

# Models of War and Crime in Confronting Organized Violence

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Is it crime or is it war? American politicians immediately beat the drums of a “war on terrorism” after 9/11 despite some cautionary notes sounded by professionals in the military, law, and international affairs. But the only other option promoted in the popular debates has been that of domestic criminal law enforcement. For some reason, the most obvious model, that of criminal sanctions under the law of nations combined with military operations other than war (MOOTW), has not received much attention despite its long-standing utility with regard to piracy and slavery.

The drumbeat of war continues in some quarters today, long after it has become apparent that there is no identifiable battlefield, that terrorism is a movement rather than an entity, and that the rhetoric of war has contributed to a number of confusions with serious consequences. There are even those who assert that miscreants such as KSM should not be placed on trial for criminal behavior because they should not be “given a public forum” – a public forum being precisely the way to show the ludicrous nature of their beliefs and behavior.<sup>1</sup>

At the same time, it is probably true that the phenomenon of modern international terrorism is a bit much for the domestic criminal justice system to handle. The criminal justice system has convicted over 200 persons of “material support of terrorism” and similar offenses, including some with very direct ties into the alQaeda organization. But expecting FBI agents to track down criminals in the wilds of Tora Bora and bring them back to the U.S. for trial without military assistance may be stretching matters a bit.

In the search for a model in which to place responses to terrorism, it is not necessary to handicap ourselves either by insisting on a single construct or by limiting our options to the two of war and crime.<sup>2</sup> The categories of war and crime are merely bookends enclosing a middle ground, known

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<sup>1</sup> Whether KSM can be tried in a U.S. court after being waterboarded 183 times is another matter.

<sup>2</sup> Indeed, that limited view of life produces Professor Feldman's "asymmetry" or "disconnect" problem: "In crime, one generally cannot kill until after capture, but at that point, cold-blooded execution is legally permissible. In war, one may kill almost at will before surrender and capture, but after capture, the prisoner cannot be killed or otherwise sanctioned." Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J.L. & PUB. POLICY 457, 458 (2002).

formally as “military operations other than war” (MOOTW). It should not be thought that these constitute a spectrum or that the categories are indeterminate. Although the categories may overlap and complement each other, it is important to keep them as separate categories, in much the same way that legislative, executive, and judicial categories overlap but are maintained in separate spheres.

There are many occasions for use of military force short of war. At the same time, the law of war is feeding the rapid development of a body of international criminal law that is expanding on the criminal law of separate sovereign nation-states. Thus, both military action and supra-state criminal law are filling the large gap between war and domestic criminal law. That middle ground consists of a number of provisions in which customary international law and international criminal law play central roles. The key to understanding the international criminal regime is that it is based on a blend of the law of war and criminal law.

Some observers contend that it is not important whether we refer to terrorism as war or crime, indeed a very penetrating analysis<sup>3</sup> likens the current conflict to the “Long War” identified by George Kennan, which became the “Cold War” in popular parlance. I will try to demonstrate below that the language matters greatly, but first I want to observe how the loose language of war came to have almost cliché status.

First, there was the Cold War, then the War on Crime, the War on Drugs, the War on Poverty, and then the Global War on Terrorism. The difference is that nobody took seriously the message to shoot a virus, there were protections against shooting criminals, and absolutely nobody thought it appropriate to shoot a pharmacist or a homeless person. The war metaphors in those instances were seen for what they were – metaphorical embellishments. But in the case of GWOT, people took it so seriously that we have had Guantanamo, torture, warrantless wiretaps, and possibly as-yet-unknown abuses.

With regard to non-state terrorism,<sup>4</sup> the international community has struggled to settle on a definition of the phenomenon sufficient to enshrine in a formal convention, but in fact the customary law reflected in decisions of international criminal tribunals has come very close to resolving the definitional difficulties without using the language of terrorism. This article first traces the problems created by the language of war and identifies the international dispute over defining terrorism; it then uses both U.S. experience with racial terrorism and the growing body of international criminal law to propose a body of international criminal law to fill the remaining gap. This is not international cooperation in application of domestic criminal law but a body of supra-state law independent of the domestic law of any nation.

## A. The War and Crime Models

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<sup>3</sup> JAMES JAY CARAFANO AND PAUL ROSENZWEIG, WINNING THE LONG WAR: LESSONS FROM THE COLD WAR FOR DEFEATING TERRORISM AND PRESERVING FREEDOM (2005).

<sup>4</sup> For simplicity, the term “terrorist” in this article refers only to non-state actors. A state-authorized actor who is using terrorist tactics to instill fear and thus shore up the power of the state may violate any number of norms of international humanitarian law which will be discussed herein. But unless otherwise indicated (or if I just get sloppy and make a mistake), when I use the term “terrorist,” I am referring to a non-state actor.

## 1. The War-Crime Distinction

The distinction between war and crime is critical for two reasons that I will call the “source of law” and “process” issues. The first has to do with locating the regime of law under which decisions regarding the use of lethal force are to be made. The second has to do with what process is to be followed with a captive.

If terrorist operatives were enemy combatants, then it could be asserted that actions they take against military targets would be legitimate and not punishable. This example is the source of the canard of “one person's freedom fighter is another's terrorist.” But the “clandestine” operative (one person's freedom fighter) would still violate the law of war by failure to “have a fixed distinctive emblem recognizable at a distance” unless fitting within one of the exceptions for a lawful belligerent.<sup>5</sup> Moreover, most “terrorist” actions will be taken against civilian targets and thus violate basic norms of warfare from their very nature.

Even with the insurgent who never attacks a civilian target, the distinction between war and crime affects the “source of law” and “process” determinations. With regard to the source of law, the insurgent will be a criminal under domestic sources of law even if not considered a war criminal under international law. With regard to process, the difference between war and crime is critical for nations such as the U.S. which have different justice systems for military offenses and civilian crimes.

The distinction between war and crime also comes into play with regard to the use of deadly force in the pursuit or pre-capture stage, the so-called “targeted killings” issue.<sup>6</sup> Is it legal to seek out and kill someone who is not at the moment “carrying arms” with hostile intent? The Israeli Supreme Court has answered the question with a resounding “maybe.”<sup>7</sup> It depends on the proximity of the

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<sup>5</sup> Hague Convention on the Laws and Customs of War on Land, Annex article I(2) (1907); 1949 Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III) article 4(A).

<sup>6</sup> American intelligence managed to pinpoint the identity and location of Abu Ali, “chief suspect” in the USS Cole bombing, targeting his automobile with a drone missile and killing him along with five others. <http://www.cnn.com/2002/WORLD/meast/11/04/-yemen.blast/index.html>. Drone missile attacks have escalated during the Obama Administration and increase anti-American sentiment in many quarters.

