious minorities in the country. Though purportedly designed to prevent “unethical or fraudulent conversions,” the laws are overly broad and ill-defined, giving Sri Lankan officials the latitude to use them to suppress minority religious activities. Indeed, despite being couched in the rhetoric of religious liberty and human rights, the laws are likely to be used by the Buddhist majority as instruments of oppression over unpopular religious groups.

THE TRAFFICKING OF PERSONS INTO THE EUROPEAN UNION FOR SEXUAL EXPLOITATION: WHY IT PERSISTS AND SUGGESTIONS TO COMPEL IMPLEMENTATION AND ENFORCEMENT OF LEGAL REMEDIES IN NON-COMPLYING MEMBER STATES

R. Victoria Lindo

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Abstract: Trafficking in persons for the purpose of sexual exploitation is a global scourge that affects all corners of the planet, including the European Union (E.U.). Since 1997, the E.U. has made great strides toward conquering trafficking within its borders, and yet this modern day slave trade continues to flourish. This Note follows the progression of Community legislation targeting trafficking from 1997 through today, and analyzes Member States’ compliance with those laws as well as patterns of concern. Because current legislation focuses primarily on penalization and victim’s protections, this note argues that the E.U. must pass legislation requiring Member States to take preventative action as well. It also argues that the E.U. must use its judicial powers to more effectively fight trafficking for sexual exploitation by punishing those Member States who still fail to comply with existing Community legislation.
WRANGLING IN THE SHADOWS: THE USE OF UNITED STATES SPECIAL FORCES IN COVERT MILITARY OPERATIONS IN THE WAR ON TERROR

Michael McAndrew

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Abstract: Following the terrorist attacks in the United States on September 11, 2001, the United States Senate granted the use of all necessary and appropriate force to prevent any future acts of international terrorism against the country. As part of this campaign against global terrorism, the United States Department of Defense sought an expanded role for Special Forces soldiers in covert paramilitary operations, a tactical responsibility traditionally within the domain of the CIA. In this Note, the author analyzes the protocol for authorizing covert activity and the ramifications under international law of utilizing formal United States military personnel to conduct such operations. The author suggests that non-uniformed, deniable covert operations should remain with the CIA since the loss of Geneva Convention status by United States Special Forces personnel seems excessive in light of the legal means available for utilizing them in the war on terror.

A RE-EXAMINATION OF THE UNITED STATES-JAPAN STATUS OF FORCES AGREEMENT

Ian Roberts McConnel

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Abstract: On August 13, 2004, a United States Marine Corps helicopter crashed on the campus of Okinawa International University. The helicopter crash and the resulting U.S. military investigation served to reinvigorate pent up resentment and anger towards the U.S. military presence in Okinawa, threatening to destabilize the long standing relationship between the two nations. This Note discusses the U.S.-Japan Status of Forces Agreement which, among other things, apportions jurisdictional authority over off-base U.S. military accidents that occur on Okinawa. This Note argues that the U.S.-Japan Status of Forces Agreement (U.S.-Japan SOFA) should be a reciprocal agreement and that the United States should amend the Agreed Minutes of the U.S.-Japan SOFA to allow for a joint effort in investigating and securing off-base military accident sites. Altering the U.S.-Japan SOFA will be a substantial step in demonstrating that the United States views Japan as an equal partner in the effort to encourage peace and prosperity in the Asian hemisphere.
THE ANXIETY OF SOVEREIGNTY: BRITAIN, THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT

DOUGLAS E. EDLIN*

Abstract: This Article examines the development of the International Criminal Court, outlines the positions of and disagreements between Britain and the United States concerning the ICC, and analyzes the specific objections to the ICC raised by the United States. In this discussion, the Article argues that the contrasting positions of Britain and the United States toward the ICC can be understood in terms of each nation’s differently configured perception of its own sovereign power. For various reasons, Britain’s sovereignty is tested most acutely by its relationship with the European Union, while the United States feels its sovereignty encroached primarily by its relationship with the United Nations. Britain and the United States share a commitment to constitutionalism and this commitment has grounded Anglo-American support for international war crimes tribunals in the past. In the end, the ICC raises the question whether constitutionalism is a domestic or a universal conception.

Introduction

The United States and Britain disagree about several legal issues with a political dimension, or political issues with a legal dimension, ranging from landmines to climate change.1 But unlike disagreements over the Ottawa Convention and the Kyoto Protocol, given

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both nations’ shared cultural, historical, and constitutional commitments to the rule of law and judicial independence as a means of securing fundamental values and governmental accountability, the disagreement between Britain and the United States over the International Criminal Court (ICC) seems especially unexpected. As this Article will explain, the nations’ divergent positions toward the ICC are perhaps not as surprising as it first appears.

This Article examines the development of the International Criminal Court, outlines the positions of, and disagreements between, Britain and the United States concerning the ICC, and analyzes the specific objections to the ICC raised by the United States. This Article will argue that the contrasting positions of Britain and the United States toward the ICC can be understood in terms of each nation’s differently configured perception of its own sovereign power. For various reasons, Britain’s sovereignty is tested most acutely by its relationship with the European Union (EU), while the United States feels its sovereignty encroached primarily by its relationship with the United Nations.

I. THE ORIGINS AND JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

The ICC traces its antecedents back, ultimately, to the Nuremberg Trials (Nuremberg). British leaders had grave doubts about the efficacy of an international tribunal; the official British position toward the punishment of identified war criminals from 1943 until the end of

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the war was summary execution. Nevertheless, Nuremberg and the aftermath of World War II generated international legal awareness of and momentum for the creation of an international legal tribunal to prosecute and punish those responsible for war crimes. After Nuremberg, and in light of persistent questions about the legal legitimacy of those proceedings, the United Nations (U.N.) General Assembly appointed a body of experts to organize and codify international legal principles. In particular, this International Law Commission (ILC) was asked to draft a statute instituting an international criminal court along with an international criminal code, the so-called “Nuremberg Principles,” which would be enforced by the international criminal tribunal.

These efforts culminated in the ILC’s draft statute for the creation of an international criminal court in 1994. Two years later, the ILC completed its draft international criminal code. As background to the ILC’s work, international pressure was building for the creation of tribunals to try individuals in connection with the human rights atrocities in the former Yugoslavia. This was followed in 1994 by a United Nations Security Council resolution to create a second ad hoc tribunal as a result of the genocidal activities in Rwanda.

Building on the ILC’s draft statute and referencing the two ad hoc tribunals as prototypes, the U.N. General Assembly issued resolutions that led to the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, which met in Rome beginning on June 15, 1998. On July 17, 1998, the Rome Statute of the International Criminal Court was signed by 120 states, with twenty-one abstentions and seven objections, including that of the United States. The ICC was formally created upon the ratification of the Rome Statute by sixty states and entered into force on July 1, 2002.

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8 See William A. Schabas, An Introduction to the International Criminal Court 8 (2nd ed. 2004).
9 Id. at 11.
Four crimes may be prosecuted before the ICC: genocide, crimes against humanity, war crimes, and aggression. These crimes are understood to possess an intrinsic international dimension as a result of their scope and extraordinary inhumanity, which raise a concern for all nations. The jurisdictional limitation of the ICC to these four crimes links it to its historical predecessor at Nuremberg because all four of these crimes were also prosecuted in some form at the Nuremberg Trials. Also, like Nuremberg, the ICC was created to provide a forum for prosecution of leaders and organizers most responsible for these crimes, not lower-level functionaries. Indeed, the Rome Statute specifically rejects official capacity as a bar to prosecution and highlights the potential criminal responsibility of commanders and other superiors. At the same time, the ICC hearkens back to Nuremberg by expressly precluding exculpation for core crimes through the defense that someone was “just following orders.” Finally, the ICC contains explicit provisions that preclude the legal and theoretical challenges raised concerning the legitimacy of Nuremberg. By specific, separate articles, the ICC incorporates the principles of *nullum crimen sine lege*, *nulla poena sine lege* and a prohibition against *ex post facto* criminalization.

The ICC is most sharply distinguished from its predecessor tribunals by its jurisdictional mandate. Unlike the Nuremberg tribunal and the Yugoslav and Rwandan *ad hoc* tribunals, the ICC’s jurisdiction is consensual and complementary. In other words, the states that have consented to the jurisdiction of the ICC have consented to permit prosecutions of crimes committed on their soil or by their citizens in a supranational court. The ICC’s jurisdiction, however, only complements or supplements the authority of a state’s national courts. 

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13 Interestingly, there was overwhelming support for including the first three crimes within the ICC’s jurisdiction. The crime of aggression was ultimately included, “despite the knowledge that no agreement could be reached at the [Rome] conference either on its definition or on the role of the Security Council.” Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 Am. J. Int’l L. 22, 30 (1999).

15 See id. at 26–27.
16 Id. at 29.
18 See id. art. 33.
19 See id. art. 11. The English translation of the phrase *nullum crimen sine lege* is “no crime without law,” and the translation of the phrase *nulla poena sine lege* is “no penalty without law.”
21 Id. at 26.
22 Id. at 24.
ICC assumes jurisdiction over trials for the four core crimes when, and only when, the national judiciary of the state in question is unwilling or unable to proceed.  

II. BRITISH AND AMERICAN POSITIONS REGARDING THE ICC

Britain’s support was pivotal to the creation of the ICC. Beginning with the formative discussions in 1997 of the Preparatory Committee on the Creation of an International Criminal Court (PrepCom), Britain agreed to withdraw the demand that ICC proceedings would depend upon prior U.N. Security Council approval. This dramatic shift altered the course of the negotiations and was a departure from the American position, although the issue of predicate referral would return and remain contentious in Rome. In addition, in contrast to other Security Council members, Britain joined the so-called “like-minded group” (LMG) of smaller and mid-level states that wished the ICC to be a strong and influential court. Britain signed the Rome Statute on November 30, 1998 and ratified it on October 4, 2001.

As the varying and contradictory formal postures of the United States toward the ICC indicate, American attitudes toward the ICC have been decidedly ambivalent. This ambivalence is further demonstrated by the decision of the United States to vote against the Rome Statute when it was initially adopted on July 17, 1998. The United States then chose to sign the Rome Statute on the final day it remained open for signature, December 31, 2000. The United States then reversed its position again and “unsigned” the Rome Statute on May 6, 2002.

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23 See Rome Statute, supra note 11, art. 17(1)(a) The conditional nature of ICC jurisdiction is referred to as “complementarity” or “admissibility.” See generally Schabas, supra note 8, at 68; Arsanjani, supra note 13, at 24–25, 27–28.


26 Kirsch & Holmes, supra note 25, at 4; Arsanjani, supra note 13, at 23.

27 Schabas, supra note 8, at 419.


The United States followed its repudiation of the ICC with the enactment of the American Servicemembers’ Protection Act (ASPA), which ensures (so far as U.S. domestic law and policy are concerned) that no American soldier or government official will be subject to ICC jurisdiction.\(^{30}\) In fact, section 7423 of ASPA specifically precludes any American court, state entity, or agency from supporting or assisting the ICC, and it prevents any agent of the ICC from conducting any investigative activity on American territory.\(^{31}\) Where American and allied forces conduct joint operations in which an American is under the command of a state party national, ASPA authorizes the President to attempt to reduce the risk of American exposure to ICC jurisdiction.\(^{32}\) As a preemptive tactic, the United States has entered into bilateral agreements with dozens of nations in an effort to guarantee that these nations will never refer any American for prosecution before the ICC and has conditioned American participation in multinational military operations upon international immunization from ICC prosecution.\(^{33}\)

III. UNITED STATES OBJECTIONS TO THE ICC

American reluctance to join the ICC might seem peculiar, given that the ICC was originally an American idea.\(^{34}\) The ICC has been accepted by the other Allied nations and Security Council members that formed the Nuremberg tribunal (Britain, France, Russia), every NATO nation (except Turkey) and Mexico. Nevertheless, the ICC was perceived by certain influential government officials as a “threat to American sovereignty and international freedom of action.”\(^{35}\) This perceived threat related, at least according to these officials, to the prospect of the ICC restricting the United States (regardless of whether the United States subjected itself to ICC jurisdiction) from pursuing certain forceful responses to acts of aggression out of fear of prosecution before the ICC. As these officials put it, “the last thing America’s leaders need is an

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\(^{31}\) Id. §§ 7423(b), 7423(h).


additional reason not to respond when our nation’s interests are threatened.”

American objections to the ICC all stem, in one form or another, from perceived threats to United States sovereignty. At hearings on the ICC held one week after the Rome Conference, Senator Rod Grams stated to the Senate Foreign Relations Committee that “the United States will not cede its sovereignty to an institution which claims to have the power to override the U.S. legal system and pass judgment on our foreign policy actions,” and Senator Larry Craig claimed that the ICC represented “a fundamental threat to American sovereignty.”

In an effort to clarify and analyze the United States’s concerns raised by the ICC, this Part organizes the objections of the United States to the ICC in six distinct but overlapping categories: institutional, constitutional, doctrinal, security, prosecution, and symbolic.

A. Institutional Objections

Institutionally, the ICC is viewed by some as supplanting the U.N. Security Council. According to the U.N. Charter, the Security Council has “primary responsibility for the maintenance of international peace and security . . .” and provides the Security Council with power to “determine the existence of any threat to the peace, breach of the peace, or act of aggression and . . . [to] decide what measures shall be taken . . . .” The ICC, at least arguably, frustrates the U.N. Charter by usurping this role from the Security Council and by denying the United States its veto of Security Council measures. Accordingly, the United States (and others) sought prior review by the Security Council as a precondition for ICC proceedings. Absent a prior Security Council imprimatur, action by the ICC strikes some as displacing the role of the Security Council and nullifying the effect of the U.N. Charter. Of course, the response to this point is that the requirement of Security Council permission prior to ICC action would effec-

36 Id.
39 Amann & Sellers, supra note 38, at 384.
41 See Amann & Sellers, supra note 38, at 386–87.
42 Id. at 387.
43 See generally id.
tively negate any authority the ICC could have as an independent tribunal, particularly where an investigation or prosecution of a Security Council member or its allies was deemed necessary.

**B. Constitutional Objections**

The ICC does not offer criminal procedures and protections that coincide completely with those offered under the United States Constitution. Most obviously, the ICC trial of an American need not (and will not) take place in “the State and district wherein the crime shall have been committed.”\(^44\) Moreover, the ICC has no jury trial provision\(^45\) and does not protect against unreasonable searches and seizures, although it does acknowledge a modified form of the exclusionary rule for improperly obtained evidence.\(^46\) Despite the presence of many familiar, fundamental constitutional protections afforded to criminal defendants under the United States Constitution and traditional American criminal procedure (such as *Miranda*-esque warnings, the presumption of innocence, notice of charges, assistance of counsel, prompt and public trial, modified confrontation and compulsory process, a privilege against self-incrimination, and double jeopardy),\(^47\) the ICC does not protect Americans to the same degree that the United States Constitution does.\(^48\)

In addition to these more specific constitutional reservations, there is a constitutional dimension to sovereignty itself, which some would say American subjection to the ICC would contravene. The British constitution is generally understood to grant Parliament the unfettered authority to bind Britain and its subjects to supranational jurisdiction as a condition of its constitutional authority. Put differently, the power of Parliament to submit Britain to the ICC is a demonstration of Parliament’s constitutional sovereignty. Unlike the case of the British Parliament, however, the very act of subjecting an American citizen to ICC jurisdiction might be a violation of the United States’s constitutional authority in the absence of a constitutional amendment. Without amending the Constitution, some Americans would claim that deference to the ICC is tantamount to the

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\(^44\) U.S. Const. amend. VI; cf. Rome Statute, supra note 11, arts. 3(1), 62.

\(^45\) See Rome Statute, supra note 11, arts. 39(2)(b)(ii), 74.

\(^46\) See id. art. 69(7).

\(^47\) See id. arts. 20, 55(2), 63, 66, 67.

abandonment of republican self-government.\textsuperscript{49} According to this view, the mere existence of the ICC (should the United States ever join it) would constitute a challenge to American constitutional democracy, because for the first time in U.S. history, an institution outside the United States government would have “the ultimate authority to judge the policies adopted and implemented by the elected officials of the United States – the core attribute of sovereignty and the \textit{sine qua non} of democratic self-government.”\textsuperscript{50}

It seems entirely plausible that American republican government permits Congress to commit the United States, on behalf of the people, to an international or supranational institution with genuine influence over U.S. policy. There is nothing inherently undemocratic about giving governmental representatives the authority to bind their constituencies in ways that the constituents find surprising or objectionable. To borrow a phrase from the British context, so long as this congressional authority is not viewed as “self-embracing,” there is no threat to American sovereignty or democracy, because not all delegations of sovereignty are derogations of sovereignty. Indeed, some would say it is the essence of constitutional democracy that the majority’s representatives may take certain actions to preserve and promote constitutional values, fundamental rights, and the rule of law, despite the majority’s disapproval.\textsuperscript{51}

Another constitutional objection to the ICC concerns the legal source of its judicial authority. If the United States Senate ratified the Rome Statute, it might seem that the ICC is just another court that Congress has chosen to accept through its Article II advice and consent power\textsuperscript{52} rather than to create through its Article III power.\textsuperscript{53} The problem is that Article III of the Constitution vests the judicial power of the United States “in one supreme Court” and grants Congress the power to ordain and establish “inferior Courts.” Joining the Rome Statute would give the ICC jurisdiction over American citizens for acts committed on American soil. Given the theoretical possibility that the ICC could prosecute an American for a crime committed in the United

\textsuperscript{49}See Amann & Sellers, \textit{supra} note 38, at 400–02.
\textsuperscript{52}U.S. Const. art. II, § 2, cl. 2 (stating “He [the President] shall have Power, by and with the Advice and Consent of the Senate to make Treaties . . . .”).
\textsuperscript{53}Id. art. III, § 1.
States, and that the ICC’s decision could not be reviewed by the Supreme Court of the United States, the ICC would be exercising the judicial authority of the United States in a manner not contemplated or tolerated by the Constitution. Under these circumstances, the ICC could not genuinely be considered an “inferior court.” The ICC’s recognition as a judicial authority over American citizens by the United States government would seem to conflict with the constitutional mandate that there be “one supreme Court.” Granting the ICC judicial authority over American nationals in a manner consistent with the U.S. Constitution would seem to require a constitutional amendment rather than a treaty. Depending upon one’s point of view, which is likely to reflect one’s national constitutional tradition, the need for a constitutional amendment prior to American acceptance of the ICC underscores the advantage (or the disadvantage) of a written constitution.

One response to these constitutional objections is that they are mistaken. Some view the protections afforded by the Rome Statute as an international codification of American criminal procedure protections, which are actually “somewhat more detailed and comprehensive than those in the American Bill of Rights.” The Rome Statute protects American military personnel in ICC proceedings at least to the same degree that the United States Constitution would protect them at home.

Another response to these objections is not that they are mistaken but that they are misplaced. On this view, the appropriate legal paradigm for evaluating the protections offered to potential American defendants under the Rome Statute is courts-martial not the federal courts. Military courts do not afford American citizens the same constitutional protections as are available in federal courts; consequently, constitutional objections—no matter how well founded they might be for Americans tried in the traditional criminal justice system—are inapplicable to the ICC’s prosecution and adjudication of war crimes. Analogizing the ICC to American courts-martial, the protections afforded by the Rome Statute seem consistent with the American military legal tradition.

54 See Casey, supra note 50 at 841–42.
Finally, a response to the argument that the ICC is not an Article III court is that the ICC does not exercise the judicial power of the United States. The Rome Statute defines crimes, procedures, and institutions that exist independently of the United States Constitution and United States law. Accordingly, there is no proper constitutional objection to subjection of Americans to ICC jurisdiction because the language of Article III and the authority of the federal courts are not implicated by the language of the Rome Statute or by the existence of the ICC.57

C. Doctrinal Objections

A central concern of the United States involves the ICC provision granting the ICC jurisdiction over nationals of nonparty states who are accused of crimes committed on the territory of states parties.58 According to settled and fundamental doctrines of international law, a treaty is binding only upon the parties that sign and ratify it (unless the treaty codifies general customary international law principles).59 The subjection of nonparties to ICC jurisdiction seems to conflict with this fundamental doctrine.60

There are three related responses to this objection. First, American resistance to the existence of the ICC or to American participation in the ICC could not prevent Americans from being tried by a foreign tribunal if, for example, members of the United States military carrying out operations on foreign soil were accused of one of the crimes within the jurisdiction of the ICC (i.e., genocide, war crimes, or crimes against humanity). On the contrary, American military personnel who found themselves in this situation would, according to principles of interna-

57 See generally Marquardt, supra note 56, at 101–08, 126–32.
58 See Rome Statute supra note 11, art. 12.
59 See, e.g., United Nations Convention on the Law of Treaties, May 23, 1969, arts. 34–38, 1155 U.N.T.S. 331, [hereinafter Vienna Convention]. This is sometimes expressed through the maxims of pacta tertiis (pacta tertiis nec nocent nec prosunt) or pacta sunt servanda. Ironically, the United States has signed, but not ratified, the Vienna Convention. See, e.g., United States. v. Yousef, 327 F.3d 56, 94 n.28 (2d Cir. 2003). This could be understood as the United States’s refusal to accept the principle that a treaty binds only its signatories, which would weaken American objections to the Rome Statute based upon this doctrinal principle. See infra note 64 and accompanying text.
60 See Scheffer, supra note 24, at 18.
tional law, be subject to the jurisdiction of the courts of the state in which the operations were conducted.61

Second, and related to the previous point, the ICC’s jurisdictional mandate simply incorporates the traditional jurisdictional foundations of nationality and territoriality. In other words, Article 12 merely allows the ICC to do what national judiciaries commonly do: exercise jurisdiction over their own nationals for crimes committed outside state borders and exercise jurisdiction over nationals from other states who commit crimes within the subject state’s territory. These jurisdictional principles of nationality and territoriality embraced by the ICC are fully consistent with the law and practice of state judiciaries around the world. The ICC serves, from a jurisdictional perspective, only as an international supplement to the ordinary judicial authority of national courts.62 Moreover, some scholars question whether Article 12 actually violates the principle that treaties bind only parties. According to these writers, the ICC does not violate this principle because “[t]he ICC statute provides a forum for the prosecution of individuals suspected of having committed acts of genocide, crimes against humanity or war crimes. It does not place any obligations upon non-party states unless such states have consented to cooperate with the ICC.”63

Third, the United States has ratified several treaties that require prosecution by states parties of any individual suspected of defined criminal activity, even if the accused’s home state has not ratified the treaty. These treaties apparently conflict with the notion that a treaty cannot authorize jurisdiction over nonparties, yet this did not prevent the United States from executing these treaties.64 This raises doubts about the gravity of American objections to the ICC grounded on its purported violation of fundamental principles of international law.

One point that the second response to the American objection seems to overlook is the potential for conflicts between state obligations under the Rome Statute and so-called “Article 98 agreements,” which are bilateral treaties between the United States (or another state) and a party to the Rome Statute that prevent surrender of American citizens to the ICC without American consent.65 The

61 Rovine, supra note 35, at 967–68.
63 Id. at 818.
65 See id. at 424–27.
United States maintains that these treaties are consistent with the language and intent of Article 98(2) of the Rome Statute. There are some doubts about whether Article 98 and its legislative history genuinely anticipate or tolerate the blanket immunity provided by these Article 98 agreements. In addition, some view Article 98 agreements as “galling instances of U.S. double standards” and “blatant hypocrisy” given that the United States demands that Serbia and Montenegro comply with the International Criminal Tribunal for the Former Yugoslavia (ICTY) while simultaneously insisting upon “its right to advance what it conceives to be its own national interests vis-à-vis the ICC . . . .”  

Article 98 agreements highlight the intractable conflicts created by an international treaty instrument that purports to permit jurisdiction over nonparty actors. Those nonparties, particularly in the context of an international military or political crisis, may fall under the custody of states parties. If allegations are made that a non-party actor is guilty of a core crime, and that actor is in the custody of a state party, then that state party will have to decide whether to turn the actor over to the ICC for investigation and prosecution. 

Americans who oppose the ICC would argue that there is a significant difference between Americans who are captured on foreign soil being tried for alleged crimes by that foreign nation’s courts and Americans being extradited to The Hague for trial before the ICC. The power of a nation to exercise its territorial jurisdiction over Americans who are accused of crimes allegedly committed on that nation’s soil cannot seriously be questioned (although, in practice, the United States might do so while negotiating for the release of American prisoners). But the legitimacy of an international tribunal that exercises jurisdiction over citizens of a government that does not recognize the tribunal’s authority, upon claims of criminal violations that the non-party state may not accept (such as the ICC crime of aggression), raises grave doubts about the tribunal’s rightful power. In this respect, American objectors might argue that the ICC suffers from precisely the same defects of legal legitimacy as its predecessor at Nuremberg.

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D. Security Objections

Related to ICC jurisdiction over nonparties, the United States argued in Rome and subsequently maintained that this unprecedented extension of international jurisdiction could significantly restrict military operations necessary to preserve American national security or to restore or maintain peace in politically volatile regions. For example, the United States maintains a wide-ranging commitment to pledge its forces to peacekeeping missions around the world. So this raises a not unlikely possibility:

American servicemen on duty in the 1990–1991 Persian Gulf conflict or in the operations in Somalia would be subject to frivolous charges raised in the [International Criminal] Court by Iraqi President Saddam Hussein or Somali leader General Aidid solely to deflect international criticism from their own egregious behavior. Then, in order to avoid the possibility of ‘malicious prosecution’ of this nature, the U.S. reduces its commitment to participate in crucial international peacekeeping missions, thereby increasing the risk of global instability and war. In particular, this jurisdictional element has led to the United States seeking and securing immunization from ICC prosecution prior to committing troops for international peacekeeping missions.67

These concerns are not only raised by politicians and others who oppose any form of international influence on U.S. policymaking. Ambassador David Scheffer, who headed the U.S. delegation at the Rome conference, also considers the concern about the threat of malicious prosecutions inhibiting United States participation in international peacekeeping missions significant.68

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67 David, supra note 4, at 357 (footnote omitted).

68 See Scheffer, supra note 24, at 19 (“Equally troubling are the implications of Article 12 for the future willingness of the United States and other governments to take significant risks to intervene in foreign lands in order to save human lives or to restore international or regional peace and security. The illogical consequence imposed by Article 12, particularly for nonparties to the treaty, will be to limit severely those lawful, but highly controversial and inherently risky, interventions that the advocates of human rights and world peace so desperately seek from the United States and other military powers. There will be significant new legal and political risks in such interventions, which up to this point have been mostly shielded from politically motivated charges.”); William K. Lietzau, International Criminal Law After Rome: Concerns From a U.S. Military Perspective, 64 LAW & CONTEMP. PROBS. 119, 125 (2001) (“The Rome Treaty will become the single most effective brake on
Marcella David addresses this concern by evaluating American participation in peacekeeping missions in Iraq, Bosnia, and Sudan. For each intervention, she asks whether, had the Rome Statute been in force at the time, the United States would have been unfairly required to defend itself against specious charges of aggression, unfairly required to defend itself against politically-motivated charges of war crimes, or subjected to inconsistent obligations arising from the U.N. Security Council and the ICC. She concludes that American operations in Iraq could conceivably raise potential aggression and war crimes charges but no obvious inconsistencies between U.N. and ICC obligations. David believes American intervention in Bosnia might support a weak prima facie claim of aggression but not a war crime charge and no inconsistent U.N. and ICC obligations. Finally, David determines that American actions in Sudan would expose the United States to politically-motivated prosecutions based on unfounded claims of aggression and war crimes. Notwithstanding the belief of some Americans that David’s analysis simply confirms their reservations about the ICC, she believes that, in the end, the ICC would actually reinforce U.N. commitments to international peace and security. For some Americans, though, the problem is that David bases her conclusion on her assessment that “where the United States unilaterally resorts to armed force on a questionable or contested factual record, or in non-traditional responses to acts of aggression against it, its actions may subject it to scrutiny by the International Criminal Court.” These individuals object to the ICC (and, at times, the U.N. itself) for this very reason: in their view, no entity other than the United States government can or should decide when or how the United States will defend itself and pursue its national interests.

E. Prosecution Objections

A concern closely related to the previous discussion addresses the possibility that the ICC might be used to pursue political agendas rather than war criminals. The United States sees itself as a likely target for politically-motivated prosecutions before the ICC and is therefore...
reluctant to support the creation of a tribunal that might be manipulated out of such political motivations. Additionally, the United States objects to the ability of the ICC prosecutor to initiate an investigation even in the absence of any state party or Security Council complaint or reference. For many members of the United States military this is the insurmountable obstacle to the United States signing the Rome Statute or complying with the ICC. As Lieutenant Colonel William Lietzau puts it:

Because the jurisdictional regime does not adequately protect U.S. troops and commanders from politically motivated prosecutions, the United States cannot sign the treaty. . . . [T]he Rome negotiators settled on a regime that fell short of U.S. objectives to maintain certain jurisdictional control over its own forces. . . . Referrals initiating such [ICC] jurisdiction can derive from any of three sources: the U.N. Security Council, a state party to the Statute, or the prosecutor acting in his or her independent capacity. The U.S. military has been much criticized for its stance on this critical aspect of the ICC Statute, but what the critics sometimes fail to recognize are the unique and vital national security responsibilities of the U.S. armed forces and the consequences of their front-line role in carrying out the nation’s national security strategy. . . . No other state regularly has nearly 200,000 troops outside its borders, either forward deployed or engaged in one of several operations designed to preserve international peace and security. . . . Soldiers deployed far from home need to do their jobs without exposure to politicized proceedings.

Other United States military personnel, such as Major General William Nash (Retired), point out that few foreign nations have accepted American assertions of exemption from ICC jurisdiction. So in the event that an ICC investigation or prosecution required compliance by foreign states or actors, American opposition to the ICC is unlikely to have much effect. Moreover, the military might have an interest

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74 See id. at 356 n.71.
75 Lietzau, supra note 68, at 125–26; see also Scheffer, supra note 24, at 18.
77 See id.
in supporting the ICC because American forces serving overseas are at the greatest risk of becoming victims of war crimes. So it could be in the interest of the military to see war crimes investigated, prosecuted, and punished as extensively and vigorously as possible.\footnote{See Bass, supra note 6, at 282–83.}

Some scholars and politicians argue further that the admissibility constraint on ICC jurisdiction—that the ICC cannot assume jurisdiction over a matter unless a state’s domestic courts cannot or will not do so—should quell American concerns about possible threats to national sovereignty or politically motivated prosecutions.\footnote{Gwyn Prins, 9/11 and the Raiders of the Lost Ark, 35 CORNELL INT’L L.J. 611, 619 (2002).} These individuals note that the conditional nature of ICC authority meets the concerns of the British government and so it should satisfy the United States as well.\footnote{See, e.g., id. Of course, there is another possible explanation for the opposing British and American stances toward the ICC that I will mention but not pursue here. Perhaps Britain and the United States view the ICC differently not just based upon differing assessments of risks of prosecution attendant to relative levels of international military engagement but also based upon differing actions of military and nonmilitary operatives that might fall under the Rome Statute’s definition of core crimes.} One interesting and less-often noted aspect of the admissibility precondition to ICC jurisdiction, however, is that the ICC may retain jurisdiction over a matter, even if a proceeding was conducted by the judiciary of a state party, if the ICC determines that the state proceeding was undertaken “for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the [International Criminal] Court . . . there has been an unjustified delay in the [state] proceedings . . . [or] the proceedings were not or are not being conducted independently or impartially . . . .”\footnote{Rome Statute, supra note 11, art. 17(2); see Scheffer, supra note 24, at 19.} This effectively authorizes the ICC to review independently state party court proceedings involving a core crime for impartiality, delay, or pretense.\footnote{See Rome Statute, supra note 11, art. 17(2); Scheffer, supra note 24, at 19.}

F. Symbolic Objections

The final, and in some ways the most fundamental, U.S. objection to the ICC is captured by the spectacle of an American President or high-ranking military or political official standing trial before a non-American tribunal. The ICC does not recognize claims of official immunity,\footnote{See Rome Statute, supra note 11, art. 27.} and it is unclear whether the ICC would honor a national
grant of amnesty that could shield individuals from ICC prosecution. Accordingly, the concern about the spectacle and its symbolic and practical effects on American position, prestige, and power is not merely hypothetical. Its very possibility is intolerable to the sensibilities of many Americans. Of course, the response to this objection is that the prospective national embarrassment of a leader being prosecuted before the ICC is itself a salutary deterrent effect of the tribunal’s existence. This is hardly a basis for American objections to the ICC.

IV. National Sovereignty in a Global Community

One plausible explanation for the disparate reactions of Britain and the United States toward the ICC might be found in their reactions to the perceived sovereignty threats posed by the EU and the U.N., respectively. Britain has, after some constitutional indigestion, accepted the supremacy of EU law in two judicially relevant ways. First, Britain accepts—as all EU members ultimately must—the supranational jurisdiction of the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR). Given that British citizens and the British government may appear as parties before the ECJ and the ECHR, and that the decisions of those courts are binding upon Britain’s national judiciary, Britain has acknowledged the judicial authority over its citizens of courts outside its borders. Second, EU law is directly enforceable by the national courts of Britain. So British courts apply external legal doctrine that has been incorporated by reference into British law through, among other things, the Human Rights Act of 1998. As a result of these two factors, Britain likely does not view the ICC as a challenge to the authority or autonomy of its governmental structure, in part because it has made its (sometimes uneasy) peace with its presence within the EU.

Unlike Britain and the EU, influential elements of the United States government continue to view the U.N. with measured circumspection. The United States tends to be most supportive of U.N. action when that action has no direct repercussions for U.S. foreign pol-

84 See Amann & Sellers, supra note 38, at 394.
85 See Paul Craig & Grainne de Burca, EU Law 301–08 (3d ed., 2003).
86 Factortame, supra note 2.
87 See Craig, supra note 2, at 86–87.
icy or when it would serve the interests of the United States. Moreover, Americans tend to view their courts and their law as entirely sufficient for the expression and maintenance of legal doctrine and government accountability. Indeed, Supreme Court justices still have serious reservations about citing, to say nothing of following, decisions of foreign courts such as the ECHR.

Notwithstanding these differing perceptions of place in the international community, the Anglo-American commitment to the rule of law both within and beyond national borders offers a meaningful incentive to support an international court of criminal justice. In the end, as Gary Bass explains, “[A] war crimes tribunal is an extension of the rule of law from the domestic sphere to the international sphere . . . . [T]he serious pursuit of international justice rests on principled legalist beliefs held by only a few liberal governments.”

Britain and the United States are two of these few liberal governments. Britain’s preference for execution rather than legalism after World War II was the sole aberration in the commitment of liberal states to legalism when confronting war crimes. The United States’s rejection of the ICC is now, arguably, the second. The Anglo-American commitment to the rule of law and the historical contribution of both nations to the development of due process and norms of justice enforced by an independent judiciary has, in the past, anchored a shared commitment to legalism in the pursuit of international justice. Britain and the United States have supported international war crimes tribunals largely out of a belief in the fundamental fairness of their own tradition of constitutional protection of criminal defendants and the intrinsic value of their principles and process as a means of achieving justice domestically and internationally. At Nur-

91 Bass, supra note 6, at 7–8.
92 See Overy, supra note 5, at 3-4; see also Bass, supra note 6, at 147, 181.
93 Bass, supra note 6, at 148–49, 281.
94 Id. at 173 (“At the end of America’s most brutal war ever, the Germans would be accorded the benefit of legal procedure as it had evolved in America, because of an Ameri-
emberg, the United States had to persuade (or remind) Britain that trials alone were the only means of achieving justice for war crimes consistent with Anglo-American legalism.95 Perhaps Britain needs to return the favor with respect to the ICC.96

Inasmuch as Anglo-American dedication to international norms of justice enforced by international tribunals derives, at least in part, from the recognition and reinforcement of domestic rule of law values in those international norms and tribunals, it is reasonable to see Anglo-American legalism itself as a manifestation of national sovereignty. After all, “sovereignty does not arise in a vacuum, but is constituted by the recognition of the international community, which makes its recognition conditional on certain standards . . . .”97 Just as American democracy is theoretically predicated upon a relinquishment of a measure of liberty in exchange for security and individual autonomy in a larger social context, so too can support for the ICC be viewed as the relinquishment of a measure of sovereignty in exchange for security and international respect in a global context. Put differently, supporting the ICC does not just mean sacrificing sovereignty, it also enhances sovereignty.98

This view of sovereignty depends upon a particular view of the nature of political power. Power is more than the ability of one state to bend other states to its will through coercion; it is also the ability of one state to persuade other states that their interests align. In other words, soft power can, in certain circumstances, be more effective than hard power.99 If the United States will achieve more, including the achievement of more of its own political goals, in a world that respects its leadership, then ongoing opposition to the ICC may engender a very real loss of American influence and, ultimately, of American sovereignty and security.100 The international perception that United States opposition to the ICC tarnishes the longstanding

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95 Id. at 150, 180–82.
96 See Amann & Sellers, supra note 38, at 404; Prins, supra note 79, at 619. The United States strongly supports an international court of criminal justice, just not one that would try Americans without American consent. See Amann & Sellers, supra note 38, at 404; Prins, supra note 79, at 619.
97 Broomhall, supra note 37, at 43.
98 See id. at 59.
99 See, e.g., Orentlicher, supra note 64, at 430–31.
American commitment to the rule of law inside and outside its borders could limit the United States’s ability to influence international affairs in ways that ultimately will detract from its sovereignty.\(^{101}\)

**Conclusion**

The United States’s rejection of the ICC has angered its allies, increased resentment toward the United States around the world, raised doubts about American commitments to the preservation of the rule of law nationally and internationally, and seemingly distanced the United States from otherwise shared Anglo-American values of legalism and support of norms and institutions of international justice. All of these factors inevitably lead one to wonder whether the current position of the United States toward the ICC is politically prudent. Some commentators suggest that a less unilateral position toward the ICC would serve American interests for four reasons: (1) the practical risk of prosecution of American citizens before the ICC is extremely remote,\(^{102}\) (2) American negotiating influence would not be weakened in contexts such as the Security Council, where U.S. rejection of the ICC, among other things, led to international reluctance to support American military intervention in Iraq,\(^{103}\) (3) the current U.S. policy has floundered, because of the backlash against Article 98 Agreements, the refusal of most significant powers to sign them, and the inability of the United States to alter the fundamental structure of the ICC or to influence policy relative to the ICC now that the United States is no longer a party to the Rome Statute,\(^{104}\) and (4) the apparent inconsistency between America’s commitment to rule of law values and its unwillingness to comply with the ICC as an


\(^{102}\) See, e.g., Nash, supra note 76, at 153, 159.