Israeli Mossad agents hunted down and killed in Norway someone who they believed had been responsible for the Munich Olympic incident, but it turned out that they got the wrong person. Ahmad Salameh, who probably was the mastermind of Munich, later was killed in a car-bombing in Lebanon. Norway sentenced the first group to relatively short prison terms and Israel agreed to pay compensation to the victim's family. One online source recounts the story this way:

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

<http://www.globalsecurity.org/intell/world/israel/mossad.htm>

actor to likely violent actions both before and after the event, as well as on the prospects for peaceful capture.

The use of military units, armed forces, to enforce principles of international law without rising to the level of armed conflict is very familiar. The Marine Corps Hymn reflects an early use of armed force on “the shores of Tripoli” to root out the Barbary Coast pirates.

Military Operations Other Than War (MOOTW) were spelled out in some detail by the Joint Chiefs of Staff in 1993<sup>8</sup> and was at that time the acknowledged rubric under which to use force for “combating terrorism.”<sup>9</sup> Use of force can range from domestic deployment to quell civil unrest, transnational provision of humanitarian relief in natural disasters, rescue operations for citizens caught in hostile circumstances, peacekeeping operations, and protection of shipping (anti-piracy actions).

Confusion exists in some quarters over what is perceived as the conflation of the law of war with human rights law. There are three sets of legal principles involved with armed force: the law of war, human rights law (what a nation can do to its own citizens), and international humanitarian law (limits on widespread or systematic violence). There are certainly overlaps, but these are still distinct bodies of law.

Most terrorism by subnational groups logically fits within the criminal paradigm. The most significant problem is simply that the criminal justice system of a single nation will have extreme difficulty operating across national boundaries. Like piracy and slavery before it, terrorism can be slotted into the proscriptions of *jus gentium* (law of nations). Like domestic terrorism in the U.S. in the hands of groups such as the Ku Klux Klan, international terrorism can be made to respond to the overarching demands of supra-state sources of law. This article highlights the limits of the model of war, the frustration of arriving at an international definition of terrorism, and then turns to more promising developments. One is the movement from the law of war to international humanitarian law and the other is the history of U.S. developments with domestic terrorism. From those two sources, a doctrine of international terrorism can be constructed so that treating the international terrorist as an international criminal solves many of the concerns expressed in the disconnects of war and crime. That conclusion leaves open the prospect that some military action short of war may still be available in some situations but eliminates the necessity of using the language of war in most instances.

## 2. War It Is Not

In traditional law of armed conflict, war is a state that exists between nation-states, not with individuals or even groups of individuals. Professor Feldman argues that the identity of the actor is only one element that goes into the definition of war and that we should pay attention to elements such as the scale of the conflict.<sup>10</sup> His additional elements may influence the decision of whether the

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<sup>8</sup> Joint Pub. 3-0 (1993).

<sup>9</sup> See Michael Hoffman, *Rescuing the Law of War: A Way Forward in an Era of Global Terrorism*, 35 *PARAMETERS* 18 (2005).

<sup>10</sup> In his construct, the other three elements are provenance (whether the actor is within the jurisdiction of the state), intent (whether the actor intends to challenge the very existence of the state or its government), and scale (whether the hostile acts are sufficiently large to justify military response). Feldman at 458 - 461.

state chooses to respond with military force, but they are not part of whether the law of armed conflict is the appropriate regime.

Professor Paust asserts that “the United States simply cannot be at war” with any group that is not a “state, nation, belligerent, or insurgent group (as those entities are understood in international law).”

The lowest level of warfare or armed conflict to which certain laws of war apply is an insurgency. For an insurgency to occur, the insurgent group would have to have the semblance of a government, an organized military force, control of significant portions of territory as its own, and its own relatively stable population or base of support within a broader population.<sup>11</sup>

In the absence of these factors, a group engaged in violence is a criminal organization, or not criminal if there is an adequate justification for their use of violence, but bears no resemblance to a belligerent.<sup>12</sup>

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<sup>11</sup> Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Law of War*, 28 YALE J. INT’L L. 325, 326 (2003). Professor de Lupis provides a further explanation of the point that Professor Paust makes. She insists that a state of “war” implies at minimum a group with a claim to governance of a “territorial unit” and then points out that international law has shown a marked movement toward the term “armed conflict” rather than “war” to deal with the variety of conditions that constitute warlike status among contending forces. INGRID DETTER DE LUPIS, *THE LAW OF WAR* (1987) She concedes that a terrorist group that wishes to create a separate State may achieve the status of belligerent but insists that the intermittent and clandestine nature of terrorist acts take them out of the category of war. *Id.* at 16 (“Parties which engage in war do not have to be recognized as States by their enemy. A country, nation or group can be a belligerent in spite of non-recognition.”). Nevertheless, “terrorist ‘tactics’ may be adopted in war for the purposes of guerilla warfare.” *Id.* at 23.

<sup>12</sup> The Geneva Convention on Treatment of POW's (GPW) provides protection for those who engage in defense of their homeland, but imposes requirements on the defenders that vary according to both their own status and the level of control that the invading forces have obtained over the territory, a distinction based on whether the territory is "occupied" or merely under attack. Geneva Convention on Treatment of POW's article 4(A) (1949):

Prisoners of war . . . are persons belonging to one of the following categories, who have fallen into the power of the enemy:

2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
  - a. that of being commanded by a person responsible for his subordinates;
  - b. that of having a fixed distinctive sign recognizable at a distance;
  - c. that of carrying arms openly;
  - d. that of conducting their operations in accordance with the laws and customs of war.
6. Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

Professor de Lupis<sup>13</sup> provides a further explanation of the point that Professor Paust makes: “Parties which engage in war do not have to be recognized as States by their enemy. A country, nation or group can be a belligerent in spite of non-recognition.”<sup>14</sup> But she goes on to insist that a state of “war” implies at minimum a group with a claim to governance of a “territorial unit” and then points out that international law has shown a marked movement toward the term “armed conflict” rather than “war” to deal with the variety of conditions that constitute warlike status among contending forces. She concedes that a terrorist group that wishes to create a separate State may achieve the status of belligerent but insists that the intermittent and clandestine nature of terrorist acts take them out of the category of war, although “terrorist ‘tactics’ may be adopted in war for the purposes of guerilla warfare.”<sup>15</sup>

Even if one were to concede that military action against a terrorist organization is a state of armed conflict, that provides no additional autonomy for handling of a prisoner after capture. After capture, a prisoner is entitled at least to humane treatment. If he or she had followed the rules of GCIII Article 4 so as to be called a combatant, then s/he would get the further rights of a POW. But no terrorist will follow the rules of Article 4, so the combat immunity disappears along with POW status. If instead we follow the model of crime, then the prisoner can be punished using criminal proceedings. Under neither model, does the accused become a nonperson. The salient distinctions are not about the handling after capture but about the use of lethal force prior to capture.

The distinction could be acute with regard to the use of deadly force in the pursuit or pre-capture stage. US intelligence managed to pinpoint the identity and location of Abu Ali, “chief suspect” in the USS Cole bombing, to the point of being able to target his automobile with a drone missile and kill him along with five other “suspected al Qaeda members.”<sup>16</sup> How is it legal to seek out and kill someone who is not at the moment “carrying arms” against the U.S.? Israeli Mossad agents hunted down and killed in Norway someone whom they believed had been responsible for the Munich Olympic incident, but it turned out that they got the wrong person. Ahmad Salameh, who probably was the mastermind of Munich, later was killed in a car-bombing in Lebanon. Norway sentenced the first group to relatively short prison terms and Israel agreed to pay compensation to the victim’s family.<sup>17</sup>

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<sup>13</sup> The descriptor of professor seems appropriate to an American reader for one whose official title is “Senior Associate Member of St. Antony’s College, Oxford.”

<sup>14</sup> INGRID DETTER DE LUPIS, *THE LAW OF WAR* 16 (1987).

<sup>15</sup> *Id.* at 23.

<sup>16</sup> <http://www.cnn.com/2002/WORLD/meast/11/04/yemen.blast/index.html>. In 2005, U.S. personnel reportedly killed al-Yemeni in Pakistan with a Predator drone.

<sup>17</sup> One online source recounts the story this way:

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## **B. Terrorism and the Rules of War**

Terrorism may come in many forms and under many guises, but the common theme is that of more-or-less clandestine attacks on civilian populations. The link between the law of war and response to terrorism consists of at least these facets:

- First, some observers treat terrorism as the use of illegal methods of warfare under the laws and customs of war, standards that can be enforced through appropriate tribunals. The difficulty in this approach is attempting to fit the terrorist into the framework of standards designed to deal with nation-state behavior.
- Second, there is the question of whether acts of terrorism constitute “armed attack” on the target nation so as to justify military response. The principal issue in this context is the threshold at which non-state actors become subject to justifiable use of military force.
- Third, if the target nation resorts to use of military force in responding to terrorist acts, then international law establishes controls on the use of military force, particularly in dealings with non-state actors.

On the other hand, the politicians who have insisted on using the language of war in dealing with terrorism have created a host of difficulties. First, there is the problem of what to do with the alleged “unlawful combatant” once identified; the confusion created by this loose use of language has even led many serious observers to believe that the international law of armed conflict failed to anticipate this “new form of warfare” and that there are gaping holes in the Geneva Conventions.<sup>18</sup> Second, and related, there is the assertion that the ordinary processes of criminal law are inadequate to deal with the “enemy combatant” arrested on domestic soil.<sup>19</sup> Third, there is the problem of being “at war” with a group that may be operating inside a friendly nation; if this were truly war, then could the U.S. send military forces into Pakistan or France without the permission of either nation? Fourth, describing the response to terrorism as “war” runs the risk of legitimizing (at least in the political

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<http://www.globalsecurity.org/intell/world/israel/mossad.htm>

<sup>18</sup> Rivkin? Bradley?

<sup>19</sup> Padilla

arena) the actions of the terrorist.

Although it has become popular to describe international law as a mechanism by which European nations subjugated and oppressed indigenous peoples in the colonial era, the Judeo-Christian sources of European law under which the world operates today are almost identical to the norms that have developed on parallel tracks in other parts of the world. Sun Tzu in China, the Book of Manu in India, and many strands of Islamic thought all coincide on the basic principles. The idea of “just war” in Christian-European terms does not *require* that any war be fought, it only describes the justifications required before a war *may* be fought.

The picture presented to the West regarding Islamic law is a bit confused. There are various, and in some degree conflicting, statements from Islamic jurists regarding principles that correspond to the Western notion of *jus in bello*, such as protection for children and the aged or prohibitions on beheading of enemies.<sup>20</sup> The more difficult part is understanding the concept of *jihad* and its relation to the Western idea of *jus ad bellum*. A basic tenet of Islam was that all people should submit to the will of God, and Islam itself emerged “as a conquering nation with world domination as its aim.”<sup>21</sup> The term *jihad* reflects the obligation of Muslims to bring all people under the will of Allah and translates as “exertion” or “struggle” with the idea of a “permanent” state of strife with nonbelievers.<sup>22</sup> It does not necessarily require violence, however, as the jurists have identified methods of carrying out the obligation through the heart, tongue, hands, or sword.<sup>23</sup> Whether to move to the stage of war is subject to the call of the caliph or imam, depending on the branch of Islam followed.<sup>24</sup>

Loosely speaking, the non-state terrorist has no authorization from a governmentally declared source, attacks civilian targets, and blends back into a civilian population. Each of the three phases of this conduct defies the rules laid down by nations for the conduct of their affairs. The nations of the world have not agreed on a definition of terrorist in part because some still maintain that it is necessary to allow for “freedom fighters” to strike at an oppressive regime.<sup>25</sup> This argument fails,

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<sup>20</sup> MAJID KHADDURI, WAR AND PEACE IN THE LAW OF ISLAM 102-08 (1955).

<sup>21</sup> *Id.* at vii.

<sup>22</sup> *Id.* at 62-65.

<sup>23</sup> *Id.* at 56.

<sup>24</sup> *Id.* at 94 -95

<sup>25</sup> The Lawyer's Committee on Nuclear Policy reports the 2001 deliberations of the Sixth Committee in these terms:

The Coordinator, Richard Rowe (Australia), reported that the outcome of the treaty would depend heavily on the decision for Article 18 on the exemption of armed forces from the scope of the treaty. Rowe proposed a draft that he prepared at the end of the October 2001 session, which exempted the activities of “armed forces . . . inasmuch as they are governed by other rules of international law.” Meanwhile, the Organization of the Islamic Conference proposed changes, which would exempt the activities of “parties during an armed conflict, including in situations of foreign occupation . . . in conformity with international law.” The OIC wants to ensure that the “armed struggle against foreign occupation . . . shall not be considered a terrorist crime,” and their version of article 18 would seemingly prevent certain oppressed groups, like the Palestinians, from being more criminalized under the treaty than a state’s armed forces.

or at least obfuscates the subtleties, in several ways. For one, the striking of civilian targets cannot be justified even for the most sympathetic freedom fighter. In addition, if action is taken against a nation outside the person's home base, then it is difficult to apply this justification until we look more deeply into transborder conflicts. To be a "freedom fighter" striking across borders, the combatant would have to be a national of the target state, at least self-described as such, and attempting to overthrow an oppressive regime without striking civilian targets.

There are, of course, some genuine "freedom fighters" in today's world who do have ambitions to exert control of their home territory. For those who do, if their actions can rally additional supporters, at some point the group will become called "insurgents." If they gain sufficient power to control some portion of the home nation, then they could be labeled "belligerents" and eventually be recognized as the legitimate government by other nations. These labels are important because other nations are not entitled to assist insurrections but can assist lawful governments,<sup>26</sup> just as France waited to see if the American colonists were capable of governing before providing assistance in that revolution.