\(^{103}\) See, e.g., Harold Hongju Koh, *Jefferson Memorial Lecture: Transnational Legal Process After September 11th*, 22 BERKELEY J. INT’L L. 337, 348 (2004); Orentlicher, supra note 64, at 428–29. Of course, two of the other actions that increased international animosity toward the United States were its recantation of the Kyoto Protocol and its rejection of the Ottawa Convention. See id. at 428.

\(^{104}\) See Broomhall, supra note 37, at 182; Orentlicher, supra note 64, at 430–31, 432 (“[I]t can hardly be doubted that the ICC is more likely to operate in accordance with America’s vision of the Court if the United States participates in shaping the institution than if it declares open war against it.”).
institution dedicated to the preservation of human rights through international legal norms has eroded America’s political and moral capital as a leader in international affairs.\textsuperscript{105}

Just as Britain’s acceptance of the Ottawa Convention influenced the United States’s decision not to employ landmines during joint military operations in Afghanistan after September 11, 2001,\textsuperscript{106} so too can Britain’s decision to join the ICC influence American actions during joint military operations. To the extent that the very existence of the ICC promotes a “culture of accountability,”\textsuperscript{107} the ICC may exert an influence over American policy even if Americans are never subject to ICC jurisdiction. Of course, this influence on American policy will strike those Americans who oppose the ICC as the realization of their initial concerns, and this influence will strike American supporters of the ICC as mitigation of their misgivings over U.S. withdrawal from the ICC. In the end, the ICC raises the question of whether constitutionalism is a domestic or a universal conception.\textsuperscript{108} The ICC tests the Anglo-American commitment to the rule of law, in part, by asking what law will rule. Britain and the United States share a cultural, historical, theoretical, and doctrinal commitment to the rule of law and this commitment to legalism has grounded Anglo-American support for international war crimes tribunals in the past. But Britain seems more willing than the United States to accept that, at least where the ICC is concerned, the law that will rule Britain and its leaders and citizens can sometimes be made by an institution beyond its borders, while the United States remains committed to the rule of law solely as defined and limited by the law of the United States.

\textsuperscript{105} Cf. Koh, supra note 103, at 348 (“[B]y rejecting a legal process approach, [the United States] limited itself to coercive solutions, which have now ironically diminished its capacity for global leadership under a banner of rule of law.”).


\textsuperscript{107} Broomhall, supra note 37, at 3.

DEFINING TERRORISM: THE EVOLUTION OF TERRORISM AS A LEGAL CONCEPT IN INTERNATIONAL LAW AND ITS INFLUENCE ON DEFINITIONS IN DOMESTIC LEGISLATION

Reuven Young*

Abstract: This Article examines the evolution of the definition of terrorism at international law and tests the widely held view that international law does not provide a definition of terrorism. It contends that by abstracting from the common elements and themes present in the United Nations General Assembly and Security Council resolutions concerning terrorism, and the multi-lateral anti-terrorism conventions, treaties, and protocols, one can discern a core international law definition of terrorism. The Article then compares this definition to those in the domestic legal systems of the United States, United Kingdom, India, and New Zealand to determine whether (1) international law was influential in the drafting of these definitions or in the anti-terrorism legislative process generally and (2) these definitions are consistent with the international law definition discerned from the existing sources of international law relating to terrorism. It concludes that until a customary international law rule prohibiting terrorism emerges or a comprehensive terrorism convention is concluded, states should draw on the international law definition of terrorism when drafting their domestic anti-terrorism legislation for legal and policy reasons, including to enhance the protection of human rights. The Article also examines the history of the development of the international law anti-terrorism instruments and the development of a comprehensive terrorism convention and model domestic legislation, and serves as a study of the implementation or incorporation of international law treaty obligations into domestic law in the context of terrorism.

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The search for a legal definition of terrorism in some ways resembles the quest for the Holy Grail: periodically, eager souls set out, full of purpose, energy and self-confidence, to succeed where so many others before have tried and failed.


I. An Old Problem of Unsettled Scope

Opening his lectures at the Academy of International Law at The Hague in 1938, Antoine Sottile said of international terrorism: “The intensification of terrorist activity in the past few years has made terrorism one of today’s most pressing problems.”1

Such concerns have been frequently repeated over the last sixty-eight or so years. Terrorism’s grave threat did not start with Al Qaeda. Writing in 1977, M.K. Nawaz and Gurdip Singh quoted Sottile and added that the “verdict is no less true in our contemporary times.”2 Popular opinion in the West would endorse the statement’s continuing cogency. Without being asked a question about terrorism, U.S. President George W. Bush referred to “terrorism” (or a variant of the word) twenty-two times in a 2004 televised interview.3 International terrorism is frequently cited by world leaders as the greatest threat to Western democracies, a claim made before4 and after September 11, 2001.5

Notwithstanding the great concern about terrorism, it is most often said that no universally (or even widely) accepted definition of terrorism exists at international law.6 Since at least the 1920s and

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1 Antoine Sottile, Le Terrorisme International, in 65 Recueil des Cours 89, 91 (1938).
6 See, e.g., Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J., concurring) (“[T]he nations of the world are so divisively split on the legitimacy [of terrorism] as to make it impossible to pinpoint an area of harmony or consensus.”), cert. den’d, 470 U.S. 1003 (1985); Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 17
1930s many states have recognized terrorism as a transnational problem requiring a solution originating at international law. This Article examines the evolution of terrorism as a legal concept at international law and challenges the commonly accepted view that international law does not contain a definition of terrorism. This Article contends that “terrorism” has a core, objectively determinable meaning at international law, and that one can discern such a definition from the existing sources of international law relating to terrorism.

The Article is divided into two main sections: Part Two examines the development of the definition of terrorism at international law and Part Three examines four definitions of terrorism in domestic law and considers whether (1) international law was influential in their formation and (2) the domestic definitions are consistent with the international definitional jurisprudence. Through treaty law, the international community has required signatory states to criminalize certain acts of terrorism by enacting domestic legislation. This approach to counter-terrorism makes the definitions of terrorism in domestic counter-terrorism legislation crucial to the effectiveness of international law’s response.

After contextualizing terrorism as a phenomenon, Part Two then examines the evolution of the definition of terrorism at international law. It first examines the failed efforts in the 1920s and 1930s to define terrorism and then considers the United Nations General Assembly’s resolutions with respect to terrorism and, more importantly, the resolutions of the United Nations Security Council. There are thirteen multilateral terrorism conventions, which have attracted widespread support. This Article analyzes their prohibitions and argues that a core

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7 See sources cited in supra note 6.
8 See Appendix 1.
definition of terrorism is discernable from the overlap of the conventions’ prohibitions and the themes present in each of the conventions. This Article advances the proposition that states should draw on this core international definition of terrorism when enacting domestic definitions for both legal and pragmatic reasons, even though this minimum definition of terrorism has not attained customary international law status.

Part Three of the Article turns to the definitions of terrorism in domestic law. First, it considers the definitions in the United Kingdom, United States, India, and New Zealand (states that have experienced terrorism to varying degrees, but all of which enacted or significantly amended their counter-terrorism legislation after September 11), assessing whether international law influenced the formation of their definitions. Second, the substance of the four domestic definitions of terrorism is compared with the definition of terrorism at international law identified in Part Two.

The Article concludes that there is a core definition of terrorism at international law that provides guidance to states enacting terrorism legislation, but that to have an effect, states must look to international law and accept its guidance. Although the four domestic definitions are substantively similar to the international definition, all states should treat the international law definitional jurisprudence as setting a minimum level, not a maximum. The international definition of terrorism is destined to develop very slowly, and states need to tailor their legislation to specific national circumstances and respond to threats. The ease with which terrorists can cross borders means states cannot protect themselves simply by enacting and enforcing domestic legislation proscribing terrorism within their borders. Rather, every state must have legislation denying terrorists safe havens and safe places of operation. An established minimum international law definition of terrorism that informs states’ domestic criminal law is required to ensure a baseline of consistency and to facilitate international cooperation. The core definition identified in this Article provides that minimum as well as a yardstick against which to measure states’ legislation.

The existence of a definition of terrorism is important. It shapes states’ understanding of the problem, delimits their responses to it, and helps to distinguish lawful from unlawful responses. The perceived absence of an accepted international law definition is said by

some largely to explain the inadequacy of international law’s ability to combat terrorism. Do states share a common definition of international terrorism? Or at least, is there sufficient conceptual consensus to facilitate international cooperation in the “war on terrorism”? Is the enemy in the war sufficiently well defined to give “war” a real meaning? Or is the enemy so broad to render speaking of “war” meaningless? Perhaps George Orwell’s Nineteen Eighty-Four is prophetic? Furthermore, many international instruments require states to take steps to fight terrorism. Without a clear definition of what to fight, states can unduly curtail civil rights and suppress political opposition under the pretext of fighting terrorism. The grant of police powers triggered by terrorism without defining terrorism is inconsistent with the rule of law.

A. Brief History of Terrorism through Time

Generally speaking, for hundreds of years “terrorism” has been used as a pejorative term, usually applied to “the other side.” This is the word’s political descriptor role; its significance as a legal term is more recent.

The root word “terror” (from the Latin “terrere”—“to frighten”) entered Western European languages’ lexicons through French in the fourteenth century and was first used in English in 1528. “Terrorism” gained its political connotations from its use during the French Revolution. The French legislature led by Maximilien Robespierre, concerned about the aristocratic threat to the revolutionary government, ordered the public execution of 17,000 people (“regime de la terreur”) to educate the citizenry of the necessity of virtue. Robespier-
erre’s supporters who turned against him, having supported the use of terror in the first instance, accused him of using terrorism in an attempt to identify the illegitimate use of terror.\textsuperscript{17} Terrorism, initially associated with state-perpetrated violence, shifted to describing non-state actors following its application to the French and Russian anarchists of the 1880s and 1890s.\textsuperscript{18}

Terrorism following World War II harnessed newly developed technology. Terrorist hijackings of civil aviation aircraft were a feared and relatively common occurrence.\textsuperscript{19} The international community responded with a series of treaties which, in tandem with increased airport security, successfully reduced the incidence of harm to aircraft and passengers. The United Nations’ response to a series of terrorist attacks on diplomats and civilians in the 1970s was similarly reactionary.\textsuperscript{20} The International Convention Against the Taking of Hostages (Hostages Convention) followed in 1979, although it did not result in fewer hostage-taking incidents.\textsuperscript{21} Of course, law alone is insufficient; it must be buttressed with faithful enforcement and effective prevention strategies.\textsuperscript{22}

The terrorism that began in the early 1990s differs from that of the 1960s and 1970s\textsuperscript{23} (although terrorism motivated by the goal of decolonization still exists, \textit{inter alia}, in the Middle East and around Kashmir).\textsuperscript{24} This modern variety of terrorism comes from a mix of religious affiliation intertwined with political ideology and geo-political goals.\textsuperscript{25} It poses a greater threat to society, in part because modern terrorists are harder to deter than the terrorists of the 1960s who were concerned— at least to a greater extent— with the harmful consequences

\begin{footnotes}
\item[18] These groups sought to affect political change through violence against symbolic targets that would, they hoped, arouse the masses. \textit{See id.} at 13–14. \textit{See generally} \textsc{Joseph Conrad}, \textit{The Secret Agent} (1907).
\item[21] \textsc{Bassiouni}, \textit{Multilateral Conventions}, \textit{supra} note 6, at 48.
\item[22] \textit{See}, e.g., Alberto R. Coll, Comment, \textit{The Legal and Moral Adequacy of Military Responses to Terrorism}, 81 \textit{Am. Soc’y Int’l L. Proc.} 297, 304 (1987) (noting that Egyptian President Mubarak sent the hijackers responsible for the murder of a U.S. citizen during the seizure of the Achille Lauro away from Egypt to avoid having to exercise Egypt’s extradition jurisdiction under foreign pressure).
\item[24] Ownership of provinces of Kashmir and Jammu is disputed by India and Pakistan.
\item[25] \textit{See} \textsc{Bassiouni}, \textit{Multilateral Conventions}, \textit{supra} note 6, at 46, 47, 52.
\end{footnotes}
of their actions. Furthermore, the relationship between the means employed and the terrorists’ ends is more attenuated than in the past. Although the frequency of terrorist attacks has been relatively constant since 1989, the increasing scale of attacks (as September 11, the Bali and Madrid bombings, the siege at Beslan, and the London bombing tragically illustrate) is alarming. September 11, illustrating that terrorism crosses national and ethnic boundaries, changed the prevailing attitude to terrorism and certainly the attitude of the most influential states. The proliferation and greater availability of weapons of mass destruction, modern society’s dependence on computer systems, and the emergence of cyber-terrorism increases the likelihood of a large-scale high-impact terrorist attack.

The use of civil aviation aircraft to destroy the World Trade Center towers in New York and part of the Pentagon building in Virginia on September 11 is perceived as highlighting deficiencies in international anti-terrorism law and enforcement: the lack of international police and intelligence coordination; the absence of a comprehensive definition of terrorism; and insufficient international criminal law infrastructure. The attacks’ scale and principal victim jolted world opinion. Consequently, the Security Council issued an interventionist resolution, the U.N. General Assembly took up the terrorism debate with increased vigor, and, generally speaking, states and non-state entities reaffirmed the relevance of international law and cooperation in preventing and punishing terrorism.

26 Id. at 52–53.
27 See U.S. DEP’T OF STATE, PATTERNS OF GLOBAL TERRORISM, supra note 6, app. H.
II. THE DEFINITION OF TERRORISM AT INTERNATIONAL LAW

Despite its prior exclusive use as a pejorative political term of stigmatization, “terrorism” is increasingly used as a legal term and therefore should be accompanied by a discrete meaning. The definition certainly requires something more than “[w]hat looks, smells and kills like terrorism is terrorism.”

The seven sections in this Part of the Article examine the development of terrorism as a legal concept at international law. Section A considers the methodological issues with defining terrorism and outlines the importance of an agreed upon definition. Section B tracks the pre-United Nations development of the concept. Section C considers the debate in the U.N. General Assembly and its various resolutions and declarations with respect to terrorism. Section D addresses the role of the Security Council, with particular attention given to Resolutions 1373 of 2001 and 1566 of 2004. Section E examines the international anti-terrorism conventions and analyzes their contribution to establishing a definition of terrorism. Section F distills a definition of terrorism from the existing international anti-terrorism conventions and other sources by identifying the substantive overlap in the quasi-definitional statements and the common themes running through the conventions. Finally, Section G concludes that there is considerable agreement regarding the core meaning of terrorism and briefly notes the current definitional developments and those likely in the near future.

A. It’s a Question of Definition

In 2001, following the September 11 attacks, the United Nations Security Council declared that “acts of international terrorism constitute one of the most serious threats to international peace and security in the twenty-first century,” but exactly what constitutes this threat is subject to conjecture. Rather than define and prohibit terrorism in toto, international and domestic instruments frequently prohibit particular acts recognized as falling under the banner of terrorism. Such acts are often proscribed without expressly acknowledging

that the acts are considered to be terrorism. Thus, when identifying
the content of terrorism as a concept, the inquiry cannot be limited
to international instruments that expressly mention terrorism. This
Part of the Article, however, limits itself to international law at large
(rather than regional international law, such as the law of the Euro-
pean Union or the Organization of African Unity). Part Three con-
siders domestic law definitions.

1. International Terrorism

Legal measures targeting terrorism operate on both the domestic
and international planes. To engage the United Nations, as a political
and legal matter, terrorism must have a significant international di-

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36 The United Nations’ mandate does not directly authorize addressing intra-state ter-
rorism although this strict international-domestic distinction seems artificial given the
pervasive influence of human rights. U.N. Charter art. 1. Contra Aaron J. Noteboom, Ter-
rorism: I Know It When I See It, 81 Or. L. Rev. 553, 559 (2002).

90 [hereinafter Rome Statute]. The exclusion of terrorism from the Court’s jurisdiction
largely resulted from an inability to define the elements of the crime. Richard J. Goldstone
& Janine Simpson, Evaluating the Role of the International Criminal Court as a Legal Response to
gence sharing and international cooperation and permit tighter goal definition in the “war against terrorism,” which might facilitate coalition building and strengthen the legitimacy of the “war.” Imposing sanctions and criticizing states that support terrorism would attract broader support once a definition of terrorism is established.

In the United States, criminal prosecution of terrorists is a critical, if not the dominant, method of counter-terrorism. The effectiveness and fairness of such an approach turns on whether there is a clear definition of terrorism in the applicable laws.

The mobility of international terrorists allows them to select their place of operation and strike at targets beyond their home state’s borders. Simply prohibiting terrorism in one state is not sufficient to stop terrorist attacks in all states. A common definition is needed to provide a sufficient “least common denominator” jurisdiction worldwide. Even if all acts done by terrorists—for example, murder, property damage, and kidnapping—should be crimes in all domestic jurisdictions notwithstanding the obligations under the various conventions, the conventions focus international attention, voice the commitment of states to fight terrorism, and help to ensure consistent criminalization.

Security Council Resolution 1373 of 2001 imposes significant obligations on states to fight terrorism. Nevertheless, without a common understanding of against whom or what states should be fighting, counter-terrorism obligations can be avoided or used to mask human rights abuses. Human rights organizations have reported acts of repression against legitimate political opposition or dissidents under the pretext of fighting terrorism, and, although not necessarily corrective, an accepted definition would make it harder to engage in such acts.

43 Russia and Egypt, for example, are alleged to have dismantled domestic political opposition under the pretext of fighting terrorism. See HUMAN RIGHTS WATCH, IN THE NAME OF COUNTER-TERRORISM: HUMAN RIGHTS ABUSES WORLDWIDE (2003), available at http://www.hrw.org/un/chr59/counter-terrorism-bck.pdf.
This Article contends that there is a core meaning of terrorism that should be accepted as the minimum international definition. This core definition serves as a useful yardstick against which to measure domestic terrorism legislation. The balance of this Part of the Article argues that a definition emerges from the relevant conventions and resolutions. As Emanuel Gross said: “[T]he majority of the definitions have a common basis—terrorism is the use of violence and the imposition of fear to achieve a particular purpose.”

Similarly, Professor Oscar Schachter remarked that the absence of a comprehensive definition “does not mean that international terrorism is not identifiable. It has a core meaning that all definitions recognize.” Speaking more broadly than just the legal definition of terrorism, Brian Jenkins said in 1992 that “a rough consensus on the meaning of terrorism is emerging without any international agreement on the precise definition.” This Article identifies the parameters of this core definition by examining the overlap of existing prohibitions but, more importantly, by identifying recurrent themes present in statements at international law about terrorism. Although the conventions are more a product of political compromise than derived from principle, the extent of the overlap and common elements indicates a broad conceptual consensus regarding terrorism as a legal concept.

B. Background to the International Law Definitions

Putting aside the question of whether terrorism breaches customary international law, acts of terrorism by non-state actors generally do not constitute a breach of international law per se. Since the early twentieth century, the international community has, however, engaged with the non-state actor terrorism issue. The first U.N. General Assembly resolution concerning terrorism was passed in 1972. From this time onwards, the United Nations, principally the General Assembly, attempted to offer leadership towards eliminating international terror-

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46 Schmid, supra note 15, at 18.
ism. Before the post-September 11 paradigm shift, however, the United Nations viewed terrorism as a social phenomenon and generally exhibited an ambivalent attitude towards it. Amongst other things, this manifested itself in a failure to agree to a comprehensive definition. September 11, however, converted terrorism from an “issue of ongoing concern” for the General Assembly to an issue sufficiently threatening to international peace and security to engage the Security Council.

Prior to the most recent terrorism convention being opened for signature, the Secretary-General identified twenty-one global or regional treaties pertaining to international terrorism, twelve of which are global. Most do not refer to terrorism explicitly. In general terms, the international conventions seek to utilize domestic criminal law to eliminate international terrorism rather than to establish “in-


50 Rostow, supra note 29, at 475.


ternational crimes.” This makes domestic law definitions of terrorism crucial, as discussed in Part Three.

1. Early Definitions of Terrorism at International Law

“Terrorism” was probably first used as a legal term in international legal circles in 1931 at the Third Conference for the Unification of Penal Law at Brussels.53 The proposed definition of an act of terrorism was:

[T]he intentional use of means capable of producing a common danger that represents an act of terrorism on the part of anyone making use of crimes against life, liberty or physical integrity of persons or directed against private or state property with the purpose of expressing or executing political or social ideas . . . .54

The Sixth Conference in Copenhagen in 1935 adopted a text that defined terrorism in Article 1 as:

International acts directed against the life, physical integrity, health or freedom of a head of state or his spouse, or any person holding the prerogatives of a head of state, as well as crown princes, members of governments, people enjoying diplomatic immunity, and members of the constitutional, legislative or judicial bodies [if the perpetrator creates] a common danger, or a state of terror that might incite a change or raise an obstacle to the functioning of public bodies or a disturbance to international relations.55

Certain other acts—for example, instigating a calamity—were considered under Article 2 to create a common danger or to provoke a state of terror. As today, in the 1930s there were concerns about the efficacy of international cooperation in combating terrorism.56

International efforts to curb terrorist acts first found expression in the League of Nations’ Convention for the Prevention and Pun-

53 See V.S. Mani, International Terrorism—Is a Definition Possible?, 18 Indian J. Int’l L. 206, 207 (1978); Nawaz & Singh, supra note 2, at 66–67; Zlataric, supra note 2, at 479.
54 Zlataric, supra note 2, at 479.
55 Id. at 481–82.
ishment of Terrorism (1937 Terrorism Convention). This followed a resolution stating “that the rules of international law concerning the repression of terrorist activity are not at present sufficiently precise to guarantee efficiently international co-operation . . . .” Following the assassination of King Alexander I of Yugoslavia and the French Foreign Minister in October 1934 (and Italy’s refusal to extradite the accused under the political crime exception), France proposed that “international measures” be taken to address the problem. A panel of experts provided a draft of the convention, which was considered in 1937. The same conference considered a complementary convention creating an international criminal court exercising jurisdiction over the substantive convention.

The substantive 1937 Terrorism Convention concerned only transnational terrorism perpetrated by non-state actors thus avoiding the controversial issue of terrorism by state actors. It defined “acts of terrorism” in paragraph 1 as “[c]riminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public.” States were required to enact legislation criminalizing terrorism and certain other acts.

The 1937 Terrorism Convention was signed by twenty-four states but was only ratified by India in January 1941. Neither this nor the

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58 Nawaz & Singh, supra note 2, at 67.
59 Mani, supra note 53, at 208.
60 The experts were appointed by Belgium, Chile, France, Hungary, Italy, Poland, Romania, Spain, Switzerland, U.K., and U.S.S.R. Proceedings of the International Conference, supra note 56, at 49.
62 1937 Terrorism Convention, supra note 57, art. 2.
63 See id. art. 1(2).
64 See id. arts. 1(2), 2(1)–(5).
65 Id. The signatory states were: Albania, Argentina, Belgium, Great Britain, Bulgaria, Cuba, Dominican Republic, Egypt, Ecuador, Spain, Estonia, France, Greece, Haiti, Monaco, India, Norway, The Netherlands, Peru, Romania, Czechoslovakia, Turkey, U.S.S.R, Venezuela, and Yugoslavia. Id.
66 India’s separate membership of the League of Nations entitled it to sign independently of Britain. This was the first multilateral diplomatic convention that India signed when no other commonwealth states did so. Starke, supra note 41, at 215. One author
complementary convention ever entered into force,\textsuperscript{67} and they were overtaken by World War II.\textsuperscript{68} The broad definition of terrorism contributed to the low number of signatures and ratifications. Britain, for example, did not ratify it because of foreseen difficulties with drawing up the required implementing domestic legislation.\textsuperscript{69} Foreshadowing criticism of terrorism conventions generally, J.G. Starke said of the 1937 Terrorism Convention in 1938 that “there can be few, if any, civilised countries in which legislation of the type provided for is not in force” and “for the prevention of terrorist outrages . . . co-operation is likely to be far more effective than the stiffening of the law for the infliction of punishment.”\textsuperscript{70}

C. United Nations General Assembly\textsuperscript{71}

The killing of twenty-eight people at Israel’s Lod airport in May 1972 and of eleven Israeli athletes at the Munich Olympic Games in September 1972 forced the General Assembly to confront the issue of terrorism.\textsuperscript{72} No consensus on definition was reached because, \textit{inter alia}, some states supported the use of terrorism to advance political goals.\textsuperscript{73} Furthermore, the United Nations maintained an institutional commitment to self-determination that clouded its vision relating to terrorism.\textsuperscript{74} States directly interested in national liberation sought to exclude acts committed in such struggles from any definition of terrorism. The polarization of positions resulting from the division of the world into the West, the Soviet Bloc, and the Non-Aligned States exacerbated the division over terrorism.\textsuperscript{75}

\textsuperscript{67} Responsibility for the treaty did not pass to the United Nations so it can be regarded as no longer valid. See Nawaz & Singh, supra note 2, at 67.


\textsuperscript{69} Starke, supra note 41, at 215.

\textsuperscript{70} Id.


\textsuperscript{73} See Abraham D. Sofaer, \textit{Terrorism and the Law}, 64 FOREIGN AFF. 901, 903 (1986).

\textsuperscript{74} See U.N. Charter art. 1; José E. Alvarez, \textit{The U.N.’s ‘War’ on Terrorism}, 31 Int’l J. Legal Info. 238, 238 (2003); see also Moore, supra note 72, at 88 (arguing that there is no necessary congruence between the pursuit of self-determination and terrorism).

\textsuperscript{75} See van Krieken, supra note 16, at tit. page, 114; G.A. Res. 3034, supra note 48 (an early resolution on terrorism which was a product of the Western states’ view that all ter-
Other attempts to find a comprehensive approach to international terrorism also achieved little. The General Assembly established an ad hoc committee on terrorism in 1972, but its inconclusive debate failed to make any significant progress.\(^\text{76}\) The committee was suspended from 1973 until 1976, during which time responsibility for the terrorism issue fell to the General Assembly’s Sixth Legal Committee.\(^\text{77}\)

There was no shortage of draft conventions at the United Nations. For example, the United States tabled a draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism\(^\text{78}\) that did not define terrorism but instead instructed states to criminalize offenses of “international significance.” These were defined as (1) acts performed with intent to “damage the interests of or obtain concessions from a State or an international organization,” (2) involving the unlawful killing, the causing of serious bodily harm, or the kidnapping of another person, (3) that are “committed neither by nor against a member of the armed forces of a state in the course of military hostilities,” and (4) are international in character.

The strength of national liberation movements and the solidarity of recently liberated states with people under foreign rule affected the conclusion of multilateral conventions as well. In 1979, Algeria and Libya sought to create an exception to the Hostages Convention that would allow hostage taking in the context of national liberation.\(^\text{79}\) Similarly, Syria argued that individual terrorism was only an international concern when employed solely for personal gain.\(^\text{80}\) The debate over the legitimacy of terrorism hampered the progress towards a definition,\(^\text{81}\) although the end of the decolonization period...
largely settled the legitimacy issue.\textsuperscript{82} Others attribute the slow forming consensus to states that support terrorism preferring to leave the definition vague.\textsuperscript{83} The U.N. efforts to fight terrorism have been described as “almost totally useless.”\textsuperscript{84} Although this assessment overstates the position, even within U.N. circles it is acknowledged that the “lack of agreement on a clear and well-known definition undermines the normative and moral stance [of the U.N. General Assembly] against terrorism and has stained the United Nations image.”\textsuperscript{85}

The end of the Cold War—and more significantly, the withdrawal of Soviet support for radical groups in the Middle East—allowed the General Assembly to more categorically declare the illegitimacy of terrorism in all circumstances.\textsuperscript{86} The decoupling of the right to self-determination and terrorism was a significant step forward.\textsuperscript{87} In contrast to the earlier conventions dealing with specific targets (for example aircraft, marine vessels, and diplomats), the “second generation” agreements\textsuperscript{88} contain wider prohibitions and were concluded under the United Nations’ auspices.\textsuperscript{89} Resolutions were unequivocal in their condemnation.\textsuperscript{90} Another ad hoc committee was established
civilian populations should be differentiated from legitimate struggles of peoples under colonial, alien or foreign domination for self-determination and national liberation . . . . ”); Press Release, General Assembly, Calls for Resolute Action Against Terrorism Tempered in Assembly by Appeals for Caution in Identifying ‘Enemy,’ U.N. Doc. GA/9962 (Nov. 12, 2001) (“It was unacceptable to label as terrorism the struggle of peoples to protect themselves or to attain their independence . . . .”).

\textsuperscript{82} Decolonization struggles still exist. The Israel-Palestinian dispute is often portrayed in this way.

\textsuperscript{83} See Tiefenbrun, supra note 79, at 378.

\textsuperscript{84} Richard Clutterbuck, International Co-operation Against Terrorism—Treaties, Conventions and Bilateral Agreements, in INTERNATIONAL TERRORISM: REPORT FROM A SEMINAR ARRANGED BY THE EUROPEAN LAW STUDENTS’ ASSOCIATION 39, 45 (Magnus Sandbu & Peter Nordbak eds., 1987).


\textsuperscript{86} Flory, supra note 40, at 18.


\textsuperscript{89} This is distinguished from other terrorism conventions, for example, which are deposited with the International Civil Aviation Organization. See Montreal Convention, supra note 52; Montreal Airports Protocol, supra note 52.

in 1996\textsuperscript{91} to continue developing treaties criminalizing terrorism-related acts. The General Assembly’s most significant resolution to date, the Declaration on Measures to Eliminate International Terrorism of 1994 (Elimination Declaration), states that:

2. Acts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations, which may pose a threat to international peace and security, jeopardize friendly relations among States, hinder international cooperation and aim at the destruction of human rights, fundamental freedoms and the democratic bases of society;

3. Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them . . . .\textsuperscript{92}

Paragraph 3 repeats but augments the definition in the 1937 Terrorism Convention that was drafted under the auspices of the League of Nations. The Elimination Declaration was endorsed annually in subsequent resolutions.\textsuperscript{93} The context indicates that paragraph 3 of the Elimination Declaration expands on paragraph 2. Under the approach adopted by the Elimination Declaration and the conventions, the label of terrorism provides an additional “layer of criminality”\textsuperscript{94} and signals greater moral culpability. This definitional statement requires mens rea with respect to the criminal act’s consequences and excludes any possible justification for the act. Resolutions of the Gen-


\textsuperscript{92} G.A. Res. 51/210, supra note 90.


\textsuperscript{94} Noteboom, supra note 36, at 564.
eral Assembly do not make law per se, although they can evidence the opinions of states and be declarative of law.\textsuperscript{95}

Following the increased Security Council management of the United Nations’ anti-terrorism strategy after September 11, the General Assembly continued to adopt resolutions calling on states to eliminate international terrorism.\textsuperscript{96} The Sixth Legal Committee did not incorporate the obligations arising from Resolution 1373 into its recent draft Comprehensive Terrorism Convention.\textsuperscript{97} Although duplicating Resolution 1373’s provisions is arguably unnecessary, the exclusion of them may indicate some tension between the General Assembly and the Security Council concerning the United Nations’ management of its anti-terrorism efforts. The General Assembly’s composition makes it unsurprising that even in the wake of September 11 it failed to achieve clarity of vision sufficient to produce anything new and constructive.\textsuperscript{98} Illustrating the vexed nature of defining terrorism, the Council of Europe—a more homogenous and harmonious congress than the General Assembly—also failed to reach a definitional consensus in the context of European Convention for the Suppression of Terrorism.\textsuperscript{99}

In late 2004, the Secretary-General of the United Nations presented the report of the High-level Panel on Threats, Challenges and Change to the General Assembly, which was compiled by a panel of experts appointed by the Secretary-General.\textsuperscript{100} Amongst a wide range of other topics, the report recommended that the General Assembly should complete negotiations on a comprehensive convention on terrorism.\textsuperscript{101} In addition to this direction, however, the report recommended that the definition (1) restate that the acts proscribed by the twelve global terrorism conventions constitute acts of terrorism and declare that such acts are crimes at international law and (2) refer to the definitions in the Financing Convention and Resolution 1566.\textsuperscript{102} Noteworthy is the conclusion implicit in the report that the Financing

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\textsuperscript{96} See, e.g., G.A. Res. 56/88, \textit{supra} note 91.

\textsuperscript{97} \textit{Infra} note 184.

\textsuperscript{98} \textit{Contra van Krieken, supra} note 16, at 119 (expressing surprise that so little was achieved).


\textsuperscript{100} \textit{U.N. High-Level Panel, supra} note 85, ¶ 2.

\textsuperscript{101} \textit{Id.} ¶ 159.

\textsuperscript{102} \textit{Id.} ¶ 164.
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Constitution and Resolution 1566 provide definitions of terrorism. More important, however, is the suggestion that acts of terrorism (however defined) should be illegal at international law. This appears to advocate for a change in direction from the current approach of using international law to declare that certain acts should be criminalized in the domestic law of each signatory state. Whether this approach will be given serious consideration is unclear at present.

D. United Nations Security Council

The Security Council is authorized by Articles 25 and 48 of the U.N. Charter to adopt resolutions that bind U.N. member states. Terrorism is almost certainly within the Security Council’s province and the Council proclaimed it one of the “most serious threats to peace and security,” thereby invoking its powers under Chapter VII of the Charter. Following September 11, the Security Council focused on terrorism’s domestic and international manifestations. Resolution 1368 condemned the terrorist attacks and, foreshadowing Resolution 1373, called on the international community to “redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorism conventions.”

Resolution 1373, adopted on September 28, 2001, is the first use of Chapter VII powers to order states to take or refrain from specific actions other than when disciplining a specific country. For Resolution 1373, the Security Council largely adopted existing obligations from the Convention for the Suppression of the Financing of Terrorism (Financing Convention) and the General Assembly’s Elimination

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103 See id.
104 Id. ¶ 164(b).
105 S.C. Res. 1566, pmbl., U.N. Doc. S/RES/1566 (Oct. 8, 2004) (stating international terrorism “constitutes one of the most serious threats to peace and security”); see also S.C. Res. 1373, pmbl., supra note 42 (stating international terrorism “constitute[s] a threat to international peace and security”).
Declaration of 1994. Indeed, working from a blank slate would have been slower and would have denied the Security Council the advantage of capturing the legitimacy of obligations that many states had already accepted by signing the Financing Convention.

Resolution 1373 seeks to encourage governments to take action against terrorists by, *inter alia*, imposing significant obligations on states to enact domestic legislation. Paragraph 1(b) declares that “all States shall . . . [c]riminalize” the raising of funds and financing of terrorist acts. It requires tightened border controls, mutual assistance in criminal investigations or proceedings, and the denial of safe haven. Furthermore, it calls upon states to exchange information, to cooperate on prevention, and to become party to relevant conventions and protocols and implement them. Pursuant to paragraph 2, states are also required to “[r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists.” Significantly, states are also required to “[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws . . . .”

Resolution 1373 established the Counter-Terrorism Committee (C.T.C.), which monitors the implementation of the obligations under Resolution 1373 and provides assistance to states as required. The onerous obligations imposed by Resolution 1373 and monitored by the C.T.C. are of the variety “usually contained only in treaties developed through the normal treaty-making process.” Resolution 1373 departs from the normal language of “calls upon” and “urges” and instead issues mandatory directions in a style characteristic of legislation, such as “all States shall . . . .” Classical international law, built on state sovereignty and its corollary of state consent, denied

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112 Id. ¶ 2(e).
114 Rostow, *supra* note 29, at 482.
all entities the power to legislate for states. Professor Jose Alvarez argues that Resolution 1373 illustrates the hegemonic nature of contemporary international law.

Resolution 1373, despite forty references to terrorism or terrorists (including twenty-nine in operative paragraphs) and their invasive and instructive nature, does not define either term. Significantly, in selecting certain parts of the Financing Convention to make mandatory, the Security Council chose not to replicate the Financing Convention’s definition of terrorist act. The C.T.C. has said that it will not attempt to define the term and thus Resolution 1373 has left states free to define “terrorism” as each regards appropriate. This omission permits divergent implementation of Resolution 1373’s many obligations that turn on how terrorism is defined. Not until October of 2004—three years after Resolution 1373 imposed its mandatory obligations—did the Security Council give a clear indication of how it considers terrorism should be defined.

In this respect, Resolution 1373 represents a lost opportunity. Resolution 1373 could have comprehensively defined terrorism or at least codified the existing meaning of terrorism found in international law. Instead the Resolution’s important obligations remained (and possibly still remain) subject to interpretative conjecture and vulnerable to opportunistic and bad faith implementation. States with dubious human rights records actively suppress political opposition, curtail civil and political rights, or simply continue human rights abuses under the new pretext of taking the required steps to fight terrorism.

Reports to the C.T.C. confirm this disturbing trend. Whether the United States’ political capital post-September 11 was sufficient for it to press for a definition—no doubt styled with its own pen—is unclear. The absence of an articulated definition in Resolution 1373 does not, however, completely undermine the operation of the obligations if this Article’s

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117 See Szasz, supra note 109, at 901.
118 Hegemonic International Law Revisited, supra note 88, at 875 (developing on Detlev F. Vagts, Hegemonic International Law, 95 Am. J. Int’l L. 843 (2001)).
thesis is accepted. The core definition of terrorism provides human rights advocacy groups, governments, and other international actors with a widely accepted yardstick to use in determining the legitimacy of governments fighting what is said to be terrorism.

Resolution 1566, unanimously approved by the Security Council in October 2004, remedies the absence of a definition in Resolution 1373 to some extent. Like previous Security Council and General Assembly Resolutions, Resolution 1566 condemns terrorism in all its forms, irrespective of its motivation, and urges states to cooperate fully in the “fight against terrorism.” But paragraph 3 of Resolution 1566:

Recalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature . . . .

On its face, this appears to be a definition of terrorism. According to a Security Council press release, Ambassador Ronaldo Mota Sardenberg of Brazil stated to the Security Council during its debate of Resolution 1566 that operative paragraph 3 was not an attempt to define the concept of terrorism but rather a compromise among the Member States that contained a clear political message. But over time, paragraph 3 is likely to be recognized as the Security Council’s definition of terrorism, de facto, if not de jure. It is important to note, however, that the definition is qualified by the phrase “which constitute offenses within the scope of and as defined in the international conventions and protocols relating to terrorism.” Thus, the most significant of the Security Council statements on terrorism can be read to support the notion that terrorism is the aggregate of the existing definitions of terrorism in the conventions.

122 S.C. Res. 1566, supra note 105, ¶ 3.
It is not clear from what point in its history this definition is recalled. Previous Security Council resolutions, as discussed above, have not come close to a definition exhibiting such specificity. Resolution 1566 avoids the contentious issue of whether military targets can be the subject of terrorist attacks by defining the class of victims as “including . . . civilians,” thereby implying further targets fall within the definition. Such targets might include political and state leaders, depending on who is regarded as a civilian, but most likely provides plausible grounds for arguing that the definition includes attacks on military targets as acts of terrorism. Ambassador Jack Danforth of the United States, in his statement to the Security Council, strongly implied that the paragraph 3 definition is not exhaustive, that other terrorists acts occur, and that nothing in paragraph 3 should be read as indicating anything to the contrary.\(^{124}\)

Irrespective of the intention of the Security Council and whether the definition is exhaustive or otherwise, Resolution 1566’s definition is an important pronouncement and should be read as partially filling the gap in Resolution 1373. The pronouncement, however, remains subject to the legitimate criticism that because it endorses a definition of terrorism ascertainable from the conventions, it adds little new to the development of terrorism as a legal concept. Nevertheless, Resolution 1566, although not of law-making force,\(^ {125}\) goes some way to clarifying the extent of the obligations in Resolution 1373, and, for this reason, it is significant. The three year delay in imposing various anti-terrorism obligations on states and providing what states might well come to regard as the Security Council’s definition of terrorism is unfortunate to the extent that most states have discharged their obligations and have already delineated what each considers terrorism to be.

E. Multilateral Anti-Terrorism Conventions and Protocols\(^ {126}\)

Prior to September 11, the General Assembly had effectively delegated its terrorism responsibilities to the Sixth Legal Committee. The Committee (as well as international organizations such as the Interna-

\(^{124}\) Id.

\(^{125}\) See, e.g., id.

tional Civil Aviation Organization) developed treaties that encouraged states to criminalize some of those acts commonly carried out by terrorists (such as airplane hijackings) and provided for comprehensive jurisdiction combined with a duty to prosecute or extradite. Other conventions seek to restrict terrorists’ access to resources. The thirteen multilateral conventions deal with both punishment and prevention across disparate subject areas. Technological advancement necessitated “prevention conventions” that curb the availability of weapons of mass destruction and unmarked plastic explosives.

The punishment conventions proscribe conduct and, broadly speaking, define the following crimes: physical attacks on internationally protected persons and their (and their government’s) property; the seizure of hostages to compel third parties to act in a certain way; the use of explosive or other lethal devices against public targets with the intention to cause death, serious injury, or major economic loss; the unlawful possession of radioactive material with the intention to cause death or serious injury or the unlawful use of such material with the intention to cause death, serious bodily injury, substantial property or environmental damage, or to compel a person, organization, or state to do or not do something; jeopardizing the safety of a civil aviation aircraft or persons or property onboard; gaining control of a civil aviation aircraft by use or threat of force or intimidation; doing things that endanger the safety of a civil aviation aircraft; acts of violence that cause serious injury or death or endanger safety at a civil aviation airport; the threat or use of nuclear material that causes or is likely to cause serious injury, death, or property damage; and gaining control over a vessel or fixed mari-

127 But see e.g., John F. Murphy, Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution, 12 Harv. Hum. Rts. J. 1 (1999) (citing an example of an alternative approach).

128 The one reported deadly use of weapons of mass destruction by terrorists is the release of sarin gas in the subway in Tokyo, Japan, in 1995. It caused twelve deaths and many people were injured. See Joby Warrick, An Easier, but Less Deadly Recipe for Terror, Wash. Post, Dec. 31, 2004.

129 Internationally Protected Persons Convention, supra note 52, art. 2(1)(a), (b).

130 Hostages Convention, supra note 52, art. 1(1).

131 Bombings Convention, supra note 52, art. 2(1).

132 Nuclear Terrorism Convention, supra note 51, art. 2(1)(a), (b).

133 Tokyo Convention, supra note 52, art. 1(1)(b).

134 The Hague Convention, supra note 52, art. 1(a).

135 Montreal Convention, supra note 52, art. 1(1).

136 Montreal Airports Protocol, supra note 52, art. II(1).

137 Nuclear Materials Convention, supra note 52, art. 7(1).
time platform by threat, force, or intimidation or endangering the safe navigation of the vessel or fixed maritime platform.\textsuperscript{138}

Despite not necessarily referring to terrorism expressly, these conventions\textsuperscript{139} and their prohibitions are intended to address terrorism. International politics necessitates the incremental criminalization of acts of terrorism, and some agreement on which acts should be proscribed was better than no progress. The Financing Convention, and General Assembly and Security Council resolutions, and statements by other international law actors\textsuperscript{140} make a sufficient link between the conventions and the goal of addressing terrorism such that the conventions are very relevant to determining the definition of terrorism at international law.

1. The Punishment Conventions

The international anti-terrorism instruments tend to require specific prohibitions in domestic law but leave states significant latitude in implementing their international obligations. The conventions generally follow a basic model: a type of terrorist activity of particular concern at the time is identified; states are obliged to criminalize this conduct and impose penalties proportional to the act; and states are required to establish jurisdiction at least based on territory, nationality, and place of registration (and in some cases more exten-

\textsuperscript{138} Maritime Convention, \textit{supra} note 52, art. 3(1) (vessels); Fixed Platforms Convention, \textit{supra} note 52, art. 2(1).


\textsuperscript{140} See, e.g., G.A. Res. 44/29, \textit{supra} note 87 (evidencing the link between the listed conventions and terrorism by referring to the “existing international conventions relating to various aspects of the problem of international terrorism, viz . . . .” naming all those Convention mentioned in, \textit{supra} note 52 passed before 1989). \textit{See also G.A. Res. 46/51, \textit{supra} note 90; S.C. Res. 1373, \textit{supra} note 42, pmbl.; Financing Convention, \textit{supra} note 52, art. 2(1)(a), Annex.}
The following brief survey pays particular attention to how the conventions’ prohibitions and other features relate to the content of the definition of terrorism.

Following the frequent hijackings of the 1960s, the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention) (1963), the Convention for the Suppression of the Unlawful Seizure of Aircraft (The Hague Convention) (1970), and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention) (1971) were adopted under pressure from the International Civil Aviation Organization to attempt to secure the safety of civil aviation.141

The Tokyo Convention establishes a system for allocating jurisdiction over offenses concerning aircraft, rather than defining particular offenses.142 “Offenses” are not defined. By contrast, The Hague Convention makes it an offense to “unlawfully, by force or threat thereof, or by any form of intimidation, seize[], or exercise[] control” of a civilian aircraft.143 The Montreal Convention provides for further offenses, including acts of violence against persons, damaging aircraft, placing substances likely to destroy or seriously damage aircraft, and damaging or interfering with navigational facilities in a way likely to endanger the safety of an aircraft.144 States have a duty under each of these conventions to criminalize the conventions’ specified conduct.145 A protocol to the Montreal Convention requires states to criminalize acts of violence or destruction of property committed at international airports serving civil aviation.146

The Internationally Protected Persons Convention (1973) is structurally similar to The Hague and Montreal Conventions.147 It defines an “internationally protected person” as a head of state functionary, head of government, Minister of Foreign Affairs, their families, and other representatives of states and international organizations.148 It requires states parties to criminalize murder, kidnapping, and other at-

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141 See Montreal Convention, supra note 52; The Hague Convention, supra note 52; Tokyo Convention, supra note 52.
142 Tokyo Convention, supra note 52.
143 The Hague Convention, supra note 52, art. 1(a).
144 Montreal Convention, supra note 52, art. 1.
145 Id. arts.1, 3; The Hague Convention, supra note 52, arts. 2, 4.
146 Montreal Airports Protocol, supra note 52, art. II.
147 Internationally Protected Persons Convention, supra note 52.
148 Id. art. 1.
tacks on the liberty of such persons, as well as attacks upon their residences, transport, and official premises.\textsuperscript{149}

The International Convention Against the Taking of Hostages (Hostages Convention) (1979)\textsuperscript{150} requires states to make a provision in their domestic law for the crime of seizing, detaining, or threatening to kill, injure, or continue to detain another person in order to compel a state, international intergovernmental organization, person, juridical person, or group of persons to do or abstain from doing an act explicitly or implicitly conditioned on release of the hostage.\textsuperscript{151}

Offenses similar to those required under The Hague and Montreal Conventions are also required with respect to ships (other than police or war ships)\textsuperscript{152} by the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (Maritime Convention) (1988). States are required to criminalize the seizing of, or the exercising of control over, a ship using force or intimidation; performing acts of violence on a ship or causing damage that is likely to endanger the safe navigation of the ship; placing devices or substances on board a ship that are likely to destroy the ship, damage it or its cargo, or endanger its safe navigation; and destroying or seriously damaging maritime navigational facilities.\textsuperscript{153} A protocol effectively extends the Maritime Convention to apply to fixed platforms on the continental shelf.\textsuperscript{154}

In 1998, the U.N. General Assembly adopted the International Convention for the Suppression of Terrorist Bombings (Bombing Convention).\textsuperscript{155} This convention specifically acknowledges that the existing multilateral conventions are insufficient to address terrorism.\textsuperscript{156} In 2002 bombings accounted for 70\% of the world’s terrorist attacks.\textsuperscript{157}

\begin{itemize}
  \item \textsuperscript{149} Id. art. 2(1)(a), (b).
  \item \textsuperscript{150} Hostage taking is a crime under international humanitarian law during armed conflict not of an international character. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 34, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].
  \item \textsuperscript{151} Hostages Convention, supra note 52, arts. 1, 2.
  \item \textsuperscript{152} Maritime Convention, supra note 52, arts. 1, 2.
  \item \textsuperscript{153} Id. arts. 3(1), 5.
  \item \textsuperscript{154} See id.
  \item \textsuperscript{156} Bombings Convention, supra note 52, Annex (“Noting also that existing multilateral legal provisions do not adequately address these attacks . . . .”).
  \item \textsuperscript{157} See U.S. Dep’t of State, supra note 6, at intro.
\end{itemize}
The Bombings Convention broadly prohibits the use of explosives and other lethal weapons. States must provide for the offenses listed in the Bombings Convention in domestic law.\textsuperscript{158} The ease of manufacturing destructive devices and their frequent use by terrorists explains the Bombings Convention’s far-reaching requirements. Application of this convention’s prohibitions to armed forces during armed conflict is expressly excluded.\textsuperscript{159} Article 2(1), the principal offense provision, reads:

Any person commits an offence . . . if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility:

(a) With the intent to cause death or serious bodily injury; or

(b) With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.\textsuperscript{160}

And by Article 5, mirroring the General Assembly’s Elimination Declaration of 1994 quoted above, the Bombings Convention states:

Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention, in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature.\textsuperscript{161}

On September 14, 2005 the International Convention for the Suppression of Acts of Nuclear Terrorism (Nuclear Terrorism Convention) was opened for signature. This convention requires states to criminalize\textsuperscript{162} the unlawful and intentional possession of radioactive material or devices (both as defined) and the making of such devices

\textsuperscript{158} Bombings Convention, \textit{supra} note 52, art. 4(a); \textit{see also} Nuclear Terrorism Convention, \textit{supra} note 51, at pmbl.
\textsuperscript{159} \textit{Id.} art. 19(2).
\textsuperscript{160} Bombings Convention, \textit{supra} note 52, art. (2)(1).
\textsuperscript{161} \textit{Id.} art. 5.
\textsuperscript{162} Nuclear Terrorism Convention, \textit{supra} note 51, art. 2(1)(a)
with the intent to cause death or serious bodily harm or substantial damage to property or the environment. It also requires criminalization of the use of radioactive material or devices or the use of or damage to a nuclear facility which releases or risks the release of radioactive material with the intent to cause death, serious bodily injury, substantial damage to property or the environment, or to compel a person, international organization, or state to do or refrain from doing an act. Although similar to other punishment conventions, the Nuclear Terrorism Convention refers to environmental damage as well as to humans and property.

2. The Prevention Conventions

A second class of conventions seeks to prevent terrorism, or at least to mitigate its impact, by denying terrorists materials, finance, support, and equipment. The Convention on the Physical Protection of Nuclear Material (Nuclear Materials Convention) (1980) relates to the international transportation and storage of nuclear material. For the purposes of this Article, however, the Nuclear Materials Convention contributes little to the definitional debate, as it applies to all entities handling such materials and not specifically to terrorism. The Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991), the first of the conventions to use the word “terrorism,” also seeks to limit the availability of materials to terrorists by requiring states to prohibit and prevent the manufacture of unmarked explosives.

The Financing Convention, adopted by General Assembly resolution in 1999, seeks to eliminate terrorism by cutting off funding streams, noting that the “number and seriousness of acts of international terrorism depend on the financing that terrorists may obtain.” It builds on obligations in previous General Assembly state-

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168 Id. art. 5(a).
164 Nuclear Materials Convention, supra note 52, art. 2.
165 See Non-Proliferation Treaty, supra note 139, (limiting the availability of nuclear material and facilitating the application of the International Atomic Energy Agency’s standards and guidelines for the safe handling of nuclear material).
166 See Nuclear Materials Convention, supra note 52, art. 7(1).
167 Plastic Explosives Convention, supra note 52, pmbl. (“Conscious of the implications of acts of terrorism for international security . . . .”).
168 Id. art. II.
170 Financing Convention, supra note 52, art. 1.
ments. It is the first international convention since 1937, however, to attempt to define terrorism in the abstract. Its offense provision implies this definition:

1. Any person commits an offence . . . if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:
   (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or
   (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

F. Thematic Content of the Concept of Terrorism at International Law

This section examines the themes and common elements present in the terrorism conventions and the overlap of their prohibitions. Stating these themes abstractly identifies the constituent parts of terrorism as a legal concept at international law and helps to establish the parameters of the definition of terrorism. Nine themes are examined below.

1. The Harm Caused

Causing the death of or serious bodily injury to non-combatant civilians is a proscribed outcome under the Bombings, Financing, and

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171 See generally G.A. Res. 51/210, supra note 91, ¶ 3(f); see also G.A. Res. 52/165, supra note 90.
172 Financing Convention, supra note 52, art. 2; see also id. art. 1 (defining various terms in the Convention).
173 Id. at Annex (listing the Bombings Convention, supra note 52; Maritime Convention, supra note 52; Fixed Platforms Convention, supra note 52; Montreal Airports Protocol, supra note 52; Nuclear Materials Convention, supra note 52; Hostages Convention, supra note 52; Internationally Protected Persons Convention, supra note 52; Montreal Convention, supra note 52; The Hague Convention, supra note 52; see also id. art. 23 (stating that the list may be amended).
Nuclear Terrorism Conventions. The other conventions’ prohibitions support the principle that killing or harming civilians is terrorism, though their prohibitions apply only in certain contexts (for example, in civil aviation airports or on ships).\textsuperscript{174} Causing death or serious bodily injuries is also encompassed by the definition in paragraph 3 of Security Council Resolution 1566,\textsuperscript{175} although not only civilians may be the target of terrorists’ attacks under this definition.

The standard appears to be “serious bodily injury,” a term used in the Financing Convention,\textsuperscript{176} Bombings Convention,\textsuperscript{177} Nuclear Terrorism Convention,\textsuperscript{178} Montreal Airports Protocol,\textsuperscript{179} and Security Council Resolution 1566.\textsuperscript{180} Although the Maritime Convention and Fixed Platforms Protocol refer simply to “injuries,” and the Montreal Convention refers only to “violence against persons,” the protection of civilians is not the principal aim of these conventions. Rather, injury or death is only prohibited under these conventions if it is likely to endanger safe navigation, or if the injuries or deaths occur while a prohibited act (such as seizing control of a ship or airplane) is being performed. In contrast, the Bombings Convention, Nuclear Terrorism Convention, Resolution 1566, and (to a lesser extent) the Financing Convention are, \textit{inter alia}, directly concerned with harm to civilians. Any injuries caused in the commission of an otherwise prohibited act suffices as an additional illegal act. Injuries generally must be serious in nature to independently constitute terrorism. Although of less direct relevance, the current draft Comprehensive Convention on International Terrorism\textsuperscript{181} refers to serious bodily injury. Injuries must be physical; mental harm is insufficient.

\textsuperscript{174} Maritime Convention, \textit{supra} note 52, art. 3(1); Montreal Airports Protocol, \textit{supra} note 52, art. II.
\textsuperscript{175} S.C. Res. 1566, \textit{supra} note 105.
\textsuperscript{176} Bombings Convention, \textit{supra} note 52, art. 2(1) (a).
\textsuperscript{177} Financing Convention, \textit{supra} note 52, art. 2(1) (b).
\textsuperscript{178} Nuclear Terrorism Convention, \textit{supra} note 51, art. 2(1) (a) (i), (1) (b) (i).
\textsuperscript{179} Montreal Airports Protocol, \textit{supra} note 52, art. II(1).
\textsuperscript{180} S.C. Res. 1566, \textit{supra} note 105, ¶ 3.
\textsuperscript{181} Draft Comprehensive Terrorism Convention, \textit{supra} note 139, Annex II, cl. 2(1)(a). The definition of terrorism in clause (2) (1) of the Draft Comprehensive Terrorism Convention is:

Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes:
(a) Death or serious bodily injury to any person; or
(b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or
Unlike in previous conventions and the more recent Nuclear Terrorism Convention, damage to property is not a proscribed harm under the Financing Convention. Nor did the Security Council include such damage in its recent effort to define terrorism in Resolution 1566. Statistically, attacks on private property are significant. On average 298 business facilities were struck annually between 1997 and 2002, compared with thirty-one diplomatic facilities, sixteen governmental, forty-three military, and ninety other facilities. The Bombings Convention contemplates damage to places of public use, state facilities, and public transport systems or infrastructure where it causes or is likely to cause economic harm. Damage to property with respect to ships and airplanes is covered by the maritime and the civil aviation conventions, which evince a concern for the consequences of the prohibited acts beyond their harm to private property. Whether property is privately or publicly owned is not determinative; the criterion is public use, not ownership. The Nuclear Terrorism Convention is broader again and refers only to “substantial damage to property or to the environment.” Although the aviation and maritime conventions do not expressly condition property damage on detrimental economic consequences, the aviation conventions in particular grew out of a concern for confidence in safe air travel. Economic consequences were, at minimum, a relevant consideration indicating that harm to property is only considered sufficiently worrisome if it causes major economic damage.

Pure economic loss (such as a depreciation in share value following a terrorist attack) does not suffice under any convention. In the 1970s, property damage was excluded, for example, from the U.S. draft, as a concession to the Non-Aligned States that were wary of protecting foreign owned property abroad. Western states, however, argued strongly for the inclusion of property damage, especially to transportation systems, and this argument has won out, though not to the extent of pure economic loss.

(c) Damage to property, places, facilities, or systems referred to in paragraph 1 (b) of this article, resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.

Id.

182 See U.S. Dep’t of State, supra note 6, app. H.
183 Nuclear Terrorism Convention, supra note 51, art. 2(1)(a)(ii).
184 Franck & Lockwood, supra note 68, at 76.
185 Id. (citing Observations of States, supra note 80, at 17).
2. The Criminal Status of the Act Causing Harm

A number of the conventions require acts to be independently “unlawful” to contravene their provisions (see the Bombings, Financing, Nuclear Terrorism, The Hague, Montreal, and Maritime Conventions and the Fixed Platforms Protocol). Independent unlawfulness, presumably a reference to applicable domestic law, is implicit in the other conventions too. For example, the deprivation of liberty of an internationally protected person, prohibited by the Internationally Protected Persons Convention, must be restricted to unlawful detention to render results that are not absurd. Some circumstances might warrant detention of such persons. “Unlawful acts” is a broader standard than that used in Resolution 1566, the Elimination Declaration, and Article 5 of the Bombings Convention (and the 1937 Terrorism Convention) which refer to “criminal acts.” The “unlawful” standard is appropriate for the core international definition, as the conventions are more specific than the Elimination Declaration (which is largely aspirational) and the repeat of the Elimination Declaration’s wording in Article 5 of the Bombings Convention. Furthermore, the conventions are much more persuasive as a source of law than the Elimination Declaration, which is soft law, and the Security Council’s Resolution 1566, which is not stated as a binding definition.

3. Intimidation or Coercion

Subclause 2(1)(b) of the Financing Convention requires that the harm be done “when the purpose of such [an] act, by its nature or context” is to intimidate a population or coerce a government or international organization. Intimidation or coercion of some description, also expressly required by the Hostages and Nuclear Materials Conventions and Resolution 1566, is implicit in the other conventions and inherent in the concept of terrorism. For example, the protection of governmental and international organizations’ staff derives partly from the need to protect their principals’ freedom of action. Similarly, the civil aviation—and probably the maritime—conventions are underpinned by a concern for the coercion and intimidation of states and groups of persons.

186 See also Draft Comprehensive Terrorism Convention, supra note 139, cl. 2(1).
188 See Bombings Convention, supra note 52, art. 5.
189 See Financing Convention, supra note 52.
190 Internationally Protected Persons Convention, supra note 52.
Although not required by the Bombings Convention’s principal prohibition in Article 2, Article 5 requires states to adopt measures to ensure criminal acts contrary to the Bombings Convention are not justifiable, “in particular where they are intended or calculated to provoke a state of terror.” Despite this, which might indicate a modification of the general prohibition, intimidation or coercion is not a requirement of the Bombings Convention. The case for excluding intimidation and coercion from the international definition is bolstered by the Nuclear Terrorism Convention, which provides that intending to compel an act using radioactive material is an alternative to, for example, causing death. As an implicit requirement of the earlier conventions and prominent feature of the Financing Convention, however, intimidation or coercion should be regarded as a necessary element of terrorism as a legal concept at international law.

The use of the indefinite article preceding population\(^{191}\) indicates that intimidation of any state’s population or a part thereof is sufficient. The Hostages Convention’s wide class of entities that must not be made the subject of compulsion (“a State, an international intergovernmental organization, a natural or juridical person, or a group of persons”) is much broader than the other conventions, which are restricted to governments or international organizations, thereby excluding, for example, coercion of multinational corporations.

4. The Range of Victims Generally Includes Persons and Property

Over time this issue has become more, not less, complicated. In 1973, there was general consensus that only innocent persons could be victims of terrorism, which Thomas M. Franck and Bert B. Lockwood defined as persons unconnected with the terrorist’s struggle.\(^{192}\) The present position is that persons and property involved in armed conflict are excluded from the conventions, and thus they cannot be the subject of terrorist attacks under international law.\(^{193}\) The aviation, Maritime, and Financing Conventions expressly exclude military and police aircraft and ships. Other conventions refer to doing the proscribed acts “without lawful excuse” or “unlawfully.” Placing a bomb in a situation of

\(^{191}\) See, e.g., Financing Convention, supra note 52, art. 2(1)(b) (“Any other act . . . is to intimidate a population.”).

\(^{192}\) Franck & Lockwood, supra note 68, at 80. See generally Observations of States, supra note 80.

\(^{193}\) There is academic support for requiring that the victims of terrorism be innocents. See, e.g., Benjamin Netanyahu, Defining Terrorism, in TERRORISM: HOW THE WEST CAN WIN 7, 9 (Benjamin Netanyahu ed., 1986).
armed conflict would not constitute an offense against the Bombings Convention if the circumstances of an armed conflict would make the placement “lawful.” 194 Thus, one can conclude that terrorist acts directed towards combatants do not fit within the core definition of terrorism at international law. It is notable that the definition in Resolution 1566 refers to the range of victims of terrorism as including civilians, thereby avoiding the debate on terrorism directed against military targets.

There is pressure from the United States to regard off-duty and unarmed service personnel as non-combatants under the Draft Comprehensive Terrorism Convention that is currently being debated. 195 Notwithstanding this debate, the scope of “non-combatant” is unclear. Certain governmental officials are expressly protected when overseas. 196 Whether military leaders, businesses that manufacture weapons, civilians employed in military enterprises, and so forth are protected is unclear. It is relatively clear, however, that only non-combatants may be the subject of terrorism attacks at international law.

5. Motivation of the Attacker

The conventions are not limited by the attacker’s motivation. For example, neither the Nuclear Terrorism Convention nor the Financing Convention definition require a religious, political, or ideological motive, nor does Resolution 1566. 197 Similarly, the Internationally Protected Persons Convention, which criminalizes intentional attacks against certain persons, does not expressly require knowledge of the person’s status. Although some states’ domestic law may imply this additional mens rea element, 198 it is not a requirement at international law 199 (although there is academic support for this being a necessary

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194 At the very least, there is a strong inference of the legality of killing combatants under certain conditions arising from the Geneva Conventions, infra note 221. Whether criminal law defenses (such as necessity) constitute lawful authorization of killings for the purposes of the conventions, as implemented, is unclear.


196 See Internationally Protected Persons Convention, supra note 52, arts. 1, 2.

197 Financing Convention, supra note 52, art. 2.

198 Contra Internationally Protected Persons and Hostages Act, No. 6, § 7(a) (1982) (Cook Islands).

Such a motivation usefully separates terrorist groups from organized crime and limits the parameters of the concept of terrorism thereby reducing the potential for abuse by governments. Proving a higher motivation (such as political, ideological, or religious) may make prosecutions unduly difficult. Once the act and the purpose elements are proven, the motivation is arguably irrelevant. Furthermore, incorporating motivation opens the vexing issues of moral and political legitimacy that have severely hampered the definitional debate in the past.

6. Mens Rea Elements Are Relevant to Both the Commission of the Act Itself and the Creation of the Intimidatory or Coercive Consequences

Each act proscribed in the conventions requires some form of mens rea, usually intent. For example, the Bombings Convention’s prohibition in Article 2 refers to “intentionally” and the Financing Convention to “willfully” and “intentionally” doing certain acts. The Nuclear Terrorism, Internationally Protected Persons, Montreal, Nuclear Materials, and Maritime Conventions, the two Protocols, and Resolution 1566 require the act of terrorism specified to be an intended act.

The Financing Convention also requires a form of desired foresight with respect to the consequences of the act, stating “when the purpose of [the proscribed act], by its nature or context, is to intimidate . . . .” Similarly, Resolution 1566 refers to acts done “with the
purpose to provoke a state of terror . . . [or] intimidate . . . .” Yet the General Assembly’s Elimination Declaration and Article 5 of the Bombings Convention refer to the “intended or calculated” formulation, which first appeared in the 1937 Terrorism Convention. Construed contextually, the mens rea of “calculated” must be a standard below intention. This broader formulation is attached to the creation of terror (i.e. the consequences) not the commission of the act itself. In this way, it is an additional mental element relating to the creation of some special state of affairs. This is what differentiates terrorism from everyday crimes. Hence, the international definition requires first that the act is intended and second that the consequences are either intended or perhaps calculated.

7. The Conventions Are Primarily Concerned with International Terrorism

International efforts to eliminate terrorism largely relate to preserving peace and security, and the friendly relations of states. Therefore, bombings to intimidate one’s own citizenry might not come under an international definition of terrorism, however worthy they may be of condemnation. An increased international commitment to human rights, however, might provide a foundation for extending the prohibition against intra-state targets. The need for protection of a state’s population against its own state is pressing. Sources estimate that more than 70 million people died during the twentieth century from “state-sponsored terror-violence,” whereas 100,000 causalities resulted from terror attacks by small groups or individuals. In the future, human rights norms may serve as the “internationalizing element.” Presently, such attacks do not come within the core definition.

Daniel Partan has argued that the aircraft hijacking and hostage-taking prohibitions in the conventions relate more strongly to protecting civilians than government. The protection of civilian popula-

207 S.C. Res. 1566, supra note 105, art. 3.
208 Bombings Convention, supra note 52, art. 5; 1937 Terrorism Convention, supra note 57; G.A. Res. 49/60, supra note 90, Annex (I)(3).
209 Nuclear Terrorism Convention, supra note 51, art. 3; Bombings Convention, supra note 52, art. 3; Maritime Convention, supra note 52, art. 4(1); Montreal Convention, supra note 52, art. 4(2). But see id. art. 4 (listing limited exceptions to the general rule that the convention is only concerned with international terrorism).
210 Bassiouini, MULTILATERAL CONVENTIONS, supra note 6, at 46 (citations omitted).
212 Id.
tions, however, is more recent. Early hijackings and hostage-takings were performed to compel governments, principally democratic ones, to act in a certain way.\textsuperscript{213} Harm to civilians is the means not the end, as recognized by, for example, the Financing Convention making harm to civilians contingent on some intimidatory or coercive purpose.\textsuperscript{214} The Bombings Convention does not condition harm to civilians by means of bombings on intimidation but these attacks on civilians are performed to pressure governments.\textsuperscript{215} Civil unrest and/or the democratic process translate intimidation of the populous into compelled governmental action. Because civilians are a sufficiently important means to coercing government (particularly in democracies), the conventions protect them. Furthermore, under most, if not all, legal systems, attacks on civilians are illegal whether or not they are intended to compel a government to act. The conventions are not needed to cement adherence to the prohibition against civilian murder. Rather, the conventions exist to protect governments.\textsuperscript{216}

8. All Multilateral Conventions Concern Terrorist Acts by Individuals

The conventions speak to individual, not state or group, conduct. The Nuclear Terrorism, Financing, Maritime, The Hague, and Hostages Conventions speak of “person,” and clearly individuals may perform acts of terrorism. Whether state actors can commit acts of terrorism has been, and remains, a contentious issue.\textsuperscript{217} Interestingly, Resolution 1566 avoids specifying what type of entities may engage in terrorism, whereas the Nuclear Terrorism Convention expressly provides that the activities

\textsuperscript{213} The Internationally Protected Persons Convention, \textit{supra} note 52, art. 3, was also designed to protect the governments for whom such protected persons worked.

\textsuperscript{214} Financing Convention, \textit{supra} note 52, art. 2(1)(b).

\textsuperscript{215} The timing of the bombing in Madrid, which preceded the Spanish general elections, appears to have been planned to influence the election, particularly the position of the then incumbent government, which supported the military measures against Iraq. Tony Karon, \textit{Did Al-Qaeda Change Spain’s Regime?}, \textit{Time}, Mar. 15, 2004, available at www.time.com/time/world/article/0,8599,601306,00.html.

\textsuperscript{216} See, \textit{e.g.}, Internationally Protected Persons Convention, \textit{supra} note 52, pmbl. (“Having in mind the purposes and principles of the Charter of the United Nations concerning the maintenance of international peace and security and the promotion of friendly relations and co-operation among States . . . .”); see also Financing Conventions, \textit{supra} note 52, pmbl.; Bombings Convention, \textit{supra} note 52, pmbl.; Maritime Convention, \textit{supra} note 52, pmbl.; Hostages Convention, \textit{supra} note 52, pmbl. (starting with similar language).

\textsuperscript{217} Walter, \textit{supra} note 33, at 35. Certainly there is not universal agreement on excluding state acts from what constitutes terrorism. See, \textit{e.g.}, Zeidan, \textit{supra} note 6, at 492–96. Zeidan, at the time, was a Lebanese Diplomat at the Permanent Mission of Lebanon to the United Nations.
of armed forces during an armed conflict are not governed by the convention. The reference to “person” in the conventions might be thought to bind state officials, and the conventions do not textually exclude application to states. Nevertheless, given that self-enforcement is unlikely, the conventions would have explicitly bound states if that was intended.

Furthermore, application is unnecessary for two reasons. First, state action is already restricted by, inter alia, the U.N. Charter, the Geneva Conventions, the Genocide Convention, customary and conventional rules against torture, human rights obligations, international humanitarian law, and, in time, perhaps the emerging principle of civilian inviolability. Thus, gross human rights violations, war crimes, and like acts are already breaches of international law. Second, acts done by individuals sufficiently connected to a state engage state responsibility for breaches of the above rules. State involvement in terrorism can be usefully categorized as (1) states supporting terrorism (provision of ideological, logistical, financial, military, or operational support to a terrorist entity); (2) states operating terrorism (initiating and directing terrorism through non-state agents); and (3) states performing terrorist acts (acts of terrorism performed by state

218 Nuclear Terrorism Convention, supra note 51, art. 4(2).
219 E.g., Financing Convention, supra note 52, art. 2(1).
220 See Walter, supra note 33, at 37, for a similar conclusion.
225 See, e.g., Rome Statute, supra note 37, art. 8.
agents).\textsuperscript{227} Inter-state or other transborder acts of terrorism performed by the state that would otherwise constitute terrorism under the international definition, as distilled by this Article, would constitute a transborder use of force and are prima facie illegal. States that operate terrorism through intermediaries will breach the clear obligation not to support terrorism, directly or indirectly,\textsuperscript{228} and may also result in the use of force itself if being attributed to the state that supported the act of terrorism. To a large extent, the difficult question is of evidence, not of principle, when establishing state responsibility for engaging in terrorist acts through supporting non-state actors. Thus, states do not escape responsibility for terrorism. Rather, conduct that constitutes terrorism by an individual breaches the states’ international obligations. Intra-state violence is significantly less regulated, although the prohibition against genocide and human rights norms constrain state behavior.\textsuperscript{229}

Finally, agreement on “state-perpetrated terrorism” will be hard to achieve. Intra-state acts of violence usually attract less pressure from other countries than those with cross-border effects, which explains the current consensus. Whether for the pragmatic considerations of obtaining state consent, or on conceptual grounds, excluding state action from the definition of terrorism is desirable. Presently, the Draft Comprehensive Terrorism Convention excludes acts by armed forces despite some states’ contrary urgings (such as those of Iraq).\textsuperscript{230}

9. Political Exceptions

The first convention, signed in Tokyo in 1963, did not require the application of criminal law with respect to offenses of a political nature, thereby recognizing the political exception that motivated France to push for a comprehensive approach to terrorism in the 1930s. A political exception was not included in either the Montreal or The Hague


Conventions of the early 1970s and is expressly excluded in the modern conventions\(^{231}\) and Resolution 1566.

**G. A Core Definition of Terrorism at International Law**

The conventions exhibit high levels of ratifications, signaling their widespread acceptance.\(^{232}\) This is illustrated in Appendix 1.\(^{233}\)

There is striking consistency in the form, themes, and philosophy of the various conventional statements on terrorism. Abstracting from their particular prohibitions (or viewing the prohibitions more broadly than in the narrow context in which they appear and considering their underlying policy goals) illustrates that terrorism as a legal concept at international law has a core content. The serious harming or killing of non-combatant civilians and the damaging of property with a public use causing economic harm done for the purpose of intimidating a group of people or a population or to coerce a government or international organization are proscribed outcomes. The act, which must be independently unlawful, must be intentional, and its consequences must at least be foreseen and desired. No particular motivation need explain the act and none can justify it. Group action or involvement is not a requirement, but the act must be perpetrated by a sub-state actor. The act and/or its effects must be international in character. States ought to ensure that the definition of terrorism in their domestic legal systems is consistent with this minimum definition of terrorism at international law. Although the case can be made for a broader definition based on recent and more expansive conventions, such as the Nuclear Terrorism Convention, it is unrealistic to think the definition may be extended by one convention, particularly one relating to a narrow set of circumstances. Rather, the approach of this Article is to look at the recurrence of themes over time in determining the parameters of the core definition of terrorism at international law.