The terrorist first is a criminal, only occasionally coming anywhere close to having a sufficient organization to achieve insurgent or belligerent status. So can we use all our available military force to go into another nation to arrest a criminal? In theory, not without the permission of the other nation. Sending a military force into another nation is an act of war that can be justified only by consent or prior aggressive act on the part of the attacked nation. There are several examples in recent decades of the US government's seizing drug lords and bringing them to trial in this country.<sup>27</sup> In the case of Manuel Noriega, we justified our actions by claiming that the prior government of Panama was the legitimate government and we were carrying out their wishes.<sup>28</sup> In the cases of a few individuals seized in Mexico and tried in the US, we did not have permission and the Mexican government has objected vociferously.<sup>29</sup>

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<http://www.lcnp.org/global/terrorismconvention.htm>

<sup>26</sup> Christine Gray, *International Law and the Use of Force* 74 - 75 (2000). A counter view that postulates the power to intervene on behalf of oppressed peoples has been fueled by US claims of the right to assist (without direct use of force) insurrectionists against tyrannical leftist regimes. It now is possible to argue that there *should* be power to intervene to fight oppressive or racist regimes. Oscar Schachter, *International Law in Theory and Practice* 119 - 13 (1991).

<sup>27</sup> *United States v. Alvarez-Machain*, 504 U.S. 655 (1992). The proposition that prosecution of accuseds in US courts is permissible following abduction from another country is known as the *Ker-Frisbie* doctrine. [\* need cites]

<sup>28</sup> *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997).

<sup>29</sup> These abductions have arisen after Mexico refused to extradite to the US without an assurance that the defendant would not be subject to the death penalty. Official protests by the Mexican government over the abductions were then followed by Mexican extradition requests to send perpetrators back to Mexico for trial. The death penalty issue has become a difficulty between the US and many nations.

The 1980 extradition treaty between the US and Mexico allows either country to refuse to extradite its own national to the other state. The Mexico Supreme Court has ruled that life imprisonment would constitute cruel and unusual punishment and thus the extradition treaty bars extradition if the potential for a life sentence exists under US law. Senator Feinstein has introduced a resolution calling for renegotiation of the US-Mexico treaty.

Might the Afghan or Iraqi resistance fighter expect to be treated as a criminal with the due process that the American system normally would provide? In these instances, the insurgent is violating the legitimate law of the occupying force and has no immunity for hostile actions. The occupying force has the right to establish conditions for its own security, even including curfews and relocation of civilians from their homes.<sup>30</sup> Thus, any violation of regulations laid down for the governance of an occupied region may result in punishment.

The model of war technically should be applicable only if the area is still in a state of armed conflict, in which case the resistance fighter can be killed without warning unless trying to surrender. If we follow the model of crime, then he must be captured without deadly force if possible but can then be punished in criminal proceedings. Under either model, deadly force can be used against someone carrying arms in a hostile fashion and punishment would be meted out according to the justice system of the occupying force. There is no question of the authority of military tribunals to dispense punishment in occupied territory or in a zone of armed conflict. In these settings, the military justice system can enforce the ordinary norms of criminal law. The resistance fighter has engaged in violence without the justification of self-defense, which was lost when the invading forces became victorious occupying forces. So under the Geneva Conventions, the captured resistance fighter can hope for only humane treatment (not POW status) and can expect to be punished for the crime of insurrection against the occupying force.

Nor is there any reason to distinguish between the models of war and crime in this setting for purposes of the process to follow while in the occupied zone. Military tribunals would be the appropriate forum for prosecution of crimes, either against the law of war or against the penal law of occupation.<sup>31</sup>

### **C. Terrorism and Domestic Law Enforcement**

There are actually three separate legal regimes that could be invoked in prosecuting a given instance of terrorist activity or a conspiracy plot – the domestic law of an affected nation, international conventions, and customary international law. Each has its limitations as well as its advantages.

The domestic criminal law of any nation affected by a conspiracy or an act of violence can be applied to prosecute that offense. The range of options for defining substantive offenses is vast, ranging from basic assault and murder through a variety of regulatory offenses surrounding weapons and explosives. The application of domestic law, however, is constrained by two separate lines of thought about jurisdiction, authority to legislate with regard to the transaction or event and jurisdiction to adjudicate with respect to the defendant.

With regard to authority to legislate, the jurisdictional nexus essentially depends on impacts to

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For a brief summary of the issues, see <http://feinstein.senate.gov/04Releases/r-extradition.htm>.

<sup>30</sup> GC art. 64.

<sup>31</sup> GC art. 84. The significance of *Rasul v. Bush* is simply that the domestic law of the occupation forces will determine the method by which determinations of status will be made. The follow-up to *Rasul* will determine whether article 5 of GPW is enforceable in the courts of the occupying force so that POW's must be released.

the nation seeking to apply its law. The analysis is not the same as in choice of law questions because there is no need to limit applicable law to any one nation. Any nation seeking to apply its law is free to do so, subject to the procedural objection of *ne bis in idem* (double jeopardy).<sup>32</sup> Therefore, all that is needed is an adequate relationship between the act and the national interest.

The Restatement of Foreign Relations distinguishes between “jurisdiction to prescribe”<sup>33</sup> and “jurisdiction to adjudicate.”<sup>34</sup> In general, jurisdiction to adjudicate is commensurate with the concepts developed under the heading of due process for jurisdiction over the person in civil

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<sup>33</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 Jurisdiction to Prescribe

Subject to §403, a state has jurisdiction to prescribe law with respect to:

- (1) (a) conduct that, wholly or in substantial part, takes place within its territory;
- (b) the status of persons, or interests in things, present within its territory;
- (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
- (d) the activities, interests, status, or relations of its nationals outside as well as within its territory; and
- (e) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

<sup>34</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 421 Jurisdiction to Adjudicate

(1) A state may exercise jurisdiction through its courts to adjudicate with respect to a person or thing if the relationship of the state to the person or thing is such as to make the exercise of jurisdiction reasonable.