Signature to and/or ratification of the conventions has been particularly rapid following September 11.\(^{234}\) Although the conventions received widespread approval in their own terms, abstracting from the specific prohibitions to analyze the emerging trends and themes is a

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\(^{231}\) *See, e.g.*, Financing Convention, *supra* note 52, art. 14; Bombings Convention, *supra* note 52, art. 5.


\(^{233}\) *See* Appendix 1.

\(^{234}\) *See* Rosard, *supra* note 115, at 337–38.
valid analytical technique because states neither consider nor sign conventions relating to terrorism in isolation. Although states’ anti-terrorism commitments are made in a specific context, there is little reason to restrict this view to that particular context, especially when the view is expressed in multiple contexts and given the trend of the conventions towards less context-specific prohibitions (for example, compare the Montreal Convention with the Bombings Convention).  

This Article does not argue that the elements of the definition of terrorism as identified above form a customary rule. The formation of customary international law requires the coexistence of general and settled state practice and *opinio juris*. The evident willingness of states to rapidly assume binding treaty obligations illustrates the momentum and extent of state practice and the emerging *opinio juris*. Treaty behavior can establish the dual elements of custom. Although the potential for “instant custom” was recognized in the *North Sea Continental Shelf* case, it requires extensive and virtually uniform state practice, including that by particularly affected states. The terrorism conventions are certainly norm-creating but are unlikely to satisfy this heightened state practice requirement. Furthermore, debate persists in key areas (such as military targets). In time, a customary prohibition may crystallize, but its existence is very doubtful at present.

Given the broad support, considerable overlap in obligations, recurring themes in the conventions, and the endorsement of the definition of terrorism in Resolution 1566 by the Security Council, a powerful definitional jurisprudence exists in international law sufficient for states to draw on in forming their own definition of terrorism in domestic law. Because international and domestic

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235 *See generally* Bombings Conventions, *supra* note 52; Montreal Convention, *supra* note 52.


237 N. Sea Cont’l Shelf, 1969 I.C.J. at 3.

238 *Id.* at 43, ¶¶ 73–74.

239 *Id.* at 41, ¶ 71.

240 Note too the similarity of the core definition of terrorism at international law distilled by this Article and the recommended “description” of terrorism in the report of the High-level Panel on Threats, Challenges and Change:

[A]ny action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.
definitions exist due to the dangers posed by terrorism, the definitions in the two systems should be substantively similar;\textsuperscript{241} although the needs and constraints of domestic legal systems may necessitate particular drafting. Domestic definitions, to be consistent with the international obligations arising under the various conventions and Resolution 1373, should meet this standard.\textsuperscript{242} The international definition offers a useful standard against which to measure the domestic definitions.

H. Current Developments

States may receive legislative guidance on defining terrorism from sources other than just the conventions and resolutions. International organizations are presently advancing model definitions of terrorism (often as part of model terrorism legislation), the development of which is influenced by the existing terrorism conventions. The United Nations Office on Drugs and Crime produced a guide to implementing the terrorism conventions that provides model domestic legislation for states to consider and notes the desirability of consistent implementation of the conventional obligations for procedural reasons.\textsuperscript{243} The Commonwealth Secretariat—an organization representing the fifty-three member states of the British Commonwealth—has also produced model legislation,\textsuperscript{244} which provides a definition of “terrorist act”\textsuperscript{245} based on the conventions, resolutions, and national

\textit{U.N. High-Level Panel, supra} note 85, ¶ 44.

\textsuperscript{241} Cf., Walter, \textit{supra} note 33, at 31-32.

\textsuperscript{242} Cf., \textit{id.} at 13.


\textsuperscript{244} See \textit{Commonwealth Secretariat, supra} note 201.

\textsuperscript{245} See \textit{id.} The text of the Commonwealth Secretariat’s draft legislation states:

(1) [A]n act or omission in or outside [country name] which constitutes an offence within the scope of a counter terrorism convention; or

(2) [A]n act or threat of action in or outside [country name] which—

(a) involves serious bodily harm to a person;

(b) involves serious damage to property;

(c) endangers a person’s life;

(d) creates a serious risk to the health or safety of the public or a section of the public;

(e) involves the use of firearms or explosives;

(f) involves releasing into the environment or any part thereof or distributing or exposing the public or any part thereof to—

(i) any dangerous, hazardous, radioactive or harmful substance;

(ii) any toxic chemical;

(iii) any microbial or other biological agent or toxin;
defini-
tions. The definition is not limited to the acts proscribed by the conventions and provides an abstract definition principally based on the Financing Convention. Unlike the international approach to defining terrorism, however, the model legislation narrows its definition by expressly excluding labor strikes and protests. Notably, the Secretariat suggests the possibility of requiring a political, ideological, or religious motivation but does not give a recommendation either way. This, like the express exclusion of protestors, is a suggestion rooted in domestic rather than international law. In addition, the C.T.C. was reported to be developing model anti-terrorism legislation, most likely heavily influenced by the United States.

A parallel development is the possibility of a Comprehensive Terrorism Convention that provides a definition of terrorism. The cur-

(g) is designed or intended to disrupt any computer system or the provision of services directly related to communications infrastructure, banking or financial services, utilities, transportation or other essential infrastructure;
(h) is designed or intended to disrupt the provision of essential emergency services such as police, civil defence or medical services;
(i) involves prejudice to national security or public safety; and is intended, or by its nature and context, may reasonably be regarded as being intended to:

(i) intimidate the public or a section of the public; or
(ii) compel a government or an international organization to do, or refrain from doing, any act [and
(iii) is made for the purpose of advancing a political, ideological, or religious cause.]

(3) [A]n act which—
(a) disrupts any services; and
(b) is committed in pursuance of a protest, demonstration or stoppage of work, shall be deemed not to be a terrorist act within the meaning of this definition, so long and so long only as the act is not intended to result in any harm referred to in paragraphs, (a), (b), (c) or (d) of subsection (2).

Id. at 4–6. The Commonwealth Secretariat recommends two alternative definitions. The bracketed text in clause 2(i)(iii) is the only difference between the two definitions.

246 Id. at 41.
249 Under G.A. Res. 51/210 (1996), supra note 91, art. 3, ¶ 9, the Ad Hoc Committee established by that resolution, is tasked with, inter alia, drafting a comprehensive legal framework of conventions dealing with international terrorism. See also G.A. Res. 54/110, supra note 91, ¶ 12 (calling upon the Ad Hoc Committee to begin work on a comprehensive convention.)
rent sectoral approach of the conventions is recognized as undesir-
able.  Although negotiations are still in progress, the current
draft seeks to fill in the gaps left by the sectoral conventions. Like
the existing conventions, Article 2 lists offenses, and states are obliged
to provide for these offenses in their domestic legal systems. It com-
prehensively (not limited by means or target) defines the scope of
terrorist acts in terms very similar to the core definition distilled from
the existing terrorism conventions, although the draft is subject to
criticism. Notably, the draft defines “terrorist act” and does not pro-
vide a conceptual definition of “terrorism.”

III. Domestic Law Definitions of Terrorism

A. Introduction

As outlined above, international law seeks to work through domes-
tic law to eliminate terrorism. Unlike international law where the lack
of a comprehensive and clear definition is not fatal, a domestic anti-
terrorism statute must provide a precise definition of terrorism. Al-
though not all jurisdictions have a void for vagueness doctrine, all the
jurisdictions in this study require that criminal laws be sufficiently
knowable. For example, the United States Constitution precludes
punishment pursuant to a vague criminal provision. Such restrictions
protect against the arbitrary application of the laws. This protection is

250 See, e.g., Bassiouni, Multilateral Conventions, supra note 6, at 6.
251 See Draft Comprehensive Terrorism Convention, supra note 139, Annex I.
252 See Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17
253 Draft Comprehensive Terrorism Convention, supra note 139, cls. 4, 5.
254 For the text of the definition, see Draft Comprehensive Terrorism Convention, supra
note 139.
255 See Alexandra V. Orlova & James W. Moore, “Umbrellas” or “Building Blocks”?:
Defining International Terrorism and Transnational Organized Crime in International Law, 27
256 Id. at 272.
257 See Kokkinakis v. Greece, 17 Eur. Ct. H.R. 397, 423 (1994); Andrew Ashworth,
Principles of Criminal Law 67 (2d ed. 1995); A.P. Simester & W. J. Brookbanks, Prin-
ciples of Criminal Law ¶ 2.1.3 (2d ed. 2002); see also Raz, The Authority of Law: Es-
258 See U.S. Const. amends. V, VI, XIV; (providing, respectively, the modern basis for
the federal void for vagueness doctrine, the early foundation of the void for vagueness
document, and applying the doctrine to the states). In fact, early common law practice was
for courts to refuse to enforce legislation deemed too uncertain to be applied. Ralph W.
particularly important with respect to politically motivated crimes.\footnote{see generally Giaccio v. Pennsylvania, 382 U.S. 399 (1966). But see Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968); Wayne R. LaFave, Criminal Law ¶ 2.3(c) (4th ed. 2003) (suggesting that language that is so vague that it makes detection of arbitrary enforcement very difficult is problematic).} The requirement that the laws be sufficiently knowable also ensures satisfaction of the fair notice requirement implicit in the rule of law.

A domestic law definition of terrorism has four major functions. First, most domestic regimes provide for a designation process whereby persons or entities are certified as a “terrorist” or a “terrorist organization.” Such a designation often permits asset seizure or freezing, heightened monitoring, questioning, and detention. The definition determines who may be designated. Second, the definition forms an element of many terrorism-related offenses.\footnote{See, e.g., Terrorism Act 2000, 2000, c. 11, § 15 (U.K.) (criminalizing the funding of terrorism), available at http://www.opsi.gov.uk/acts/acts2000/20000011.htm (last visited Oct. 19, 2005).} Third, it allocates responsibility within government. In the United States, for example, a crime of terrorism is primarily investigated by the Federal Bureau of Investigations (F.B.I.) and the Department of Justice rather than local police\footnote{Philip B. Heymann, Terrorism and America: A Common Sense Strategy for a Democratic Society 4–5 (1998).} and may permit intelligence agencies to become involved. Fourth, the definition of terrorism is crucial for delimiting responses to the problem.\footnote{W. Michael Reisman, International Legal Responses to Terrorism, 22 Hous. J. Int’l L. 3, 9 (1999).} Particularly because of the first and second functions, the definition must be precise in order to provide adequate notice of what constitutes unlawful conduct.\footnote{See generally Crandon v. United States, 494 U.S. 152, 158 (1990); McBoyle v. United States, 283 U.S. 25, 27 (1919).} Given the invasive police investigative and detention powers conferred specifically for countering terrorism,\footnote{See, e.g., The Prevention of Terrorism Act, 2002, No. 15, §§ 52(4), 62, Acts of Parliament, 2002, (India), available at http://mha.nic.in/poto-02.htm#pnm (preventing an accused’s lawyer from being present throughout interrogation and providing for administrative detentions in various jurisdictions); Bassiouuni, Multilateral Conventions, supra note 6, at 20 (stating that “nearly every proposed or enacted piece of legislation in the world that purports to prevent and control individual terrorism exists in the nature of repressive penal and administrative measures”).} clear parameters of terrorism as a concept protect the public as well as facilitate the apprehension and punishment of terrorists. Clear parameters also serve to distinguish organized and other crime from terrorism.
Most states adopted or amended their anti-terrorism laws following September 11 or are currently doing so. The purpose of this Part is to assess the extent to which international obligations and the international jurisprudence on the definition question are influential in domestic law by (1) considering the drafting history of domestic definitions of terrorism with respect to the role played by international law and (2) comparing the domestic definitions with the core international definition to assess the degree of substantive similarity. The former task is made more difficult by legislative drafters’ reports, which tend not to be particularly detailed. To make the inquiry manageable, this Article considers the position of four common law jurisdictions that actively participate in international law but in which international law does not have automatic authority.265 The United States, United Kingdom, New Zealand, and India, all liberal democracies, are currently threatened by terrorism and have experienced terrorism over the last 100 years to quite different extents. This Part of the Article argues that, given the high degree of similarity between the domestic and international definitions, one can infer that international law, through its obligations and definitional jurisprudence, has been influential.

Although the four jurisdictions examined in this Article exhibit a relatively strong commitment to the rule of law, doubts are frequently expressed (to varying degrees) about the propriety of each state’s anti-terrorism legislation. Some criticism is leveled directly at the definition of terrorism.266 For example, Amnesty International has expressed concerns that the vagueness of the Indian definition might permit the government to silence legitimate political dissent.267 Many of the recently created police powers and criminal offenses are triggered by, or require a determination of, terrorist activity. Thus, the definition acts as a gatekeeper to invasive police powers and criminal liability. A broad and open definition has the effect of conferring greater powers on the police than a narrow definition does.

265 Each of the United States, United Kingdom, New Zealand, and India follow the common law approach to the relationship between domestic and international law whereby each legal system is viewed as a separate sphere (a “dualist” conception). The Netherlands and Greece, for example, use a different approach. See Antonio Cassese, INTERNATIONAL LAW 179 (2002).

266 See, e.g., Nanda, supra note 10, at 604.

B. The Relationship of International Law and Domestic Law

Modern international law has a significant impact on states’ domestic legal systems, often requiring states to enact domestic legislation in order to achieve objectives mandated by international law. Treaties—binding international agreements between states governed by international law—and a source of public international law—increasingly shape the international regulatory system. Significantly, the anti-terrorism conventions require signatory states to implement domestic legislation criminalizing certain acts that the international community has declared to be acts of terrorism.

Broadly speaking, in both monist and dualist legal systems, treaties require some form of national approval before becoming part of domestic law. Professor Antonio Cassese believes that “international law cannot work without the constant help, co-operation, and support of national legal systems.” The influence that international law has on domestic law depends almost completely on domestic law rules and political will. International law is relatively silent on this matter. It simply asks for the good faith implementation of its treaties.

In those states closely following the British common law tradition (including the United Kingdom, New Zealand, and India), international obligations accepted by the executive by exercise of its prerogative must be transformed into domestic law by the legislature before such international obligations affect private rights or liabilities, mod-

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268 Klabbers, supra note 126, at 37–38; see also Vienna Convention on the Law of Treaties, art. II (1)(a), May 23, 1969, 1155 U.N.T.S. 331 (providing a definition of the term “treaty”) [hereinafter Vienna Convention]. This definition has been largely accepted as declarative of custom. See, e.g., Qatar v. Bahrain, 1994 I.C.J. 112, 137 (Oda, J., dissenting).

269 Statute of the International Court of Justice, art. 38, 3 Bevans 1179; 59 Stat. 1031; T.S. No. 993. (1945).

270 See Brownlie, supra note 95, at 32–34 (providing a discussion of dualist and monist theories of international law).

271 Antonio Cassese, International Law in a Divided World 15 (1986) [hereinafter Cassese, Divided World].


273 Vienna Convention, supra note 268, art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith”); see Cassese, Divided World, supra note 271, at 169 (noting the “wish of sovereign States to regulate international relations as they thought best, without any obligation being imposed from outside”); see also Stefan Kadelbach, International Law and the Incorporation of Treaties into Domestic Law, 42 Ger. Y.B. Int’l L. 66, 67 (1999) (noting that deep—or often any—analysis of implementation is also absent from most textbooks on international law).
ify the existing law, or require public funds.274 Broadly speaking, this common law division of powers still persists despite minor deviations275 and codifications.276 In the United States, the treaty-making power is vested in the President acting with the advice and consent of the Senate.277 Once a treaty is adopted by the Senate, it becomes part of the “supreme Law of the Land.”278 The terrorism conventions cannot be regarded as self-executing279 because they create crimes and confer jurisdiction. Thus, in each of the four states, implementing legislation is required to give effect to the treaty obligations.

Some courts and commentators, most notably Professor Ian Brownlie, posit a general duty to bring national law into conformity with international law,280 arising from the “nature of treaty obligations and from customary law.”281 A survey of contemporary state practice powerfully questions the existence of such a norm.282 Irrespective of this duty, failure to enact the appropriate implementing legislation would put the state in breach of its international treaty obligations as well as those obligations under Security Council Resolution 1373. The conventions’ benefits are maximized by consistent and widespread implementation of their prohibitions and provisions, *inter alia*, because terrorists can select a home base jurisdiction but strike other states utilizing modern transborder transportation and communication systems.

C. Domestic Law Definitions

This section very briefly considers the definitions of terrorism in the four domestic jurisdictions with a particular view as to the influence international law has had on the definitions’ development. As illus-


276 See, e.g., *India Const*. art. 253: amended by the Constitution (Eighty-sixth Amendment) Act, 2002 (providing the legislature’s power to implement treaty obligations).

277 *U.S. Const*. art. II, § 2, cl. 2.

278 *Id*. art. VI.


281 Brownlie, *supra* note 95, at 36.

trated below, international law influenced some states but appears not
to have played even an indirect role in others. Examining the domestic
definitions is an important precondition to assessing their substantive
similarity with the international definition, which follows this section.

1. United Kingdom

Between 1969 and the 1998 “Good Friday” peace accord in
Northern Ireland, 3289 people were killed by terrorism in Northern
Ireland.\(^{283}\) Between 1976 and 1998, there were ninety-four incidents
of international terrorism in the United Kingdom (including over Lock-
erbie).\(^{284}\)

The United Kingdom was one of the first states to specifically
criminalize terrorism.\(^{285}\) Parliament responded to bombings by the
Irish Republican Army with the Prevention of Violence (Temporary
Provisions) Act 1939.\(^{286}\) Although temporary in title, it was extended
annually until 1954. Frequent bombings in mid-1974 prompted passage
of the Prevention of Terrorism (Temporary Provisions) Act 1974, which
followed the 1939 model.\(^{287}\) This Act, of six months temporary dura-
tion, was temporary in name only; it remained on the books (as
amended) until 2000. It very broadly defined terrorism as “the use of
violence for political ends, and includes any use of violence for the
purpose of putting the public, or any section of the public in fear.”\(^{288}\)

Following an official inquiry,\(^{289}\) the Terrorism Act 2000 was passed
as a permanent statute.\(^{290}\) In response to September 11, the Anti-
Terrorism, Crime and Security Act 2001 was hurriedly passed,\(^{291}\) con-

\(^{283}\) Secretary of State for the Home Department & the Secretary of State for
Northern Ireland, Legislation Against Terrorism, A Consultation Paper, 1998,
Cm. 4178, at ch. 2.3 [hereinafter Legislation Against Terrorism, A Consultation
Paper], available at http://www.archive.oficial-documents.co.uk/document/cm41/4178/
4178.htm. See generally Lord Lloyd of Berwick, Inquiry into Legislation Against
Terrorism, 1996, Cm. 3420, vol. 1, ch. 1, vol. 2. app. F.

\(^{284}\) Legislation Against Terrorism, A Consultation Paper, supra note 283.


\(^{286}\) Id. at 31.

\(^{287}\) Id. at 31, 40.

\(^{288}\) This definition is also used in the Prevention of Terrorism (Temporary Provisions)

\(^{289}\) Lloyd, supra note 283.

\(^{290}\) David Williams, The United Kingdom’s Response to International Terrorism, 13 IND. INT’L
& COMP. L. REV. 683, 689–90 nn.37–41 (2003) (citing the numerous times the Terrorism
Act has been used).

\(^{291}\) It has been subject to criticism including being labeled “the most draconian legisla-
tion Parliament . . . passed in peacetime in over a century.” Adam Tomkins, Legislating
ferring new powers and creating new offenses. The Terrorism Act 2000 introduced a general definition of terrorism not limited by geography.292 “Terrorism” is an act or threat thereof that is designed to influence the United Kingdom (or a foreign government) or to intimidate a population that is done for the purpose of advancing a political, religious, or ideological cause that brings about a prohibited outcome. The listed prohibited outcomes are: endangering another person’s life or creating a serious risk to the public’s health or safety; acts designed to interfere seriously with or to disrupt an electronic system; and acts


292 Terrorism Act 2000, c. 11, § 1 (U.K.). See the definition in the Reinsurance (Acts of Terrorism) Act, 1993, c. 18, § 2(2) (U.K.) (“In this section ‘acts of terrorism’ means acts of persons acting on behalf of, or in connection with, any organisation which carries out activities directed towards the overthrowing or influencing, by force or violence, of Her Majesty’s government in the United Kingdom or any other government de jure or de facto”). This definition, based on the Association of British Reinsurers’ wording may be more concerned with business than terrorism. Clive Walker, Blackstone’s Guide to the Anti-terrorism Legislation (2002) [hereinafter Blackstone’s Guide]. In the Terrorism Act 2000, c. 11, § 1 (U.K.), the definition of terrorism is:

(1) In this Act “terrorism” means the use or threat of action where-
   (a) the action falls within subsection (2),
   (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
   (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.

(2) Action falls within this subsection if it-
   (a) involves serious violence against a person,
   (b) involves serious damage to property,
   (c) endangers a person’s life, other than that of the person committing the action,
   (d) creates a serious risk to the health or safety of the public or a section of the public, or
   (e) is designed seriously to interfere with or to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1) (b) is satisfied.

(4) In this section—
   (a) “action” includes action outside the United Kingdom,
   (b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
   (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and
   (d) “the government” means the government of the United Kingdom, of a part of the United Kingdom or of a country other than the United Kingdom.

Id.
involving serious violence to or death of another person or serious property damage.

The new definition is significantly broader in scope but is more tightly framed than the definition in the 1974 and 1989 Acts. The preparatory work evidences little direct influence of international law. Rather, the definition’s roots are in the Lloyd Report’s recommended adoption of the F.B.I. working definition. A later report, however, doubted that the F.B.I. definition was sufficiently comprehensive and voiced concern regarding property otherwise not protected (for example, harm to computer systems and data). How the definition’s substance compares to international law is examined in Section D below.

2. United States

The creatively titled Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001 is the most recent U.S. legislative measure dealing with terrorism. Its forerunners include the Act to Combat International Terrorism of 1984 (which established a system of rewards for information regarding terrorism); the Diplomatic Security and Antiterrorism Act of 1986 (which facilitated sanctions against states that sponsored terrorism and criminalized murder or the causing of serious harm to Americans abroad if the Attorney General judged that the act was “intended to coerce, intimidate or retaliate against a government or civilian population”); the Antiterrorism Act of 1990 (defining terrorism and providing for civil remedies); and the Vio-

293 According to Legislation Against Terrorism, A Consultation Paper, Lord Loyd recommended the UK government adopt the F.B.I.’s working definition of terrorism, which is stated to be: “[T]he use of serious violence against persons or property, or the threat to use such violence, to intimidate or coerce a government, the public, or any section of the public in order to promote political, social, or ideological objectives.” Lloyd, supra note 283, at ¶ 3.14–15.
294 Id. at 11.
lent Crime Control and Law Enforcement Act of 1994 (which criminalized providing material support to terrorists).\textsuperscript{299} Following the Oklahoma City bombing in 1995, Congress passed the Anti-Terrorism and Effective Death Penalty Act of 1996 that provided, \textit{inter alia}, for the designation of foreign organizations, the consequential freezing of assets, and the extraterritorial extension of jurisdiction over terrorist acts.\textsuperscript{300}

Also noteworthy is an exception to the Foreign Sovereign Immunities Act. It carves out an exception to the broad grant of immunity for foreign states in federal and state courts by permitting certain suits for money damages against foreign states that sponsor terrorism.\textsuperscript{301}

Following September 11, there was a widely perceived need to enact legislation that would protect the United States from international terrorism.\textsuperscript{302} The response—the Patriot Act—was passed at record-breaking speed\textsuperscript{303} and signed by President George W. Bush on October 26, 2001. It is comprehensive (342 pages covering 350 subject areas),\textsuperscript{304} and it expands the powers of the federal government to combat terrorism in the areas of surveillance and interception of communications. It provides for greater information sharing, greater inter-agency coordination, and closer policing of financial transactions. It also strengthens the anti-money-laundering regulations with a view to disrupting terrorists’ resource flows, tightens immigration laws and enhances their enforcement, creates new crimes connected to terrorist acts, and expands existing crimes. The Patriot Act also authorizes administrative detentions.\textsuperscript{305}

United States federal law contains nineteen definitions or descriptions of terrorism.\textsuperscript{306} Although many of the definitions are simi-
lar, they vary considerably with respect to material matters. This fact demonstrates that different circumstances and departmental functions are best served by tailored definitions. Courts have said that the United States “characterizes rather than enumerates acts [of terrorism] for the purposes of designating foreign state sponsors of terrorism and defining criminal terrorist offenses under federal law” because of the uncertainty with respect to what constitutes terrorism. The United States may suffer from a lack of consistent conceptual clarity due to many and differing definitions of terrorism. A Congressional subcommittee found that “practically every agency of the United States Government . . . with a counterterrorism mission uses a different definition of terrorism [and that all such agencies] should agree on a single definition, so that it would be clear what activity constitutes terrorism and who should be designated as a terrorist.” In addition, each U.S. state has its own criminal law definition of ter-

307 Although a full review of all the federal definitions of terrorism is beyond the scope of this Article, a helpful collection of the federal definitions together with analysis may be found in Perry, supra note 306, at 254–69.

308 Different agencies and other parts of government have different definitions suiting their own needs. For example, the definition used by the Department of State to prepare its annual report on terrorism states that terrorism means “premeditated, politically motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine agents” 22 U.S.C. § 2656f(d)(2) (2004). The current F.B.I. definition of terrorism is “the unlawful use of force and violation against persons or property to intimidate or coerce government, the civilian population, or any segment thereof, in furtherance of political or social objectives.” 28 C.F.R. § 0.85(l) (2004); see Federal Bureau of Investigations, Terrorism in the United States, at ii (1999). Noteworthy too is the definition of terrorism in Executive Order 13224 issued by President George W. Bush on Sept. 23, 2001 which defines terrorism as “an activity that (i) involves a violent act or an act dangerous to human life, property, or infrastructure; and (ii) appears to be intended (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage-taking.” Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism 66 Fed. Reg. 49,079, 49,080 (Sept. 23, 2001).

309 Flatow, 999 F. Supp. at 17.


311 See Levitt, supra introductory quote, at 103–08 (considering the U.S. attempts to define terrorism in legislation in the 1970s and early 1980s).

312 See Staff of H. Subcomm. on Terrorism and Homeland Security, House Permanent Select Comm. on Intelligence, 107th Cong., Report on Counterterrorism Capabilities and Performance Prior to 9–11, (July 2002), available at http://www.fas.org/irp/congress/2002_rpt/hpsciths0702.html (recommending that the “standard definition” of terrorism is, “the illegitimate, premeditated use of politically motivated violence or the threat of violence by a sub-national group against persons or property with the intent to coerce a government by instilling fear amongst the populace”).
Significantly for the purposes of this study, the U.S. implementation of the Financing Convention contains a carbon copy of the Convention’s definition, which is used only for the purposes of the implementing act.\textsuperscript{314}

Chapter 113B of Title 18 deals with terrorism. Sections 802 and 808 of the Patriot Act amended two of the existing criminal law definitions of terrorism. One of the most significant definitions, 18 U.S.C.A. § 2331(1) (inserted in 1992)\textsuperscript{315} presently defines international terrorism as activities involving violent acts (or those acts dangerous to human life) that constitute crimes in the United States (or would do so if committed within U.S. jurisdiction) that appear to be intended “(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping” and that occur primarily outside U.S. territorial jurisdiction or transcend boundaries in some way.\textsuperscript{316} This definition, however, does not form


(1) [T]he term “international terrorism” means activities that—

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.

Id.

\textsuperscript{315} See Federal Courts Administration Act of 1992 § 1003.

part of a criminal offense. Rather, it functions in a variety of contexts including allowing the disclosure of tax information during investigations,\textsuperscript{317} granting warrants for investigations relating to terrorism,\textsuperscript{318} and allowing financial information disclosure rules.\textsuperscript{319} Second, 18 U.S.C.A. § 2332b, inserted by the Anti-terrorism Act of 1996, concerns acts of terrorism that transcend national boundaries.\textsuperscript{320} It defines the “federal crime of terrorism” in (g)(5) as a breach of a listed provision of U.S. criminal law that is “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.”\textsuperscript{321} The long list of offenses includes a range of

\begin{itemize}
  \item \(26\text{ U.S.C.A. § 6103(b)(11)}\ (2002).\)
  \item \(\text{Fed. R. Crim. P. 41(b)(3)}\).
  \item \(31\text{ C.F.R. § 103.90(b)}\ (2002).\)
  \item \(\text{The term “Federal crime of terrorism” in 18 U.S.C.A. § 2332b(g)(5) mean an offense that:}\)
    \begin{itemize}
      \item \(\text{(A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and}\)
      \item \(\text{(B) is a violation of—}\)
        \begin{itemize}
          \item \(\text{(i) section 32 (relating to destruction of aircraft or aircraft facilities), 37 (relating to violence at international airports), 81 (relating to arson within special maritime and territorial jurisdiction), 175 or 175b (relating to biological weapons), 229 (relating to chemical weapons), subsection (a), (b), (c), or (d) of section 351 (relating to congressional, cabinet, and Supreme Court assassination and kidnapping), 831 (relating to nuclear materials), 842(m) or (n) (relating to plastic explosives), 844(f)(2) or (3) (relating to arson and bombing of Government property risking or causing death), 844(i) (relating to arson and bombing of property used in interstate commerce), 930(c) (relating to killing or attempted killing during an attack on a Federal facility with a dangerous weapon), 956(a)(1) (relating to conspiracy to murder, kidnap, or maim persons abroad), 1030(a)(1) (relating to protection of computers), 1030(a)(5)(A)(i) resulting in damage as defined in 1030(a)(5)(B)(ii) through (v) (relating to protection of computers), 1114 (relating to killing or attempted killing of officers and employees of the United States), 1116 (relating to murder or manslaughter of foreign officials, official guests, or internationally protected persons), 1203 (relating to hostage taking), 1362 (relating to destruction of communication lines, stations, or systems), 1363 (relating to injury to buildings or property within special maritime and territorial jurisdiction of the United States), 1366(a) (relating to destruction of an energy facility), 1751(a), (b), (c), or (d) (relating to Presidential and Presidential staff assassination and kidnapping), 1992 (relating to wrecking trains), 1993 (relating to terrorist attacks and other acts of violence against mass transportation systems), 2155 (relating to destruction of national defense materials, premises, or utilities), 2280 (relating to violence against maritime navigation), 2281 (relating to violence against maritime fixed platforms), 2392 (relating to certain homicides}\)
        \end{itemize}
    \end{itemize}
\end{itemize}
crimes against persons and property and does not necessarily involve transnational acts.

Historically, the United States has not taken a completely isolationist approach to the definition question. Legislation enacted in 1985 that prohibited foreign assistance to countries shielding persons guilty of international terrorism\(^{322}\) chose not to define the term and preferred that its definition be the product of international negotiations in which the President was called upon to engage.\(^{323}\) There is no evidence, however, that international law was an important consideration when drafting the criminal law definitions considered above.

3. India

On October 16, 2001, the President of India promulgated The Prevention of Terrorism Ordinance 2001 (Terrorism Ordinance) which remained in effect for six weeks.\(^{324}\) Despite India’s history of terrorism, there was significant opposition in Parliament to the legislation in bill form partly because it replicated the Terrorism Ordinance’s provisions. Between 1988 and 1999, Indian authorities estimate that 20,506 people

and other violence against United States nationals occurring outside of the United States, 2332a (relating to use of weapons of mass destruction), 2332b (relating to acts of terrorism transcending national boundaries), 2332f (relating to bombing of public places and facilities), 2339 (relating to harboring terrorists), 2339A (relating to providing material support to terrorists), 2339B (relating to providing material support to terrorist organizations), 2339C (relating to financing of terrorism[)], or 2340A (relating to torture) of this title;

(ii) section 236 (relating to sabotage of nuclear facilities or fuel) of the Atomic Energy Act of 1954 (42 U.S.C. 2284); or

(iii) section 46502 (relating to aircraft piracy), the second sentence of section 46504 (relating to assault on a flight crew with a dangerous weapon), section 46505(b)(3) or (c) (relating to explosive or incendiary devices, or endangerment of human life by means of weapons, on aircraft), section 46506 if homicide or attempted homicide is involved (relating to application of certain criminal laws to acts on aircraft), or section 60123(b) (relating to destruction of interstate gas or hazardous liquid pipeline facility) of title 49.


\(^{323}\) Id. § 507 (noting that the treaty was to be concluded between “those democratic nations . . . most victimized by terrorism” and “should incorporate an operative definition of terrorism”).

\(^{324}\) Prevention of Terrorism Ordinance, 2001, No. 9, Acts of Parliament, 2001, available at http://www.indianembassy.org/policy/Terrorism/poto_2001.htm; see India Const. art. 3, § 123, cls. 1, 2. Ordinances have the same force of law as statutes but are of limited duration and automatically expire unless approved by the legislature.
were killed in Jammu and Kashmir provinces alone,\textsuperscript{325} mostly in attacks of an international character. Although the Indian Parliament itself was attacked by terrorists on December 13, 2001,\textsuperscript{326} the legislation was not passed until March 28, 2002.\textsuperscript{327} Opposition parties complained that the government was using September 11 to push through legislation reenacting the draconian Terrorist and Disruptive Activities (Prevention) Act 1985 (TADA), which had lapsed in 1995.\textsuperscript{328} The government responded by claiming that the measures were required by Resolution 1373,\textsuperscript{329} although amendments were made that softened the bill.\textsuperscript{330} International comparisons were drawn to justify the need for the legislation.\textsuperscript{331} The Prevention of Terrorism Act 2002 criminalizes various acts,\textsuperscript{332} including terrorist acts and fundraising for the purposes of terrorism. Membership in terrorist organizations is also prohibited as is providing support and funds to such organizations.\textsuperscript{333}

Much of the criticism of the legislation comes from India’s experiences with TADA. Of the 75,000 arrests made under the Act, only 1–2% resulted in convictions,\textsuperscript{334} leading to widespread criticism of the Act.\textsuperscript{335}


\textsuperscript{326} Amy Waldman, India-Pakistan Talks Make No Specific Gains on Kashmir, N.Y. Times, June 29, 2004 at A8.

\textsuperscript{327} Prevention of Terrorism Act 2002, (India).


\textsuperscript{329} See Prasad, supra note 328.

\textsuperscript{330} E.g., clause 3(8) of the Prevention of Terrorism Ordinance 2001, supra note 324, which compels disclosure of information known to be of material assistance in preventing terrorist offences unless reasonable to do otherwise, was excluded.

\textsuperscript{331} See Law Commission Report, supra note 325, § VI(b) (putting forward the case for permanent anti-terrorism legislation by arguing that if the United Kingdom needs it, India definitely does).

\textsuperscript{332} Prevention of Terrorism Act 2002, § 3 (India).

\textsuperscript{333} Id. §§ 21, 22.

\textsuperscript{334} See Prasad, supra note 328.

The following frequent objection has been leveled against counter-terrorism legislation more generally:336

[E]very criminal act defined in [the 2002 Act] is already contained in the Indian Penal Code. . . . What [the Act] does is to merely criminalise the intent i.e. intention to cause terror, threaten the unity, integrity and sovereignty of the country, supporting terrorists, being a member of a terrorist organisation, etc [sic].

The Law Commission of India (Law Commission), which was responsible for drafting the legislation, considered the U.S. Antiterrorism Act 1996 and the U.K. Prevention of Terrorism Act 1989 in its preparatory work337 and noted that Security Council Resolution 1269 called upon all states to implement their international obligations under the international terrorism conventions. Thus, both comparative law analysis and India’s international obligations were relevant to the Law Commission’s thinking. Although intended to introduce a new definition of terrorism less open to government abuse than that in TADA,338 the Law Commission’s proposed definition was similar to that in TADA.339 It exhibits the influence of the U.S. and U.K. definitions, not of international law.340

The definition of terrorist in the Prevention of Terrorism Act is to be inferred341 from the definition of “terrorist act” in section 3(1),342

339 LAW COMMISSION REPORT, supra note 325, § II, 1.16.1 (noting that the proposed bill is basically modeled on the TADA (Prevention) Act 1987”).
340 See generally id. at Part 2.
341 The Prevention of Terrorism Act 2002, § 2(1)(g) (India).
342 Id. § 3(1) (India), defined terrorism as:

[W]ith intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature or by any other means whatsoever, in such a manner as to cause, or likely to cause, death of, or injuries to any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community or causes damage or destruction of any property or equipment used or intended to be used for the
which is ambiguous, poorly drafted, and confusing. Section 3(1) states that a terrorist act is committed by someone who intends to “threaten the unity, integrity, security or sovereignty of India” or terrorize the population by use of explosives, firearms, or other lethal weapons; poisons, toxins, or other chemicals; or by “any other means whatsoever” to kill or injure persons, damage or destroy property, disrupt essential supplies or services, damage or destroy national defense or other government property, or detain a person to compel the government or another person to act in a certain way.

Substantively, this definition bears some similarity to those in international law. Its phrasing, however, offers no indication that international law’s various definitions have been influential. Parts of the Indian definition are inconsistent with the core international law definition, as discussed below.