(2) In general, a state's exercise of jurisdiction to adjudicate with respect to a person or thing is reasonable if, at the time jurisdiction is asserted:

- (a) the person or thing is present in the territory of the state, other than transitorily;
- (b) the person, if a natural person, is domiciled in the state;
- (c) the person, if a natural person, is resident in the state;
- (d) the person, if a natural person, is a national of the state;
- (e) the person, if a corporation or comparable juridical person, is organized pursuant to the law of the state;
- (f) a ship, aircraft or other vehicle to which the adjudication relates is registered under the laws of the state;
- (g) the person, whether natural or juridical, has consented to the exercise of jurisdiction;
- (h) the person, whether natural or juridical, regularly carries on business in the state;
- (i) the person, whether natural or juridical, had carried on activity in the state, but only in respect of such activity;
- (j) the person, whether natural or juridical, has carried on outside the state an activity having a substantial, direct, and foreseeable effect within the state, but only in respect of such activity; or
- (k) the thing that is the subject of adjudication is owned, possessed, or used in the state, but only in respect of a claim reasonably connected with that thing.

litigation: presence, consent, domicile, or minimum contacts.<sup>35</sup> Jurisdiction to prescribe is premised more on the effects of the activity on the state than on the conditions and activities of the individual. As Justice Field recognized from the beginning of U.S. jurisdictional analysis, the principles of international law stem from the recognition of state sovereignty and autonomy, which carry the corollary that no nation-state will interfere in the affairs of another nation-state.<sup>36</sup>

Given these principles of jurisdiction, the international community has worked to achieve a cooperative posture toward some types of criminal offenses that cross national boundaries – air piracy, hostage-taking, torture, financing of terrorism. In the international conventions regulating these affairs, the basic methodology is that of “extradite or prosecute.”<sup>37</sup> Each signatory nation takes on the obligation of criminalizing the proscribed conduct. It then agrees that if an alleged perpetrator is located within its borders, it will either prosecute for violation of its law or will extradite to another requesting nation which will then prosecute under its law. Of course, in both instances, the law to be applied might be *jus cogens* or customary international law as well as the domestic law of that state.<sup>38</sup>

The first set of problems in using the criminal justice system to combat terrorism arises from the difficulties of investigation. The medium-scale, long-term operations of a terrorist group raise the stakes above those of ordinary crime even if the number of deaths were not particularly high. Because the death rate from terrorist attacks has been on the rise for the past decade, the pressure on enforcement agencies is extreme. To complicate matters further, the public expects interdiction more than post-hoc punishment. To interdict plots without human intelligence is extremely difficult, but a terrorist group can be infiltrated only at great risk. The combination of all these factors is to make it difficult to obtain evidence against a terrorist plot, particularly one unfolding in another country.

The first step in initiating a prosecution is obtaining a defendant. There are essentially three methods for doing so – arrest on domestic soil, extradition or rendition from a host country, and abduction.

We need not spend much time on the defendant who is arrested on domestic soil. Just as “presence” within a political entity gives a court of that entity power over a defendant in a civil matter so long as the presence is “knowing and voluntary,”<sup>39</sup> a similar presence within a jurisdiction would give a court jurisdiction to adjudicate for criminal matters, leaving only the question of jurisdiction to legislate with regard to the alleged conduct.<sup>40</sup> The analogy to civil proceedings falters, however, when the presence of the defendant is not “knowing and voluntary.” A U.S. court in a criminal matter does not really care how the defendant came to be within the jurisdiction. In both

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<sup>35</sup> Comment b to § 421: “*Civil and criminal jurisdiction*. In principle, this section applies to the exercise of criminal as well as of civil jurisdiction. It does not apply to adjudication of family law controversies.”

<sup>36</sup> *Pennoyer v. Neff*,

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<sup>38</sup> *Pinochet*

<sup>39</sup> *Burnham v. Superior Court*,

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*United States v. Yunis* and *United States v. Yousef*, the argument was made that the defendant was not present in the United States within the meaning of the statutes granting the court personal jurisdiction. In both cases, the statutes applied to persons “found” within the U.S. and in both cases the defendant had been captured in another country and brought to the U.S. forcibly. The courts did not hesitate to follow Supreme Court precedent, discussed below,<sup>41</sup> that authorizes abduction from another country to the United States

#### **D. The “Law of Nations” – Customary International Law and *Jus Gentium***

Comparison of the laws and customs of war with the laws and norms of criminal enforcement shows that terrorism by subnational groups does not fit within either paradigm. Rather than contorting the traditions of either existing paradigm, it would be better to come up with a third paradigm, one that reflects the concerns of an emerging supra-state body of law. International criminal law is developing around offenses that are characterized by ongoing violence against civilians, particularly when it is “widespread or systematic.” Terrorism falls into the same realm as other ongoing violence against civilian populations and could be punished under the heading of crimes against humanity.

A valuable corollary is the US experience with racial terrorism and the so-called KKK statutes. The reason for supra-state intervention by international organizations into the affairs of a nation-state is the same as the reason for supra-state intervention by the US federal government into the affairs of a US state. It is the presence of an organization (whether recognized as the state or not) with sufficient resources to carry out violent actions against a civilian population without the state=s being willing or able to control it. This is the identical problem with terrorism today. It means that the most salient defining characteristic of terrorism is not the purpose of the terrorist but the organization that lies behind the terrorist. It also means that terrorism will not be effectively combated until there is an international counter-terrorism task force, complete with transnational police power to operate within the territory of any nation.

##### **1. International Criminal Law**

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

That understanding began to change when it was discovered that there are some criminal behaviors that ought to be enforceable against individuals regardless of their nationality or locus of action. These are the offenses *ergo omnes*, or offenses against all. They form part of the law *jus gentium* which nations are not allowed to abrogate. Thus, no nation can authorize and validate piracy or slavery. Any nation capturing a pirate or slaver is entitled to enforce criminal sanctions against the perpetrator pursuant to the practice of universal jurisdiction.

When this concept applied to just piracy and slavery, there was very little controversy about it because who would stand up for the rights of a pirate or slave trader? But following World War II,

the victorious nations decided to enforce the law of war in formal judicial proceedings rather than through the more traditional mode of simply executing enemy leaders.

Not surprisingly, the defendants in those cases raised the defense of *sine leges, nullem crimen*, or what we know in the U.S. as the *ex post facto* limitation – the proposition that there can be no criminal punishment unless a pre-existing law spelled out the elements of the offense. The response to this argument essentially was “you should have known the rules because the law of war was part of customary international law.” Under this theory, WWII defendants were punished for offenses against the law of war, crimes against humanity, and crimes of aggression. Subsequent developments, including the International Criminal Tribunals for Yugoslavia and Rwanda, have led to the International Criminal Court’s power over those crimes as well as the crime of genocide.

As of now, the headings of customary international law that are enforceable under the heading of “universal jurisdiction” generally are slavery, piracy, the law of war, genocide. In the view of many, torture would fall into that category because the Convention Against Torture requires every nation to criminalize that behavior. All we need do now is recognize that any incident that is part of a “widespread or systematic” pattern of violence against civilians is an offense against the law of nations and our definitional needs are met.

In other words, we need to be able to say to an alleged terrorist that “you should have known the rules because the law of terrorism was part of customary international law.” It is not likely that international tribunals will be established in the near future for dealing on a regular basis with terrorism, but some terrorist acts could be of such a scale to qualify as violations of the law of nations or the law of war. Moreover, the patterns of international tribunals will provide models and lessons to follow in dealing with the international phenomenon of terrorism. In a very real sense, terrorism touches more nations than do acts of war and could be seen as a concern of the total world community.