4. New Zealand

New Zealand’s principal anti-terrorism statute is the Terrorism Suppression Act 2002 (Terrorism Suppression Act), as supplemented by the Counter-Terrorism Act 2003.343 Both evidence international law’s role as the statutes’ guiding force. As a liberal Western democracy, the threat highlighted by the September 11 attacks resonated with New Zealand, despite its limited experiences with terrorism.344

When considering the Terrorism Suppression Act in bill form, which was amended following September 11 to comply with New Zealand’s international obligations, a Parliamentary review committee specifically noted the obligations incumbent on New Zealand under Resolution 1373 and their binding nature under Article 41 of the U.N. Charter.345 New Zealand was anxious to be “seen to be playing its part”

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344 In July 1985, agents of the Government of France detonated a bomb on board of a Greenpeace ship docked in Auckland harbor, killing two people. As a state perpetrated act, however, it does not constitute terrorism.
in addressing international terrorism. The House of Representatives, sitting under urgency, passed the bill. After the law received royal assent but before the Terrorism Suppression Act came into force, the bombing in Bali, Indonesia occurred, killing three New Zealanders and thus bringing the specter of international terrorism closer to home.

The Terrorism Suppression Act refers to New Zealand’s international law obligations in framing its purpose as to “make provision to implement New Zealand’s obligations under—(i) the Bombings Convention; (ii) the Financing Convention and (iii) [Resolution 1373],” each of which are appended as schedules to the Terrorism Suppression Act. Like other acts, it defines “terrorist act” and criminalizes causing a terrorist bombing and financing terrorism. It establishes a procedure for the designation of “terrorists” and associated entities.

The manifest intention to discharge the country’s international obligations, combined with the lack of immediate terrorist threats (which can distort a legislature’s vision), explains New Zealand’s close attention to international law. Although Resolution 1373 did not provide a definition, the Parliamentary committee reviewing the draft legislation speculated about the Security Council’s intentions when recommending changes to the proposed definition. New Zealand’s request of the C.T.C. underlines the shortcoming of the United Nations in regards to the definition of terrorism: “Given the complexity of some of the issues that arise in defining terrorist acts, the New Zealand Government would welcome guidance from the Security Council on what conduct it aims to cover by the term ‘terrorist acts’” in resolution 1373 . . . .”

346 Id.
348 Id. § 7(1).
349 Id. § 8(1). Section 8(2) subjects § 8(1) to a specific exemption for collecting and providing funds intended to be used for advocating democratic government or the protection of human rights. Id.
350 Id. §§ 20–21 (interim designation), 22–23 (final designation).
351 Id. §§ 26–29. The act also states that decisions are reviewable (§ 33), revocable (§ 34) and self terminating (§ 35). Id. §§ 36–41 (outlining procedure).
353 See Letter from Permanent Representative of N.Z. to the U.N. to the Chairman of the C.T.C. (Dec. 24, 2001) annexed to Letter from the Chairman of the C.T.C. Concerning Counter-Terrorism Addressed to the President of the Security Council (Dec. 27, 2001), S/2001/1269, 6 [hereinafter Letter to the Counter-Terrorism Committee].
New Zealand concluded that the Security Council’s conception of terrorist offenses included acts beyond the terrorism conventions’ prohibitions. Changes were made to the legislation to reflect the “wording used in similar European Union, Canadian and American legislation” and to clarify the scope of the definition.\footnote{Select Committee Report, supra note 352, at 3.} For example, the terms “intimidation,” “population,” and “lawful government” were abandoned in favor of phrases such as “induce terror” and “civilian population.”\footnote{Id. at 4.} The term “serious bodily injury” was introduced to, \textit{inter alia}, “ensure consistency with the definition [from the Financing Convention] of the term ‘terrorist act in armed conflict.’”\footnote{Id.} Concerns particularly important in New Zealand motivated other changes, such as the prohibition on releasing disease-bearing organisms, which was important given the state’s strong agricultural sector. New Zealand reported to the C.T.C. that the definition was drafted “in the same terms” as the Financing Convention.\footnote{See Letter to the Counter-Terrorism Committee, supra note 353, at 6.}

Under the Terrorism Suppression Act, there are three ways actions can constitute terrorism.\footnote{See Terrorism Suppression Act 2002, §§ 5(1)–(5) (N.Z.), available at http://rangi.knowledge-basket.co.nz/gpacts/public/text/2002/an/034.html. This act defined a “terrorist act” in section 5 as:}

(1) (a) the act falls within subsection (2); or
(b) the act is an act against a specified terrorism convention (as defined in section 4(1)); or
(c) the act is a terrorist act in armed conflict (as defined in section 4(1)).

(2) An act falls within this subsection if it is intended to cause, in any 1 or more countries, 1 or more of the outcomes specified in subsection (3), and is carried out for the purpose of advancing an ideological, political, or religious cause, and with the following intention:
(a) to induce terror in a civilian population; or
(b) to unduly compel or to force a government or an international organisation to do or abstain from doing any act.

(3) The outcomes referred to in subsection (2) are—
(a) the death of, or other serious bodily injury to, 1 or more persons (other than a person carrying out the act):
(b) a serious risk to the health or safety of a population:
(c) destruction of, or serious damage to, property of great value or importance, or major economic loss, or major environmental damage, if likely to result in 1 or more outcomes specified in paragraphs (a), (b), and (d):
(d) serious interference with, or serious disruption to, an infrastructure facility, if likely to endanger human life:
(e) introduction or release of a disease-bearing organism, if likely to devastate the national economy of a country.
Montreal, Internationally Protected Persons, Hostages, Maritime, Bombings, and Nuclear Materials Conventions, or the Airports or Fixed Platforms Protocols constitutes terrorism in New Zealand. Second, acts done during an armed conflict against persons not actively involved in the armed conflict and not wholly domestic in nature are terrorism if done to compel a government or international organization to act in a certain way. Third, acts done to advance an ideological, political, or religious cause and to induce terror in any population or to compel a government or international organization to act in a certain way are terrorism if they cause one of the following outcomes: death or serious injury; serious risk to public health or safety; destruction or serious damage to property of great value or importance; major economic loss or major environmental damage if it threatens injury, death, endangers life or the public health and safety; serious interference with infrastructural facilities likely to endanger life; and releasing disease-bearing organisms likely to devastate the national economy. Acts done according to international law and during an armed conflict situation are excluded from this definition.\footnote{359}

Although structurally similar to the U.K. definition, international law was influential in determining the parameters of the definition, although concerns specific to New Zealand also shaped it. The Australian counter-terrorism legislation\footnote{360} also exhibits a structural similarity

\footnote{(4) However, an act does not fall within subsection (2) if it occurs in a situation of armed conflict and is, at the time and in the place that it occurs, in accordance with rules of international law applicable to the conflict.

(5) To avoid doubt, the fact that a person engages in any protest, advocacy, or dissent, or engages in any strike, lockout, or other industrial action, is not, by itself, a sufficient basis for inferring that the person—

(a) is carrying out an act for a purpose, or with an intention, specified in subsection (2); or

(b) intends to cause an outcome specified in subsection (3).}

\textit{Id.}\textsuperscript{359}


As amended, the Australian Criminal Code defines terrorism as a threat or action that causes a prohibited terrorist outcome and is done with the intention of advancing a political, religious, or ideological cause and with the intention of coercing or influencing by intimidation an Australian or foreign government or intimidating the public in Australia or elsewhere. Prohibited terrorist outcomes are enumerated: causing serious physical harm or death to a person; endangering another person’s life or creating a serious risk to the health and safety of a section of the public; causing serious property damage; and destroying or seriously interfering or disrupting an electronic system (such as telecommunications, financial or public utility system). Industrial, advocacy or protest action not intended to harm, kill, or endanger others or create a risk to the public’s health and safety are expressly excluded from the list of proscribed outcomes Criminal Code Act 1995, § 100.1 (Austl.). Specifically, it states:

(1) Terrorist act means an action or threat of action where:
   (a) the action falls within subsection (2) and does not fall within subsection (3); and
   (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
   (c) the action is done or the threat is made with the intention of:
      (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
      (ii) intimidating the public or a section of the public.
(2) Action falls within this subsection if it:
   (a) causes serious harm that is physical harm to a person; or
   (b) causes serious damage to property; or
   (c) causes a person’s death; or
   (d) endangers a person’s life, other than the life of the person taking the action; or
   (e) creates a serious risk to the health or safety of the public or a section of the public; or
   (f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
      (i) an information system; or
      (ii) a telecommunications system; or
      (iii) a financial system; or
      (iv) a system used for the delivery of essential government services; or
      (v) a system used for, or by, an essential public utility; or
      (vi) a system used for, or by, a transport system.
(3) Action falls within this subsection if it:
   (a) is advocacy, protest, dissent or industrial action; and
   (b) is not intended:
      (i) to cause serious harm that is physical harm to a person; or
      (ii) to cause a person’s death; or
      (iii) to endanger the life of a person, other than the person taking the action; or
to the U.K. definition. Yet, whereas international law was a motivation and guide to New Zealand’s legislation, it played an advocacy role in the debate on the definition of terrorism in the Australian legislation when it was open to public comment. The Australian Senate Legal and Constitutional Committee (Committee), expressing concern at the bill’s principal definition, specifically noted the difficulties with defining terrorism at international law but cited with approval a submission that listed various definitions at international law (including the Elimination Declaration) and in U.S. legislation. The Committee later concluded:

The Committee considers that there is no compelling reason why Australian legislation should reach further than legislation enacted in the United Kingdom, the USA or Canada, or as proposed in New Zealand . . . . While the Committee acknowledges the difficulties that have been experienced internationally in defining terrorism, all the definitions that have been drawn to the Committee’s attention during this inquiry contain some element of intent to cause extreme fear to the public and/or coerce the government. The Committee considers that this element is at the very heart of the nature of terrorism.

The reference to “internationally,” in this context, appears to refer both to international law and comparative law. Through comparisons with international law and like jurisdictions, the Committee recommended that the concept of terrorism be given a meaning consistent with other definitions. On this basis, for example, the Committee rec-

(iv) to create a serious risk to the health or safety of the public or a section of the public.
(4) In this Division:
(a) a reference to any person or property is a reference to any person or property wherever situated, within or outside Australia; and
(b) a reference to the public includes a reference to the public of a country other than Australia.

362 Id. ¶¶ 3.56–.59 (citing Submission 136).
363 Id. ¶ 3.76.
ommended the inclusion of an element of intent, which was previously absent from the legislation.

D. *Comparison with the Core International Law Definition*

Having briefly examined the domestic definitions of four states, this section compares these domestic definitions with the core definition of terrorism identified in Part Two. Although significant and important differences are discernable, the domestic definitions are broadly similar to the international law definition.

The following nine topics correspond to the nine themes present in the international law definition of terrorism and examined in Part 2, Section F. As discussed, the international definition can be seen as a minimum definition; its subject matter is less controversial than some other aspects of defining terrorism, as illustrated by the high rate of ratification of the conventions from which the minimum definition arises. The following discussion examines whether the United Kingdom, United States, India, and New Zealand—all of which are committed to the rule of law and well-resourced—meet these minimum conditions. Appendix 2 compares, in summary form, the elements of the international law definition with the equivalent parts of the domestic definitions and may provide the reader with a useful guide to this section of the Article.364

1. International Law Contemplates Serious Injury, Death, and Serious Property Damage Causing Economic Harm as Proscribed Terrorist Outcomes

Causing death or serious harm to persons is a sufficient harm under each statutory definition. Only in New Zealand and the United Kingdom, however, must the injury be serious. In India and under section 2331(1) in the United States, lesser harms suffice. Endangering life, acts dangerous to human life, and activities creating a serious risk to public safety or health are also prohibited in the United Kingdom and New Zealand. While seemingly consistent with the international prohibition’s thrust, the conventions are directed at actual, not potential, harm, and thus these potential harms go beyond the international law definition.

Property damage suffices under each domestic definition (although section 2332b (U.S.) refers to particular kinds of property dam-

364 *See Appendix 2.*
age). At international law, only significant (“extensive” in the Bombings Convention) property damage is a prohibited outcome and such property damage must result in economic harm. Furthermore, the property must have some public function (for example, transportation systems or markets), although this is not a settled distinction at international law.

The domestic definitions do not require wider economic consequences. For example, the United Kingdom and Australia simply require “serious damage to property” and, under the Indian Act, any loss, destruction, or damage to property is sufficient. In contrast, New Zealand’s provision for bio-terrorism (that it must devastate a country’s economy), and serious damage to property, major environmental damage, and causing major economic loss (each of which must harm or endanger persons) shows a standard broadly consistent with international law if the contingent consequences at international law include not only economic harm but also harm to people. Such a conclusion is supported by one reading of the aviation and Maritime conventions. New Zealand is, however, the only jurisdiction providing for pure economic harm, which is clearly beyond international law’s definition.

Section 2332b’s listed offenses encompass property damage and to a certain extent resemble the international conventions’ subject matter, although the offenses are not generally limited to serious damage. This provision, like the United Kingdom definition, provides that harm to electronic systems or services also constitutes terrorism. If restricted to serious harm or disruption (as in the United Kingdom), this seems consistent with the international concept of serious property damage. Such damage can cause significant economic and physical harm. But specifically proscribing harm to property and electronic systems, which would otherwise be included under the general property damage heading, indicates that the definitions might contemplate cyber-terrorism (including, for example, attacks on banking services through the internet).\textsuperscript{365} Destruction of computer-stored data might arguably be covered. Cyber-terrorism is not specifically provided for at international law and whether international law and/or the domestic definitions protect pure information is open to conjecture. India’s prohibition on “disruption of essential supplies and services essential to the life of the community” appears to contemplate any damage to essential services or supplies. Simply cutting a telephone line and thereby disrupting tele-

communications would probably not constitute terrorism at international law, but it would in India.

Although the domestic definitions appear generally consistent with the international law concept, their prohibitions are wider, encompass less serious harm and potential harm, and do not condition property damage on detrimental economic consequences.

2. At International Law the Terrorist Act Must Be Independently Criminal

This feature is present in both U.S. definitions. Although not present in the other states’ definitions, the general approach is still influential. To commit the offense of terrorist bombing contrary to section 62 of the U.K. Act, the conduct must fall within the definition of terrorism and violate a listed offense. The U.K. drafters consciously excluded criminality from the definition because they thought it would unduly narrow the definition.\textsuperscript{366} By requiring underlying criminality as an element of the terrorist offences, however, an act of terrorism must still be independently criminal despite the definition of terrorism, thereby providing a similar type of protection to the accused. Independent criminality is not a feature of the Indian definition, however, and simply committing a “terrorist act” in India is an offense (the same is true in Australia).\textsuperscript{367}

Although underlying criminality is unnecessary in India, whether as part of the definition or the offense provisions, it is required in the United States, United Kingdom, and New Zealand. Given that many police powers are triggered by a determination of terrorism or the designation of an entity as such, the definition-offense distinction is significant. The latter allows police powers to be exercised in more circumstances than the former would.

3. International Law Requires Intimidation of a Population or Coercion of a Government or an International Organization

Each domestic jurisdiction reflects this foundational requirement. The definitions typically speak of coercing, influencing, and compelling governments, and intimidating the population or part thereof, or


\textsuperscript{367} Prevention of Terrorism Act 2002, § 3(1) (India); Criminal Code Act 1995, § 100.1. (Austl.).
of striking terror. Notably, New Zealand uses a higher standard by requiring the *undue* compulsion or forcing of government policy (which oddly implies that some compulsion, as opposed to mere political pressure, is acceptable) while section 2331(1) requires a lower intimidation standard when the harm is mass destruction, assassination, or kidnapping (compare “affect the conduct of a government” in the case of mass destruction, assassination, or kidnapping with “influence the policy of a government by intimidation or coercion” for other harms). India’s definition requires more than intimidation. It states that acts must “threaten the unity, integrity, security or sovereignty of India,” which is a wholly indigenous formulation and *facially* sets a high bar, although its ambiguity may permit a less restrictive reading.

Section 2332b, which is restricted to effects on government, does not require intimidation or coercion if the act is calculated to “retaliate against government policy.” Potentially, this is a very wide exception to the usual requirement of intimidation or coercion. The U.K. definition also waives the intimidation or coercion requirement when firearms or explosives are employed to achieve the proscribed harms. This exception may also swallow the rule, and it undermines a fundamental element of what constitutes terrorism. It has some support at international law, however, to the extent that the Bombings Convention’s principal prohibition does not require intimidation or coercion.

Under the definitions, with the exception of India, the target of the intimidation or coercion is not restricted by geography. All definitions contemplate coercion of either the state’s government(s) or a foreign government (with the exception of India, which is restricted to Indian governments). This is consistent with developments at international law. Section 2331(1) and the New Zealand definition implicitly contemplate the intimidating of *a* (meaning any) civilian population, whereas the U.K. definition expressly applies to civilian popula-

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370 Prevention of Terrorism Act 2002 § 3(1) (India).
371 Terrorism Act 2000 § 1(3) (U.K.).
372 Bombings Convention art. 2(1); see also Nuclear Terrorism Convention, supra note 51, art. 2 (which, although open for signature after the legislation was passed, offers support for this approach.).
tions inside and outside the state’s territorial jurisdiction.\footnote{Id. c. 11, § 1(4)(c) (U.K.); Terrorism Suppression Act 2002, § 5(2)(a)(a) (N.Z.).} India appears to require terror in an Indian population.

A further target at international law is international organizations. Compelling such entities constitutes terrorism only under the New Zealand definition.\footnote{India’s definition may also be taken to extend to international organizations if “persons” includes legal persons (and the provision is given extraterritorial applicability). This runs contrary to the context and the other uses of the term in the provision. See Prevention of Terrorism Act 2002, § 1(3) (India).}

All the definitions require that the intimidation or coercion (or equivalent) be “intended” (India, New Zealand, and section 2331(1)); “designed” (U.K.); or “calculated” (section 2332b). Given that the act causing the intimidation or coercion must be intended, employing a mens rea standard other than intent for these consequences is not of heightened concern, and international law does not appear to direct that the intimidation or coercion be intended. Section 2331 employs an objective determination by stating “appears to be intended,” unlike the subjective approach of the other jurisdictions and the prevailing approach at international law. This is consistent, however, with international law that uses the standard “calculated” (also used in section 2332b). “Calculated” was first used in the 1937 Terrorism Convention and repeated in the 1994 General Assembly Elimination Declaration in the context of “intended or calculated” (although it is used elsewhere in Title 18, so it does not necessarily reflect international law’s direct influence).

4. The Range of Victims at International Law Excludes Military Targets but Expressly Includes Internationally Protected Persons and Civilians

Most domestic definitions do not expressly define a class of victims; rather, they refer just to persons and property. Because the definitions do not limit property damage to government-owned property, the destruction of private property is sufficient to constitute a terrorist attack. Unlike at international law, there is no suggestion that such property must have a public function.

Section 2332b’s listed offenses include the destruction of national defense installations. The case for the international law definition excluding violent acts against military targets is strong, thus indicating section 2332b is inconsistent with international law in this regard. The
U.S. Department of State considers unarmed and off-duty military personnel to be noncombatants. This approach classifies the October 23, 1983 attack on a Beirut Marines barracks that killed 242 servicemen as terrorism. Similarly, the State Department considers attacks on military installations during a period without hostilities to be terrorism. The domestic definitions’ references to “persons,” “public,” and “population” arguably include military personnel. The use of “citizenry,” and perhaps “public,” might exclude military personnel although perhaps also government officials that must be protected under the international conception of the range of victims. The line between when military personnel are “civilians” (for example, reservists living at home during time of non-hostilities) and when engaged in military service (for example, on active patrol) is hard to draw. For the clarification of doubt, if states wish to deviate from international law’s exclusion of military targets, express reference should be made (as in section 2332b and the Indian definition).

It is certainly within a state’s interest to define the range of victims widely, as this increases the number of attacks the state can classify as terrorist (thereby triggering, inter alia, increased investigative powers). It also gives greater protection to the military. Similarly hard cases are presented by non-military enterprises involved in war efforts (for example, factories producing weapons) and civilians employed in military operations. Notably the offense of terrorism drafted for the U.S. Military Commission simply refers to “persons,” without further elaboration.

India’s definition also expressly protects “property [and] equipment used or intended to be used for the defence of India.” Given the anomaly that protecting military property but not servicepersons would present, one might infer that India considers the reference to “persons” to include military personnel. The same may be said of the United States. In light of the state’s signature and intention to implement the conventions, a domestic court might interpret “person” in light of the state’s international obligations. When two interpretations are possible,

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378 Cf. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (clarifying that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country”).
379 U.S. MILITARY COMMISSION INSTRUCTIONS SOURCEBOOK, supra note 195, at 13, § 2.
the one consistent with international law should be preferred. Textual ambiguity should be construed in favor of harmony with international law. Furthermore, while attacks on civilians are likely to intimidate the public, small-scale attacks on military personnel are unlikely to have this effect. It is also not clear such attacks “coerce the government” either.

By implication, the New Zealand definition of terrorism excludes attacks on military personnel “taking an active part in the hostilities,” although it is unclear whether this is broader or narrower than the U.S. Department of State approach.

The vexing issue of the legitimacy of military targets is very much a live issue. The international law position is clear, as is that in New Zealand, India, and the United States. Ambiguity in the United Kingdom’s definition may be interpreted to avoid a conflict with international law, although the laws of armed conflict may interpose a contrary interpretative guide.

5. International Law’s Approach to Terrorism Does Not Require That “Terrorist” Acts Are Carried Out for the Purpose of Advancing a Political, Religious, or Ideological Cause

The U.S. and Indian definitions are similar in not requiring a specific motivation. The United Kingdom and New Zealand, however, require that the act is done with the “purpose” of advancing a political, religious, or ideological cause. The 1994 General Assembly Elimination Declaration refers to these three causes as well as philosophical, racial, and ethnic causes in declaring terrorist acts unjustifiable. The U.K. legislation influenced the New Zealand draftsmen, so the similarity of the clauses is not coincidental. The three motivations selected and the others in the General Assembly Elimination Declaration certainly overlap

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380 See, e.g., Charming Betsy, 6 U.S. at 118; New Zealand Pilots’ Ass’n Inc. v. A-G, [1997] 3 N.Z. L.R. 269, 289 (C.A.); J.H. Rayner Ltd. v. Dep’t of Trade and Indus., [1990] 2 A.C. 418 (H.L.); see also Ahmad v. Inner London Educ. Auth., [1978] 1 Q.B. 36, 48 (C.A.). Note, however, the question of whether international law is sufficiently precise to be of interpretative assistance would have to be addressed by the court.

381 The New Zealand definition states that a terrorist act occurring in an armed conflict is an act “(a) that occurs in a situation of armed conflict; and (b) the purpose of which, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or abstain from doing any act; and (c) that is intended to cause death or serious bodily injury to a civilian or other person not taking an active part in the hostilities in that situation; and (d) that is not excluded from the application of the Financing Convention by art. 3 of that Convention.” Terrorism Suppression Act 2002, § 4(1) (N.Z.).
to a significant extent. But given that the requirement of a particular motivation restricts the scope of terrorism and the state’s interest in defining terrorism widely, it is unclear why these three were chosen. Their absence from the definition arising from the conventions indicates that this qualification of the definition is not a part of the international definition of terrorism.

6. At International Law, Causing a Prohibited Terrorist Outcome Must Be Intended

Aside from the New Zealand definition, none of the definitions surveyed in this study attach a mens rea requirement to the proscribed outcomes. In New Zealand the act must be intended to cause one of the prohibited terrorist outcomes, whereas under section 2331(1) an act only need be, for example, dangerous to human life to constitute a proscribed terrorist outcome. Although all states require that the intimidation or coercion be intended, the action producing this consequence need not be intended. Some states utilize the independent criminality approach (noted above) so that to constitute terrorism, an act must meet the definition of terrorism and be independently criminal. Some states include independent criminality in their definition, while others include it in offense provisions. Thus, terrorist crimes generally incorporate the definition and either a mens rea standard relating to performing the act or another crime. In India, however, where the definition does not include independent criminality or an intention to do the act causing the harm, simply engaging in an act of terrorism is illegal. The intent requirement in the Indian definition relates only to threatening the state rather than, for example, detonating a bomb. Not requiring independent criminality and not attaching a mens rea standard to performing the act is inconsistent with international law. In contrast, sections 2331(1) and 2332b in the United States require the violation of a criminal law as an element of international terrorism thereby incorporating a mens rea standard.

Unlike the other jurisdictions, the New Zealand legislation requires that the act’s outcome be intended. Some crimes in the Terrorism Suppression Act—such as financing terrorism—incorporate the definition and also require, for example, funding to be “wilful and without lawful excuse.” Although this duplicates the mens rea requirement, the same evidence might satisfy both requirements. Furthermore, in New Zealand an offense against a terrorism convention is also
terrorism under New Zealand domestic criminal law and each convention offense specifies a mens rea standard.

7. The International Definition Focuses on Terrorism of an International Character

The Indian definition does not expressly address whether elements of the act of terrorism can be extra-territorial, whereas the U.K. and New Zealand definitions expressly contemplate acts and harms irrespective of location. Both the U.S. definitions indicate an international focus. Section 2331(1) is limited to acts that transcend national boundaries. Some of section 2332b’s listed crimes are international in orientation (for example, murdering, kidnapping, and maiming persons abroad or even committing violence at international airports), but others appear to be largely domestic in character (for example, the killing of Supreme Court Justices).

Despite their extraterritorial jurisdiction, with the exception of section 2331(1), the definitions also cover purely domestic acts. Although not the focus of the international conception of terrorism, prohibiting purely intra-state terrorism is a strong state interest and a necessary implication of international law’s approach to counter-terrorism. International law certainly does not preclude the criminalization of purely domestic terrorism and, to a large extent, state internal stability is to the advantage of the international system.

8. The International Definition and the Domestic Definitions Speak to Acts of Terrorism by a Single Person as Terrorism; Group Conduct or Participation Is Not a Requirement

Each of the definitions is the same as international law in this regard. Furthermore, none of the definitions expressly exclude government or official conduct (even if acting through individual actors) from the definition. Although one commentator has identified that national definitions are split on whether terrorist acts must be perpetrated by groups or if individuals can commit terrorist crimes, the jurisdictions examined here are unambiguous in not requiring group conduct.

382 See id. § 5(1)(b) (N.Z.).
383 There is a domestic analogue to § 2331(1) in 18 U.S.C.A. § 2331(5).
385 Walter, supra note 33, at 30-31.
9. Justifications and Defenses

Like international law, none of the domestic definitions, nor the statutes they sit within, provide for a political exception whereby terrorism committed for a particular purpose is excused or justified.

E. The Domestic Implementation of the Minimum Definition of Terrorism

Terrorists frequently operate transnationally and terrorism’s cross-border effects motivated the international community to create treaties obligating states to criminalize certain acts of terrorism in their domestic criminal law. Resolution 1373 buttresses these obligations. The conventions and resolutions evidence the international community’s desire to facilitate a common approach. States do not legislate to prohibit terrorism in a vacuum and must be cognizant of their international obligations. Given the transnational nature of terrorism, anti-terrorism measures, initiatives, and legal instruments will operate more efficiently if states define terrorism consistently. Given the pursuit of common and equivalent jurisdiction, legislating in harmony with international law is crucial and drawing on international law’s jurisprudence concerning the definition of terrorism is logical. Speaking descriptively, have states done this?

The content of the concept of terrorism at international law and the definitions enacted by the four states is broadly similar. The international definition’s major elements are common to the domestic definitions. There are differences, however, some of which reflect areas of relative uncertainty at international law. For example, the states proscribe a wider range of harms than international law does. Other differences are a result of drafting technique. As discussed, on their face, some jurisdictions do not use the underlying criminality concept in their definition of terrorism in contrast to international law. But others effectively make this a requirement by requiring that the acts that constitute a terrorist offense are independently unlawful.

The two issues on which there is substantive divergence are the legitimacy of military targets and the need for a particular motivation. Consistent with international law, New Zealand regards persons involved in active hostilities as outside the range of victims. The other states’ laws are less clear and arguably protect military personnel and property under their general prohibition against harm. States are the primary actors in the international system and a powerful force in determining the conventions’ content, the focus of which is usually on the position that best protects that state’s interests. Reference has been made to one example: the United States is pushing for the in-
clusion of some military targets in the definition in the Draft Comprehensive Terrorism Convention. National agendas, usually reflected in domestic law, influence the formation of international law, as international law influences the formation of domestic definitions. The relationship is one of cross-fertilization.

The United States, United Kingdom, and New Zealand implemented the prohibitions in the Bombings and Financing Conventions faithfully and closely followed the conventions’ phrasing. Despite differences, India’s definition is also broadly consistent with international law. Given this apparent willingness to follow international law, why are there distinctions between the international law concept of terrorism and the domestic definitions?

First, as illustrated above, extracting the definition of terrorism from the relevant international sources requires one to abstract from the specific prohibitions and resolutions. This process generates a concept of terrorism that sits above the particular sources. States must actively search for and distill the definition. It is not found in a single instrument that states are required to implement, although the international organizations’ model definitions—such as that of the Commonwealth Secretariat—draw on international conventional law. In other words, states must actively seek definitional guidance from international law because it is not readily apparent. Second, because the definition is arrived at by abstraction, within bounds, there can be legitimate disagreement over the parameters of the definition. Third, states view international law differently. New Zealand was very eager for international guidance and actively sought to follow international law. Other states more jealously guard their sovereign right to determine their own laws, either based on a normative commitment to independence or simply because doing so is conducive to national interest. Fourth, international law is only one of the relevant considerations taken into account in the anti-terrorism law-making process and may be “outweighed” by other considerations, which are likely to be weighty when national security issues are implicated.

Strong policy reasons exist to induce states to deviate from the core definition identified in Part Two. If some states simply discharge their international treaty obligations while others go further, however, we are denied some of the benefits of a consistent definition and anti-

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terrorism regime. To take a simple example, if bio-terrorism is a crime only in New Zealand, India may be reluctant (or even unable) to assist with the investigation and extradition of the alleged terrorist. States may, however, legitimately conclude that the cost of defining terrorism differently than other states is outweighed by the benefit of the heightened protection. Notwithstanding this, the international definition should set a floor, or the minimum conditions, of the definition, not a ceiling.

States are, and must be, entitled to proscribe conduct beyond that which they are required to proscribe pursuant to international obligations. As stressed throughout the Article, the core international definition that arises is derived from the existing conventions. To find expression in a convention, a significant number of states must consent to the prohibition. This causes the formation of international terrorism treaties to be a slow process. The lack of a provision in international law for prohibiting cyber-terrorism, in contrast to some states’ laws, shows that often international law lags behind domestic law. The international definition should be regarded as a minimum; states’ definitions should be assessed against this standard. States are entitled to proscribe further conduct, as states in this study have done (for example, India’s protection of military equipment). To think otherwise would wrongly construe international law, rather than the state, as the source of sovereignty. The acute need to address threats such as cyber-terrorism underline why states cannot be bound by international law’s slow-developing definition. Particular state interests (for example, the protection of New Zealand’s large agricultural sector) necessitate national tailoring of terrorism legislation.

The above analysis shows that, in most instances, the four states have met the minimum conditions provided by the core definition at international law, although there are some exceptions (for example, the requirement that the commission of the act itself be intended, which is not met in India). Is the similarity coincidental or the product of international law’s influence? The New Zealand Parliamentary review committee strove to harmonize New Zealand’s then-draft legislation with international law obligations. Specific changes were made to adopt the wording of the Financing Convention, and the C.T.C. was consulted regarding the Security Council’s intended definition. Substantive guidance was, although not forthcoming from the C.T.C.,

found in the terms of the conventions and might now be found, to an extent, in Resolution 1566. International law was also influential in Australia where it (and other domestic jurisdictions) served as a yardstick by which to assess Australia’s draft legislation. Providing a point of comparison is an important function, as non-governmental entities can build law reform arguments on this basis. International law does not appear to have been particularly persuasive in either the United States or India, although their definitions are substantively similar to the international definition.

New Zealand’s experience indicates that some states will seek to follow international law. Furthermore, states without significant drafting resources might willingly adopt “pre-made” definitions. To this end, the model definitions based on the existing conventional law being developed and recommended by international agencies such as the Commonwealth Secretariat and U.N. Office for Drugs and Crime might become popular. Together these two effects will produce, in time, a large number of states with definitions of terrorism satisfying this minimum condition supplied by international law.

It is unclear when, if ever, agreement will allow the Comprehensive Terrorism Convention to be opened for signature. Even if this does not receive sufficient support, a customary rule might arise in time, based on the evidence of consistent domestic definitions motivated by a sense of obligation to harmonize their definitions of terrorism with the international definition for legal and practical reasons, notwithstanding that some states continue to support terrorism and inhibit the development of a comprehensive treaty.

**Conclusion**

“Terrorism” no longer describes state conduct. It now refers to the acts of sub-state actors. Similarly, its function is no longer just a term expressing moral condemnation. It is now used as a legal term, and thus should be accompanied by a legal definition. There are dangers in using terrorism as a legal term without defining it, as the widespread potential for (and some actual) avoidance and abuse of Security Council 1373’s obligations illustrates.

The first attempt to define terrorism in the 1937 Terrorism Convention failed. Its abstract definition was not acceptable to states, at least partially due to the difficulty of implementing the definition in domestic legislation. Similarly, the U.S. draft in 1972, which defined terrorism in the abstract, did not attract sufficient support to be opened for signature. Rather than continue to attempt to establish a
universal jurisdiction with respect to terrorism, the international community, through conventions and Security Council and General Assembly resolutions, opted for a system whereby states exercise domestic criminal jurisdiction over acts of terrorism. This incremental criminalization has produced a list of disparate proscribed acts reflecting those acts that most harm states’ interests but upon which agreement can be reached.

On its face, this approach does not provide a definition of terrorism. As shown, when the overlap of the individual prohibitions is viewed alongside the consistent themes that run through the conventions, however, a core definition of terrorism is discernable. It represents a minimum condition that states’ definitions ought to satisfy. States may adopt a definition consistent with the minimum international law definition through three mechanisms (aside from the possibility of a comprehensive treaty): first, states voluntarily enacting definitions of terrorism that are consistent with international law and its obligations; second, states adopting draft model legislation provided by international organizations and potentially the C.T.C.; and third, the development of a customary rule demanding that states criminalizing terrorism. The first and second factors may establish sufficient state practice to allow a plausible case for the existence of a customary rule requiring states to prevent and punish terrorism to be put forward. Whether this rule will crystallize before the conclusion of a comprehensive anti-terrorism multilateral treaty solution is unlikely yet possible. In the interim—which could be lengthy—international law is capable of providing leadership on the definition of terrorism but, as is the case so often with international law, states must be willing to be lead. The extent to which there is bilateral and/or multilateral pressure on states to implement international treaty obligations is most likely to be directly related to whether terrorist entities continue to strike (or perhaps simply threaten) the interests of powerful states.

<table>
<thead>
<tr>
<th>Instrument (with adopted or opened for signature)</th>
<th>Signatory states</th>
<th>Ratification, accession or succession</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tokyo Aviation Convention (1963)</td>
<td>40</td>
<td>178</td>
</tr>
<tr>
<td>The Hague Aviation Convention (1970)</td>
<td>76</td>
<td>178</td>
</tr>
<tr>
<td>Montreal Aviation Convention (1971)</td>
<td>59</td>
<td>180</td>
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<tr>
<td>Internationally Protected Persons Convention (1973)</td>
<td>25</td>
<td>153</td>
</tr>
<tr>
<td>Hostages Convention (1979)</td>
<td>39</td>
<td>145</td>
</tr>
<tr>
<td>Nuclear Material Convention (1980)</td>
<td>44</td>
<td>100</td>
</tr>
<tr>
<td>Maritime Navigation Convention (1988)</td>
<td>41</td>
<td>115</td>
</tr>
<tr>
<td>Plastic Explosives Convention (1991)</td>
<td>51</td>
<td>113</td>
</tr>
<tr>
<td>Terrorist Bombings Convention (1997)</td>
<td>58</td>
<td>132</td>
</tr>
<tr>
<td>Financing Convention (1999)</td>
<td>132</td>
<td>132</td>
</tr>
<tr>
<td>Nuclear Terrorism Convention (2005)</td>
<td>63</td>
<td>0</td>
</tr>
</tbody>
</table>

2 As of September 16, 2005.
## Appendix 2: Comparison of the Definitions of Terrorism in the U.K., U.S., India, New Zealand and at International Law

<table>
<thead>
<tr>
<th>Element/Theme</th>
<th>International Law</th>
<th>United Kingdom</th>
<th>United States</th>
<th>India</th>
<th>New Zealand</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Proscribed terrorist outcome</td>
<td>•Death, serious injury. •Serious property damage causing economic harm.</td>
<td>•Serious violence against persons; death; endangering another’s life or the public health or safety. •Serious property damage; acts designed to seriously interfere with or disrupt an electronic system.</td>
<td>§ 2331: “[V]iolent acts or acts dangerous to human life”. § 2332b: Specifies a large range of harms including to persons, property and military installations.</td>
<td>• “Causing or likely to cause”. •Death or injuries. •Detaining and threatening to kill or injure. •Loss, damage or destruction of property; (including national defense and other government property). •Disruption of essential supplies and services essential to life of community.</td>
<td>•Death or serious bodily injury; serious risk to public health or safety. • Destruction or serious damage to property of great value; major economic loss; major environmental damage; serious interruption or destruction of infrastructure facility if endangering or harming people. •Bio-terrorism if likely to devastate an economy.</td>
</tr>
<tr>
<td>2. Act’s Independent Criminality</td>
<td>•Unlawful.</td>
<td>•Not required by the definition.</td>
<td>§ 2331: Violate U.S. criminal law. § 2332b Violates listed crime.</td>
<td>•Not required by the definition.</td>
<td>•Not required by the definition.</td>
</tr>
<tr>
<td>3. Intimidation or coercion</td>
<td>•Intimidation or coercion. •Targets: governments, international organizations, populations or part thereof. •Mens rea: calculated or intended.</td>
<td>•Influence a government; intimidate a section of the population. •Mens rea: “designed”. •Not required if: using of firearms or explosives.</td>
<td>§ 2331: Intimidate or coerce a civilian population. •Influence a government’s policy by intimidation/coercion; affect conduct using certain means. •Mens rea: intent (objective). § 2332b: Influence or affect a government by intimidation or coercion.</td>
<td>• “Threaten the unity, integrity, security or sovereignty of India.” •Striking terror into any section of the people. •Mens rea: intention. •Detaining government employees requires addition purpose to compel the government or persons to act in a certain way.</td>
<td>•Terror in a civilian population. •Unduly compel or force a government or international organization. •Mens rea: intent.</td>
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<tr>
<td>5. Higher Motivation</td>
<td>Not required.</td>
<td>“[P]urpose of advancing a political, religious, or ideological cause.”</td>
<td>§§ 2331 and 2332b: Not required.</td>
<td>Not required.</td>
<td>“[P]urpose of advancing an ideological, political or religious.”</td>
</tr>
</tbody>
</table>
**PAKISTAN, THE WTO, AND LABOR REFORM**

**Asna Afzal***

**Abstract:** This Note examines the economic and legal implications of developing nations’ membership in the World Trade Organization (WTO). Specifically, the article analyzes Pakistan’s labor reforms subsequent to its membership in the WTO. The Note first provides a historical background of Pakistani membership in the WTO. Next, the Note discerns that despite the lack of established WTO labor standards, developing nations face pressure to implement labor reforms incidental to trade liberalization policies. The author argues that the pressures imposed on lesser-developed countries (LDCs) such as Pakistan have, as of yet, spawned only superficial labor reforms. The final section of the Note suggests that whether or not the WTO chooses to set labor standards in the future, international trade commitments must adequately account for the economic and legal constraints of LDCs in order to spur lasting labor reform.