Starting with Nuremberg, the international community began to impose individual criminal sanctions for serious violations of the law of war, genocide, and crimes against humanity. The first effort of this type under United Nations auspices was establishment of the International Criminal Tribunal for the Former Yugoslavia in 1993, followed closely by the International Criminal Tribunal for Rwanda in 1994. Meanwhile, the U.N. was working through its International Law Commission on drafting a convention that would create a permanent international tribunal for prosecution of crimes against the law of war, genocide, and crimes against humanity.

## **2. International Criminal Court**

The Statute of the International Criminal Court applies to individuals who commit crimes in four categories: aggression, genocide, crimes against humanity, or war crimes. The ICC Prosecutor recently initiated its first case, proceeding against two senior officials of the Sudanese government and requesting cooperating nations to arrest the defendants.<sup>42</sup> Whether an act of terrorism might be prosecuted before the ICC depends not only on the definitions of crimes within its charter but also on the degree of power that the Court may obtain. As the statute now stands, there is a serious question whether the tribunal is capable of apprehending and prosecuting an alleged terrorist. The Statute creates a supranational body with investigatory power within the borders of any State Party

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<sup>42</sup> Prosecutor v. Ahmad Harun and Ali Kushayb, ICC-02/05-01/07, [http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-1\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-1_English.pdf) (April 27, 2007).

but only through the “cooperation” and within the mechanisms of that state.<sup>43</sup> The cooperative approach, of course, recognized the “sovereign” status of nation-states and was central to obtaining ratification by many States that would not have consented to an external police force’s operating within its borders.

Eventually, it should become true that an international tribunal such as the ICC will have coercive force behind it, and it should be hoped that it will not take a cataclysmic event on the order of the American Civil War to bring about realization of the need for states to yield a portion of their sovereignty to the whole. The action of the U.S. in withdrawing from the ICC was a major blow, not just to the existing regime but to any prospect of long-term development of coercive power.

With regard to the definitions of crime and terrorism, there are certainly some possibilities. In the first place, the crime of “aggression” is not defined in the Statute at all. Because terrorists act without any authority, the terrorist attack is necessarily aggressive. But can an individual with no national authority commit the crime of aggression? The answer may turn on the question of the extent of state sponsorship behind the attack. One premise of the ICC, flowing from the international tribunal experience of Nuremberg and its progeny, is to make individuals responsible for producing unjustified wars, thus modifying the historic thrust of the law of war to curb the power of sovereigns and nations. But without inter-nation hostility, the crime would not seem to involve external concerns. If the terrorist is a national of the state in which violence occurs, then ordinarily the matter should be treated as an issue of domestic criminal activity. If the terrorist is supported or sponsored by another state, however, then the international community becomes involved. This issue is taken up first in the *Nicaragua* case and then in the ICTY analysis of state involvement.

One major impediment to ICC assertion of jurisdiction over acts of terrorism is simply that the Statute does not specify that authority with sufficient clarity to survive arguments of due process and fair notice. The ICC is not built for the purpose of internationalizing every aggressive act by an individual or organization against a signatory nation. Aggression in this sense almost certainly be limited to groups with at least the status of insurgents, if not belligerents, and acts that carry support from another state to the point that they might be deemed attributable to that state.

Aggression is different from other headings of offenses cognizable before the ICC. Attacking and murdering civilians is a component of a number of offenses under the general headings of “crimes against humanity,” “genocide,” and “war crimes,” which may not carry the same connotation of involvement with a foreign state as would the concept of “aggression.” The jurisdictional element of crimes against humanity is “part of a widespread or systematic attack directed against any civilian population.” Similarly, the heading of “war crimes” applies to many types of acts but only when “part of a plan or policy or as part of a large-scale commission of such crimes” and perhaps only when there is an “armed conflict” whether international or not.

### **3. From Nuremberg to Fundamental Rights**

The International Military Tribunal created for the purpose of trying Nazi war criminals by the victorious parties after World War II was governed by a Charter adopted through the Treaty of

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<sup>43</sup> Rome Statute art. 54.

London.<sup>44</sup> The Charter listed three categories of crimes: crimes of aggression, war crimes, and crimes against humanity.

The Nuremberg Judgment of the Major War Criminals<sup>45</sup> first dealt with whether the Charter constituted an *ex post facto* law:

It was submitted that *ex post facto* punishment is abhorrent to the law of all civilised nations, that no sovereign power had made aggressive war a crime at the time the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.

In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the government of Germany, the defendants, or at least some of them must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out the designs of invasion and aggression.<sup>46</sup>

The Tribunal did not engage in much *ex post facto* discussion with regard to war crimes because various international conventions, such as the Hague Conventions of 1907, had sufficiently delineated the principles of individual responsibility for illegal conduct during time of war. With regard to “crimes against humanity,” however, the IMT encountered the difficulty that the only statutory basis of criminality was contained in the Charter of the Tribunal itself, which referred to “inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal.” The Tribunal did not deem acts committed before a state of war to have been criminal. Essentially, it seems that how Germany chose to treat its own citizens before the outbreak of war was no business of the international community but was instead a matter of internal policy. Respect for the sovereign decisions of the nation-state prior to the outbreak of war at that time still remained a hallmark of international law. Once Germany crossed its own borders, however,

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<sup>44</sup> The Avalon Project of Yale Law School provides extensive coverage of the documents and transcripts from the Nuremberg and related trials. See <http://www.yale.edu/lawweb/avalon/imt/imt.htm> (last visited June 21, 2007).

<sup>45</sup> Twenty-two persons were indicted and tried by the tribunal (two more were indicted but not tried because one committed suicide and the other was too frail). Twelve were sentenced to death, three to life imprisonment, four to prison ranging from 10 to 20 years, and three were acquitted. Ten of the twelve sentenced to death were hanged on October 16, 1946. (Hermann Göring committed suicide just three hours before the hanging. Martin Bormann was tried in absentia and sentenced to death but it was later discovered that he had died.) Rudolf Hess was the controversial deputy to Hitler who flew to England in 1944, ostensibly to negotiate a peace without Hitler's approval; he was sentenced to life in prison and for decades was the only inmate of Spandau Prison in Berlin until his death at the age of 93 in 1987.

<sup>46</sup> *Id.* IMT Judgment, “The Law of the Charter.”

then its treatment of civilian populations at home could become a matter of concern for the international community.

The view that other nations have no jurisdiction within the internal affairs of one nation until that nation crosses its own borders, began to shift immediately after World War II. The U.N. General Assembly adopted the Universal Declaration of Human Rights in 1948. The first product of the Council of Europe was the European Covenant on Human Rights in 1950, which attempted to assure fair treatment of its own nationals by each signatory nation. At that time, this was an act of sovereignty by the signatory, not an application of extraterritorial will by other nations or by the international community. Given the economic devastation of Europe at the time, why was the ECHR adopted even before Conventions on economic matters?