**Introduction**

As a founding member of the World Trade Organization, Pakistan has faced a myriad of challenges stemming from its status as a developing nation.¹ Many of these challenges derive from the nation’s substantial decline in economic growth in recent years.² From 1997 to 2004, GDP growth remained below 6.0%.³ The country’s economic struggles mirror the steady growth in poverty levels.⁴ Approximately

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* Asna Afzal is an Executive Editor of the *Boston College International & Comparative Law Review*.


² See id.


one-third of the nation’s 148 million people live below the poverty line.\textsuperscript{5}

In addition to poor economic health, Pakistan has confronted other crises common among developing nations: political instability and lack of transparency.\textsuperscript{6} Budgetary constraints, largely due to steep military expenditures, further limit spending in the education and health sectors.\textsuperscript{7}

Pakistan has undertaken various reform measures in accordance with its trade liberalization policies.\textsuperscript{8} While the WTO does not formally incorporate labor standards in the obligations imposed upon members, developing nations such as Pakistan face pressure to implement labor reforms incidental to trade liberalization policies.\textsuperscript{9} For example, the country has faced pressure to adopt internationally accepted wage and safety requirements.\textsuperscript{10} Despite the impetus for labor reform underlying many of Pakistan’s WTO obligations, however, the nation has encountered difficulty in enacting sustainable labor reforms.\textsuperscript{11}

This Note analyzes the relationship between labor reform sustainability and the constraints unique to Pakistan as a developing nation member of the WTO. Part I introduces the WTO accession process and discerns key reforms instituted by Pakistan pursuant to WTO commitments, including pressures for labor reform that underlie trade liberalization. This section also highlights the current status of labor standards enforcement on the WTO agenda. Part II describes the labor reforms indirectly spawned by Pakistan’s implementation of WTO commitments, and argues that they are superficial due to the constraints associated with developing nations. Finally, Part III suggests that whether or not the WTO chooses to set labor standards in the future, it must adequately consider the economic and legal constraints of LDCs in order to spur lasting labor reform.

\textsuperscript{5} Id.
\textsuperscript{6} See id.
\textsuperscript{7} Id.
\textsuperscript{8} See Pakistan Summary, supra note 1.
\textsuperscript{11} Telephone Interview with Practicing Advocate, Punjab Province (Oct. 9, 2004) [hereinafter Telephone Interview].
I. Background

A. The Accession Process

Article XII of the WTO Agreement provides: “Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations . . . may accede to this Agreement, on terms to be agreed between it and the WTO.”

Pakistan was among the founding members of the WTO, established in 1995. For non-founding members, the accession process begins when the WTO General Council and the working party to the Council approve a nation’s request. Next, the nation is required to detail all elements of its trade and economic policy that have an impact on WTO agreements. Upon resolution of fundamental policies, individual WTO members begin bilateral negotiations with the prospective member, determining the specific policies that will be agreed upon as a precursor to membership. A member’s protocol consists of the negotiated terms of membership. After completion of negotiations, the working party finalizes the accession terms, which are then presented to the WTO General Council for approval by member nations.

B. Pakistan’s Membership in the WTO

The broad principles underlying Pakistan’s WTO membership centered upon commitments that would position the nation to garner maximum gains from free trade. In the international realm, Pakistan sought to further this goal through increased participation in a global multilateral trading system; in the domestic arena, the nation focused on promoting efficient and competitive domestic production activities. A key underlying aim of liberalization rested on the ability

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13 Pakistan Summary, supra note 1.
14 How to Become a Member, supra note 12.
16 See id.
17 Id.
18 See WORLD TRADE ORGANIZATION, TRADE POLICY REVIEW OF PAKISTAN 12 (1995) [hereinafter TRADE POLICY REVIEW].
19 Id.
of a free and competitive trade environment to spur social and economic progress.\textsuperscript{20}

Pursuant to the nation’s WTO membership, the following broad goals were set forth for 1994/1995:

- \textit{Improve market access in goods:} The nation set the stage for an increasingly liberalized global economy resulting from the Uruguay Round Agreements.\textsuperscript{21} To this end, Pakistan sought export growth, by means of providing readily available access to raw materials, inputs, and machinery.\textsuperscript{22}

- \textit{Enhance transparency:} In light of transparency and governance concerns, Pakistan aimed to establish viable governance mechanisms, thereby reducing administrative controls.\textsuperscript{23}

- \textit{Reduce protection:} Pakistan also agreed to reduce economic controls. Through liberalization, the nation would derive growth from increased reliance on market forces in lieu of economic control mechanisms.\textsuperscript{24}

- \textit{Advance technology:} Pakistan committed itself to promoting the growth of intellectual capital, specifically through expanding research and development capabilities and human resource development.\textsuperscript{25} Correspondingly, the nation agreed to promote the transfer of technology into the country in support of industry diversification.\textsuperscript{26}

- \textit{Strengthen macro-economic policy:} Pakistan agreed to set forth policies aimed at economic stability, in part through fostering consistency in policy planning.\textsuperscript{27}

C. \textit{Status of Labor Standards on WTO Agenda}

Strictly speaking, the WTO has not established a multilateral agreement on labor standards.\textsuperscript{28} Nonetheless, the establishment of formal labor standards remains subject to extensive debate in the or-

\begin{itemize}
\item \textsuperscript{20} \textit{Id.}
\item \textsuperscript{21} \textit{Id.} The Uruguay Round Agreements spurred the first major reform of the world’s trading system since the inception of GATT, including key reforms in the dispute settlement process and agreements to further liberalize the world trade regime.
\item \textsuperscript{22} \textit{Id.}
\item \textsuperscript{23} \textit{See Trade Policy Review, supra note 18.}
\item \textsuperscript{24} \textit{See id.}
\item \textsuperscript{25} \textit{Id.}
\item \textsuperscript{26} \textit{Id.}
\item \textsuperscript{27} \textit{Id. at 13.}
\item \textsuperscript{28} \textit{Labor Summary, supra note 9.}
\end{itemize}
ganization.\textsuperscript{29} A 1996 Singapore Conference produced a Ministerial Declaration stating that the WTO would collaborate with the International Labor Organization (ILO) to set forth and enforce core labor standards (relating to issues such as child labor, wages, and discrimination) for WTO member nations.\textsuperscript{30} In the Conference’s concluding remarks, however, the chairman noted that the declaration did not put labor on the WTO agenda.\textsuperscript{31}

Despite this official reservation, many developing nations assert that labor concerns often provide their developed counterparts with an excuse for protectionism.\textsuperscript{32} While neither the WTO’s current scheme nor its predecessor (the General Agreement on Trade and Tariffs, or GATT) discern labor violations as a formal basis upon which trade barriers can be erected against the accused country, developed nations have invoked GATT provisions in support of sanctions against alleged violators.\textsuperscript{33} Article XX is invoked by member governments to restrict trade with a nation whose labor standards threaten “public morals” or “human life and health.”\textsuperscript{34} Developed nations seeking sanctions against their developing counterparts have also argued that inadequate labor rights in export industries constitute “social dumping.”\textsuperscript{35}

As such, developed nations, led by the United States, the European Union, and Canada, assert that the WTO’s use of economic sanctions is the only way to ensure that member nations abide by labor standards.\textsuperscript{36} Developing nations counter that such sanctions represent a bid by developed members to undercut the comparative advantage of “cheaper labor” trading partners amidst increasingly liberal capital markets.\textsuperscript{37} For example, Pakistan’s former ambassador to the WTO, Munir Akram, argued that “the EU’s suggestions to bring labor issues onto the [WTO] agenda have little to do with human rights and
everything to do with attempts to keep out competing goods from low-cost nations.”

D. Underlying Pressures for Labor Reform

Though the WTO agenda does not directly encompass labor reform, developing nations often face pressure to abide by core labor standards in connection with trade liberalization policies. For example, with regard to market access in goods, Pakistan committed itself to increasing export growth. In this arena, the nation has focused specifically on the textile industry, its economic backbone. The industry serves as the source of employment for 38% of industrial workers and generates a staggering proportion (60%) of foreign exchange earnings. As such, the nation has attempted to boost textile exports significantly. Developed nation trading partners, interested in protecting their own industries, or weary of child labor and sweatshop scandals, often seek assurances that the products are made in accordance with standards accepted in their own nations.

Similarly, amidst growing trade relationships spurred by WTO membership, Pakistan faced pressure from trading partners related to gender discrimination in the workplace. Given that women, a significant portion of the nation’s intellectual capital, lack significant legal protection in the workplace, Pakistani companies faced increasing pressure to assure against discriminatory practices.

The merits and role of the WTO in enforcing labor standards remains a point of contention within the organization, and is a topic beyond the scope of this Note’s analysis.

38 BEEM & MANNING, supra note 32.
40 See TRADE POLICY REVIEW, supra note 18, at 12.
42 See id.
43 See generally TRADE POLICY REVIEW, supra note 18.
44 See Noshab, supra note 41, at 15.
45 See Labor Wages to be Revised After Every Three Years, supra note 39.
46 See id.
47 See PAKISTAN SUMMARY, supra note 1.
II. Discussion

A. Workplace Safety

Pursuant to WTO commitments regarding market access in goods, Pakistan has sought export growth, particularly in the textile industry.48 During the period from 1974 to 1994, the Multi-Fibre Agreement (MFA) governed bilateral agreements and allowed developed nations to restrict textile imports from developing nations; in 1994, members reached an agreement to phase out the MFA by 2005.49

While the phasing out of the MFA has expanded market access for Pakistan in this sector, it simultaneously subjects key low-cost textile producers, primarily developing nations heavily dependent on labor-intensive industries, to increased competition from one another.50 This increased competitive pressure is compounded by the fact that developed trading partners seek high-quality products, low turnaround times, and assurances that the products conform to labor standards in their own nations.51

The “credibility gap,” the perception that developing nation exports will not be on time or of high quality, marks a significant handicap for Pakistani exports.52 In an effort to maintain market share amidst heightened competition, production objectives may override labor concerns.53

Furthermore, the nation is ardently pushing for additional expansion in this arena, as reflected in a policy report entitled “Textile Vision 2005.”54 The report outlines an ambitious goal for textile growth in the post-MFA quota arena: propelling the nation from the world’s eighth largest textile exporter ($4.9 billion) in 1998 to the fifth largest in 2005 ($13.8 billion).55

The pressure to remain profitable in an intensely competitive business environment gives rise to the risk that some textile mills may purchase advanced machinery without providing the necessary training, and others may attempt to pack additional capacity into existing

48 See Noshab, supra note 41.
49 See id.
50 See id.
51 See generally id.
52 See Noshab, supra note 41.
53 See generally id.
54 See id.
55 See id.
infrastructure.\textsuperscript{56} In response to watchdog group concerns over questionable safety conditions and lack of union rights, new trading partners and multinational companies voiced the desire for appropriate regulations.\textsuperscript{57}

Existing labor laws, such as The Factories Act of 1934 (the Factories Act), specifically §§ 27–33, indicate that measures must be taken to ensure safety in the design, construction, maintenance, testing, and inspection of machinery, tools, and equipment.\textsuperscript{58} While the Factories Act in theory addressed the concerns of trading partners, much work remains to be done in order to spur lasting change in workplace safety conditions.\textsuperscript{59} A survey conducted by the Centre for the Improvement of Working Conditions and Environment (CIWCE) discerned major weaknesses in basic hygiene facilities, exhaust filters, fire prevention and medical facilities, emergency transport, waste disposal services, and warning signs.\textsuperscript{60} Further, in the case of injury, families who seek remedy under legislation such as the Factories Act lack strong success rates, as courts tend to favor the employer due to lack of proof of negligence.\textsuperscript{61} Thus, while WTO market access commitments have spawned export growth, the incidental pressures for labor reform from developed trading partners often take a secondary role to production objectives.\textsuperscript{62}

\textbf{B. Transparency}

Pakistan has also undertaken trade-related commitments in the area of transparency, which often imply heightened monitoring of labor conditions.\textsuperscript{63} To this end, the existence of labor laws such as the Factories Act, which empowers authorities to monitor, suspend, restrict, or prohibit work that poses a serious threat to worker safety, is notewor-

\begin{itemize}
\item \textsuperscript{56} See generally \textit{id}.
\item \textsuperscript{57} See \textit{e.g.}, International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers’ Association, Global Meeting of Coca-Cola Workers: Delegates Vow to Continue Fight for Worker Rights, \url{http://www.iuf.org.uk/cgi-bin/dbman/db.cgi?db=default&uid=default&ID=747&view_records=1&ww=1&en=1} (last visited Dec. 2, 2005).
\item \textsuperscript{59} See \textit{Telephone Interview, supra note 11}.
\item \textsuperscript{60} \textit{University of Iowa College of Nursing, Occ. Health, http://www.occhealthnursing.net/pakistanO.htm} (last visited Dec. 2, 2005).
\item \textsuperscript{61} See \textit{id}.
\item \textsuperscript{62} See \textit{Telephone Interview, supra note 11}.
\item \textsuperscript{63} See generally \textit{Trade Policy Review, supra note 18}.
\end{itemize}
thy.\(^{64}\) Despite the presence of such legislation, however, potential remains for substantially greater progress in the area of transparency.\(^{65}\) A primary reason is that in developing nations, governance issues have not reached a level of prominence comparable to that prevalent in the developed world.\(^{66}\) As such, business owners as well as monitoring authorities lack understanding of the purpose or implications of transparency standards set forth pursuant to labor legislation.\(^{67}\)

The problem is further magnified by administrative complexity, leading to arbitrary application of regulations.\(^{68}\) As one Pakistani economist noted, “It is not uncommon that the attitude of government functionaries towards the industry and business people is harsh. Instead of helping them and guiding them to be in full compliance of the prescribed requirement, they are reminded of the possibilities of big fines and punishment . . . .”\(^{69}\)

Additionally, business owners have voiced concerns regarding inconsistent application.\(^{70}\) As a result, minimal incentives exist for them to comply with transparency standards in the long term, inhibiting the ability of external entities to monitor labor standards, as theoretically provided for in legislation such as the Factories Act.\(^{71}\)

C. Gender Discrimination in the Workplace

Another key pressure Pakistan faced as a result of its WTO obligations stemmed from trading partners’ concerns over gender discrimination in national industries.\(^{72}\) In 1996, Pakistan ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).\(^{73}\) CEDAW required the provision of effective remedies for

\(^{64}\) See Int’l Lab. Org., supra note 58.

\(^{65}\) See Telephone Interview, supra note 11.

\(^{66}\) See id.


\(^{68}\) Id.

\(^{69}\) See id.

\(^{70}\) See Telephone Interview, supra note 11.

\(^{71}\) See Chaudhry, supra note 67.

\(^{72}\) See Telephone Interview, supra note 11.

any act of gender discrimination in the labor sector. The use of national legal machinery to fulfill CEDAW obligations is rendered difficult by the fact that the majority of the nation’s female labor force participants are employed in the informal labor sector, which is accorded minimal protection under national labor laws.

Many Pakistani women are employed in menial positions in the textile industry, often working up to 16 hours daily. Nonetheless, they are typically classified by profession as homemakers and are thus deemed to be outside the labor force. While domestic labor laws in the textile sector encompass most labor management affairs, they do not provide legal protection for the informal labor sector. Additionally, Pakistani labor laws apply only to workplaces with more than fifty workers, further excluding the substantial contributions of women through the informal labor sector. As a result, despite Pakistan’s ratification of the CEDAW in spirit, its substance has yet to be fulfilled in practice.

Typical working conditions in the informal labor sector include irregular and low wages, vulnerability to sexual harassment, and minimal job security. Such conditions not only lack legal redress, but also lack statistical recognition. Since national labor statistics only encompass the formal labor sector, the majority of female employment is excluded from national labor indicators.

The lack of legal protection for women is compounded by the fact that increasingly liberalized trade provides opportunity for expanding companies to exploit the key sources of low cost labor, namely those susceptible members of the work force who are unprotected by the law. This is particularly problematic as the MFA is phased out, and

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76 Id.
77 Id.
79 Jamil, supra note 75.
80 See Telephone Interview, supra note 11.
81 Syal, supra note 78.
82 Id.
83 Id.
84 Id.
multinational corporations gain greater freedom of movement between nations in pursuit of cheap raw materials, the absence of trade union rights, and low wages.  

D. Child Labor

Export expansion has also subjected Pakistan to pressure for child labor reform, particularly in light of allegations that high-profile multinational corporations have used child labor in Pakistani production facilities. The nation’s developed trading partners, weary of child labor scandals, sought assurances that exports were manufactured under standards acceptable in their own nations. Though child labor inspections have risen in recent years pursuant to legislation such as the Employment of Children Act of 1991, data shows that child labor remains under-prosecuted.

In evaluating the Employment of Children Act’s success, it is instructive to examine the Pakistani soccer ball industry, which has been investigated on several occasions for allegations of child labor violations. In 1996, 75% of the world’s soccer balls were produced in Sialkot, Pakistan. A 1996 International Labor Organization study estimated that more than 7,000 children between the ages of five and fourteen stitched balls on a full-time basis, and a significant number worked part-time.

The dominant factor in the failure of child labor legislation lies in lack of incentives for compliance, on the part of employers as well as government officials responsible for monitoring the industry. In order to remain competitive with industrialized trading partners, developing nations must leverage their primary source of competitive advantage: cheap, abundant labor. As Najanuddin Najmi, director general

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85 Id.


87 See id.


90 Id.


93 See id.
of the government-sponsored Workers Education Program, notes: “There’s little doubt that inexpensive child labor has fueled Pakistan’s economic growth.”

In addition to employers, government officials lack incentive to lend enforcement power to child labor legislation. Despite the fact that government inspecting officers received special training in the enforcement of child labor laws, empirical evidence shows inconsistent inspections, prosecutions, and convictions. One author aptly comments that: “[S]peaking officially, [Pakistan’s leaders] deplore [child labor] and have nothing but pity for the roughly 11 million children working in factories, in fields, and on the streets. Speaking pragmatically, they regard the practice as a distasteful but unavoidable part of an emerging economy . . . .”

This systemic lack of incentive to enforce child labor standards lends credence to the argument that such stringent standards are unrealistic in the context of developing nations. As Shabbir Jamal, advisor to the Ministry of Labor, remarked: “Europeans addressed slavery and child labor only after they became prosperous. Just as we are catching up with the West in industrial development, so we are catching up in workplace and social reforms.” Additionally, the stringent child labor standards advocated by Pakistan’s developed trading partners ignore the underlying issue of poverty: high rates of adult unemployment dictate the necessity of multiple household incomes.

Given that labor-intensive sectors such as the textile and the soccer ball industry are the backbone of the nation’s economy, there is little institutional incentive to legitimately implement and enforce child labor legislation, or other mechanisms that would significantly hamper the development of these sectors. As such, there is little incentive for enforcement, and that which exists is geared primarily toward appeasing developed trading partners. As the Human Rights Commission

94 Id.
95 See id.
97 Silvers, supra note 92.
98 See id.
99 See id.
101 See Telephone Interview, supra note 11.
102 See Bureau of Int’l Lab. Aff., supra note 89.
of Pakistan noted during a visit to Sialkot, manufacturers seemed to have instructed their contractors not to talk about child labor, and had taken the contractors to task “not so much for employing child labor as for letting it become visible.” Such superficial labor reforms are further perpetuated by the lack of governmental personnel trained to monitor and develop sound proactive policy regarding child labor.

III. Analysis

The pressure faced by Pakistan to implement labor reforms incidental to trade liberalization has spawned only superficial labor reforms that cannot be sustained in the long term. In order to firmly entrench these reforms, trade liberalization commitments must adequately account for the economic and legal constraints of developing nations.

A. Proposals for Pakistan

This Note proposes three mechanisms to further the development of trade liberalization policies that adequately account for the economic and legal constraints of developing nations and drive lasting labor reform.

Firstly, trade commitments should appropriately consider the essential prerequisite for lasting legal reform: viable civil service infrastructure capable of developing, implementing, and enforcing sound labor policy. The success of legal reform depends largely on a conducive institutional environment, which many developing nations such as Pakistan have yet to develop. Building and modernizing institutional capacity will lay the groundwork for sustainable labor reform, allowing Pakistan to “speak the same trade . . . language’ as the rest of the world.” One author, Dr. Abid Suleri, cites the inefficient use of resources in Pakistan’s current civil service structure, pointing out that government employees who receive WTO training courses are often

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103 Id.
104 See Telephone Interview, supra note 11.
105 Id.
107 See generally Chaudhry, supra note 67.
108 Bashir, supra note 10.
transferred among departments before they are able to develop a particular area of expertise.\textsuperscript{109}

Dr. Suleri aptly suggests the development of a WTO cadre in the Pakistani civil service structure, dedicated solely to WTO issues and including representatives from the academic arena and the private sector.\textsuperscript{110} He also recommends government sponsorship of empirical research on WTO-related reforms, which would provide valuable data on the effectiveness of various mechanisms to enforce labor standards.\textsuperscript{111}

In addition to minimizing arbitrary interpretation and application of laws, strong institutional bases will counteract inconsistent application and misuse of enforcement resources.\textsuperscript{112} One study reveals substantial budgetary planning inefficiencies in areas such as salary allocation for parliamentarians and hiring in various ministries.\textsuperscript{113}

The creation of accountable civil service structures avoids such inefficiencies, rendering funds available to assist Pakistan in establishing more advisory institutions to complement those dedicated to enforcement.\textsuperscript{114} Employers stand to benefit from advisory resources that can aid them in better understanding and complying with labor legislation.\textsuperscript{115}

Secondly, the prominent issue of child labor must be addressed with cognizance of the reality that child labor is viewed as a contributor to economic growth.\textsuperscript{116} Since both the government and employers in developing nations lack incentives to comply with labor laws, legislation designed to address the problem retroactively is largely ineffective. Pakistan should instead focus on policies aimed at eradicating the root causes of child labor: adult unemployment and poverty.\textsuperscript{117} Conservative estimates place the unemployment rate at 7.7\%, with approximately one-third of the nation living in poverty.\textsuperscript{118}

Research finds that in nations where child labor is a mass phenomenon, as is overwhelmingly the case in developing nations, a

\textsuperscript{109} Suleri, \textit{supra} note 106.

\textsuperscript{110} Id.

\textsuperscript{111} See id.


\textsuperscript{113} See id.

\textsuperscript{114} See Chaudhry, \textit{supra} note 67.

\textsuperscript{115} See id.

\textsuperscript{116} See Silvers, \textit{supra} note 92.

\textsuperscript{117} See Basu, \textit{supra} note 100, at 495.

child’s non-work is a luxury good in a household’s decision-making.\textsuperscript{119} Often, a family cannot reach even basic sustenance goals without child income.\textsuperscript{120} Hence, if trade liberalization policies lead to a reduction in adult unemployment, parents will, on their own initiative, withdraw children from the labor market.\textsuperscript{121} Moreover, these are long-run goals, and must be implemented accordingly. The WTO’s social clause does not currently account for such considerations relating to child labor.\textsuperscript{122}

Finally, making WTO trade liberalization commitments more feasible for developing nations requires broader representation of their interests in the decision-making process.\textsuperscript{123} In past WTO negotiations, major decisions were left primarily to the European Union, the United States, and a small number of other developed countries, despite the fact that approximately 100 of the WTO’s members are developing nations.\textsuperscript{124} Such marginalization reinforces the perception among developing nations that reforms set forth are simply an attempt to impose protectionist barriers against their exports.\textsuperscript{125} This cynicism is particularly prevalent in the area of labor reform, as “[e]ssentially all developing nations see low labor costs (and, perhaps, lax regulation of child labor and working conditions and rights to organize) as an important—perhaps their only—comparative advantage in attracting foreign investment.”\textsuperscript{126} Meaningful inclusion of developing nations in WTO negotiations will allow them to voice their unique constraints and to develop attainable legal reform goals.\textsuperscript{127} One way to promote such meaningful inclusion lies in effective consultation between WTO and NGOs.\textsuperscript{128} As NGOs have a depth of experience in developing nations, they can contribute valuable input in the design of viable legal reform mechanisms.\textsuperscript{129}

At the national level, Pakistan should leverage trade relationships in the South Asian region to diversify its economy and decrease de-

\textsuperscript{119} See Basu, supra note 100, at 495.
\textsuperscript{120} See id.
\textsuperscript{121} See id.
\textsuperscript{122} See id.
\textsuperscript{124} See id.
\textsuperscript{125} See id. at 354.
\textsuperscript{126} Id.
\textsuperscript{127} See id. at 351.
\textsuperscript{128} See Maura Blue Jeffords, Turning the Protestor into a Partner for Development: The Need for Effective Consultation Between the WTO & NGOs, 28 Brook. J. Int’l L. 937, 974 (2002).
\textsuperscript{129} See id.
pendence on labor-intensive industries. Decreasing the country’s overwhelming dependence on such industries will generate greater incentive to comply with labor standards. Also, as Pakistani Chief Justice Nazim Hussain Siddiqui has noted, the legal systems of South Asian countries are confronted with common issues. As such, developing nations of South Asia can use their respective strengths to synthesize recommendations that adequately account for domestic conditions, setting the stage for sustainable labor reform.

Conclusion

As a developing nation member of the WTO, Pakistan confronts the difficulties of developing viable legal mechanisms necessitated by economic liberalization. In the face of pressure to implement labor reforms incidental to trade liberalization policies, Pakistan’s unique constraints as a developing nation dictate the need for feasible reform expectations. By establishing a viable civil infrastructure, improving the adult labor market, and garnering a broader participatory role in the WTO, Pakistan holds potential to reap the rewards of economic growth accompanied by lasting labor reform.


132 See id.
RIGHTS RHETORIC AS AN INSTRUMENT OF RELIGIOUS OPPRESSION IN SRI LANKA

Tracy Hresko*

Abstract: Two laws proposed by the Sri Lankan government present a threat to Christians and other religious minorities in the country. Though purportedly designed to prevent “unethical or fraudulent conversions,” the laws are overly broad and ill-defined, giving Sri Lankan officials the latitude to use them to suppress minority religious activities. Indeed, despite being couched in the rhetoric of religious liberty and human rights, the laws are likely to be used by the Buddhist majority as instruments of oppression over unpopular religious groups.

INTRODUCTION

“Militant Buddhism” may sound like an oxymoron, but it is a fact of life and has been a source of violent oppression in Sri Lanka in recent years. Indeed, since 2002, militant Buddhists on the island have rabidly pursued the suppression of Christianity and have stirred up popular opposition to the Christian faith. As a result, in the last two years alone there have been over 150 violent attacks on Christians and churches in the nation. Pastors and missionaries have been beaten and sexually assaulted. Mobs armed with bicycle chains have surrounded churches and burnt them to the ground.

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4 Becket Fund, supra note 3.

5 Winkler, supra note 1.
The treatment of Christians in Sri Lanka is likely to get worse over the coming years in light of two laws recently proposed by the Sri Lankan government.⁶ These laws would prohibit unethical or fraudulent religious conversions and harshly punish anyone involved in such activities.⁷

This Note analyzes the likely effects of these laws on religious minorities, particularly Christians, in Sri Lanka. Part I examines the history and current state of religion in the country. In doing so, it delves into the dominance of Buddhism on the island and discusses the ongoing violent oppression of Christians there. Part II discusses the religious anti-conversion laws introduced by the Sri Lankan government and explores their legislative history and content. Particularly close attention is paid to the language of the laws, which contain frequent references to religious liberty and human rights. Part III demonstrates how the laws will undermine rather than promote religious liberty in Sri Lanka. More specifically, it will discuss the ways in which the laws will inhibit religious expression are explored.

I. RELIGION IN SRI LANKA

The Democratic Socialist Republic of Sri Lanka is a small island nation located approximately eighteen miles off the southeastern coast of the Indian subcontinent.⁸ Despite a small population of approximately 19 million people, Sri Lanka is ethnically, linguistically and religiously diverse.⁹ The Sinhalese, a predominantly Buddhist group, make up 74% of the population.¹⁰ Tamils, most of whom are Hindu, com-

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⁹ See id.

prise roughly 18% of the population. Christians and Muslims are the third and fourth largest minority groups in Sri Lanka, making up 8% and 7% of the population respectively.

A. Buddhist Dominance

Buddhism has pervaded Sri Lankan society almost since its arrival on the island in the third century B.C. Indeed, the Sinhalese people who first colonized the island rapidly embraced that religious tradition and developed a great civilization around it. From this civilization arose an enduring ideology marked by two distinct elements: *sinhaladipa* (the idea that the island of Sri Lanka belongs to the Sinhalese) and *dhammadipa* (the notion that Sri Lanka is the “island of Buddhism”). These themes find frequent expression in the historical chronicles written by Buddhist monks over the centuries and have arguably influenced the actions of the Sinhalese-controlled government since its inception in 1948.

Christianity, in both its Protestant and Roman Catholic forms, arrived in Sri Lanka during the centuries of colonial rule by the Portuguese, Dutch and British. This was not a peaceful arrival, however, as the colonists, particularly the Portuguese, used their power to force Christianity upon the indigenous population and to repress all forms of Buddhism and Hinduism. The colonists did not succeed, however, in permanently converting most Sri Lankans, and Buddhism experienced a strong revival in the 1870s. Today, therefore, Christians are a small minority in Sri Lanka, comprising only 8% of the total population. Notably, however, unlike other religious groups in Sri Lanka, the Christian community is not ethnically homogenous but composed of both Sinhalese and Tamils.

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12 *Id.* The Muslim population in Sri Lanka is comprised of both Moor and Malay Muslims. *State Dep’t,* *supra* note 8. Most Sri Lankan Christians are of the Roman Catholic denomination. *Id.*
13 *See State Dep’t,* *supra* note 8.
14 *See Moss & Savada,* *supra* note 10.
16 *See Moss & Savada,* *supra* note 10.
17 *Id.*
18 *See id.*
19 *See id.*
B. Minority Oppression

Despite the small size and diverse ethnic composition of the Christian community in Sri Lanka, it has been met with extreme violence and oppression over the last several years. Indeed, over the past two years, members of the clergy have been beaten, churches have been burned and female Christian missionaries have been sexually assaulted. In 2003, a total of ninety-one attacks on churches and Christians were reported. In the first four months of 2004 alone, there were forty-four assaults on churches in Sri Lanka. To put these numbers in perspective, the attacks in Sri Lanka are occurring at a much higher rate than the “much noted” wave of anti-Semitic violence in France. In addition to this violence, extremist Buddhist groups have launched an anti-Christian propaganda campaign.

The precise causes of this violence are unclear, especially because Buddhists and Christians have had a peaceful coexistence up until recently. Nevertheless, a number of issues may be cited as contributing to the mistreatment of Christians in Sri Lanka, including the growth of Christianity in rural areas, the perception of Christians as enemies after decades of European colonialism, and the outrageous and widespread public accusation that a Christian conspiracy led to the death of a well-known Buddhist monk. Moreover, Christian Solidarity Worldwide, a non-profit organization that works on behalf of persecuted Christians, notes that there is suspicion among both Buddhists and Hindus that the Roman Catholic Church has provided support to the rebel group the Tamil Tigers. The accusation that has captured the

22 Christian Solidarity, supra note 3.
23 Becket Fund, supra note 3. The churches targeted are both Catholic and Protestant and located in both urban and rural areas. Winkler, supra note 1.
24 Christian Solidarity, supra note 3.
25 Winkler, supra note 1.
26 Id.
27 Christian Solidarity, supra note 3.
28 Page, supra note 2.
29 See id. “Although statistically there has been no growth in Christianity as a percentage of the population in the past 15 years, the Church, which had been declining, has grown in some areas. This growth has mainly been with the newer, freer, evangelical and Pentecostal churches.” Christian Solidarity, supra note 3.
30 Christian Solidarity, supra note 3.
31 Page, supra note 2. Three autopsies of this monk, Gangodawila Soma, showed that he died of natural causes. Id.
32 Christian Solidarity, supra note 3. A violent ethnic conflict has raged between the Sinhalese and the Tamils since 1956. See State Dep’t, supra note 8. A tentative ceasefire, however, currently exists between the two groups and they have agreed to work with Norwegian mediators to construct a permanent truce. Peace Deals in Sri Lanka, BBC News Online,
attention of the Sri Lankan government the most, however, is the widespread charge that Christians are engaged in “unethical conversions,” an ambiguous term that has been used to describe everything from the use of outright bribery to gain converts to the use of “more subtle forms of humanitarian aid and development carried out as a normal part of the Church’s mission.”

II. Discussion

A. The Rise of Religious Anti-Conversion Laws

On May 28, 2004, Sri Lanka’s JHU party introduced legislation that would criminalize the conversion of others “by use of force or allurement or by fraudulent means.” This legislation (“JHU law”) was proposed largely in response to strong pressure from Buddhist monks and anti-Christian Buddhist organizations for such an anti-conversion law. Very similar to a law that was passed in Tamil Nadu, India in 2002, the JHU law has a number of effects on religious activities. It would not only prevent forcible or “fraudulent” conversions but also criminalize assistance in such conversions and requires all converts to report their conversions to the government. Individuals found guilty of such conversions would be subject to five years in prison and a fine not exceeding 150,000 rupees, which is approximately double the average annual salary in Sri Lanka. Interestingly, the punishments are increased when...
a woman, child, student, inmate, or law enforcement officer is converted.\textsuperscript{40}

Shortly after the proposal of the JHU law, the President’s cabinet introduced a similar bill entitled the “Act of 2004 for the Protection of Religious Freedom.”\textsuperscript{41} This bill was proposed by the Minister of Buddha Sasana, a member of the President’s cabinet, and goes further than the JHU law by banning religious conversions altogether.\textsuperscript{42} Moreover, unlike the JHU law, it provides for the extradition of any alien engaged in conversion activities.\textsuperscript{43} The government seems to have been influenced by the findings of the Buddhist Sasana Commission in 2002 and the attacks on Christians and churches over the past two years in introducing this law.\textsuperscript{44}

The JHU law met an obstacle in August 2004 when the Supreme Court of Sri Lanka ruled that two of the law’s clauses were unconstitutional.\textsuperscript{45} The two clauses at issue were Clause 3, which requires those participating in conversions to report to the government, and Clause 4(b), which provides for the punishment of those failing to report.\textsuperscript{46} The Supreme Court said that these clauses violated Article 10 of Sri Lankan Constitution, which provides for freedom of religion.\textsuperscript{47}

\begin{footnotes}
\item[a] JHU Law, \textit{supra} note 7, art 4(a). The punishments for converting individuals within those groups are a prison term no longer than seven years and a fine not exceeding 500,000 rupees. \textit{Id.}
\item[b] Cabinet Law, \textit{supra} note 7, art. 1.
\item[c] \textit{CHRISTIAN SOLIDARITY, supra} note 3. The law states that “no person shall convert or attempt to convert another person . . . .” Cabinet Law, \textit{supra} note 7, art. 2.
\item[d] Cabinet Law, \textit{supra} note 7, art. 5(vi).
\item[e] \textit{See Page, supra} note 2; \textit{CHRISTIAN SOLIDARITY, supra} note 3. The Commission on Buddha Sasana met at the request of the Sri Lankan President and investigated Christian activities, particularly those of Christian non-governmental organizations (NGOs) in Sri Lanka. \textit{CHRISTIAN SOLIDARITY, supra} note 3. According to Dr. Anula Wijesundera, a member of the commission, it found that Christian groups have a “planned strategy . . . of planting a church in every village” and “indoctrinating” small children by starting preschools. \textit{Id.}
\item[g] \textit{Id.; JHU Law, supra} note 7, arts 3, 4(b).
\end{footnotes}
by a two-thirds majority, the law could come into effect.\textsuperscript{48} The court did not comment on the provisions of the law that criminalize “fraudulent” religious conversions.\textsuperscript{49} In response, the JHU announced that it would make the necessary amendments to bring the law within the bounds of the Sri Lankan Constitution and table the revised law within six months.\textsuperscript{50} The Supreme Court has not examined the Cabinet law.

The current state of both laws remains unclear. The revised JHU law has not yet been tabled and the Cabinet law “appears to have been put on hold” for the time being, perhaps until the new JHU law is unveiled.\textsuperscript{51}

\textbf{B. Anti-Conversion Laws \& Religious Liberty}

The Constitution of Sri Lanka proclaims that Buddhism shall be at the “foremost place” in the country and that “it shall be the duty of the State to protect and foster the Buddha Sasana . . . .”\textsuperscript{52} The Constitution also asserts, however, that all people are “entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt the religion or belief of his choice.”\textsuperscript{53} This language is virtually identical to the language in the religious liberty provision of the United Nations International Covenant on Civil and Political Rights\textsuperscript{54} and similar to the language used in the relevant provision of the United Nations Universal Declaration of Human Rights,\textsuperscript{55} both of which Sri Lanka has signed.\textsuperscript{56} Indeed, given that the present Sri Lankan Constitution was drafted in 1978, it is likely that its religious liberty provisions were, in fact, based on these international covenants.\textsuperscript{57} Thus, based on the language of its Constitution and its commitment to these human rights covenants, it would appear that Sri

\textsuperscript{48} COLOMBOPAGE, supra note 45.
\textsuperscript{49} See id.
\textsuperscript{50} CHRISTIAN SOLIDARITY, supra note 3.
\textsuperscript{51} See id.
\textsuperscript{52} CONST., supra note 47, ch. II, art. 9.
\textsuperscript{53} Id. ch. III, art. 10.
\textsuperscript{56} See, e.g., Kao, supra note 29, at 2.
\textsuperscript{57} This appears even more likely in light of the fact that Sri Lanka is a signatory to both documents. See, e.g., id. at 1.
Lanka is committed to protecting the rights of both its Buddhist majority and its religious minorities.58

The anti-conversion laws at issue, moreover, are presented as laws designed to protect the religious liberty of Sri Lankans.59 The JHU law, for instance, states in its preamble that the State “has a duty” to assure to “all religions” the religious liberty rights granted in Articles 10 and 14(1)(e) of the Constitution.60 Similarly, the Cabinet law is entitled a law “for the Protection of Religious Freedom” and states that it is introduced “with a view to strengthening the mutual trust/unity that exists among religions and with a view to protecting the religious freedom that people have enjoyed in the past . . . .”61 Both laws, moreover, speak primarily in terms of the prevention of conversions that are “illegal,”62 “compelled,”63 or “fraudulent,”64 conveying the idea that they are protecting religious persons from unfair or oppressive encroachments on their religious liberty.65 In essence, the government of Sri Lanka has employed a rhetoric of religious liberty rights when setting out the provisions of these two laws.66

If put into force, however, these laws will have precisely the opposite effect on the religious liberty rights of minorities within Sri Lanka, particularly Christians,67 by severely inhibiting religious expression.68 Indeed, as proposed, the Cabinet law and the JHU law will do so in two ways: suppressing religious speech and suppressing religious activity.69

58 See Const., supra note 47, ch. III, art. 10; ICCPR, supra note 54, art. 18(1); UDHR, supra note 55, art. 18.
59 See JHU Law, supra note 7, pmbl; Cabinet Law, supra note 7, intro.
60 See JHU Law, supra note 7, pmbl. Article 10 of the Sri Lankan Constitution provides: “Every person is entitled to freedom of thought, conscience, and religion, including the freedom to have or to adopt a religion or belief of his choice.” Const., supra note 47, at ch. III, art. 10. Article 14(1)(e) of the Constitution states that every citizen is entitled to “the freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice or teaching.” Id. ch. III, art. 14(1)(e).
61 Cabinet Law, supra note 7, intro., art. 1 (emphasis added).
62 Id., art. 2.
63 Id., art. 3.
64 JHU Law, supra note 7, art. 2.
65 Id.; Cabinet Law, supra note 7, intro., arts. 1, 2, 3.
66 See JHU Law, supra note 7, art. 2.; Cabinet Law, supra note 7, intro, arts. 1, 2, 3.
67 Kao, supra note 39, at 2; Becket Fund, supra note 3; Christian Solidarity, supra note 3; Press Release, supra note 6.
68 Becket Fund, supra note 3.
69 See generally Kao, supra note 39.
III. Analysis

A. Suppression of Religious Speech

First, the laws suppress religious speech by defining “fraudulent” conversion in an overly broad manner.\(^{70}\) The bills criminalize any form of religious speech that entails a misinterpretation of religious doctrine or an outright untruthful one.\(^{71}\) The JHU bill, for instance, states that “‘fraudulent’ means includes [sic] misinterpretation or other fraudulent contrivance.”\(^{72}\) The Cabinet bill defines “fraudulent” as “the submission of false information and the use of dishonest means.”\(^{73}\) Neither law, however, provides a means of distinguishing between what is religiously “true” or “false” nor between what is religiously correct interpretation and what is not.\(^{74}\) These provisions of the law, therefore, “invite abuse” of minority religious groups, whose speech—in the forms of teaching or preaching—could be deemed “false” by Buddhist authorities who wish to squelch them.\(^{75}\)

In such an atmosphere, adherents of minority religious faiths in Sri Lanka may rightly fear engaging in any form of religious speech, regardless of whether it is aimed at converting others.\(^{76}\) Indeed, though a religious adherent “may intentionally and explicitly proselytize . . . in some instances, a religious adherent may manifest religious belief in a manner that unintentionally or implicitly influences another.”\(^{77}\) With Sri Lankan authorities having great leeway to deem such religious expression “false,” and with the harsh penalties that may incur as a result, such adherents may find that the risks associated with engaging in any form of religious expression far outweigh the benefits of engaging in it “either individually or in community with others . . . .”\(^{78}\)

B. Suppression of Religious Activity

Second, the laws severely inhibit religious activity by holding religious individuals liable for both intentional and unintentional conver-
Indeed, the JHU law states that “no person shall convert or attempt to convert, either directly or otherwise, any person from one religion to another . . . .” Similarly, the Cabinet law defines “conversion” as “any direct or indirect action or behaviour designed to cause a person to abandon his practice of religion . . . .” As a result, virtually any outward display of religious activity can be categorized as the type of “conversion” activity that the laws criminalize.

A letter to the Sri Lankan President Kumaratunga and Prime Minister Rajapakse from the Becket Fund for Religious Liberty—an “international, interfaith, public interest law firm dedicated to protecting the free expression of all religious traditions”—explains how the laws could stymie all religious activities. It notes: “Even . . . common, everyday practices that communicate religious meaning that other may find attractive—such as eating and drinking on Ramadan or Passover, or the Catholic Mass—could . . . trigger liability under the Proposed Laws.” Further, “celebrations of major life events that communicate religious beliefs—such as those surrounding births, marriages, and death—could subject a religious assembly to liability.”

Additionally, the laws undermine religious activity by criminalizing the charitable giving engaged in by many religious adherents. The laws do so by prohibiting the use of “allurement” by religious adherents, which they broadly define as the bestowal of “any gift or gratification.” As virtually any form of charitable giving can be categorized as the giving of gifts, religious adherents wishing to avoid fines or jail time will have little choice but to cease such activities if the laws are put into action. Many will have to do so, moreover, in spite of the fact that such activities may be “central” to their religious practice.

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79 See Cabinet Law, supra note 7, art. 8(l) (a-b); JHU Law, supra note 7, art. 2.
80 JHU Law, supra note 7, art. 2 (emphasis added).
81 Cabinet Law, supra note 7, art. 8(l) (b) (emphasis added).
82 See Kao, supra note 39, at 5-6.
83 Id. at 1, 2.
84 Id. at 10–11.
85 Id. at 11.
86 Id. at 6.
87 JHU Law, supra note 7, art. 2; see also Cabinet Law, supra note 7, art. 8(a).
88 JHU Law, supra note 7, art. 8(a) (i); see also Cabinet Law, supra note 7, art. 8(a).
89 See Kao, supra note 39, at 6-7.
90 “Almost by definition, only a limited number of religious practices can be fundamental to a person’s religion.” Steven C. Seeger, Restoring Rights to Rites: The Religious Motivation Test and the Religious Freedom Restoration Act, 95 Mich. L. Rev. 1472, 1501 (1997).
lims, for instance, will have to stop paying zakat (donations to the poor), to avoid punishment for unintentionally “converting” others.91

Conclusion

Despite the attempts of the Sri Lankan government to couch the language of the proposed religious anti-conversion laws in the rhetoric of religious liberty, it is clear that the laws, as proposed, are instruments of religious oppression. If passed, the laws will severely restrain the ability of religious adherents to engage in religious expression and other forms of religious activities, as doing so will subject them to outrageous fines and even jail time. Thus, instead of “strengthening the mutual trust/unity that exists among religions”92 in Sri Lanka or “promoting religious harmony”93 on the island, it is more likely that the laws will contribute to the ongoing mistreatment of religious minorities.

If the government of Sri Lanka is truly concerned about protecting the religious liberty of all citizens, it should engage in a much closer examination of both the “unethical” conversions that are allegedly occurring in the nation and at the language of the proposed laws. In doing so, the Sri Lankan government is likely to find that the former are significantly less threatening to the rights of Sri Lankans than the latter.

91 See Kao, supra note 39, at 6–7.
92 Cabinet Law, supra note 7, intro.
93 JHU Law, supra note 7, pmbl.
THE TRAFFICKING OF PERSONS INTO THE EUROPEAN UNION FOR SEXUAL EXPLOITATION: WHY IT PERSISTS AND SUGGESTIONS TO COMPEL IMPLEMENTATION AND ENFORCEMENT OF LEGAL REMEDIES IN NON-COMPLYING MEMBER STATES

R. VICTORIA LINDO*

Abstract: Trafficking in persons for the purpose of sexual exploitation is a global scourge that affects all corners of the planet, including the European Union (E.U.). Since 1997, the E.U. has made great strides toward conquering trafficking within its borders, and yet this modern day slave trade continues to flourish. This Note follows the progression of Community legislation targeting trafficking from 1997 through today, and analyzes Member States’ compliance with those laws as well as patterns of concern. Because current legislation focuses primarily on penalization and victim’s protections, this note argues that the E.U. must pass legislation requiring Member States to take preventative action as well. It also argues that the E.U. must use its judicial powers to more effectively fight trafficking for sexual exploitation by punishing those Member States who still fail to comply with existing Community legislation.

Introduction

In addition to the traditional form of chattel slavery, modern slavery increasingly involves the trafficking of human beings, mostly women and children, for sexual exploitation.1 Today, anywhere from 700,000 to 4 million women and children are trafficked across international borders by criminal trafficking organizations and subse-

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quently forced into some form of sexual slavery. In fact, the United Nations has estimated that, after trafficking in narcotics and arms, the profits from human trafficking provide the third greatest revenue source for organized crime, generating an average of 9.5 billion U.S. dollars annually.

Within the European Union (E.U.), there are between 200,000 and half a million illegal sex workers, most migrating from Eastern and Central Europe as a result of the opening up of former Cold War borders about a decade ago. The problem is exacerbated by the traditional treatment of trafficking victims as criminals, who are subsequently either deported or convicted of prostitution and imprisoned while their traffickers go free. Since 1996, both the E.U. and a good number of its Member States have taken more proactive measures to combat trafficking in persons for sexual exploitation. Despite their efforts, however, the slave trade continues to flourish.

This Note argues that, despite European Community legislative requirements for Member States to adopt basic anti-trafficking measures, lack of implementation and enforcement of those laws, coupled with insufficient prevention programs in Member States, has hindered the Community’s attempts to combat the trafficking of persons for sexual exploitation into the E.U. In order to successfully fight this form of trafficking, the E.U. must utilize its enforcement power under the Treaty Establishing the European Community (E.C. Treaty) to compel Member States to implement and enforce more effective

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3 Dep’t of State, 2004 Report, supra note 1, at 14; see also Trafficking in Women, supra note 2.


5 See id.

6 See Trafficking in Women, supra note 2. See generally infra notes 30, 35, 38, 43, 46 and accompanying texts.

criminal statutes, while simultaneously passing legislation that requires Member States to adopt prevention programs.

Part I of this Note will discuss the conditions that facilitate trafficking for sexual exploitation as well as provide an overview of trafficking into and within the E.U. Part II will describe Community legislation and programs designed to combat trafficking in persons for sexual exploitation and explore patterns of implementation and enforcement within Member States. Part III will argue that the E.U. can use its power to penalize non-complying Member States under the E.C. Treaty to compel them to correct defaults. Further, it will argue that the E.U. should pass legislation that requires Member States to adopt adequate prevention programs to complement current Community legislation dealing with penalization and victim’s protections.

I. BACKGROUND

Around the globe, women forced into sexual slavery originate predominantly in Russia and the other former Soviet republics, large parts of Asia, and Central and South America. Not surprisingly, these states tend to possess certain socioeconomic and cultural characteristics that facilitate trafficking for sexual exploitation: widespread poverty, weak social and economic structures, lack of employment opportunities, organized crime, violence against women and children, discrimination against and devaluation of women, government corruption, and political instability.

Facing conditions such as these in her home country, the victim often agrees to leave with her trafficker in the belief that she is going to be married, find a better life, or find employment or educational opportunities. However, this is often a trap, as the victim is taken to a foreign country where she is forced into sexual slavery.


opportunities. Sometimes, she is simply sold by her family. The victim is then usually taken by the trafficker to another state where she cannot speak or understand the language and is immediately forced into prostitution. The substantial profits from trafficking frequently allow the trafficker to become entrenched in a community and continuously exploit it as a ready source of victims.

A. Trafficking Persons into the E.U. for Sexual Exploitation

Not surprisingly, the European Commission has conceded that the E.U. is also host to the cycle of trafficking and victimization, to the extent that all Member States are affected by trafficking in women in some form.

In addition to Central and Eastern European states (including former Soviet republics), victims originate in both non-member and applicant states in the Balkans. To a lesser extent, victims are trafficked from Africa and South America. Victims also originate within certain recently admitted E.U. Member States.

The victim is trafficked from her state of origin into and through the E.U. via transit states. Once the trafficker and the victim have entered the E.U. through the transit state, the trafficker re-traffics the victim either to another transit state or to the final destination state. Of the three types of states in this traffic pattern, all E.U. Member States are at least one.

The victim’s final journey from state of transit to state of destination is facilitated by the ease of movement between Member States that

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10 See Dep’t of State, 2004 Report, supra note 1, at 18, 216; Trafficking in Women, supra note 2.
12 See Dep’t of State, 2004 Report, supra note 1, at 10.
13 See id. at 12.
14 Trafficking in Women, supra note 2.
16 Council of Europe, supra note 15.
17 See Table 1; Dep’t of State, 2005 Report, supra note 9, at 93–94, 102–03, 121–22, 141–42, 144–45, 179–80, 195–96, 196–97.
18 See Table 1; see, e.g., Dep’t of State, 2005 Report, supra note 9, at 59.
19 See Trafficking in Women, supra note 2.
20 See generally Dep’t of State, 2005 Report, supra note 9, at 59–222.
resulted from the Schengen Agreement of 1985.\textsuperscript{21} The Schengen Agreement created the Schengen Area, which permits travelers and citizens legally present in the European countries party to the Agreement to move about freely without having to show passports when crossing internal frontiers.\textsuperscript{22} In 1997, the Treaty of Amsterdam amended the E.C. Treaty to officially incorporate the Schengen Area, which now includes all of the E.U. Member States.\textsuperscript{23} Although it is only intended to permit free movement of individuals legally within the Schengen Area, the practical effect is that if individuals enter the area illegally, they too can move about unchecked.\textsuperscript{24}

\section*{II. Discussion}

As early as 1993, the issue of trafficking of women for forced prostitution has been recognized as a serious problem.\textsuperscript{25} The European Commission initially felt, however, that the problem could and should be handled under existing treaty provisions, and thus no action was taken to address it.\textsuperscript{26} Three years later, Parliament called for the prohibition of trafficking in persons to be immediately amended to the E.C. Treaty in order to bring it within the sphere of Community jurisdiction, leading the way for a series of progressive legislative acts attacking the problem from all sides.\textsuperscript{27}

\textsuperscript{21} See Schengen Agreement on the Gradual Abolition of Checks at Their Common Borders and The Convention Applying the Agreement, June 14, 1985, 30 I.L.M. 68 [hereinafter Schengen Agreement]; Council of Europe, supra note 15; see also infra notes 23, 24 and accompanying text.

\textsuperscript{22} See Schengen Agreement, supra note 21, art. 2; Free movement of people within the Schengen zone, http://www.oasis.gov.ie/moving_country/moving_abroad/schengen_agreement.html. (last visited Oct. 16, 2005).


\textsuperscript{24} See Committee on Economic Affairs and Development, Europe’s Fight Against Economic and Transnational Organised Crime: Progress or Retreat?, The Many Faces of Economic Crime, Doc. 9018 (Apr. 6, 2001), available at: http://assembly.coe.int/Documents/WorkingDocs/doc01/EDOC9018.htm. As a result, victims who have been trafficked into the Schengen Area are easily transported to their final destination. See id.

\textsuperscript{25} See European Union Parliamentary Questions, 1993 O.J. (C 137) 2.

\textsuperscript{26} See id.

\textsuperscript{27} European Preparatory Act, Parliament Resolution on Trafficking in Human Beings, 1996 O.J. (C 32) 88.
A Brief History of E.U. Measures Combating Trafficking for Sexual Exploitation

The first major piece of E.U. legislation was the Incentive and Exchange Programme for Persons Responsible for Combating Trade in Human Beings and the Sexual Exploitation of Children (STOP) of 1996, which supported coordinated initiatives by public officials and non-governmental organizations (NGOs) for the fight against and prevention of trafficking in people. Because the E.U. did not have jurisdiction over trafficking yet, it used the STOP program to offer incentives to reinforce and coordinate systematic efforts already in place in Member States.

In February, 1997, the Council adopted the Joint Action on the Trafficking of Human Beings for Sexual Exploitation, which recognized that the extent of trafficking in persons for sexual exploitation within the E.U. was becoming increasingly worrisome, and attempted to address this problem by utilizing other areas of the treaty under which the E.U. had jurisdiction, such as illegal immigration and judicial cooperation on criminal matters. This was the first Community measure to actually require Member States to take legislative measures independently, as well as in cooperation with other Member States, to fight trafficking.

With the ratification of the Treaty of Amsterdam in 1998, the E.U. received jurisdiction over trafficking for sexual exploitation. This allowed the E.U. to achieve its goal of broadening the scope of the issue by confronting it as a violation of women’s fundamental human rights rather than approaching it in terms of judicial cooperation and the fight against organized crime and illegal immigration. The E.U.’s primary focus, however, was simply on developing penal

28 Trafficking in Women, supra note 2.
31 See id.
legislation, law enforcement and judicial co-operation, rather than on the prevention of trafficking and the protection of victims.\textsuperscript{34}

In 2000, the E.U. released the Charter of Fundamental Rights of the European Union, which specifically prohibits slavery, servitude, and trafficking in human beings.\textsuperscript{35} It also articulates the right to respect for physical and mental integrity.\textsuperscript{36} Although the Charter is not judicially enforceable unless and until the E.U. Constitution is ratified, it has nonetheless been used as a foundation for other E.U. legislative actions.\textsuperscript{37} Also, in December of 2000, the E.U. implemented the Daphne Programme.\textsuperscript{38} Daphne was broader in scope than STOP because it covered the general issue of violence against women, including trafficking; it was also given a 20 million Euro budget.\textsuperscript{39} Instead of working exclusively through Member State governments, the Daphne Programme encouraged NGOs to set up or reinforce European networks and helped them implement innovative projects, the results of which could be disseminated to other Member States and regions.\textsuperscript{40} The idea behind the program was that these NGOs could provide services which the public authorities did not have the power or the ability to provide.\textsuperscript{41} A Commission report concerning the first two years of the Daphne Programme found that it demonstrated a marked improvement of both policy development and practical solutions to violence-related issues and their operational applications across Europe.\textsuperscript{42}

\textsuperscript{34} Trafficking in Women, supra note 2.

\textsuperscript{35} Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1 [hereinafter Charter].

\textsuperscript{36} Id.


\textsuperscript{39} Id.


\textsuperscript{41} See id.

In 2002, the European Council passed a decision (2002 Decision) which recognized the need for a more comprehensive approach in which the definition of constituent elements of criminal law, and sanctions, were consistent throughout all Member States.\textsuperscript{43} This decision nullified the vague 1997 Joint Action, obligated Member States to specifically criminalize general trafficking as well as trafficking in persons related activities, and to adopt minimum prison sentences for individuals convicted of certain trafficking offenses.\textsuperscript{44}

In 2004, the E.U. placed more emphasis on helping victims of trafficking for sexual exploitation.\textsuperscript{45} First, the E.U. implemented the Daphne II program, and extended the budget to 50 million Euros.\textsuperscript{46} This Daphne renewal decision recognized that violence against women was widespread throughout the Community and recognized that the sexual exploitation and violence endured by these victims constituted a “health scourge and an obstacle to the enjoyment of safe, free and just citizenship in the E.U.”\textsuperscript{47} That same year, the European Council passed a directive (2004 Directive) that introduced a residence permit intended for victims of trafficking in order to provide an incentive for these victims to cooperate with authorities while including certain conditions to safeguard against abuse.\textsuperscript{48} Unlike prior programs like STOP and Daphne, which attempted to aid victims through incentives, this directive actually requires Member States to offer certain protections to victims.\textsuperscript{49} In fact, this directive requires that Member States provide victims with medical treatment, translation services, and a reflection period (during which they cannot be deported) to decide whether to help authorities.\textsuperscript{50}

\textbf{B. The Status of Member State Legislation and Problematic Areas}

Although the E.U. has not produced a comprehensive document on member state anti-trafficking legislation since 2000, the United States Department of State has produced such a document annually

\textsuperscript{44} See id.
\textsuperscript{46} See P & C Decision 803/2004/EC, supra note 45.
\textsuperscript{47} Id. at 1.
\textsuperscript{49} Id. arts. 6(1)–(2), (7).
\textsuperscript{50} Id. The directive also provides Member States with the option of providing victims free legal aid. Id. art. 7(4).
since 2001. By compiling the data from the 2005 Report into a table, Member States’ efforts, or lack thereof, to combat trafficking, may be more easily explored.

In compliance with the aforementioned 2002 Decision, all Member States but one, Estonia, have passed legislation that specifically criminalizes trafficking for sexual exploitation, and some have even recently updated their statutes to increase their effectiveness. Member States, however, reported greatly varied conviction rates ranging from no convictions to 170. While some of the disparity can be attributed to a difference in the severity of trafficking between Member States, government corruption was reported in at least six states and was almost certainly a factor in some of the low numbers.

Penalization, however, appeared to be a larger problem. Eight states reported average sentences that were extremely light, such as suspended sentences, fines, and prison terms of less than four years. Only two states reported average sentences that exceeded six years: the U.K. (up to eighteen years) and Portugal, (on average eleven to fifteen years).

Although neither the 2002 Decision nor the 2004 Directive requires Member States to provide prevention programs, many states...
have developed these programs independently.59 Sixteen states have developed adequate to exemplary prevention programs, which include measures such as informational campaigns, law enforcement assistance and training, participation in and funding for intra-state anti-trafficking organizations, increased border protection, and harder-to-forge visas.60 Seven states, however, have inadequate prevention programs that fail to effectively educate their populations.61

With respect to victim’s protections, most Member States are in compliance with the 2004 Directive by legally granting victims assistance such as reflection periods, shelter, legal services, and medical care.62 Ten states, however, reportedly still fail to fully comply with the 2004 Directive, and in some of these states the victim is still treated as a criminal or an illegal alien and deported.63

By grouping Member States of origin together, other patterns emerge.64 First, with the exception of Poland, Member States of origin all exhibited low rates of trafficking convictions.65 They also tended to hand down light average sentences for convicted traffickers.66 In addition, five of these eight states also fail to fully comply with the 2004 Directive by maintaining inadequate victim’s protection programs.67 Four of the six states that reported official cor-

60 See Table 1; Dep’t of State, 2005 Report, supra note 9, at 59, 65, 92, 95, 105, 106, 111, 130, 163, 179, 181, 197, 199, 205, 221. Adequacy is determined by the extent and variety of programs reported, and whether the report indicates that the country’s efforts are inadequate to meet the needs of the population. See generally Dep’t of State, 2005 Report, supra note 9, at 59, 65, 92, 95, 105, 106, 111, 130, 163, 179, 181, 197, 199, 205, 221.
61 See Dep’t of State, 2005 Report, supra note 9, at 103, 114, 122, 141, 145, 146, 195. In Luxembourg’s defense, the problem of trafficking is new to the country, and thus its efforts to combat it have been recent. Id. at 146.
62 Council Directive 2004/81/EC, supra note 45, arts. 6(1)–(2), (7); see Table 1. See generally Dep’t of State, 2005 Report, supra note 9, at 59–222. In Table 1, the adequacy of victim’s protections is determined by whether the state exceeded, complied, or failed to comply with the 2004 Directive. For example, some exceed requirements by offering and the option to repatriate or gain permanent residency. See generally Dep’t of State, 2005 Report, supra note 9, at 59–222.
63 See Dep’t of State, 2005 Report, supra note 9, at 103, 105, 106, 114, 122, 141–42, 146, 180, 195–96, 222.
64 See Table 1.
65 Dep’t of State, 2005 Report, supra note 9, at 93–94, 102–03, 121–22, 141–42, 144–45, 179–80, 195–96, 196–97; Table 1.
67 See Dep’t of State, 2005 Report, supra note 9, at 102, 121, 141, 179, 195; Table 1.
ruption are also states of origin. It is important to note, however, that all eight states of origin are also states that are new to the E.U. as of May 1, 2004, so some of their failures may be attributed to sheer lack of time to fully implement all new Community legislation.

III. Analysis

The findings of the 2005 Report indicate that while most states have taken some steps to combat trafficking for the purposes of sexual exploitation, the problem remains predominantly because the positive efforts of Member States are patchwork at best, and overall there exists egregious and widespread failures in the areas of enforcement, penalization, prevention, and protection of victims.

A. Recommendations to Strengthen Member State Legislation, Enforcement, and Secondary Programs

Under Article 226 of the E.C. Treaty, once the Commission has identified a Member State that is not complying with E.U. legislation, it has authority to bring action against it. Using Article 226, the Commission can compel a Member State to enact more effective legislation by first sending it informal notice of the default. Then, if the state fails to resolve the problem or does not believe that there is a problem, the Commission can deliver a reasoned opinion, in which it explains exactly how it finds the Member State in default. If the Member State still fails to resolve the problem, the Commission can bring a case against it in the European Court of Justice (E.C.J.). If the E.C.J. rules in favor of the Commission, under Article 228 the state is required to immediately comply with the judgment. If the Member State still fails to comply, the Commission can repeat the process, and if the case again reaches the E.C.J., the Commission can request an appropriate

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68 See Dep’t of State, 2005 Report, supra note 9, at 93, 144, 179, 195.
69 Table 1; Dep’t of State, 2005 Report, supra note 9, at 93, 102, 121, 141, 144, 179, 195, 196; EU Presidency 2004, New Member States, http://www.eu2004.ie/templates/map_acceding_states.asp?isNavLocator=6,29.
70 Table 1. See generally Dep’t of State, 2005 Report, supra note 9, at 59–222.
71 EC Treaty, supra note 33, at 269.
72 Id.
73 Id.
74 Id.
penalty to be paid by the Member State. This process has generally been quite successful in compelling compliance; the Commission prevails on almost 90% of Article 226 cases that go before the E.C.J., and Member States almost never defy E.C.J. rulings.

Because the 2002 Decision and the 2004 Directive are relatively new, it is not surprising that the Commission has not yet utilized this avenue of enforcement. Nevertheless, in light of the seriousness of the human rights violations that are permitted to continue in lieu of Member State compliance, the Commission should begin utilizing this procedure immediately, starting with Estonia, which is the only state in the E.U. that has of yet failed to pass legislation specifically criminalizing trafficking for the purpose of sexual exploitation. The Commission should then focus on those states that have lagged in implementing the 2004 Directive. In addition to helping victims directly, this will likely also strengthen prosecution and conviction rates, because if victims are provided with adequate services such as reflection periods and medical treatment, they will be more likely to help prosecutors by testifying against their traffickers. This would be a more effective route to boosting conviction rates because it would most likely be difficult to impossible for the Commission to find a state in default for failing to convict sufficient numbers of traffickers, as there are neither prosecution nor conviction requirements in the 2002 Decision.

Also, the E.U. must take immediate action to pass comprehensive legislation requiring Member States to adopt preventative measures. This legislation should target Member States of origin and transit by requiring measures such as improved educational opportunities and school systems, state-sponsored economic opportunities for women, the promotion of equality of rights, and targeted community education regarding the dangers of trafficking and citizens’ legal rights. This legislation must also target states of destination by requiring Member

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76 EC Treaty art. 228.
79 See Dep’t of State, 2005 Report, supra note 9, at 102.
80 See Table 1; supra note 62.
81 See Dep’t of State, 2005 Report, supra note 9, at 66.
82 Council Framework Decision 2002/629/JHA.
83 See generally Dep’t of State, 2005 Report, supra note 9, at 59–222.
84 See id. at 20.
States to conduct awareness-raising campaigns so that trafficking is no longer a concealed and ignored crime. Moreover, this legislation must acknowledge that trafficking is an interstate crime, and consequently it must require Member States to coordinate their law enforcement efforts to more effectively identify and intercept trafficking routes. Finally, this legislation must augment the 2002 Decision by requiring Member States to pass legislation that specifically targets customers of this crime, whether through informational campaigns or through criminal sanctions.

In order to boost trafficking sentences, the E.U. should also pass legislation that requires minimum sentences for certain types of trafficking offenses.

With respect to ending corruption, some anti-corruption practices have been successfully implemented by Central and Eastern European states to bolster the fight against human trafficking. The E.U. could use these programs as a model on which to develop its own legislative requirements to ensure that law enforcement agents are better qualified to understand and handle trafficking cases.

Finally, in order to better fight trafficking within its borders, the E.U. must begin researching and producing a report similar to the U.S. Trafficking in Persons Report so that it can make informed decisions about how to develop and adjust its strategy in the future.

**Conclusion**

The trafficking of persons into the E.U. for sexual exploitation remains a pervasive problem. While the E.U. has done an admirable

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85 See id.
86 See id.
87 See id. at 70, 92. Granted, requiring Member States to legally punish customers would be difficult to implement in states where prostitution is legal like the Netherlands. Id. at 164.
88 See Dep’t of State, 2005 Report, supra note 9, at 93, 95, 103, 111, 141, 144, 179, 205, supra note 57.
89 See Dep’t of State, 2004 Report, supra note 1, at 8. These measures include: mandatory ethics briefings; standard I.D. badges; random integrity tests; anonymous anti-corruption hotlines; increased wages; performance incentive awards; helping personnel understand the importance of their work; and routine administrative checks. Id. Some Member States have already begun to fight corruption, like Latvia, which established an anti-corruption bureau. Dep’t of State, 2005 Report, supra note 9, at 141.
90 See Dep’t of State, 2004 Report, supra note 1, at 8.
91 See generally Dep’t of State, 2005 Report, supra note 9, at 55-222; Carmen Galiana, Trafficking in Women, Working Paper, Mar. 2000, Civil Liberties Series, LIBE 109 EN.
92 Trafficking in Women, supra note 2.
job enacting legislation focused on combating this problem, many Member States have yet to fully implement or enforce the 2002 Decision or the 2004 Directive.\(^\text{93}\) To combat this problem, the E.U. should produce an annual report that tracks Member State anti-trafficking legislation and enforcement and should also exercise its power under Article 226 of the E.C. Treaty to compel Member States to correct defaults.\(^\text{94}\) Additionally, the E.U. must generate legislation focused on prevention programs and mandatory minimum sentences for convicted traffickers. The E.U. still has much to do to end trafficking for sexual exploitation, and to attain that end it must aggressively assert its legislative and judicial powers to compel Member States to quash this modern age slavery.

\(^3\) See generally Dep’t of State, 2005 Report, supra note 9, at 59–222.

\(^4\) See EC Treaty, supra note 33, art. 226.
## Appendix 1: Dep’t of State 2005 Trafficking in Persons Statistical Summary Table

<table>
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<tr>
<td>Austria</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>106 (yr2004)</td>
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<td>Unknown</td>
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<td>Unknown</td>
<td>Unknown</td>
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<td>C.R.</td>
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<td>19</td>
<td>12</td>
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<td>Unknown</td>
<td>3-5yrs, conditional/suspended sentences</td>
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<tr>
<td>Cyprus</td>
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<td>X</td>
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<td>but gender specific</td>
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<td>Adequate</td>
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<td>Denmark</td>
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<td>X</td>
<td>X</td>
<td>3</td>
<td>8</td>
<td>Exemplary</td>
<td>Adequate</td>
<td>8-12yrs max, depend on stat. used.</td>
<td>1-3.5yrs</td>
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<tr>
<td>Estonia</td>
<td>Yes</td>
<td>X</td>
<td>X</td>
<td>Enforced under other laws.</td>
<td>Unknown</td>
<td>9</td>
<td>Inadequate</td>
<td>Inadequate</td>
<td>2-4yrs. (under other related laws)</td>
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<td>Finland</td>
<td>X</td>
<td>X</td>
<td></td>
<td>0</td>
<td>0</td>
<td>Inadequate</td>
<td>Adequate</td>
<td>10 yrs max.</td>
<td>N/A</td>
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<td></td>
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<td>Adequate</td>
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<td></td>
<td>No</td>
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<td>Mostly suspended sentence</td>
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<td>94</td>
<td>&quot;few&quot;</td>
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<td>Unknown</td>
<td>&quot;Significant&quot;</td>
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<td>Country</td>
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<td>X</td>
<td>X</td>
<td>X</td>
<td>Years</td>
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<td>Adequacy</td>
<td>Sufficiently Severe</td>
<td>Severe</td>
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<td>X</td>
<td>X</td>
<td>X</td>
<td>21</td>
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<td>Sufficiently Severe</td>
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<td>X</td>
<td>X</td>
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<td>Sufficiently Severe</td>
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<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>16</td>
<td>low-14</td>
<td>Inadequate</td>
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<td>10 yrs max.</td>
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<td>Lux.</td>
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<td>Inadequate</td>
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<td>Sufficiently Severe</td>
<td>N/A</td>
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<td>Yes</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>18</td>
<td>Inadequate</td>
<td>Adequate</td>
<td>Sufficiently Severe</td>
<td>low-mostly suspended sentences</td>
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<td>X</td>
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<td>248</td>
<td></td>
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<td>Adequate</td>
<td>Unknown</td>
<td>18 mo-15 yrs, many 11-15 yrs</td>
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<td>X</td>
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<td>19</td>
<td>6</td>
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<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>1</td>
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<td>Adequate</td>
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<td>X</td>
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<td>Sufficiently Severe</td>
<td>5.7 yrs, average</td>
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<td>X</td>
<td>X</td>
<td>22</td>
<td></td>
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<td>Exemplary</td>
<td>Unknown</td>
<td>1 yr - 4/5 yrs.</td>
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<td>T.Nthlds</td>
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<td>127 (2003)</td>
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<td>UK</td>
<td></td>
<td>X</td>
<td>Unknown - 572 arrests (yr 2004), 340 pros. (yr 2003)</td>
<td>66 (yr 2004)</td>
<td>Inadequate</td>
<td>Adequate</td>
<td>Unknown</td>
<td>heavy - as high as 18 yrs.</td>
<td>Unknown</td>
<td>No</td>
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WRANGLING IN THE SHADOWS: THE USE OF UNITED STATES SPECIAL FORCES IN COVERT MILITARY OPERATIONS IN THE WAR ON TERROR

MICHAEL MCANDREW*

Abstract: Following the terrorist attacks in the United States on September 11, 2001, the United States Senate granted the use of all necessary and appropriate force to prevent any future acts of international terrorism against the country. As part of this campaign against global terrorism, the United States Department of Defense sought an expanded role for Special Forces soldiers in covert paramilitary operations, a tactical responsibility traditionally within the domain of the CIA. In this Note, the author analyzes the protocol for authorizing covert activity and the ramifications under international law of utilizing formal United States military personnel to conduct such operations. The author suggests that non-uniformed, deniable covert operations should remain with the CIA since the loss of Geneva Convention status by United States Special Forces personnel seems excessive in light of the legal means available for utilizing them in the war on terror.