Why did the international community become involved with Nazi treatment of its own civilians during time of war? Obviously, the coldly calculated attempt at genocide of the Jewish population colors the entire proceedings. Secondly, even without the genocidal aspects, humane treatment of civilians during time of war had been a part of international concerns as exemplified in Common Article 3 of the Geneva Conventions. Finally, it is quite likely that the international community was convinced that Germany could not have engaged in the level of aggression it did without first being able to subjugate its own population. Regardless of the motivations, it is instructive that supranational involvement with human rights was very high, if not paramount, on the agenda of what Winston Churchill called the movement toward a “United States of Europe.”

The post-WWII actions of the international community mirror the post-Civil War actions of the United States. By defining human rights that a state may not contravene within its own population, the supra-state bodies express their intolerance for subjugation of the state’s own population.

The Universal Declaration and ECHR were followed by Conventions and Declarations addressing various forms of discrimination, “economic, social, and cultural rights,” and “civil and political rights.” In pursuing control of violence without regard to transnational activities, Conventions and Declarations were addressed to the status of refugees and torture, while the U.N. Security Council and NATO took increasingly active interest in what came to be known as “humanitarian” issues of the internal affairs of nations. All these developments bore on the development of customary international law condemning crimes against humanity, which have now been articulated as matters of international enforcement through the Tribunals dealing with Yugoslavia and Rwanda.

#### **4. International Criminal Tribunals**

The first ad hoc International Criminal Tribunals were established to deal with atrocities from Yugoslavia and Rwanda. Since then, a Special Court has been created jointly by Sierra Leone and the U.N. Security Council, and another by agreement between the United Nations and Cambodia.

The Sierra Leone court is a hybrid for which prosecutors and judges were chosen by Sierra Leone and the U.N. Secretary-General.<sup>47</sup> The funding for the court is to be provided by “voluntary contributions from the international community” and there is a management committee established from among the donors. The court has authority “to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.” As of summer 2007, the court

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<sup>47</sup> The website of the Sierra Leone court is at <http://www.sc-sl.org/about.html>.

has indicted eleven defendants but has not reached a judgment in any of the cases.

The Cambodia court is the outcome of a decade of negotiations among a number of nations including Cambodia. The process began in 1997 with a request for assistance from the Cambodian government.<sup>48</sup> A proposal for an international court was rejected by Cambodia and an agreement was reached initially for a “mixed” court of international and domestic partners. The King of Cambodia, however, promulgated a law in 2001 creating a special court within the Cambodian system for the prosecution of Khmer Rouge war crimes.<sup>49</sup> In March 2003, the U.N. and Cambodia came to agreement on a combination of domestic and international judges and prosecutors to staff the special court.

The ICTY and ICTR Chambers have genocide within their jurisdiction when actions constitute “serious violations of international humanitarian law.” Although neither tribunal has yet worried about the meaning of “serious” in this context, it is difficult to imagine what racially motivated killing would not be serious. Perhaps the word should be taken to connote “widespread or systematic” atrocities against definable groups, thus equating the threshold for prosecutions of genocide with that of crimes against humanity.

A number of terrorist groups could be accused of genocide. For example, the IRA’s targeting of Protestants, the ETA’s targeting of Spanish civilians, and al Qaeda’s targeting of Americans (a national group) or even Al Qaeda’s targeting of all Westerners could qualify as genocide. To prevent international law from completely occupying the field of domestic criminal law, however, it will be natural for the international tribunals to seek some limitation on the scope of their authority.

International tribunals will seek limitations on their own authority for the same reasons that federal law in the U.S. has been limited so as not to occupy or preempt the roles of the states in addressing violence against civilians.<sup>50</sup> In the U.S. system, the states need to have some relative autonomy in the operation of their criminal justice systems and in the definition of crimes, although this autonomy is limited by procedural requirements of the Constitution, substantive limits gleaned from Constitutional protections of individual liberties, and preemption in some instances by federal law. With all these limitations, however, federalism has worked reasonably well to preserve some level of autonomy closer to where the people live. That autonomy serves to enhance the perception, if not the reality, of accountability of government to the populace.

At the international level, nation-states have been accustomed to independent sovereign status. The inroads on that status have begun with statements of international criminal responsibility for acts of state. As individual criminal responsibility expands, the autonomy of the nation-state will be reduced to the extent that it cannot immunize its nationals for conduct that the international community proscribes. In return, the international community will almost certainly be alert to

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<sup>48</sup> Columbia Law School, Human and Constitutional Rights Project, *UN and Cambodia Agree on Court to Try Khmer Rouge*, <http://www.hrcr.org/hottopics/UNKhmer.html> (last visited July 24, 2007).

<sup>49</sup> Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, <http://www.genocidewatch.org/CambodianTribunalLaw.htm> (last visited July 24, 2007).

<sup>50</sup> See *United States v. Morrison*, 529 U.S. 598 (2000); see also *United States v. Lopez*, 514 U.S. 549 (1995).

encroachments on state autonomy because all international actors are, to some extent, also nationals of a nation-state themselves. In this sphere, the pressures for nation-state autonomy are identical to the pressures for autonomy of the states in the U.S. federal system.

The development of internationally enforceable criminal law thus is relevant to our terrorism inquiry on several levels. First, it illustrates the inexorable shift of power away from local to supranational levels. Second, it sets out some of the definitional elements of criminal law as well as limitations on it, such as protections for freedom of expression. Third, by attempting to define those levels of anti-social behavior that will be subject to international authority, it assists in ascertaining what aspects of terrorism might be subject to international authority.

Determining what aspects of terrorism should be subject to international authority requires distinguishing those that could be left to domestic criminal processes, which once again shows the necessity of defining different levels or types of terrorism. Now we will turn to the U.S. experience to see what lessons might be gleaned.

### **E. Supra-State Violence**

The post Civil War federalism experience of the United States offers some useful analogies. At the close of our Civil War, bitter resentment in the rebellious states gave rise to violence against Negroes and sympathizers of the federal government. The Ku Klux Klan (KKK) was described at the time as engaged in “terrorism.” Statutes validated by a constitutional amendment created two classes of federal crimes for interference with “any right or privilege secured to him by the Constitution or laws of the United States,” those committed “under color of law”<sup>51</sup> and those committed by combination of two or more persons.<sup>52</sup>

The “color of law” provision came safely within the “state action” requirement of the Fourteenth Amendment, which was in turn an expression that the federal government operated on the states and not directly on the citizenry at large.<sup>53</sup> The conspiracy statute, however, presented a bit of a conundrum. If the Fourteenth Amendment operated only against the states, how could Congress criminalize private behavior? The few cases actually using this criminal provision thus far have found either that the perpetrators were acting “in concert” with state officials or acted in direct

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<sup>51</sup> Whoever, under color of any law, statute, ordinance, regulation, or custom,

willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens . . . .

18 U.S.C. § 242 (2000).

<sup>52</sup>

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured.

18 U.S.C. § 241 (2000).

<sup>53</sup> The Civil Rights Cases, 109 U.S. 3 (1883).

contravention of defined federal interests, such as federal instrumentalities of commerce.<sup>54</sup>

The primary federal interest in the post-Civil War Era was the unwillingness of state governments to take steps to enforce the law against the KKK or similar groups. The resulting violence against U.S. citizens (newly defined as such by the Fourteenth Amendment) gave rise to a collective interest among other states to enforce legal controls against state-sanctioned violence. The primary federal interest in the KKK or similar groups today lies in the greater psychological (as well as physical) impact of a large, concerted, organized group with common means of carrying out their hostility.

Identical statements can be made with regard to terrorism. The international interest in terrorism lies in the greater psychological (as well as physical) impact of a large, concerted, organized group with common means of carrying out their hostility. The international community is based in a respect for the individual sovereignty of nations that is even greater than that of the federal respect for state sovereignty in the United States. Given that respect, international law does not need to intrude into the internal affairs of a nation to deal with ordinary street criminals. It is when a large, organized and well-funded group appears on the scene with the means to wreak widespread psychological and physical harm that the international interest is triggered. This leads to the international corollary of federally-defined offenses: either when the actor is clothed with some semblance of “state authority” or the conspiracy is sufficiently large to be a concern of the international community.

Under this view, an act may be a personal act of “terrorism” (as in the Israeli view of the LAX shooter) without triggering the international concern of “terrorism” for lack of state involvement or lack of a well-organized group identity. Crimes of violence often carry racial overtones. It is often impossible to say that any one motivation is the sole force in driving a person to violence. Any ordinary street crime may have an element of racial hostility buried within it. For the federal government to pick and choose those that it will prosecute, without any guiding principle for its decisions, would be contrary to the rationality that we demand of our criminal justice system. Thus, distinctions in American civil rights law that depend on “state action” (state sponsorship would be the analogy in terrorism) or “conspiracy” (a large terrorist organization) make sense from the point of view of importing rationality into what might otherwise become decisions based on whim, or the identity of the victim, or even the color of the defendant’s skin.

There is another limiting principle available, but we must wonder whether the courts can apply it with the requisite level of confidence. The most likely limit is that of “member of a terrorist organization,” which imports criteria of political motivation, organized group behavior, and funding capabilities to reach international targets. Thus we can construct an argument that an individual falls within the modern definition of pirate – i.e., a terrorist – by virtue of membership in a group actively engaged in violence against civilians. We should not, however, confuse the subject by using the language of war. These people are not combatants in armed conflict between nations. They are in a category of criminal that arguably places them within the domain of the military, but they are also criminals who could be referred to the ordinary processes of the civilian justice system.

With these similarities in mind, we should be able to identify the factors that go into the interest of the international community so as to refine the “widespread and systematic” test of international

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<sup>54</sup> United States v. Guest, 383 U.S. 745 (1966) (concerted action through defendants’ “causing arrests” plus private interference with federal right to travel); United States v. Price, 383 U.S. 787 (1966) (state officials were defendants); Screws v. United States, 325 U.S. 91 (1945) (state officials).

law.

- links or connections to official state actors

U.S. law applies to one who acts “under color of state law,” of which the best definition may be that the defendant created the “appearance” of acting for the state. The ICT Appeals Chamber rejected this test but noted that many persons who meet the “widespread and systematic” test will have some link to state actors.

- widespread and systematic

This jurisdictional nexus is found in the statutes of the ICTY, ICTR, and ICC. It is also an apt method to distinguish “serious violations of international humanitarian law” from sporadic incidents of hate crime. The corollary in U.S. law is the conspiracy statute (§ 242). Each of these tests focuses on the scope of the action rather than the intent of the actor.

- class-based animus

This test under the U.S. conspiracy statutes is closer to the “persecution” standard and the genocide crime than it is to the “widespread and systematic” test. The difference with genocide is that the U.S. conspiracy law may apply without an intent to “destroy,” just an intent to “deprive of rights.”

- extent of power to act

A very important consideration could be the degree of harm available to the actor. U.S. law uses “two or more” as a bright-line test to identify those persons who are likely to create harm. International law could refer to transnational organization or capacity.

The concerns that have led to criminal sanctions at the international level and federal levels within the U.S. are similar. Both can be referred to as “suprastate” criminality. International organizations such as the U.N. are suprastate in relation to nation-states and the federal government is suprastate in relation to the states of the U.S.

The reason for supra-state intervention by international organizations into the affairs of a nation-state is the same as the reason for supra-state intervention by the U.S. federal government into the affairs of a U.S. state. It is the presence of an organization (whether recognized as the state or not) with sufficient resources to carry out violent actions against a civilian population without the state’s being willing or able to control it. The terrorism organization acting within the U.S. becomes the concern of the federal government when either (a) it operates across state borders or has interstate connections that make it difficult for a single state to control it, or (b) it is able to create the appearance that the state condones its action. A terrorism organization becomes the concern of international organizations when either (a) it operates across national boundaries or has international connections that make it difficult for a single nation to control it, or (b) it is able to create the appearance that a nation condones its action.

## Conclusions

It’s not war. It’s not ordinary crime. It is *jus gentium*, a crime *erga omnes*, a violation of the “law of nations.” The paradigm of international criminality means that *jus gentium*, the “law of nations” should embrace terrorism along with piracy, slavery, genocide, and torture as offenses *erga omnes*.

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Congress needs to criminalize the targeting of civilians on a widespread or systematic basis without regard to location of either the incident or the perpetrator. This would allow for the use of military force for pursuit outside U.S. borders as well as for the use of the criminal justice system. During pursuit, if a subject resists, military units may use lethal force. But if the subject is captured, then he or she becomes subject to criminal processes.

This solution is deceptively elegant, however, because it does not answer completely a few questions.

- When is targeted killing acceptable? Chief Justice Barak gave a reasonably good answer – it depends on certainty of the target and the difficulty of capture. I might prefer even tighter control in light of the escalating use of drone-launched missiles against so many houses. The lesson to be learned is that rampant targeting of civilians is not a good way to lessen tensions and defuse hostilities.
- What to do with Khalid Sheikh Mohammed? In my view, he cannot be tried in a U.S. court, neither civilian nor military, because 183 waterboardings so “shocks the conscience” that putting him on trial is an insult to the system. The fuss about giving him a public forum, however, is pure smokescreen – that’s exactly the point of public trials, to display the follies of evildoers. But seriously, what do we do with him? Turn him loose on the streets of Enid, Oklahoma, and see what happens.