Introduction

In January, 2003, Donald Rumsfeld stated that “[t]he global nature of the war [on terrorism], the nature of the enemy and the need for fast, efficient operations in hunting down and rooting out terrorist networks around the world have all contributed to the need for an expanded role for the special operations forces.”¹ Rumsfeld made no secret of his plans to thrust special forces into a greater role in the war on terrorism by using them for covert operations around the globe.² The justification for this plan lies in the belief that twenty-first century threats necessitate the ability to deploy teams rapidly to suppress the United States’s terrorist adversaries wherever they are located, how-

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ever distant.\(^3\) The Defense Department’s contention that our special forces are uniquely equipped to manage this undertaking has placed it at odds with the CIA, which traditionally has handled covert paramilitary operations.\(^4\)

This Note seeks to examine the international legal implications of authorizing United States Special Operations Forces to conduct covert paramilitary operations in the war on terror. Part I defines covert action and the protocol for its authorization and examines why covert activity typically has fallen under the purview of the CIA. Part II illustrates the ramifications under international law of utilizing formal United States military personnel for covert operations. Part III argues that non-uniformed, deniable covert operations should remain in the domain of the CIA, and not the Special Operations Forces, since the loss of Geneva Convention status by United States military personnel seems excessive in light of the legal means available for conducting the war on terror.

I. HISTORY AND BACKGROUND

The current definition of covert action, established under the Intelligence Authorization Act for fiscal year 1991, is “an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly.”\(^5\) Covert actions therefore strive to maintain the secrecy of those sponsoring them.\(^6\) Inherent in this goal is the plausible deniability of the act by the sponsoring party.\(^7\)

Under Title 50, covert action is treated as distinct from traditional military activities.\(^8\) While the statutory language does not define traditional military activities, the legislative history reveals an intent that they encompass activities by military personnel under the direction and control of a United States military commander.\(^9\) The conference committee report explained that traditional military activities are meant to include actions preceding and related to hostili-

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\(^3\) See Donald H. Rumsfeld, *Transforming the Military*, 81 FOREIGN AFF. 20, 27 (2002).


\(^6\) Kibbe, *supra* note 2, at 104.

\(^7\) *Id.*

\(^8\) 50 U.S.C.A. § 413b(e).

ties that are anticipated to involve United States military forces, meaning approval has been given by the National Command Authorities for the activities and for operational planning for hostilities. Furthermore, it was intended for traditional military activities also to include hostilities that involve United States military forces in an ongoing manner, where their role in the overall operation is apparent or is to be acknowledged publicly.

Under Title 50 of the United States Code, the President may not authorize a covert action without first determining in a written finding that the action has an identifiable foreign policy or national security objective for the United States. Moreover, the President must specify each department, agency, or entity of the United States Government authorized to fund or otherwise participate in any significant way in such action. This statutory authorization for the President demonstrates that Title 50 leaves the President wide latitude to select any agency to carry out a covert mission, including the military.

But in order to execute a truly covert paramilitary operation—one where a premium is placed on the ability of the United States to remove its identity as sponsor—the selection of the CIA to execute the task may be, and traditionally has been, the logical choice because its paramilitary operatives are trained to accept as part of their missions that they operate without protection or help from the United States government. If an authorized covert action run by the CIA is compromised, the United States can still maintain plausible deniability based on this understanding among CIA operatives. This lack of acknowledged status nullifies any concern under international law as to an operative’s loss of international protections for operating without any identifiable affiliation with the United States. Furthermore, since the covert activity is being conducted without any relation back to the United States as sponsor, CIA covert paramilitary operations may run counter to international law or the local laws of the country.

10 Id.
11 Id.
13 Id.
16 See id.
17 See Kibbe, supra note 2, at 113.
in which the activity is taking place.¹⁸ Covert operations under Title 50 must comply at the very least with the laws of the United States.¹⁹ There is no statutory mandate, however, that binds the agency selected by the President to conduct a covert operation in accordance with international law.²⁰ With respect to the laws of foreign states, covert operations do not assume the superiority of United States law over that of a foreign country.²¹ Rather, they assert that there are overriding national interests that have to be dealt with outside the framework of international law and normal state-to-state relations, without resort to the use of official military force.²² This implies that the United States is prepared to take direct steps to protect its concerns in a world where not all countries have respect for its interests or the norms of international society.²³

In support of its plan to engage Special Operations Forces in covert paramilitary operations, the Defense Department has cited the greater size and availability of these forces to respond to an undeniably global enemy.²⁴ Special Forces operatives are the most elite personnel of the United States military and their exposure to the military’s most advanced training and equipment makes them more experienced and more educated than the rest of the conventional armed forces.²⁵ These operatives engage in specialized missions that include unconventional warfare, strategic reconnaissance, direct action, and counterterrorism.²⁶ The Defense Department thus contends that the combined Special Forces units, comprising tens of thousands of elite commandoes, may be better equipped to respond to numerous simultaneous threats around the world than the CIA’s few hundred paramilitary officers.²⁷ While the CIA possesses expertise in espionage and intelligence analysis and has engaged in covert paramilitary activity, the belief is held that small, highly mobile Special

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¹⁸ See Stone, supra note 15, at 15.
²⁰ See Stone, supra note 15, at 15.
²² Id.
²³ See id. at 27–28.
²⁴ See Robinson, supra note 4, at 50.
²⁷ See Kibbe, supra note 2, at 112.
Operations forces may be well suited to attack the new threats in light of their own proven areas of expertise.\(^\text{28}\)

The Defense Department has taken the position that the United States is in an active war and therefore any military activity, including Special Forces, would qualify as a traditional military activity that does not require a Presidential finding.\(^\text{29}\) The United States is relying on its inherent right of self-defense to justify the use of military force against terrorists.\(^\text{30}\) Senate Joint Resolution 23, which granted the use of force in response to the attacks of September 11, 2001, authorized the President to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.\(^\text{31}\)

This has led some legal scholars to contend that the Resolution grants the President virtually unlimited authority to use military force in the war on terror, as long as he “determines” that a particular target has some connection to these attacks.\(^\text{32}\)

In conjunction with this impression of the war on terror, the Defense Department increased the authority of Special Operations Command (SOCOM), the headquarters that controls all Special Forces commando units.\(^\text{33}\) SOCOM authority was amended from a purely “supporting command,” which can only contribute to other combatant commands’ missions, into a “supported command,” which can plan and execute its own independent operations if authorized by the Secretary of Defense or the President.\(^\text{34}\) While few will deny that the new threats posed by terrorism may call for updated and creative response techniques, one cannot overlook the implications of these new rules on

\(^{28}\) See Bruce Berkowitz, Fighting the New War, The Hoover Digest No. 3, 2002, at 46.


\(^{30}\) Brigadier General Charles J. Dunlap, Jr., International Law and Terrorism: Some “Qs and As” for Operators, 2002 Army Law. 23, 24.


\(^{32}\) Kibbe, supra note 2, at 108.

\(^{33}\) Id. at 110.

\(^{34}\) Id.
the Special Forces, especially where non-uniformed, covert operations are involved.\textsuperscript{35}

\section*{II. Discussion}

Under the law of armed conflict, the United States military would be bound to act not only in accordance with customary international law but also with any treaties and international agreements concerning armed hostilities to which the United States is a party.\textsuperscript{36} Therefore, although the war on terror is not an international armed conflict involving two or more nation-states, United States military personnel engaged in the effort must adhere to the international laws of war in the Geneva and Hague Conventions.\textsuperscript{37} This adherence varies significantly from the relative freedom from international constraints with which the CIA can conduct the same operations.\textsuperscript{38}

Regardless of the lack of a statutory mandate to conduct covert operations in accordance with international law, the selection of formal military personnel to execute such operations cannot be made without invoking international rules.\textsuperscript{39} The use of formal military force to conduct a covert military operation amounts to an act of war in terms of international law.\textsuperscript{40} Furthermore, United States policy dictates that the U.S. armed forces must “comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations.”\textsuperscript{41} Therefore, the mere introduction of formal United States military personnel into an operation invokes under United States policy the international law of armed conflict that governs the conduct of international armed hostilities.\textsuperscript{42}

It follows that where United States military personnel are expected to adhere to international laws of war and the applicable treaties of armed conflict, they also would expect the protections of those same laws and treaties.\textsuperscript{43} Those who serve in the military accept their responsibilities with the understanding that international rules gov-

\textsuperscript{35} See Robinson, \textit{supra} note 4, at 48.


\textsuperscript{37} Stone, \textit{supra} note 15, at 16.

\textsuperscript{38} See Best, \textit{supra} note 21, at 27.

\textsuperscript{39} See Dunlap, Jr., \textit{supra} note 30, at 24.

\textsuperscript{40} Stone, \textit{supra} note 15, at 11.

\textsuperscript{41} Directive No. 5100.77, \textit{supra} note 36, ¶ 5.3.1.

\textsuperscript{42} See id.

\textsuperscript{43} See Kibbe, \textit{supra} note 2, at 113.
ering the conduct of war and the treatment of prisoners will apply to them should something go wrong, regardless of the nature of their mission.\textsuperscript{44} This expectation does not harmonize with the concept of plausible deniability inherent in covert operations.\textsuperscript{45} The United States government, if it wishes to employ its formal military personnel in covert operations, would encounter a situation it has never faced were the operation to be compromised.\textsuperscript{46} Under the policy of strict deniability surrounding covert operations, Special Forces covert operatives could no longer expect to receive protection or help from the United States government if captured, whereas traditional military personnel, engaged in open military exercises, would continue to receive protection.\textsuperscript{47}

In order to remove the imprint of United States sponsorship from a covert action, Special Forces covert operatives would be required to forfeit their military identities and any other manifestation of a relationship with the United States government.\textsuperscript{48} Because the United States military is supposed to adhere to a policy of compliance with the law of war during all armed conflicts, however, the use of formal military personnel mandates a sharp distinction between civilians and combatants.\textsuperscript{49} Neither the Global War on Terrorism nor the fact that one is a member of the Special Operations Forces grants a license for military personnel to wear anything other than the full, standard uniform.\textsuperscript{50} Once United States military personnel begin to conduct missions out of uniform, they lose the protections of the Geneva conventions should they be captured.\textsuperscript{51}

Furthermore, a United States military operative conducting a covert mission without any identifiable affiliation with its sponsor may be considered an illegal combatant by his captors.\textsuperscript{52} Although “illegal combatant” is not mentioned anywhere in the Geneva Conventions, it is a concept that has long been recognized by state practice in the law

\textsuperscript{44} See id.
\textsuperscript{45} See Stone, supra note 15, at 11.
\textsuperscript{46} See id.
\textsuperscript{47} Id. at 13.
\textsuperscript{48} See id. at 12.
\textsuperscript{50} W. Hays Parks, Special Forces' Wear of Non-Standard Uniforms, 4 Chi. J. Int’l L. 493, 543 (2003).
\textsuperscript{51} Kibbe, supra note 2, at 113.
\textsuperscript{52} Stone, supra note 15, at 12.
of war.\textsuperscript{53} Engaging United States military personnel in true covert activity, devoid of any affiliation with the United States government, in effect frees them from the control of a nation-state that would require them to obey the laws of war.\textsuperscript{54} Such unaffiliated, intentional concealment of military personnel among the civilian population blurs the line between civilians and combatants, and a captor may classify this as unlawful activity.\textsuperscript{55}

This anonymity and resultant classification as an illegal combatant could make the covert operative culpable for acts committed on behalf of the United States.\textsuperscript{56} Illegal combatants enjoy no immunity from prosecution for their military activities.\textsuperscript{57} Also, a United States military operative engaged in a covert operation out of uniform is susceptible to being liable for the deaths or injuries that result on account of his actions.\textsuperscript{58} Conversely, a uniformed United States military operative engaged in action in accordance with the laws of war would not be liable for any actions that comply with those laws.\textsuperscript{59}

In addition to the specific international ramifications for Special Forces personnel engaged in covert activity, their participation in such acts can have heightened consequences on the United States in the international political sphere.\textsuperscript{60} In general, covert action can have diplomatic repercussions since their nature may involve sending United States agents into foreign countries against the full knowledge of the local government.\textsuperscript{61} The discovery that the agents are military personnel could cause enormous policy problems for the U.S. Government, whether the local government is an ally or an enemy.\textsuperscript{62} As a result, the United States could jeopardize its trustworthiness and credibility in the international community and hamper the willingness of the target country to cooperate with its agenda.\textsuperscript{63}

\textsuperscript{53} Yoo & Ho, supra note 49, at 216.
\textsuperscript{54} See id.
\textsuperscript{55} See id.
\textsuperscript{56} Stone, supra note 15, at 12.
\textsuperscript{57} Yoo & Ho, supra note 49, at 222.
\textsuperscript{59} See Dunlap, Jr., supra note 30, at 30.
\textsuperscript{60} Kibbe, supra note 2, at 104–05.
\textsuperscript{61} Id.
\textsuperscript{62} Id. at 105.
\textsuperscript{63} Id.
III. Analysis

Those operations that call for covert activity may best be left in
the domain of the CIA, which operates with its own set of understand-
ings regarding international protection and governmental support.64 Yet the Defense Department’s desire to create a role for its most
highly trained warriors in the war on terror still should be encour-
aged under existing law.65 Under United States statute, the Special
Forces are authorized to conduct direct action when executing their
operations.66 Direct action entails the use of military force to achieve
limited objectives.67 Utilizing Special Forces operatives for direct ac-
tion responses against terrorist targets would allow the Defense De-
partment to achieve its objectives via swift and precise uses of force.68

Direct action, as a statutorily authorized activity of Special Forces
operatives, would provide greater justification for the use of Special
Forces as a “traditional military activity.”69 This classification as a “tra-
ditional military activity” would remove the need to obtain a Presiden-
tial finding, as is required for covert actions.70 As a result, this exemp-
tion, coupled with steps already taken such as the amended authority
of SOCOM as a “supported command,” would move the Defense De-
partment closer to the objectives it advocates.71

More importantly, use of direct action would mean that the United
States would openly use its Special Forces in uniform in action for
which it is not denying responsibility.72 Title 10 permits the use of Spe-
cial Forces to preempt terrorists or support resistance movements clan-
destinely, as long as the U.S. government does not deny involvement
when the mission is over.73 By executing traditional military activities in
uniform, Special Forces operatives would be called to comply with in-
ternational law and could expect its protections in accordance with the
international laws of war.74 Classification of such action as traditional

65 See Berkowitz, supra note 28, at 44–45.
67 Berkowitz, supra note 28, at 45.
68 See Rumsfeld, supra note 3, at 27.
70 Id. at § 413b(a).
71 See Robinson, supra note 4, at 49; Kibbe, supra note 2, at 108.
72 See Berkowitz, supra note 28, at 45.
74 Stone, supra note 15, at 16.
military activity would further the goal of the United States to implement all necessary and appropriate means of force at its disposal.\textsuperscript{75}

It is likely that situations will arise that call for covert activity due to the political sensitivity or elevated risk level surrounding the mission.\textsuperscript{76} Unless the United States intends to impose a waiver of international protections upon Special Forces operatives called upon to conduct such operations, and deny their involvement if exposed, such a mission would never be truly covert by definition.\textsuperscript{77} The loss of Geneva Convention status for Special Forces operatives who operate out of uniform seems a disproportionate burden to attach to a mission that is only truly covert if performed successfully.\textsuperscript{78} With the legal capability of pursuing terror targets via direct action under Title 10, the United States can extend its reach in the war on terror without compromising its Special Forces.\textsuperscript{79}

Some Defense Department officials argue that the loss of Geneva Convention status may be moot when dealing with adversaries who do not honor them.\textsuperscript{80} Al Qaeda, unaffiliated with any nation state and a sworn enemy of the United States, has never declared, and likely will never declare, an intention to respect the Geneva Conventions.\textsuperscript{81} The United States is dealing with an enemy whose tactics defy the core principles of the laws of war through attacks on purely civilian targets with the aim of inflicting massive civilian casualties.\textsuperscript{82} The expectation of humane treatment of United States personnel in the event of capture seems more remote when our enemy recognizes that it will not have prisoner of war status if captured by the United States.\textsuperscript{83}

Nonetheless, it remains politically wiser for the United States military to respect international law in the event its soldiers are captured by

\textsuperscript{76} See Berkowitz, supra note 28, at 43.
\textsuperscript{77} Stone, supra note 15, at 13.
\textsuperscript{79} See Berkowitz, supra note 28, at 45.
\textsuperscript{81} See Yoo & Ho, supra note 49, at 215–16.
\textsuperscript{82} Id. at 216.
parties affiliated with a foreign state. Under such circumstances, the U.S. military member would be entitled to prisoner of war status. In addition, respecting international law through the use of the United States military entails a sense of openness and responsibility that legitimizes the goals of the United States in the war on terror. The use of military personnel in uniform and insignia in the war on terror signals a concomitant commitment by the United States to respect the laws of war. Most importantly, utilizing our troops identifiably in open military exercises aligns more readily with their expectation that they will be protected by their government as they serve it.

Conclusion

In June 2005, the White House rejected classified recommendations by a presidential commission that would have given the Pentagon greater authority to conduct covert action. Despite the lack of a wholesale transfer of covert operations to the Department of Defense, the President already has signed a series of findings and executive orders authorizing secret commando groups and other Special Forces units to conduct covert operations against suspected terrorist targets in as many as ten nations in the Middle East and South Asia. The war on terrorism requires swift and effective response measures to combat an enemy who is mobile and unremitting. In confronting this modern and unpredictable threat, the United States should apply all necessary and appropriate resources to eradicate the enemy.

The proposal by the Defense Department to utilize United States Special Forces operatives in combating terrorism should be encouraged in terms of direct military action to be conducted in uniform as a traditional military activity. Authorizing military activity in such a manner invokes international rules of war and the protections they tender. Covert operations that require operatives to abandon all ties to the United States should remain with the CIA due to the prospect that such operations may violate international law and, if compro-

84 See Dunlap, Jr., supra note 30, at 29.
85 Id.
86 See Berkowitz, supra note 28, at 45.
87 Directive No. 5100.77, supra note 36, ¶ 5.3.1.
88 See Kibbe, supra note 2, at 113.
mised, result in no international protections. CIA operatives accept this possibility when they accept their missions. With the ability to employ the Special Forces in a larger capacity in the war on terror under existing law, the risks they stand to face under international law during covert operations appear not to warrant their involvement in this respect. Special Operations Forces should engage in open, uniformed missions authorized through their command chain, and their training and expertise will enable the execution of operationally sensitive missions in accordance with international law.
A RE-EXAMINATION OF THE UNITED STATES-JAPAN STATUS OF FORCES AGREEMENT

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Abstract: On August 13, 2004, a United States Marine Corps helicopter crashed on the campus of Okinawa International University. The helicopter crash and the resulting U.S. military investigation served to reinvigorate pent up resentment and anger towards the U.S. military presence in Okinawa, threatening to destabilize the long standing relationship between the two nations. This Note discusses the U.S.-Japan Status of Forces Agreement which, among other things, apportions jurisdictional authority over off-base U.S. military accidents that occur on Okinawa. This Note argues that the U.S.-Japan Status of Forces Agreement (U.S.-Japan SOFA) should be a reciprocal agreement and that the United States should amend the Agreed Minutes of the U.S.-Japan SOFA to allow for a joint effort in investigating and securing off-base military accident sites. Altering the U.S.-Japan SOFA will be a substantial step in demonstrating that the United States views Japan as an equal partner in the effort to encourage peace and prosperity in the Asian hemisphere.

Introduction

On August 13, 2004, a United States Marine Corps Sea Stallion helicopter crashed on the campus of Okinawa International University.1 When looked at in isolation, the helicopter crash and the United States’s handling of the aftermath appears to be a relatively innocuous and benign incident.2 There were no casualties, and the wreckage was cleaned up in less than a week.3 Yet, the helicopter crash and the resulting U.S. military investigation are set within the larger context of

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2 See U.S. Chopper Crash, supra note 1.

3 U.S. Chopper Crash, supra note 1.
almost sixty years of pervasive U.S. military presence in Okinawa.\textsuperscript{4} As a result, this seemingly minor accident has served to reinvigorate pent up resentment and anger towards the U.S. presence in Okinawa, threatening to destabilize the long standing relationship between the two nations.\textsuperscript{5}

This Note discusses whether the U.S.-Japan Status of Forces Agreement (U.S.-Japan SOFA) that defines the scope of U.S. jurisdiction over U.S. forces in Okinawa should be revised. Part I provides a historical background of the U.S. military presence in Okinawa and the recent helicopter accident that occurred August 13, 2004. Part II gives the historical background of SOFAs. Part II also introduces and discusses the Treaty of Mutual Cooperation and Security and the U.S.-Japan SOFA which supports that treaty. Part III provides a resolution to the issue of whether the U.S.-Japan SOFA should be altered and, if so, what the recommended changes should entail.

I. Background and History

A. The U.S. Military Presence in Okinawa

On March 26, 1945, the last large battle of World War II began with the commencement of the U.S. assault for control of Okinawa.\textsuperscript{6} Approximately three and a half months later, the Japanese government signed a surrender agreement, beginning the formal occupation of Okinawa by U.S. military forces.\textsuperscript{7} In 1952, the Japanese government signed the Japanese-American Security Treaty, permitting the United States to retain control over Okinawa in exchange for ending the U.S. occupation of the Japanese mainland.\textsuperscript{8}


\textsuperscript{5} See Japan to Demand Investigatory Power Over U.S. Military Accidents, NIHON KEIZAI SHIMBUN, Sept. 18, 2004, 2004 WL 89302672; Anti-U.S. Military Rally at Crash Site Draws 30,000 Okinawan Protesters, supra note 1; JOHNSON, supra note 4, at 37; Millard, supra note 4, at 98.

\textsuperscript{6} JOHNSON, supra note 4, at 38; Masahide Ota, Re-Examining the History of the Battle of Okinawa, in OKINAWA: COLD WAR ISLAND 13, 13 (Chalmers Johnson ed., 1999).

\textsuperscript{7} Ota, supra note 6, at 13–14.

\textsuperscript{8} JOHNSON, supra note 4, at 38. Originally, the 1952 agreement between Japan and the United States envisioned Okinawa becoming a United Nations Trusteeship, “but the United States abandoned this arrangement and retained complete control over the island.” See Andrew Daisuke Stewart, Kayano v. Hokkaido Expropriation Committee Revisited: Recognition of Ryukyuans as a Cultural Minority Under the International Covenant on Civil
After twenty years of U.S. military rule, the Japanese government negotiated the official return of Okinawa to Japanese control in 1972. Nevertheless, from 1952 until the present, the United States has continued to maintain an expansive military presence on Okinawa. While the island of Okinawa is approximately the size of Los Angeles and is less than one percent of Japan’s total land mass, there are over 26,000 U.S. personnel stationed in Okinawa. This is roughly half of all the U.S. forces stationed in Japan. Approximately seventy-five percent of the land the United States occupies for its bases in Japan is situated on Okinawa, and the U.S. military bases cover approximately twenty percent of the entire island.

Not surprisingly, the large U.S. military presence in such a relatively small geographic area has created friction with the local populace. In Mike Millard’s essay Okinawa, Then and Now, he catalogues a series of incidents involving U.S. military personnel and Okinawan citizens:

In 1955, an American military officer raped and killed a six-year-old girl; in 1959, a jet fighter crashed into an elementary school killing 17 children and injuring 121 others; in 1963, a high-school girl was killed by a U.S. military truck; in 1965, a fifth-grade schoolgirl playing in her garden was killed by a U.S. military trailer dropped from a helicopter; in 1968, a B-52 heading for Vietnam crashed just after takeoff, creating an anti-U.S.-military movement on the island; in 1970, a car driven by an American civilian struck an Okinawan pedestrian and military police fired shots to intimidate the crowd that gathered, setting off riots in which 73 vehicles were set on fire. In the past twenty-five years since Okinawa’s reversion to Japan, there have been 127 aircraft accidents,
137 brush fires caused by military exercises, and 12 cases of Okinawans killed by American personnel.\textsuperscript{15}

Finally, in 1995, three U.S. military personnel brutally assaulted and raped a twelve-year-old Okinawan schoolgirl.\textsuperscript{16}

\textbf{B. The Helicopter Crash}

It is within this context that the August 13, 2005 helicopter accident occurred.\textsuperscript{17} After controlling the fire at the crash site, local Okinawan police detectives and local political leaders were barred from having any access to the accident.\textsuperscript{18} After repeated requests from the Japanese government to be allowed access to the area, the U.S. military finally permitted local Okinawan officials and Japanese investigators to enter the crash site.\textsuperscript{19} Not a single scrap of the aircraft remained for the Okinawan officials to investigate.\textsuperscript{20} “Even surface dirt had been removed with shovels.”\textsuperscript{21}

On September 12, 2004, 30,000 Okinawan citizens rallied to protest the accident and the handling of the aftermath.\textsuperscript{22} They demanded the closure of the Futenma U.S. Marine Corps Air Station, which is situated adjacent to the university campus and a fundamental revision of the U.S.-Japan SOFA.\textsuperscript{23}

\textbf{II. Discussion of Issues}

\textbf{A. Development of Status of Forces Agreements (SOFAs)}

SOFAs are agreements entered into by two or more states that delineate the explicit legal rights and obligations of military forces present in foreign countries.\textsuperscript{24} While they may appear to be merely an

\textsuperscript{15}\textit{Id.}

\textsuperscript{16}\textit{Id. at 96.}

\textsuperscript{17} See Millard, supra note 4, at 97–98; \textit{Anti-U.S. Military Rally at Crash Site Draws 30,000 Okinawan Protesters}, supra note 1.

\textsuperscript{18}\textit{U.S. Chopper Crash, supra note 1.}

\textsuperscript{19}\textit{Id.}

\textsuperscript{20}\textit{Id.}

\textsuperscript{21}\textit{Id.}


\textsuperscript{23}\textit{Id. This rally was “the largest anti-base gathering since outrage spread across Okinawa Prefecture over the [1995] abduction and rape of a local schoolgirl by U.S. servicemen.” Id.}

administrative convenience, SOFAs establish “the foundation for diplomatic reciprocity and a ‘smooth working relationship’ between the sending and receiving nations.”

SOFAs not only apportion criminal jurisdiction between the sending and receiving nations, but they also address “civil jurisdiction, claims, taxes, duties, services provided by each party, and procuring supplies and local employees.”

SOFAs are a relatively recent development in international law. Prior to the SOFA entered into by NATO in 1951, a comprehensive document did not exist that delineated the legal rights of U.S. military forces situated in alien territory. Rather, the common law doctrine of the “law of the flag” governed the jurisdictional authority over U.S. military forces stationed abroad. First articulated in The Schooner Exchange v. McFadden, the “law of the flag” states that when a sovereign country permits a friendly foreign sovereign to enter its territory, it implicitly consents to the jurisdictional immunity of the visiting sovereign. Up until the conclusion of World War II, the dominant practice of the United States was that U.S. forces stationed abroad were completely immune from the host country’s jurisdictional reach.

After World War II and beginning with the Cold War, NATO states began to station permanent troops within each other’s territory. As a result, NATO Member States entered into a reciprocal SOFA to provide a more formal arrangement between sovereigns regarding jurisdictional authority of foreign forces stationed within their territory. The NATO SOFA is the model upon which the United States structured its jurisdictional relationship with other non-NATO host nations. Currently, “absent express waiver of jurisdiction through an agreement

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28 Hemmert, supra note 24, at 217.

29 Id.

30 Id. at 218; see The Schooner Exchange v. McFadden, 11 U.S. 116, 147 (1812).

31 Hemmert, supra note 24, at 218.

32 Id. at 219.

33 Id. at 219–20.

34 See Eichelman, supra note 26, at 23.
such as a SOFA, the receiving state should have complete peacetime jurisdiction over all foreign troops inside its territory.”

B. The U.S.-Japan SOFA

In 1960, the United States and Japan signed the Treaty of Mutual Cooperation and Security as well as the SOFA that supports that treaty. The U.S.-Japan SOFA delineates the scope of jurisdiction over U.S. forces in Japan. Unlike the NATO SOFA, however, the U.S.-Japan SOFA is a comprehensive, non-reciprocal agreement. The term “non-reciprocal” means that the U.S.-Japan SOFA applies unilaterally to Japan. If Japanese troops were stationed in U.S. territory, the U.S.-Japan SOFA would not apportion jurisdictional authority between the two nations; rather, the Japanese military personnel would simply be subject to U.S. jurisdiction.

In contrast, the U.S.-Japan SOFA curtails the scope of Japanese jurisdictional authority over U.S. forces stationed in Japan. For example, Article XVII of the U.S.-Japan SOFA states that U.S. military personnel suspected of committing a crime in Japanese territory will remain in the custody of the U.S. military until they are formally indicted by the host nation. Moreover, if a criminal act is committed by U.S. service personnel during the performance of an “official duty,” the United States has primary criminal jurisdiction over that

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35 Hemmert, supra note 24, at 220.
37 See U.S.-Japan SOFA, supra note 36, at 1664.
38 See Gher, supra note 25, at 236–37. “Currently, few non-NATO countries are parties to reciprocal SOFAs with the United States.” Id. at 236; see Norman, supra note 27, at 733.
39 Gher, supra note 25, at 236–37.
40 See Gher, supra note 25, at 236–37.
41 See U.S.-Japan SOFA, supra note 36, at 1665; Norman, supra note 27, at 733.
42 U.S.-Japan SOFA, supra note 36, at 1665; William K. Lietzau, Using the Status of Forces Agreement to Incarcerate United States Service Members on Behalf of Japan, 1996 ARMY LAW. 3, 4–5 (Dec.). As a result of this provision, Japanese officials investigating the 1995 rape of an Okinawan schoolgirl were initially unable to take custody of the three U.S. servicemen suspected of committing the crime, inciting mass protests and local outrage. See Norman, supra note 27, at 723–24.
person. Regarding accidents in Okinawa involving U.S. personnel and U.S. property, the Agreed Minutes to the U.S.-Japan SOFA states:

The Japanese authorities will normally not exercise the right of search, seizure, or inspection with respect to any persons or property within the facilities and area in use by and guarded under the authority of the United States armed forces or with respect to property of the United States armed forces wherever situated, except in cases where the competent authorities of the United States armed forces consent to such search, seizure, or inspection by the Japanese authorities of such persons or property.

The United States has viewed the partial waiver of jurisdiction in non-reciprocal SOFAs as compensation for the large cost associated with maintaining U.S. forces abroad. Non-NATO Member States have agreed to these agreements, in part, because of a concern over the spread of Communism and the desire to have U.S. forces stationed in their country to mitigate that perceived threat.

C. Perspectives Regarding the U.S.-Japan SOFA

Japanese critics of the U.S.-Japan SOFA have viewed the limitations on Japan’s jurisdictional authority and the fact that it is a non-reciprocal agreement to be a fundamental infringement upon Japanese sovereignty. They perceive “the United States’ refusal to turn over its criminal suspects, even in cases where the Japanese had the primary jurisdictional right to prosecute, as a means to impede their investigations and enable U.S. service members to escape justice.”

The inequality associated with the U.S.-Japan SOFA has left the impression on many Okinawans that the United States is not “playing fair” and views itself as “superior” to the host nation.

43 U.S.-Japan SOFA, supra note 36, at 1664; Eichelman, supra note 26, at 24. Which activities are considered an “official duty” is determined unilaterally by the United States. Eichelman, supra note 26, at 24.


45 See Norman, supra note 27, at 733.

46 See id.

47 See Eichelman, supra note 26, at 27; Gher, supra note 25, at 239.

48 Eichelman, supra note 26, at 27.

49 See Norman, supra note 27, at 734.
The United States’s reluctance to enter into an agreement that apportions jurisdictional authority more equitably is predicated upon a concern regarding the Japanese criminal justice system.\(^50\) The Japanese legal system provides wide discretion to investigating authorities, permitting them “to investigate and to ‘persuade’ the accused to comply with their efforts.”\(^51\) Furthermore, suspects in Japan do not have many of the \textit{Miranda} rights that are available to criminal suspects in the United States.\(^52\) Suspects in Japan may be detained for up to twenty-three days without being formally charged.\(^53\) “Throughout this time, the suspect is isolated from both family and legal counsel and subject to unrestricted police interrogation.”\(^54\) American proponents for the current U.S.-Japan SOFA argue that the unequal apportionment of jurisdictional authority between the two states better safeguards a U.S. serviceperson’s constitutional right to due process under the law.\(^55\)

III. Analysis

In addressing previous complaints regarding the jurisdictional apportionment of the U.S.-Japan SOFA, the United States has taken few if any substantive steps towards correcting the inherent inequality in the agreement.\(^56\) In response to public outrage regarding the rape of an Okinawan schoolgirl by three U.S. servicemen in 1995, the United States established the Special Action Committee on Okinawa (SACO).\(^57\) This Committee was established to recommend actions to reduce the impact of U.S. forces in Okinawa.\(^58\) While the SACO proposed several improvements to the procedures of the SOFA, it did not recommend a fundamental reassessment of the agreement.\(^59\) Moreover, the SACO Final Report was a non-binding agreement that the United States was not obligated to implement.\(^60\)

\(^{50}\) Eichelman, \textit{supra} note 26, at 28.


\(^{52}\) See Eichelman, \textit{supra} note 26, at 28.

\(^{53}\) \textit{Id.}

\(^{54}\) \textit{Id.}

\(^{55}\) Gher, \textit{supra} note 25, at 244.

\(^{56}\) See GAO REPORT, \textit{supra} note 10, at 54, 55.

\(^{57}\) \textit{Id.} at 2.

\(^{58}\) \textit{Id.} at 2–3.

\(^{59}\) See generally \textit{id.} at 54–55.

\(^{60}\) See \textit{id.} at 18.
More recently, in response to the helicopter crash on Okinawa International University, the United States and Japan have established “guidelines,” which purport to permit Japanese police to maintain control of off-base accident sites.\textsuperscript{61} Under the new guidelines, when a U.S. military accident occurs outside a U.S. military base, two circular perimeters will be established around the crash site.\textsuperscript{62} The Japanese authorities will control the outer perimeter and both countries will jointly control the inner perimeter.\textsuperscript{63} Nevertheless, Japanese authorities cannot regulate U.S. military officials when they enter the crash site, and the United States retains exclusive control of the crashed aircraft.\textsuperscript{64} While these new guidelines may be an improvement, they do not address the issue of inherent inequality in the current U.S.-Japan SOFA.\textsuperscript{65} In light of the current global war on terrorism, the ability to forward deploy U.S. forces to Okinawa may be strategically important to the United States now more than ever before.\textsuperscript{66} The United States places its critical relationship with Japan in jeopardy by not adequately addressing the Okinawan concerns over the fundamental inequality of the U.S.-Japan SOFA.\textsuperscript{67}

The United States should alter the current SOFA in two ways.\textsuperscript{68} First, the U.S.-Japan SOFA should be a reciprocal agreement.\textsuperscript{69} “Drafting a SOFA does not merely create a legally binding document, but rather fosters a partnership, embracing another culture and sharing human values.”\textsuperscript{70} By making the arrangement reciprocal, the United States will recognize that Japan is a legally equal sovereign, and this recognition may ease some of the tension between the two nations.\textsuperscript{71} Second, the United States should amend the Agreed Minutes of the U.S.-Japan SOFA to allow for a joint effort in investigating and securing off-base U.S. military accident sites.\textsuperscript{72} The new guidelines recently set forth regarding U.S. military accidents outside U.S. military bases

\begin{footnotes}
\item[62] Id.
\item[63] Id.
\item[64] Id.
\item[65] See id.
\item[66] See Wilhelm, \textit{supra} note 11, at 15, 17.
\item[67] See \textit{Anti-U.S. Military Rally at Crash Site Draws 30,000 Okinawan Protesters}, \textit{supra} note 1; \textit{Japan to Demand Investigatory Power Over U.S. Military Accidents}, \textit{supra} note 5.
\item[68] See Gher, \textit{supra} note 25, at 256; Norman, \textit{supra} note 27, at 740.
\item[69] Id.
\item[70] Gher, \textit{supra} note 25, at 250.
\item[71] See Norman, \textit{supra} note 27, at 738.
\item[72] See \textit{Japan to Demand Investigatory Power Over U.S. Military Accidents}, \textit{supra} note 5.
\end{footnotes}
on Okinawa are just that: “guidelines.” The new policies and procedures should be directly incorporated into the U.S.-Japan SOFA to ensure that they are binding on both parties. By requiring U.S. military officials to cooperate with Japanese officials regarding U.S. military accidents that occur off-base, friction with the local populace and perceptions of malfeasance on the part of U.S. investigators will be further reduced.

Lieutenant General Thomas Waskov, the commander of U.S. Forces in Japan, defended the United States’s handling of the helicopter accident by stating at a press conference that the conduct of the investigation was “precisely in the confines of the agreement we have with the government of Japan.” While this statement may be legally accurate, it fails to recognize the need to adapt the legal framework of the U.S.-Japan SOFA to an increasingly important and evolving relationship.

Conclusion

The August 13, 2004 U.S. helicopter crash on Okinawan International University has forced the United States to reexamine the allocation of jurisdictional authority under the current U.S.-Japan SOFA. Recognizing the continued importance of the U.S.-Japan relationship, the United States should seize this opportunity to reassess its inherently unequal approach to jurisdictional apportionment. Although altering the U.S.-Japan SOFA may not entirely assuage the lasting resentment of the Okinawan populace towards sixty years of continued U.S. military presence in Okinawa, it will be a substantial step in demonstrating to the Okinawans, and the Japanese people in general, that the United States views Japan as an equal partner in the effort to encourage peace and prosperity in the Asian hemisphere.

73 See US Agrees to Let Japan Control Civilian Sites After Military Accidents, supra note 61.
74 See id.
77 See Gher, supra note 25, at 256; Norman, supra note 27, at 740.